

SOUTH AFRICA / JUDGMENT

Olivier v S (A517/16) [2018] ZAWCHC 78 (19 June 2018)

[2018] ZAWCHC 78

COURT

Western Cape High Court, Cape Town

BEFORE

Gamble, Sher

CASE / FILE NUMBER

A517/16

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IN

THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

CASE

NO: A 517/16

In

the matter between:

DONOVAN

OLIVIER Appellant

and

THE

STATE Respondent

JUDGMENT

DELIVERED ON TUESDAY 19 JUNE 2018

GAMBLE, J:

- [1] Seven years ago, on 15 June 2011 the appellant and another (Clive Coerecius) were each convicted in the Regional Court, Oudtshoorn on one count of rape in contravention of section 3 of the Criminal Law Amendments (Sexual Offences and Related Matters) Act, 32 of 2007 (“SORMA”) and two counts of assault with intent to do grievous bodily harm (“assault GBH”). On 28 June 2011 that court sentenced each of them to life imprisonment, having taken the three counts together for purposes of sentence.

- [2] Coerecius, alone, noted an appeal against his conviction and sentence which was heard by this court (per Allie and Mantame JJ) in March 2012. Our colleagues confirmed the convictions and the sentence of life imprisonment on the rape charge and further imposed sentences of 10 and 7 years respectively in respect of the assault GBH convictions.
- [3] The appellant before this court appealed only his sentence relying on the provisions of s309(1)(a) of the Criminal Procedure Act, 51 of 1977 ("the CPA) which provides for an automatic right of appeal against a life sentence imposed by a Regional Court. That appeal was first heard on 20 February 2015 by Dolamo and Rogers JJ. The court was of the view that the Regional Magistrate had erred in imposing sentence on the appellant before considering a report from a probation officer and in the circumstances the matter was remitted to the trial court to procure such a report and for that court to reconsider sentence in the light of any such report.
- [4] On 20 September 2016 the Regional Magistrate handed down sentence fresh after hearing the evidence of a probation officer (Ms. Grootboom) and imposed the same sentence as before. The appellant noted a further appeal against that sentence and on 20 February 2017 the matter was heard by Henney J and Parker AJ (as he then was). That court directed that the matter be removed from the roll because the judges were of the view that the appellant had not been properly sentenced by the trial court in terms of the directions issued by Dolamo and Rogers JJ, the concern being that the first court of appeal had directed that separate sentences should be imposed in respect of the assault GBH charges.
- [5] Hence, the matter went back to the Regional Court where the appellant was once again sentenced to life imprisonment on the rape charge and to 3 years imprisonment on each of the assault GBH charges. The appellant is before this court on appeal against sentence, again exercising his right in terms of s 309(1)(a) of the CPA.
- [6] The relevant background facts are set out in detail in the judgment of Rogers J reported as *Olivier v S* [2015] ZAWCHC 19 (26 February 2015) and will accordingly not be repeated here in. Suffice it to say that one evening shortly before Christmas 2010 the complainant (MM) aged 18 and her life-partner (PF) aged 30 and the father of her child, were out walking in the veld near the township of Toekomsrus in Oudtshoorn hunting for scrap. The couple were accosted by the appellant and his erstwhile co-accused and threatened with knives. Both of the attackers then each raped MM twice while PF was held at knife point and made to look on. They also threw stones at both of the complainants. Later, as the couple were making their way home, the assailants caught up with them again and after pinning her down, dragged MM face down along a tar road. MM sustained extensive abrasions and bruises to her face and body in the process. The appellant's plea of consensual intercourse with MM was rejected by the Regional Magistrate when convicting him.
- [7] In passing sentence after hearing Ms. Grootboom's evidence, the Regional Magistrate found that the appellant had not established the existence of substantial and compelling circumstances warranting the imposition of a sentence other than the minimum. In terms

of s51 (read with Schedule 2 thereto) of the Criminal Law Amendment Act, 105 of 1977 (the so-called minimum sentencing legislation), the minimum sentence was life imprisonment in light of the fact that MM was repeatedly raped by more than one person at the same time – a so-called “gang rape”.

