REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG PROVINCIAL DIVISION, PRETORIA

CASE NO: A254/2020

IN THE MATTER BETWEEN:

I[…] T[…] **Appellant**

and

THE STATE **Respondent**

Coram: Khumalo J *et* Matthys AJ

Heard: 19 April 2021

Delivered: 25 May 2021

Judgment handed down electronically via email by circulation to the Registrar of the Court, Appellant's Legal Representative and the Office of the Director of Public Prosecutions.

JUDGMENT

Matthys AJ

A. Introduction

[1] This is an appeal against the sentence of 10 years imprisonment imposed in terms of section 51(2) (b) of the Criminal Law Amendment Act 105/97 (CLAA) and the order made in terms of section 50 of the Criminal Law

Amendment Act (Sexual Offences and Related Matters) 32/2007 by a Regional Court.[1] The appellant was convicted on his plea of guilty to a charge of rape in contravention of section 3 of Act 32/2007. The appeal is with leave granted by the Regional Court. Having received heads of argument from both parties, it was deemed prudent for the matter to be considered on the papers and for oral argument to be dispensed with.

B. Background facts

[2] It is necessary to provide an account of the facts upon which the conviction and sentence is based. In the appellant's plea explanation in terms of section 112(2) of the Criminal Procedure Act 51/77, he admitted that on the 3rd of May 2019 he was at his house at Tsakane where he consumed alcoholic beverages. Whilst drinking he decided to go to the premises of his neighbour with the intention to rape her. The complainant is a 65 year old female.

[3] The appellant admitted that he armed himself with a panga and proceeded to the complainant's house. There he threatened the complainant with the panga in his possession and forced her to a bedroom, where he ordered her to lie on a bed. He violently removed the complainant's undergarments and took off his underpants. He proceeded by sexually penetrating the complainant's sexual organ with his, without her consent. In the course of the commission of the crime the complainant's daughter called her name from outside. The appellant stopped the sexual act and ran out of the house. He confessed that he was at all relevant times, able to comprehend the unlawfulness of his conduct and its consequences, although he consumed alcoholic beverages prior to committing the crime. He admitted to not having any defence on the charge convicted on.

[4] During the sentencing proceedings, it was placed on record that the appellant

[1] Acting Regional Court Magistrate Mrs Makamu presiding at Tsakane. The appellant was at all times legally represented.

was born on the 11th of March 1960. He was 59 years old at the time of the commission of the crime, unmarried and cohabitated with his lady friend. He has no dependents, was unemployed and has a grade 8 level of education. He looked forward to the time when he would be eligible to apply for an old age grant. He suffers of asthma and receives treatment in prison. It was reported to the probation officer by those close to him that the appellant uses the drug referred to as "Nyaope". However, the appellant is in denial of the abuse of a dependence producing substance. He is also reported to be a church goer and is said to be helpful within his community. The appellant is not a first time offender; he has three previous convictions for crimes of dishonesty which transpired over thirty years ago.

[5] According to the probation officers report the appellant's lady friend, his family and neighbors are all stunned by the fact that he raped the complainant as he admitted. The probation officer recommended short term imprisonment as an appropriate sentence. Notably there is scanty information in the record regarding the complainant as a person and the impact that the crime may have had on her.

C. Appellant's grounds on appeal & Respondent's opposition

[6] Briefly it is contended by the appellant that the term of 10 years imprisonment imposed is shockingly inappropriate, given the totality of the mitigating factors placed on record. It is submitted that the sentencing court failed to take due regard of the appellant's personal circumstances and the recommendation by the probation officer. In particular it is submitted that the sentencing court misdirected by not taking account of the appellant's advanced age and stating that he is not an older person in terms of the Older Persons Act 13/2006.

[7] It is averred that the sentencing court misdirected its self in finding that the appellant would not serve the entire minimum term of imprisonment prescribed and therefore a deviation from the minimum sentence was not warranted. It is put

forward that the sentencing court did not afford due weight, to the genuine remorsefulness of the appellant as demonstrated by his guilty plea. The appellant submits, that the sentencing court also failed to differentiate between the different degrees of seriousness of the type of offence and misdirected generally, in not finding substantial and compelling circumstances to deviate from the prescribed minimum sentence.

