

SOUTH AFRICA / JUDGMENT

S v M.D (Sentence) (CC013/2018)

[2022] ZALMPTHC 2 (15 March 2022)

[2022] ZALMPTHC 2**COURT**

Limpopo High Court, Thohoyandou

BEFORE

AML Phatudi

CASE / FILE NUMBER

CC013/2018

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INTHE HIGH COURT OF SOUTH AFRICA

LIMPOPO LOCAL DIVISION, THOHOYANDOU

CASE NUMBER: CC013/2018

THE STATE

Versus

MD Accused

JUDGEMENT ON SENTENCE

AML PHATUDI J

Introduction

- [1] DM, a convict following a guilty verdict handed down in respect of a count of rape[1] read with the provision of section 51(1) of Criminal Law Amendment Act 105 of 1997 (CLAA) as amended. In these sentence proceedings and for purposes of sentence, I consider the main and alternative counts as one offence. More emphasis will be on the mental condition of the complainant.
- [2] Imprisonment for life is mandatory to a rape convict especially when it is as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act and the victim is a mentally disabled person as contemplated in section 1 of the Act.[2]

[3] However, the court is empowered to impose a lesser sentence than the sentence prescribed if satisfied that substantial and compelling

circumstance(s) do exist to justify such a lesser sentence. The court must enter those circumstances on the record of the proceedings[3]. The onus is thus on the accused to prove existence of such substantial and compelling circumstances.

[4] The sentence proceedings are proceedings sui generis. Both the State and the accused may lead evidence to aggravate or mitigate the sentence. The evidence must be led as provided for in terms of section 274 (1) of the Criminal Procedure Act 51 of 1977. The section provides, for ease of reference, that '[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.

[5] The evidence brings to the fore, among others, (i) the accused substantial and compelling circumstances; (ii) the seriousness of the offense; (iii) the personal circumstances of both the complainant and the offender including; (iv) the interest of the community.

[6] The State has a duty to begin in leading evidence in aggravation of sentence[4] to enable the accused to rebut any such evidence. The court may solicit procurement or compilation of either the victim impact or probation officer's report. In closing arguments, the accused must be the first to address the court on any evidence received under subsection (1), as well as on the matter of the sentence, and thereafter the prosecution may likewise address the court.[5]Thereafter the accused may make submission in reply to the prosecution's address.

[7] The state opts not to lead any evidence in aggravation.

[8] The accused testifies. He was born on 7 April 1993. He was 22 years at the time of the commission of the offence. He is not married and has no children. He has no property of his own. He resides at his parental home. Both his parents are still alive and unemployed. One JM employed him as assistant motor mechanic on ad hoc basis and earned R500 per month. He assists in augmenting groceries at his homestead. He, above that, would assist his siblings, TM, a first year student at the University of Venda and RM, a grade 11 student at Nwaridi Secondary School, financially and more particularly regarding their scholastic necessary necessities including what he calls "a toilet fee" at Nwaridi Secondary School.

[9] He testifies that there was foreplay before they engulfed in sexual intercourse. The complainant's laughter during the said foreplay created an impression that she was a consenting adult. He says he did not know of her mental condition. He only learnt from these court proceedings and the findings of this court on the complainant's mental condition. He accepts that a person in her condition is incapable of giving consent to sexual intercourse but the complainant was the willing participant during foreplay. He, each day he appears in court, curses the day he had sexual intercourse with the complainant. He clothes this curse as a remorse.

[10] Defence counsel submits that this court must find the accused personal circumstances, considered cumulatively, as substantial and compelling circumstances that warrants imposition of a lesser sentence other than imprisonment for life. He submits further that the accused is a first offender. The complainant suffered no injuries. The Medico-Legal Report (J88) corroborates, as it depicts

no injuries at all. She quickly moved on with her life she has since found a man, RS, in an arranged marriage. Out of the said marriage, a child is born.

[11] He concedes that rape is perhaps the most horrific and dehumanising violation that a person can live through and is a crime that not only violates the mind and body of a complainant, but also one that vexes the soul. It may be degrading and traumatic, depending on the circumstances of each case. He nonetheless submits that a subjective test applies. The State must lead evidence to prove such psychological injuries, or, how degrading or traumatic it is to the complainant. Instead, the evidence shows that she (complainant) is staying with RS as husband and wife. This is as per Ms ML's (Mavis) testimony.

[12] He opines that 16 years direct imprisonment will be an appropriate sentence this court should consider committing the accused. He basis his opinion comparatively on the principles set out in Gqamana 2001 (2) SACR 28 (C), where the accused raped the complainant twice at the shack. The appeal court altered a sentence of life imprisonment and replaced it with 8 years' imprisonment. In Mahomotsa 2002 (2) SACR 438 SCA, the accused repeatedly raped the complainants. The appeal court altered a term of life imprisonments to eight (8) and 12 years respectively; and in Nkomo 2007 (2) SACR 198 SCA, a sentence of life imprisonment was reduced to 16 years imprisonment for an accused who repeatedly raped the complainant.