- [8] Before us on appeal, Mr. Strauss for the appellant, urged the court to find that there were indeed substantial and compelling circumstances which warranted the imposition of a sentence other than the maximum. He noted that at the time the offence was committed the appellant had just turned 18 and that his behavior suggested a level of immaturity which one would not expect to find in an adult person.
- [9] It is of course true that had this offence occurred just 2-3 months earlier the court would not have been entitled to consider imposing life imprisonment in view of the age of the perpetrator. But we are not dealing with such an offender – the appellant had attained majority by the time he attacked these 2 hapless individuals and he is accordingly to be regarded by the courts as one who is capable of being visited with the harshest sentence that a court may impose.
- [10] The evidence of the probation officer, Ms. Grootboom, suggests that the appellant grew up in the impoverished circumstances on a farm. He left school at a young age and initially resorted to petty crime, selling drugs. Indeed, his criminal record reflects two convictions for possession of drugs in June and November
2008. In respect of the first offence he was fined R200 and in respect of the second the imposition of sentence was postponed for a period of four years, the point being that the appellant was treated lightly by the courts in respect of those two offences.
- [11] But the report of the probation officer contains certain worrying remarks. It is recorded that the appellant informed Ms. Grootboom that he had in the interim taken to robbing tourists and continued to peddle drugs. The appellant clearly did not benefit from the non-custodial sentences handed down previously. In addition, there was an allegation made to Ms. Grootboom by MM that threats towards her safety had been made from within the prison where the perpetrators are presently incarcerated. This coupled with the fact that the Regional Magistrate recorded that the appellant and his co-accused were noted to be mockingly smiling at the complainant during the trial leads one to conclude that the appellant is indeed a young man who continues to exhibit anti-social behavior and, importantly, has not demonstrated remorse for his deeds. There can be little doubt that society deserves to be protected against a criminal of his sort.

- [12] The minimum sentencing legislation has been the subject of much discussion in our courts. The pendulum has swung back and forth. The leading case, *Malgas*[1], cautioned that the minimum sentences should not be deviated from for flimsy reasons. Subsequent to *Malgas* the Supreme Court of Appeal, in one of the leading cases on sentence in rape matters, *Vilakazi*[2], stressed the importance of the potential for rehabilitation in an accused person as a consideration potentially militating against the imposition of a life sentence. The appellant in that matter was a man in his thirties who was in fixed employment and had an unblemished record at the time of the offence – the opportunistic rape of a young woman around 14 years old. The Supreme Court of Appeal interfered with the sentence of life imprisonment and replaced it with 15 years' imprisonment on the basis that it considered that the facts showed that the appellant was not "of an inherently lawless character".
- [13] The same cannot be said of the appellant now before court. In her report Ms. Grootboom notes that the appellant attended a farm school in the Oudtshoorn district until grade 7 whereafter, at the age of 15, he decided to give up. Thereafter, he has lead the life of a lay-about and petty criminal while abusing drugs such as dagga, Mandrax and Tik. The report notes, importantly in my view, that the appellant has taken no responsibility for his crimes and shows no remorse. On the contrary, the observations of the Regional Magistrate referred to earlier suggest that he behaved callously and contemptuously towards his victim and her partner. Nevertheless, Ms. Jacobs for the State did accept that there was a remote prospect that after a lengthy period of imprisonment the appellant might be sufficiently reformed to be able to return to society as a responsible citizen.
- [14] The principal factor which can be considered mitigatory is the appellant's youthfulness at the time of the offence. Often it is said that youthfulness per se might be indicative of immaturity on the part of an offender, but that is not a given and each case must be assessed on its merits. In *Mabuza*[3] Cachalia JA commented as follows in a case involving charges of robbery and rape committed by offenders who were 18, 19 and 20 years respectively.

"[22]... Youthfulness almost always reflects the moral culpability of juvenile accused. This is because young people often do not possess the maturity of adults and are therefore not in the same position to assess the consequences of their actions. They are also susceptible to peer pressure and adult influence and vulnerable where proper adult guidance is lacking. There are, however, degrees of maturity, the younger the juvenile the less mature he or she is likely to be. (S v Lehnberg en 'n ander 1975(4) SA 553 (A)). Judicial policy has thus appreciated that juvenile delinquency does not inevitably lead to adult criminality and is often a phase of adult development. (S v Z en Vier Ander Sake 1999 (1) SA SACR 427 (E)). The degree of maturity must always be carefully investigated in assessing a juvenile's moral culpability for the purposes of sentencing. The Constitutional Court warned in S v Williams and Others (1995 (2) SACR 251 (CC) at [85]) that youthful offenders, particularly, should not be sacrificed on the altar of deterrence. There is therefore compelling justification for the view that youthfulness, at least before the advent of the minimum sentencing regime, was per se a factor mitigating sentence.