[8] With regards to the ancillary order made, it is stated that the sentencing court was wrong to order for the appellant's name to be entered in the register for sexual offenders in terms of section 50(1) (a) (i) of Act 32/2007, given that the conviction is not related to a sexual offence against a child or person who is mentally disabled as provided by the legislation.

[9] In. heads of argument counsel for the appellant, acknowledge that direct imprisonment is appropriate·on the facts. However it is argued that the term of imprisonment imposed by the sentencing court is disproportionate in light of the appellant's personal circumstances, when the facts of the case is compared to sentences imposed for similar transgressions in reported cases. Reference is made to the sentences in S v JN 2020 (2) SACR 412 (FB) and S v Hewitt 2017 (1) SACR 309 (SCA).

[10] Counsel for the respondent submitted in heads of argument that the aggravating circumstances of the case and the interest of society by far outweigh the mitigating factors presented by the appellant. It is contended that the sentencing court correctly found that there are no substantial and compelling circumstances in the facts of the case that justify a deviation from the prescribed minimum sentence. It is submitted that the requisite balance between the known triad of factors relevant to sentencing was reached and that the dictates of the authorities applicable to the minimum sentencing regime was observed by the sentencing court.[2]

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[2] Referring to S v Kumalo 1973 (3) SA 697 (A) ;S v Malgas 2001 (1) SACR 469 SCA ;S v Roslee 2006 (1) SACR 537 SCA

D. Discussion

[11] On appeal, the settled approach to be adopted is that the sentencing task resorts primarily within the scope of the trial court's discretion, and a court on appeal shall not interfere with a sentence so imposed, save for if it is found that the sentence is ominously inappropriate and or disproportionate to the severity of the offence or that the trial court did not exercise it discretion judiciously.[3]

[12] In this matter we are dealing with a highly prevalent type of offence, which no doubt impacts adversely on the moral of society. The consequential hardships occasioned to victims of rape are also documented in our jurisprudence. In S v Chapman[4] the Supreme Court of Appeal as far back as 1997 poignantly held that :

'Rape is a very serious offence, constituting as it does a humiliating and brutal invasion of the privacy, the dignity and the person of a victim. The right to dignity, to privacy and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilization.'

[13] It is perplexing that the persistent warnings by the authorities, civil society interest groups. and ordinary citizens against rape, are not heeded. Our courts impose robust sentences for convictions of rape daily. Yet, the forever cries of women in our country seeking protection and justice for victims of rape is palpable.

[14] Sexual violence is omnipresent in the country and the crime of rape in particular is not the sort of transgression where undue sympathy with the offender, should be allowed to prevail over common sense and the common good of society. It is therefore not incorrect for a sentencing court to afford due weight to the gravity

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[3] S v Malgas 2001(1)SACR469(SCA)at 4780

[4] 1997 (3) SA 341 (SCA) ;Also see S v Nkunkuma & others 2014 (2) SACR 168 SCA para 17

of the offence and the impact that the type of crime has on society.

[15] The facts of this matter hold aggravating features that cannot be ignored. Firstly the appellant made it clear in his plea explanation that he is aware of the unlawfulness of rape and its consequences. Nevertheless he selfishly had no regard or empathy for the complainant; he chose to sexually violate her at the risk of being brought to justice. His conduct is more reprehensible because he armed himself with a dangerous weapon (a panga) so as to overcome any resistance that the defenceless 65 year old complainant could offer. His conduct was premeditated and he took advantage of the fact that the complainant, who was his neighbour, was vulnerable as an elderly female alone at home. She was expected to feel content and safe without concerns that she would be harmed by a neighbour. Instead the appellant took advantage of her vulnerabilities and violated her sexually, thinking that he could get away with his callous criminal conduct.

[16] fortunately the. crime was detected by the complainant's daughter, when the appellant ran out of the house. Therefore the argument on behalf of the appellant, to the extent that his guilty plea alone, denotes genuine remorse is unpersuasive. In my assessment of the available evidence this argument is redolent of a further effort to avoid the known penalty ordained by the legislature.