[13] In rebuttal, counsel for the state opines that factors relied on by the defence are flimsy and far from being regarded as substantial and compelling circumstances. He, in reliance on the principle set in Malgas[6] that 'courts are required to approach the imposition of the sentence conscious that the legislature has ordained life imprisonment as the sentences that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances', submits that imprisonment for life is appropriate. He ups his submission that in Malgas, the court held that the 'specified sentences are not to be departed from lightly and for flimsy reasons'. He concedes that there is no victim impact report evidencing any injuries, they being psychological or dehumanising but for the accepted statement of the complainant's grandmother handed up as evidence during trial on merits as placed on record.

[14] It is trite law that when considering sentence, each case is to be determined on its own merits. Where the state rely on the provisions of the CLAA, the court must satisfy itself that substantial and compelling circumstances do exist justifying the imposition of a lesser sentence than the sentence prescribed. In doing so, the court must consider cumulatively

the evidence placed on record during mitigation and/or aggravation of sentence. A departure must be justified by reference to circumstances that can be seen to be substantial and compelling as contrasted with circumstances of little significance or of debatable validity or which reflect a purely personal preference unlikely to be shared by many.

[15] It is correct that Malgas[7] states that the courts are required to approach the imposition of the sentence conscious that the legislature has ordained life

imprisonment as the sentence that ordinarily should impose for the listed crimes in the specified circumstances in the absence of weighty justification. Vilakazi[8] reiterates the principle with emphasis- 'it is clear from the terms in which the test was framed in Malgas and endorsed in Dodo, that it is incumbent upon a court, in every case, before it imposes a prescribed sentence, to assess, upon a consideration of all the circumstances of a particular case, whether

the prescribed minimum sentence is indeed proportionate to the particular offence committed by the convict'.

[16] Once a court reaches the point where unease has hardened into a conviction that an injustice will be done, that can only be because it is satisfied that the circumstances of the particular case render the prescribed sentence unjust or, as some might prefer to put it, disproportionate to the crime, the criminal and the legitimate needs of society. If that is the result of a consideration of the circumstances the court is entitled to characterise them as substantial and compelling and such as to justify the imposition of a lesser sentence.

[17] It is common cause that the accused is a young unmarried first offender and whose mental maturity has not been tested Vis a Vis his youthfulness. Youthfulness usually affects the moral culpability of an 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. The degree of maturity must always be carefully investigated in assessing a young offender's moral culpability for the purposes of sentencing[9].

[18] The Constitutional Court warned in *S v Williams*[10] that youthful offenders 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. Even after the invent of the minimum sentences, depending on the circumstances, youthfulness is one of the factors considered cumulatively, as substantial and compelling to warrant imposition of a lesser sentence.

[19] The accused testified that he did not know of the complainant's mental condition at the time of the commission of the offence. They ticklish and brushed each other leaving the complainant in convivial laughter. The foreplay made both to reach the climax required in enjoyable sexual intercourse.

[20] I consider that the personal circumstances of the accused, more particularly his

- (i) youthfulness, his (ii) clean record and (iii) lack of knowledge of the complainant's mental disability as substantial and compelling circumstances that warrant imposition of a lesser sentence than the prescribed. Tipping the scales, the accused is a (iv) candidate for rehabilitation.

[21] The communities and societies watch courts of law with critical eyes the type of sentences imposed on convicted persons who perpetrates the offence classified as "gender based violence", of which rape is at the apex. It is perhaps an opportune time to consider the triad as set out in Zinn's case[11].

THE OFFENCE COMMITTED

[22] The late emeritus Mohammed CJ penned in *S v Chapman*[12] where he described rape as 'a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, to privacy and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilisation.' Khampepe J quoted the words of Mohammed CJ with approval and added that 'rape is a serious offence. It is, in and of itself, a deeply destructive and dehumanising act.[13] She penned further that 'this crime is an inescapable and seemingly ever-present reality and scourge on the nation and the collective conscience of the people of South Africa'.

[23] TPM's grandmother deposed to a statement handed up and accepted as evidence wherein she indicates- "...when I looked at her face, she was not happy. She...looked like the person who was having a problem..." It is evident from that statement that TPM felt humiliated and her dignity degraded. Even if I may be wrong due to lack of direct evidence to that effect, I infer that she may have felt humiliated and her dignity degraded.