[23] However, in requiring a sentencing court to depart from the prescribed sentence in respect of offenders who have attained the age of 18 only if substantial and compelling circumstances justify his departure, the legislature has clearly intended that youthfulness no longer be regarded as per se a mitigating factor. So while youthfulness is, in the case of juveniles who have attained the age of 18, no longer per se a substantial and compelling factor justifying a departure from the prescribed sentence, it often will be, particularly when other

factors are present. A court cannot, therefore, fully discharge its sentencing function by disregarding the youthfulness of an offender in deciding on an appropriate sentence, especially when imposing a sentence of life imprisonment, for in so doing it would deny the youthful offender the human dignity to be considered capable of redemption.”

[15] Cachalia JA went on to consider cases such as *Sikhipha*[4] – in which a 35 year old man raped a 13 year old girl and whose life sentence was replaced with 20 years’ imprisonment - and *Nkomo*[5] – in which a 29 year old man held an adult woman hostage in a hotel room for many hours and repeatedly raped her and was ultimately sentenced on appeal to 16 years’ imprisonment – and observed that the factors in those matters that were considered to constitute substantial and compelling circumstances included good work records, the prospect of personal rehabilitation and the absence of injuries to the complainant arising out of the rape itself. On the rape count the sentence of life imprisonment in *Mabuza* was replaced with one of 16 years.

[16] In this matter, it appears from the J88 medical report form that there were no significant injuries to MM’s genitalia as a consequence of the rape. There were injuries to her face and arms as a consequence of being dragged on the tar road but those injuries formed the basis of a separate charge of assault GBH for which the appellant was ultimately sentenced to 3 years’ imprisonment by the Regional Magistrate.

[17] In dealing with the aggravating factors in *Mabuza*, Cachalia JA (in a passage which echoes certain of the dicta in *Vilakazi*) observed as follows.

“[29] As against these mitigating factors the aggravating factors must be considered. There can hardly be a more terrifying experience than to be awakened in the middle of the night by armed intruders, to have one’s privacy invaded and to be subjected to an ordeal for an hour with no idea of one’s fate. That is what the appellants subjected M and her daughter to. The appellants threatened to hurt them if they did not co-operate. They ignored S’s crying and pleas not to rape her. It would have been obvious to them that she was distressed but they threatened to chop her with the axe if she refused to succumb to their predatory behaviour. They each raped her in turn and then appellant No 1 did so for a second time. They invaded her body, humiliated her and stripped her of the dignity. And despite overwhelming evidence against them, they denied any involvement in the crimes throughout the trial and continued to do so to the probation officers who interviewed them during the compilation of their pre-sentencing report.”

- [18] The aggravating factors in this matter are not at all dissimilar. The couple involved, MM and PF, were evidently poor people who were out scouting for scrap just before Christmas. Perhaps they wanted to have a little bit of money to buy something for themselves or their loved ones, or just to put food on the table? In any event, they were followed in the veld for some distance by the 2 assailants who eventually cornered them and threatened them with knives. MM was tossed to the ground and violated in public with her life-partner looking on, utterly helpless to come to her assistance for fear of grave injury to either her or himself. And then MM was subjected to the indignity of being violated a second time by both men (“n tweede rondte” as it was crudely described). Further, when the matter came before the court, the complainant had to endure the further indignity of the absurd suggestion that she had consented to gratuitous intercourse with 2 scoundrels whom she only knew by sight. And, this insult was perpetuated by the appellant in his interview with Ms. Grootboom.
- [19] In Matyityi[6] Ponnann JA discussed the issue of a perpetrator’s youthfulness in the context of a case involving a gang of criminals preying on people who parked their vehicles at a remote spot near East London.