[17] The appellant did not take the sentencing court in his confidence, by testifying during the sentencing proceedings, to explain his supposed remorse and also explain, what he has done since the commission of the crime, which may have demonstrated true penitence. On the issue of remorse it is fitting to refer to the words expressed by Ponnan JA in S v Matyityi[5] explaining the legal position as quoted :
'In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can

[5] 2011[1] SACR 469[SCA]

• find that an accused person is genuinely remorseful, it needs to have a proper appreciation of, inter alia: what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions.'

[18] The attack on the sentencing court's finding made that the appellant at the age of 59 years is not an older person in terms of the Older Persons Act 13/2006 is unfounded. An older person as defined in the Act means a person who in the case of a male, is 65 years of age or older and in the case of a female, is 60 years of age and older.[6] The 65 year old complainant however is an older person within the definition of Act 13/2006. The age of the complainant brings into play the plight of older persons in the context of abuse, which is often overlooked. Therefore I deem it prudent to restate certain applicable provisions of Act 13/2006 which may prove to be insightful in the context of the issues in this matter.

Section 4 Application of the Act

(1) The rights that an older person has in terms of this Act supplement the rights that an older person has in terms of the Bills of Rights.
(2) All organs of state and all officials, employees and representatives of organs of state must respect, protect and promote the rights of older persons contained in this Act.
(3) This Act binds both natural and juristic persons to the extent that it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

Section 5°General principles

(1) The general principles set out in this section guide-
(a) The implementation of all legislation applicable to older persons, including this Act; and
(b) All proceedings, actions and decisions by any organ of state in any

[6] Section 1 of Act 13/2005

matter concerning an older person or older persons in general.

(2) All proceedings, actions or decisions in a matter concerning an older person must-

(a) respect, protect, promote and fulfil the older person's rights, the best interests of the older person and the rights and principles set out in this Act, subject to any lawful limitation;

(b) respect the older person's inherent dignity;

(c) treat the older person fairly and equitably; and

(d) protect the older person from unfair discrimination on any ground, including on the grounds of the health status or disability of the older person.

Section 30

(4) If a court, after having convicted a person of any crime or offence . finds that the convicted person has abused an older person in the commission of such crime or offence, such finding must be regarded as an aggravating circumstance for sentencing purposes.

[My emphasis]

[19] It is clear from the legislation quoted that in our democracy the "best interest of an older person" is of paramount importance in any matter concerning an older person. It is one of our utmost responsibilities to treat older persons with reverence, promote their status, rights, wellbeing and safety given attendant weaknesses. Older Persons walk before us, have given much and play an enduring role in making possible the life enjoyed today. It is in the stated context that I find the argument made for the appellant that the sentencing court did not differentiate between the different degrees of seriousness of the type of offence rather insensitive and unsound.

[20] The offence is serious by its prevailing facts and the rape of the complainant aged 65 years, remains an aggravating circumstance as provided for in section 30(4) of Act 13/2006. . In this matter the unsuspecting complainant was an easy target of the appellant's violent conduct. Further the argument made for the appellant with reference to S v JN and S v Hewitt, in support of the notion that the sentence imposed induces a sense of shock, is devoid of

persuasive power.[7] That is so because the facts of the cited cases differ vastly from the facts at hand. Sentencing trends hold limited value and should merely be seen as a guide. It cannot be allowed to take away the sentencing courts judicial discretion informed by the peculiar facts of the case before it.

[21] The consideration by the sentencing court in finding that a deviation from the prescribed minimum sentence was not warranted, due to the prospects of the appellant's early release on parole was indeed misguided, as contended for the appellant. The prospects of. an offender's early release on parole is no justification for not finding that there are no substantial and compelling circumstances for purposed of the CLAA. Although there are circumstances in which offenders are released on parole, once sentenced to imprisonment by a court, the offender is in principle required to serve the full term of imprisonment imposed.[8] No offender has a right to be released on parole; it is a privilege which is an integral part of the sentencing regime. If a prisoner satisfies the prison authorities that he has been rehabilitated and is not a danger to society, there is no reason why he should not benefit from the parole system.