[24] I cannot agree more with counsel for the state that the accused violated the complainant's rights to dignity, privacy and the integrity of her person. It would have tipped the scales of justice more in aggravating sentence if the State lead evidence to that effect. This is a case where the state's remissness has failed the complainant and society.[14]

INTEREST OF THE COMMUNITY

[25] Rape has reached such stage of pandemic proportions in this country. It has become cancerous terminal to the morals and social fabric to our communities. Our communities are been riddled with this offences of violence against women. This has since been termed "Gender Based Violence". High incidences of these crimes especially against women- rubbing it in-mentally disabled person- prompted Parliament to enact the Criminal Law Amendment Act prescribing minimum sentences. I indicated earlier that communities and societies watch Courts of law with critical eyes the type of sentences they impose on convicted persons. The complainant seeks justice. The community seeks justice. Justice must be seen to have been done.

THE OFFENDER

[26] The accused personal circumstances are on record. I dealt with them. I cumulatively found some constituting substantial and compelling circumstances that warrant imposition of a lesser sentence than the prescribed. I am not persuaded though that the accused is remorseful. He is regretting what he did. Alternatively, he curses the day he committed the offence. The accused did not show genuine remorse as defined by Ponnann JA in *S v Matyityi*[15] where the following was said:

‘There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one’s error. Whether the offender is sincerely remorseful, and not simply feeling sorry for him or herself at having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in court, that one should rather look. 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 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; whether he or she does indeed have a true appreciation of the consequences of those action’. There is no evidence led to satisfy the three elements stipulated in the case.

[27] It is trite law that the sentencing discretion remains with the presiding officer. I, notwithstanding substantial and compelling

circumstances I found to exist, am of the view that a custodial sentence is appropriate in the circumstances. The question is-For how long must the accused be imprisoned? Nugent JA penned in *Vilakazi* 2009(1) SACR 552 SCA, at 574, that:

“In cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment, the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves immaterial to what that period should be...”

[28] In my final assessment of the evidence led and submissions advanced; bearing in mind that punishing a convicted person is not a revenge and should not be liken to one, I am of the view that a sentence of 8 (eight) years imprisonment in respect of the offence of rape of a mentally disabled person will not be appropriate. Twelve (12) years’ imprisonment is, in my view, appropriate in the abovementioned circumstances.

[29] I in the result make the following order.

ORDER

I, in terms of section 276(1) (b) of Criminal Procedure Act 51 of 1977 as amended, sentence the accused to 12 years direct imprisonment.

AML PHATUDI

JUDGE OF THE HIGH COURT

Deputy Director of Public Prosecutions

Limpopo Local Division: Thohoyandou: Adv. A. Madzuta

Legal Aid South Africa

Thohoyandou

: Mr. A.L. Thomu

Heard

: 01 and 08 March 2022

Judgment

: 15 March 2022

[1] RAPE: CONTRAVENING SECTION 3 READ WITH SECTIONS 1, 56(1), 57, 58, 59, 60 AND 61 OF ACT 32 OF 2007. ALSO READ WITH SECTION 256, 261, AND 262(1) OF ACT 51 OF 1977. ALSO, READ WITH SECTION 51(1) AND SCHEDULE 2 OF THE CRIMINAL LAW AMENDMENT ACT 105 OF 1997. In that on or about the 31st of October 2015 and at or near Mashau Village, in district of Vuwani, the said accused unlawfully and intentionally commit an act of sexual penetration with the complainant to wit [TPM] a female person by inserting his penis in her vagina without her consent. In the alternative, the State alleges that the accused is guilty of an unlawful and intentional commission of an act of sexual penetration with the complainant, one TPM, a 20-year-old mentally disabled female person who is in law incapable of giving consent to such sexual intercourse

[2] Part I Schedule 2 of CLAA. Rape under (b)(iii)

[3] Section 51(3)(a) of CLAA-‘if any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justified the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence: ...’

[4] In terms of section 274(1) of Criminal Procedure Act 51 of 1977

[5] Section 274(2) of Criminal Procedure Act 51 of 1977

- [6] S v Malgas (117/2000) [2001] ZASCA 30; [2001] 3 All SA 220 (A) (19 March 2001)
- [7] 2001(1)SACR 469(SCA)
- [8] 2010 1 SACR SCA
- [9] S v Mabuza and Others (174/01) [2007] ZASCA 110; [2007] SCA 110 (RSA) (20 September 2007)
- [10] [1995] ZACC 6; 1995
- (3) SA 632 (CC) at para 85
- [11] S v Zinn 1969(2)SA 537 (A) page 540
- [12]
- [1997] ZASCA 45; 1997 (2) SACR 3 (SCA) at 5b
- [13] Ndlovu v S (CCT174/16) [2017] ZACC 19; 2017 (10) BCLR 1286 (CC); 2017 (2) SACR 305 (CC) (15 June 2017)
- [14] Ndlovu Ibid Para[54]
- [15] S v Matyityi 2011
- (1) SACR 40 (SCA) para 13

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