

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



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

CASE NO.: CA&R31/2021

Matter heard on: 27 March 2024

Judgment delivered on: 16 April 2024

In the matter between: -

Z[...] R[...]

Appellant

and

THE STATE

Respondent

JUDGMENT

Dunywa AJ

[1] The appellant in this case was convicted by a Regional Magistrate sitting in the Magistrate's Court, Zwelitsha, for the Regional Division of the Eastern Cape. The appellant is a 59-year-old male, the foster parent of the victims, convicted of rape and attempted rape in respect of two different minors.

[2] He was sentenced to life imprisonment for rape and 6 years for attempted rape on 12 December 2012. Both sentences automatically run concurrently in terms of the legislation¹.

[3] The two victims and complainants were under the foster care of the appellant and his wife. The complainants were 15 and 14 years respectively at the time of the incidents. The court *a quo* accepted that the eldest child was raped by the appellant since March 2007. The incidents would occur when their mother was away. She was raped many times, and the last incident took place in September 2011 and she bled from her private parts.

[4] The second victim was sexually assaulted by the appellant since 2009. The appellant attempted to rape her in March 2011. On this occasion the appellant had already undressed her party and placed her on the bed. The appellant had climbed on top of her when she screamed and struggled. The appellant stopped and dressed up when a person came and stood next to the window.

[5] The appeal is directed against the sentence of life imprisonment only. The appellant has an automatic right to appeal from the Regional Court to High Court in terms of the proviso to section 309 (1) (a) of the Criminal Procedure Act 51 of 1977 ('the CPA').

Grounds of appeal

[6] The grounds on which the appellant is appealing the sentence are as follows:

6.1. The effect of life imprisonment is strikingly inappropriate in that it is not proportionate to the totality of the accepted facts in mitigation.

6.2. The court erred in finding that the only suitable sentence is that of life imprisonment.

6.3. The court erred in over-emphasising the following factors:

¹ Section 39(2) of Act 111 of 1998.

6.3.1. The seriousness of the offence.

6.3.2. The interest of society.

6.3.3. The deterrent effect of the sentence.

[7] In mitigation of sentence in the court *a quo* the appellant's argument was that he was 59 years old, married and unemployed, with a previous conviction for attempted murder. He passed grade 4 at school and has one child. The two victims were placed by the social workers under foster care of the appellant and his wife. He was assigned parental care of the children. He assumed the position of trust which he broke.

[8] In the court *a quo* it was argued by the respondent on sentence that the appellant was not remorseful. He cannot be rehabilitated considering his age. The defence conceded that there were no substantial and compelling circumstances for the court to deviate from the prescribed minimum sentence before the court *a quo* but that mindset has since been reconsidered before this court.

[9] On appeal the appellant argues that his age should be regarded as a substantial and compelling circumstance for the court to deviate from the prescribed minimum sentence of life imprisonment. The respondent is opposing the appeal in that there are no substantial and compelling circumstances and the sentence is fair and just.

[10] The issue in this appeal is whether the court *a quo* exercised its discretion correctly by finding there are no substantial and compelling circumstances for the court to deviate from the prescribed minimum sentence of life imprisonment as ordained by section 51(1) of the Criminal Law Amendment Act 105 of 1997 ('the CLA'), Part 1 of Schedule 2. The appellant was convicted of rape in circumstances where the victim was a person under the prescribed age at the time of the offence, so that a prescribed minimum sentence of life imprisonment was applicable.

[11] It is trite law that sentencing is a matter for the discretion of the trial court. Various tests have been formulated as to when a court of appeal may interfere. These include, where the reasoning of the trial court is vitiated by misdirection or whether the sentence imposed can be said to be startlingly inappropriate or to induce a sense of shock or where there is a striking disparity between the sentence imposed and the sentence the court of appeal would have imposed. All these formulations, however, are aimed at determining the same question; *viz* whether there was a proper and reasonable exercise of the discretion bestowed upon the court imposing sentence. In the ultimate analysis this is the true inquiry. Either the discretion was properly and reasonably exercised or it was not. If it was, a court of appeal has no power to interfere; if it was not, it is free to do so².