[22] The granting of parole however resorts within the powers of the executive authority and a court should not attempt to by-pass the exercise of that power.[9] In a number of decisions our courts held that the possibility of offenders being released on parole should not be invoked by courts to impose lengthy sentences to ensure that prisoners stay in prison longer.[10] The sentencing court is best to confine its self to the objectives of sentencing and the known triad of factors

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[7] Citation para 9 herein. In S v Hewitt a retired tennis player and instructor, was convicted on two counts of rape of two girls aged about 12 and 13 years and one count of indecent assault of a 17 year old girl. The offences were committed about three decades ago and the accused was convicted in 2015 at the age of 75 years and sentenced to an effective six years' imprisonment; In S V JN the appellant was convicted of the raped of a 9-year-old girl .He contended that the court a quo had erred in not taking into consideration the fact that he was, at the time of sentencing, a 71-year-old first offender who had pleaded guilty. The sentence of life imprisonment was set aside on appeal and replaced with 10 years' imprisonment.

[8] Section 73(1) of the Correctional Services Act 111/1998 provides that subject to the provisions of this Act - (a) a sentenced prisoner remains in correctional center for the full period of sentence.

[9] S v Smith 1996(1) SACR 250 (E)

[10] S v Matlala 2003(1) SACR 80(SCA);S v Khumalo en Andere 1983(2) SA 540 (N) ,Sv Leballo 1991 (1) SACR 398 (B)

relevant to the case before it. The misdirection by the sentencing court in this case as highlighted, is however not of a material nature so as to vitiate the exercise of the discretion in imposing the sentence under discussion.

[23] In the sentencing task there is a delicate balance to be achieved between the nature of the crime, the personal circumstances and characteristics of the offender and the interests of society in the effective punishment of offenders, not forgetting the interest of the victim that may differ from that of society as a whole. The desired balance to be achieved in arriving at a just and proportionate sentence can only be attained if; the sentencing court is fully informed on the diverse interests mentioned. Having perused the record of these proceeedings it is a matter of grave concern to have found that very little to no information were presented by the prosecution, in the form of a medico-legal report (form JBS) and a victim impact statement (VIS).

[24] "There is an abundance of case law in which our courts bemoans he failure by prosecutors to present evidence relevant to the interest of complainants.[11] It cannot be emphasised more that the impact that crime has and the views of complainants, especially in relation to violent crime such as rape, is a pivotal factor within the dictates of fairness, to be taken regard of during the sentencing stage. The reasons for the failure by the prosecution in the Regional Court, to present a form J88 and a VIS are not apparent from the record. However given the acknowledged devastate of sexual transgressions in the country, prosecutors have a duty towards complainants and the court, to ensure that the views of complainants are heard during sentencing.[12]

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[11] Monageng v S (590/06) [2008] ZASCA 129 (1 October 2008)

[12] See the NPA directives issued in terms of section 66(2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007 at para M providing- All complainants and/or secondary victims (or appropriate others such as a parent or guardian in the event of a child) should be informed of their right to provide the prosecutor with relevant information pertaining to the impact of the offence. Should they choose to make a Victim Impact Statement (VIS) or statement regarding sentence, the prosecutor should make an attempt to have this handed in by consent of the accused (complying with the provisions of section 212 or 213 of the CPA) or call the complainant / witness to testify thereto. Section 70(3) of the Child Justice Act, 75 of 2008, is an exception to section 212 and 213, as in terms of this section the prosecutor can hand in a VIS if the accused is a child and the contents are not disputed

[25] In adopting the needed victim-centred approach there is also nothing that prevents a presiding officer to call for the presentation of a VIS.[13] It is regrettable that no effort was made in this case to hear evidence pertaining to the physical, psychological, and social or any other consequences the crime may have had on the elderly complainant. It should be reminded that although our courts do not generally question the adverse impact that rape has on a victim, the trauma occasioned in each case of rape differs and is as unique as the character of each complainant. Effort is vital to give individual complainants a voice and it should not be expected of the sentencing court to make assumptions as to the victim's circumstances .[14] This is necessary to individualize the sentence and to give effect to a victim-centered approach in sentencing.