“[14] It is trite that a teenager is prima facie to be regarded as immature (S v Seegers 1970 (2) SA 506 (A)) and that youthfulness of an offender will invariably be a mitigating factor... unless it appears that the viciousness of his or her deeds rules out immaturity (S v Dlamini 1991 (2) SACR 655 (A)). Although the exact extent of mitigation will depend on all of the circumstances of the case, in general the court will not punish an immature young person as severely as it would an adult (S v Mohlobane 1969 (1) SA 561 (A)). It is well established that, the younger the offender, the clearer the evidence needs to be about his or her background, education, level of intelligence and mental capacity, in order to enable a court to determine the level of maturity and therefore moral blameworthiness (S v Lehnberg en ‘n Ander 1975 (4) SA 553 (A)). The question, in the final analysis, is whether the offender’s immaturity, lack of experience, indiscretion and susceptibility to being influenced by others reduces his blameworthiness (S v Van Rooi 1976 (2) SA 580 (A)). Thus, while someone under the age of 18 years is to be regarded as naturally immature, (S v Machasa en Andere 1991 (2) SACR 308 (A)), the same does not hold true for an adult. In my view a person of 20 years or more must show by acceptable evidence that he

was immature to such an extent that his immaturity can operate as a mitigating factor (S v Dlamini supra). At the age of 27 the respondent could hardly be described as a callow youth. At best for him, his chronological age was a neutral factor. Nothing in it served, without more, to reduce his moral blameworthiness.”

- [20] Ponnann JA went on to caution sentencing courts about the importance of observing the separation of powers principle and allowing the Legislature to prescribe specific sentences in the interests of society.

“[23]....(O)ne notices all too frequently a willingness on the part of sentencing courts to deviate from the minimum sentences prescribed by the legislature for the flimsiest of reasons - reasons, as here, that do not survive scrutiny. As Malgas makes plain, courts have a duty, despite any personal doubts about the efficacy of the policy or personal aversion to it, to implement

those sentences. Our courts derive their power from the Constitution and, like any other arms of State, owe their fealty to it. Our constitutional order can hardly survive if courts fail to properly control the boundaries of their power by showing due deference to the legitimate domains of power of the other arms of State. Here Parliament has spoken. It has ordained minimum sentences for certain specified offences. Courts are obliged to impose those sentences unless there are truly convincing reasons for departing from them. Courts are not free to subvert the will of the legislature by resort to vague, ill-defined concepts such as ‘relative youthfulness’ or other equally vague and ill-founded hypotheses that appear to fit the particular sentencing officer’s personal notion of fairness. Predictable outcomes, not outcomes based on the whim of an individual officer, is (sic) foundational to the rule of law which lies at the heart of our constitutional order.”

- [21] As I understand the reasoning of the court in *Matyityi*, it found that when taking into account the age of a person who was 27 years old as a substantial circumstance mitigating against the ultimate sentence, the trial court was considered to have been guilty of applying “flimsy reasoning” in introducing the concept of “relative youthfulness”. The present case is, however, quite different. Here the appellant was just 18 at the time he committed these horrific offences, and, importantly, he was a good 2 years younger than *Coericus*, who, upon the analysis of *Ponnan JA* was at an age when he was expected to demonstrate that his conduct was attributable to immaturity.
- [22] It must be stressed that we are dealing here only with the appellant’s moral blameworthiness. We were not privy to the arguments advanced on behalf of *Coericus* before *Allie* and *Mantame JJ*, nor do we have their reasoning in upholding the life sentence imposed on him. In addition, while the attack on *MM* and *PF* was brutal, I do not regard it to be of such a degree of viciousness that it can be said that it per se rules out immaturity on the part of the appellant. Furthermore, *Ms. Grootboom’s* evidence tells us that the appellant grew up in a rural environment and that his level of education is low – not more than that of a primary school pupil – despite being of the age of a high school pupil at the time he left school. The appellant’s criminal record reflects substance abuse and this is also confirmed in the evidence of *Ms. Grootboom*. Finally, one does not see in the appellant any evidence of a young person who has taken responsibility for himself in his community. He is an unemployed lay-about who leeches off others for some limited form of income.
- [23] All of these factors lead me to the inevitable conclusion that the appellant lacks the maturity of an adult and that his youthfulness is certainly a factor which lowers his moral blameworthiness. If one further has consideration for the fact that the physical scars of the victim were not severe, I am persuaded, in the words of *Cachalia JA* in *Mabuza*, that this case “is not one that is devoid of substantial and compelling circumstances justifying a lesser sentence than the prescribed minimum.” In my view the imposition of the prescribed life sentence on the appellant was disproportionate in the circumstances of this case and falls to be set aside.

