

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, BHISHO)**

CASE NO.: CA&R 12/2022

Regional Court Case No.: RCP 65/12

Matter heard on: 4 November 2022

Judgement delivered on: 8 November 2022

In the matter between:

M X

APPELLANT

and

STATE

RESPONDENT

APPEAL JUDGMENT

CHITHI AJ:

[1] The appellant was charged in the Zwelitsha Regional Court with two counts of rape in contravention of sections 1, 56 (1), 57, 58, 59, 60 and 61 of the Criminal Law (Sexual

Offences and Related Matters) Amendment Act¹ read with section 51 (1) and Schedule 2 of the Criminal Law Amendment Act² ('CLAA').

[2] The rape incidents took place in December 2011 at or near Mgababo Locality, Peddie. The state alleged that the appellant raped two minor children in the presence of each other. They were both eight years old at the time.

[3] The appellant was found guilty as charged on both counts of rape on 18 October 2013. On the same day, he was sentenced to undergo life imprisonment with both counts of rape taken as one for the purposes of sentence. The appeal is only against the sentence. Section 309(1) of the Criminal Procedure Act³ accords the appellant an automatic right of appeal.

[4] The appeal is premised on the grounds that the trial court erred in imposing an effective term of life imprisonment and as such the sentence is shockingly inappropriate for the following reasons:

- 4.1 It disregarded the fact that no *viva voce* medical evidence was led, detailing the nature, extent and severity of physical injuries inflicted on the victims;
- 4.2 It disregarded the fact that there was no expert psychological assessment of the impact of the crime on the lives of the victims, as well as the prospects of their psychological recovery;
- 4.3 It disregarded the fact that the appellant was a first offender;
- 4.4 It over-emphasised the seriousness of the offence over and above the personal circumstances of the appellant; and
- 4.5 It erred in finding that there were no substantial and compelling circumstances justifying the imposition of a lesser sentence as the rapes were not the worst types.

[5] The appellant's grounds of appeal were further buttressed in the appellant's heads of argument as follows:

¹ 32 of 2007.

² 105 of 1997.

³ 51 of 1977.

- 5.1 It was the duty of the sentencing court to consider all the factors before imposing a sentence;
- 5.2 It was the duty of the sentencing court to ensure that the prescribed sentence was proportionate to a particular offence, having taken into consideration all the circumstances;
- 5.3 The appellant did not have any previous convictions when he was convicted; and
- 5.4 At the time of his conviction, the appellant had been in custody for one year and ten months, awaiting his trial.

[6] All these factors, considered cumulatively, should have led the trial court to conclude that there were substantial and compelling circumstances justifying the court to depart from the prescribed minimum sentence of life imprisonment, or so the appellant's counsel argued. He argued further that a sentence of 18 years imprisonment, backdated to the date of his sentence, would be appropriate.

[7] Mr Giyose, for the state, on the other hand, contends that the trial court was correct in concluding that there were no substantial and compelling circumstances justifying a departure from the prescribed minimum sentence of life imprisonment.

[8] It is trite that sentencing resides pre-eminently within the discretion of the trial court. In *S v Malgas*,⁴ Marais JA enunciated the test for interference by an appeal court as follows:

“A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate Court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate Court is at large. However, even in the absence of material misdirection, the appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate

⁴ 2001 (2) SA 1222 (SCA) para 12.

Court would have imposed had it been the trial court is so marked that it can properly be described as ‘shocking’, ‘startling’ or ‘disturbingly inappropriate’.”

[9] The Supreme Court of Appeal in *Malgas* was restating a test which always formed part of our law for many years. In *S v Anderson*⁵, Rumpff JA captured the essence of the duty and power of a court on appeal concisely as follows:

Over the years our Courts of appeal have attempted to set out various principles by which they seek to be guided when they are asked to alter a sentence imposed by the trial court. These include the following: the sentence will not be altered unless it is held that no reasonable man ought to have imposed such a sentence, or that the sentence is out of all proportion to the gravity or magnitude of the offence, or that the sentence induces a sense of shock or outrage, or that the sentence is grossly excessive or inadequate, or that there was an improper exercise of his discretion by the trial Judge, or that the interests of justice require it. Some of the cases in which these principles are mentioned are referred to in the judgment of SELKE, J., in *Rex v Zulu and Others*, 1951 (1) SA 489 (N) at p. 490.

A Court that interferes with a sentence imposed by a lower court, itself exercises a discretion when it imposes a new sentence and there cannot, therefore, be a ready-made test in the strict sense of the word. Nor is it advisable to attempt to lay down a general rule as to when the Court's discretion to alter a sentence will be exercised, see *Rex v Sandig*, 1937 AD 296 and *Rex v Ramanka*, 1949 (1) SA 417 (AD). The decisions clearly indicate that a Court of appeal will not alter a determination arrived at by the exercise of a discretionary power merely because it would have exercised that discretion differently. There must be more than that. The Court of appeal, after careful consideration of all the relevant circumstances as to the nature of the offence committed and the person of the accused, will determine what it thinks the proper sentence ought to be, and if the difference between that sentence and the sentence actually imposed is so great that the inference can be made that the trial court acted unreasonably, and therefore improperly, the Court of appeal will alter the sentence. If there is not that degree of difference the sentence will not be interfered with.”

⁵ 1964 (3) SA 494 (A) at 495.