[26] It has been authoritatively acknowledged that the concept 'substantial and compelling circumstance' in the context of the provisions of CLAA, denotes an amalgamation of factors that defies precise definition. In general, the existence of such weighty circumstance will be present when it is found that the case is one in which the prescribed sentence would be unjust or disproportionate to the crime, the offender and the legitimate needs of society.[15] This is not such a case.

[27] In cases of serious crime it is permissible for the personal circumstances of the offender, to subside into the background. As was held by the Supreme Court of Appeal in S v Hewitt (supra) scrupulous care must be taken not to over-emphasise the appellant's personal circumstances without balancing those considerations properly, against the very serious nature of the crime committed; the aggravating circumstances and the consequences for the victim and the interests of society. [16] The appellant's personal circumstances are by far

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[13] Section 274 of the Criminal Procedure Act 51/77 provides (1) a court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.

[14] S v Vilakazi 2009(1) SACR 552 SCA

[15] See Tafeni v S [2016] JOL 34336 (WCC).

[16] Also see S v Salzwedel & others 1999 (2) SACR 586 (SCA) paras 12 and 18; S v Combrink

outweighed by society's demands for protection through the imposition of a deterrent sentence.

[28] After a conscientious consideration of the magistrate's reasons on sentence, it cannot be said that she in any material manner, misdirected herself in the execution of her judicial discretion. Having applied my mind to the facts, I am convinced that the sentencing court correctly found that there is no weighty justification for a deviation from the minimum term of imprisonment prescribed. No injustice will result should the appellant be ordered to serve the sentence imposed.

[29] Regarding the appellant's grievance against the order made by the sentencing court, in terms of section 50 of Act 32/2007 the section provides:

50. Persons whose names must be included in Register and related matters

(1) The particulars of the following persons must be included in the Register:

(a) A person who in terms of this Act or any other law-

(i) has been convicted of a sexual offence against a child or a person who is mentally disabled

[My emphasis]

[30] Relevant to this issue is the prosecutor's address to the effect that the complainant is "mentally disturbed". It is not clear from the record what is meant by the term "mentally disturbed" used by the prosecutor, since there is no evidence on record capable of proof that the complainant is a person who is mentally disabled as contemplated in section 1 of Act 32/2007. The appellant was not charged on the basis that the complainant is a person with a mental disability. The jurisdictional facts required for an order in terms of section 50 (1) (a) (i) of Act 32/2007 are not present in this case. There is thus merit in this ground on appeal and the order made stands to be set aside.

2012 (1) SACR 93 (SCA) pars 22-24; S v Sinden 1995 (2) SACR 704 (A) at 708F-709B.

[31] *In* this. regard it is necessary to revert to the Older Persons Act 13/2006. Section 31 of the Act provides that the Minister must in the prescribed manner keep a register of persons convicted of the abuse of an older person or of any crime or offence contemplated in section 30(4). Having regard to section 31 read with regulation 23 of the regulations issued by the Minister of Social Development under section 34 of the said Act, the crime and the appellant's personal details are required to be entered in the register of abuse of older persons in the prescribed form.[17]

[32] Accordingly the following order is made.

a. The appeal against sentence is dismissed.

b. The sentence of Ten (10) years imprisonment is confirmed.

c. The order in terms of section 50 (1) (a) (i) of Act 32/2007 is set aside.

d. The prosecution is ordered to facilitate for the appellant to be brought before the sentencing court by requisition from the prison where he is held and for the consequences of section 31 of the Older Persons Act 13/2006 to be explained to him by the court and for the crime and the appellant's personal details to be reported and entered in the prescribed form in the Register of Abuse of Older Persons held by the Department of Social Development

Matthys R
Acting Judge
Of the High Court of South Africa
Gauteng Local Division (Johannesburg)

I concur and it is so ordered.

Khumalo N
Judge
Of the High Court of South Africa
Gauteng Provincial Division (Pretoria)

Appearances·

[17] Form 14 in the regulations Government gazette No. 33075 (1 April 2010).

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