[24] What sentence would then be appropriate? The Regional Magistrate delivered a thorough evaluation of the effects that rape has had on the community in Oudtshoorn. He observed that there is an extremely high incidence thereof in the Klein Karoo and that by far the majority of serious cases that come before that court are rape and other prosecutions under SORMA. It is necessary therefore that a sentence is imposed which respects the demands of that community and which sends out a strong warning to future offenders that their repulsive behavior will be dealt with by the imposition of lengthy periods of imprisonment. Only then will the women and children of Bridgton, Toekomsrus and Bongoletu begin to feel safe about moving around their streets and public spaces.

[25] The evidence of the complainant given in 2017, many years after the event, was that she and PF still bore the psychological scars of the attack and further, as I have said, that threats towards her safety were still being from prison made albeit not necessarily by the appellant. The evidence suggests, too, that the appellant was not influenced in his misconduct by Coericius but rather that he was the instigator of the attack on the couple. It was an attack that did not end where it started but culminated in the victim being further abused and dragged along a tar road when she was encountered a second time by the appellant a short while after the

rape. Evidently, the appellant's regard for the bodily integrity and dignity of MM knew no bounds. But that offence was dislocated in time and place from the rape and clearly warrants a separate and distinct sentence. So too does the sentence for the

attack on PF who was threatened by the appellant with a sizeable knife while the rape was taking place and who was also hit on the head with that knife by the appellant, thereby drawing blood.

[26] Finally, it seems fair to say that the offence was not premeditated but rather opportunistic as the two attackers came upon the couple by chance. That having been said, they followed the couple for a distance before attacking them, and had more than ample opportunity to reflect on the wrongfulness of their conduct.

[27] For each of the assaults with intent to do grievous bodily harm, the Regional Magistrate imposed 3 years' imprisonment on the appellant. He ordered that, in terms of s280(2) of the CPA, those sentences should run concurrently with the life sentence. That, in any event, is consistent with s39(2) of the Correctional Services Act 111 of 1998 which provides that all finite sentences are to be served concurrently with any sentence of life imprisonment. Given that a sentence of life imprisonment will no longer be imposed, in light of the finding above that substantial and compelling circumstances have

been found to exist, I am of the view that the sentences on the assault counts were fair in the circumstances and there is no reason

to interfere with them save to order that they should run concurrently with each other and to be served in addition to the sentence to be imposed on the rape count.

[28] In relation to the rape count, I am satisfied that a sentence of 22 years' imprisonment will address all the traditional aims of punishment and be fair to the accused, the victim and society, while emphasizing the gravity of the offence. All the sentences should be back-dated to the date of the original sentence imposed in the Regional Court.

ORDER OF COURT:

A. The appeal against the sentence imposed on count 1 succeeds.

B. The sentence of life imprisonment on count 1 is set aside and replaced with a sentence of 22 years' imprisonment.

C. The appeal against the sentences on counts 2 and 3 are dismissed and the sentences of 3 years' imprisonment on each count are confirmed.

D. In terms of s280(1) of the Criminal Procedure Act, 51 of 1977 it is ordered that the sentences on counts 2 and 3 should be served concurrently with each other.

E. The effective sentence of the appellant is therefore 25 years' imprisonment.

F. All the sentences are antedated to 28 June 2011 and shall be deemed to have commenced running on that date.

GAMBLE J

SHER J :

I agree.

SHER J

[1] S v Malgas 2001

(1) SA 439 (SCA)

[2] S v Vilakazi 2009

(1) SACR 552 (SCA)

[3] S v Mabuza and others 2009(2) SACR 435 (SCA)

[4] S v Sikhupa 2006 (2) SACR 439 (SCA)

[5] S v Nkomo 2007

(2) SACR 198 (SCA)

[6] S v Matyityi 2011 (1) SACR 40 (SCA)

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