[10] Once again it is necessary to have regard to what was said *Malgas*,⁶ namely that the enactment of the minimum sentencing legislation was an indication that it was no longer 'business as usual.' A court no longer has a clean slate to inscribe whatever sentence it thinks fit for specified crimes. It has to approach the question of sentencing conscious of the fact that the Legislature has ordained life imprisonment as the sentence which should ordinarily be imposed, unless substantial and compelling circumstances were found to be present.

[11] The appellant testified in mitigation of his sentence. He stated that he was 45 years old. He was previously married and has two children, who were nine and seven years, respectively. However, he had since separated from his wife, who left with his children. Immediately before his arrest on 6 January 2012, he was unemployed. He attended school up to standard 10 or Grade 12. He suffered from an ailment which he was unwilling to disclose to the court. Despite having been found guilty of the offences he continued to protest his innocence.

[12] It is common cause that the appellant had been in custody ever since his arrest on 6 January 2012. At the time of his sentencing, he was in custody awaiting his trial for a period of one year and nine months.

[13] Mr Dlamkile, who appeared on behalf of the appellant, during the trial, found himself unable to address the court on the question of whether there were substantial and compelling circumstances which justified the court to deviate from the prescribed sentence of life imprisonment. He nevertheless urged the court to deviate from the prescribed minimum sentence

[14] It is a well-established principle that a court should not deviate from the prescribed minimum sentence for flimsy reasons and speculative hypothesis favourable to the offender. The question which one must ask is whether there were any reasons which warranted the learned regional magistrate to deviate from the prescribed minimum sentence of life imprisonment. In my view there was none.

[15] On the question of the lack of permanent physical injuries to the two minor children, the provisions of Section 51(3) (aA)(ii) of the CLAA come to mind. They provide that when

⁶ Note 4 above paras 7 and 8.

imposing a sentence in respect of rape, an apparent lack of physical injury to the complainant shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence. Moreover, in *S v Radebe*⁷ the Court enunciated that the absence of physical injuries in a sexual offence complaint does not mitigate against the seriousness of the crime.

[16] In interpreting the provisions of Section 51(3) (aA) of the CLAA our courts are consonant that while none of those circumstances may on their own be regarded as substantial and compelling circumstances justifying a departure from the prescribed sentence, but that each one of them may be considered along with other factors cumulatively could amount to substantial and compelling circumstances.⁸

[17] With that said, in my view the court a *quo* was correct that there were no substantial and compelling circumstances justifying a departure from the prescribed sentence.

[18] Rape is one of the most serious and brutal violations of the victim's right to privacy and bodily integrity. The Supreme Court of Appeal unequivocally expressed itself on this issue in *S v SMM*⁹ thus:

It is necessary to reiterate a few self-evident realities. First, rape is undeniably a degrading, humiliating and brutal invasion of a person's most intimate, private space. The very act itself, even absent accompanying violent assault inflicted by the perpetrator, is a violent and traumatic infringement of a person's fundamental right to be free from all forms of violence and not to be treated in a cruel, inhumane, or degrading way.

[19] The remarks as set out above are apt in the instant matter. What I consider as having been most disturbing and aggravating in this matter is the fact that the appellant raped the complainants one in front of the other. Therefore, not only did these minor children experience the primary victimisation in the hands of the appellant when he sexually assaulted them, but they also suffered secondary victimisation when they each had to watch the other being sexually assaulted by the appellant. The appellant had a knife nearby which he used to

⁷ 2019 (2) SACR 381 (GP) at 396i - 397a.

⁸ *S v Nkawu* 2009 (2) SACR 402 (ECG) para 17; *S v SMM* 2013 (2) SACR 292 (SCA) para 26.

⁹ Note 8 above para 17.

threaten the children. They were threatened to submit to his demands and also to never disclose his name to anyone including law enforcement agencies. This was a calculated move on the part of the appellant. The appellant must have known that if he allowed one of his victims to leave, she would have raised the alarm and he would most likely have been caught in the act.

[20] The appellant was not even deterred by the fact that he had children who were almost of the same ages as the complainants. The young faces of these complainants did not bring to mind the images of his children.

[21] The fact that the appellant had spent some time in incarceration awaiting trial, could not by itself impel the magistrate to impose a lighter sentence. Pre-sentence detention is but a factor to be considered along with other factors, cumulatively, for it to amount to substantial and compelling circumstances.¹⁰

[22] The failure on the part of all role players in this matter, including the prosecution, defence, and the presiding judicial officer to ensure that all relevant information was placed before court regarding the appellant, the circumstances surrounding the commission of the offences, the victims' circumstances including the impact which the commission of the offence had on the victims, is regrettable in my view. However, to consider that fact on its own as being favourable to the appellant would be highly speculative and undesirable considering the peculiar circumstances of this case especially those, I have highlighted in paragraphs 22 to 24 above. I must therefore decline to interfere with what is an appropriate sentence merely on that basis.

[23] Having regard to the appellant's personal circumstances, the severity of the crimes and the interests of society, I am of the view that the sentence of life imprisonment imposed on the appellant is not disproportionate and does not amount to an injustice. I can therefore not find any misdirection on the part of the trial court and we are consequently not at liberty to interfere with the sentence. It, therefore, follows that the appeal against sentence must fail.

[24] In the result, following order issues:

¹⁰ S v Mqabhi 2015 (1) SACR 508 (GJ) para 38.

The appeal against the sentence of life imprisonment is dismissed.

M. M. CHITHI
ACTING JUDGE OF THE HIGH COURT

I concur.

J. E. SMITH
JUDGE OF THE HIGH COURT

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