[12] In *S v Monyane and Others*³ it was held that;

“It has not been suggested that the sentence was vitiated by any misdirection. The argument advanced on behalf of the appellants is that the degree of disparity between the sentence imposed and that which this court would have imposed is such that interference is competent and required. The crucial factor which allows for the applicability of that approach is the appellate court's being able to arrive at a definite view as to what sentence it would have imposed, (*S v Matlala 2003* (1) SACR 80 (SCA) in para 10). In the present matter, such a view, I believe, can be formed”.

[13] The approach to applying the discretion as to imposition of the prescribed minimum sentence is guided by various principles emanating from case law, including:

- (1) The starting point is that a prescribed sentence must be imposed;
- (2) Only if the court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence may it do so;

² *Kgosimore v S* [1999] ZASCA 63; 1999 (2) SACR 238 (SCA).

³ 2008 (1) SACR 543 (SCA) [23]

(3) Deciding whether substantial and compelling circumstances exist, each case must be decided on its own facts and the Court is required to look at all factors and consider them cumulatively;

(4) If the Court concludes in a particular case that a minimum prescribed sentence is so disproportionate to the sentence which would have been appropriate, it is entitled to impose a lesser sentence⁴.

[14] The minimum-sentencing legislation has had a far-reaching effect on sentences imposed in respect of the offences listed in the Act. Courts have pointed out on many occasions that injustices may occur if the prescribed minimum sentences are imposed without a proper consideration of the existence of substantial and compelling circumstances, including the question whether the prescribed sentence will be disproportionate to the offence, in the wide sense, in other words, including all the circumstances of not only the offence itself, but also the circumstances of the parties involved. The duty is on the courts to avoid injustice⁵.

[15] Notwithstanding the above the courts have warned that courts should not for 'flimsy reasons' and 'speculative hypotheses favourable to the offender' deviate from the minimum sentence prescribed⁶. Instead, '*...courts are duty-bound to implement the prescribed sentences and that vague and ill-founded hypotheses that appear to fit the particular sentencing officer's personal notion of fairness ought to be eschewed*'⁷.

[16] The appellant contends that his age of 59 years at the time of sentencing must be regarded as a substantial and compelling circumstance in this case for the court to deviate from the prescribed minimum sentence of life imprisonment. The Constitutional Court has referred to a 58-year-old offender as having reached an 'advanced age'⁸. But other factors must also be considered.

⁴ *S v Homareda* 1999 (2) SACR 319 (W).

⁵ *S v De Beer* 2018(1) SACR 229 (SCA).

⁶ *S v Malgas* 2001 (1) SACR 469 (SCA). See also *S v Cwele & another* 2013(1) SACR 478 (SCA) at [29].

⁷ *S v Kwanape* 2014 (1) SACR 405 (SCA) at [15].

⁸ *S v Klaas* 2018 (1) SACR 643 (CC) at paras [37] and [46].

[17] The appellant's age is not such that, on its own, this warrants deviation from the prescribed minimum sentence. Typically, the advanced age can play a meaningful role in the consideration as substantial and compelling circumstances if it is accompanied by other factors such as the accused ill-health etc⁹. In *S v JA*¹⁰, for example, a full bench had the opportunity to deal with the argument that the sentencing court should, as a mitigating factor and for purposes of minimum sentence legislation, have considered that the accused was a relatively old offender. The appellant in that matter had been convicted of raping his 12-year-old daughter on at least three occasions over a period of some thirty months. He was 'approximately' 56 years old at the time of the offences but 59 when sentencing procedures commenced. This age was described as 'relatively advanced'. The sentencing court concluded that there were no substantial and compelling circumstances justifying a lesser sentence than a sentence of life imprisonment.

[18] It must be accepted that at the time when sentence had to be considered, there were no other mitigating factors, such as ill-health, physical infirmity or mental incapacity, to be considered in combination with the appellant's age. Furthermore, he had committed the rapes over a period of time during which he had sufficient opportunity to reconsider his actions and 'come to his senses'¹¹. The appellant had also acted in a 'calculated' manner in that he had created opportunities to be alone with the child so that he could rape her¹².

[19] Considering the circumstances in their entirety,¹³ the advanced age of the appellant was not and could not be a factor that precluded the imposition of the sentence of life imprisonment as prescribed. In the case of *S v JA*, Olivier J concluded that the 'relatively advanced age' of the appellant was 'not a mitigating factor in the context of a prescribed sentence of life imprisonment and in considering

⁹ *S v Delport & others* 2020 (2) SACR 179 FB (the offender was 68 years old) and in *S v Horn* 2020 (2) SACR 280 ECG (where the appellant was 60 years of age).

¹⁰ 2017 (2) SACR 143 (NCK).

¹¹ *S v JA* supra at para [45].

¹² *Supra* at para [46].

¹³ *Supra* at paras [47]– [49]).

whether there were substantial and compelling circumstances justifying a lesser sentence¹⁴.

[20] The age of the appellant in this case, the rape of a minor child who was in a domestic relationship with the appellant, over a long period in a calculated manner are the common similarities between this case and *S v JA*.

[21] The accused in *S v MDT*¹⁵ had raped his 14-year-old daughter. The court found that the seriousness of the offences and the severe psychological impact on the victim were factors negating any mitigatory effect that the accused's personal circumstances might have had. Life imprisonment was imposed. There were no substantial and compelling circumstances justifying a deviation from the prescribed sentence.

[22] In this case the psychologist has compiled the victim impact statement which has the following conclusion:

- The abuse has damaged the complainant with irreversible negative long-term consequences.
- She experienced Sexual Abuse Accommodation Syndrome (SAAS) while she was being sexually abused. This Syndrome was formulated to describe the process of the child enduring sexual abuse and why children do not report the abuse. The abuser entraps the minor through bribes, through the secrecy of the abuse, and through the helplessness, powerlessness, and the shame felt by the minor in the abuse. The minor has no alternative but to learn to live with the abuse. This syndrome explains why the abuse is not reported and why the child may deny the abuse when confronted.
- The sexual abuse of her took place during critical stages of her growth and development. The psychological process that she was forced to

¹⁴ *Supra* at para [41]

¹⁵ 2014 (2) SACR 630 at para [16].

endure over these years has had a profound psychologically constricting and traumatising effect on her psychology. It has restricted her functioning and general psychological growth. She has failed to flourish according to her natural potential. Instead, she has the following behavioural problems:

- Chronic bed-wetting: this is a typical and robust indicator of the presence of psychological trauma.
 - Sexual acting-out behaviour in the form of promiscuity: this is typical of the impact of chronic sexual abuse.
 - Substance use and abuse: She uses and abuses alcohol from time to time which is typical of the impact of sexual abuse in her age range.
 - Personality problems: she has permanent emotional damages in that she is rigidly distanced from her feelings. She has symptoms of Conduct Disorder in that she has a blatant disregard for rules. She behaves deceitfully. She has no empathy for the impact of her behaviour on other people. She has a pseudo-maturity which is inappropriate for her age. This is an indicator of personality problems.
- At the age of 15 emotional and personality dynamics are well on their way to being permanently established. Her current problematic emotional and personality dynamics are a direct consequence of the impact of the sexual abuse.
 - Psychological treatment of her significant behavioural problems has a poor prognosis. Research and literature indicate that 8 out of 10 women who present with psychiatric complaints in adulthood have sexual abuse in their childhood histories. It is a certainty that she will have psychiatric difficulties in

adulthood as a direct consequence of the chronic sexual abuse she suffered at the hands of the accused in this case. The complainant in the rape charge is an emotional wreck, whose life was being destroyed by the accused trust.

[23] The sentiments shared by the psychologist in this case have been regarded as aggravating circumstances by our courts. In *S v SQ*¹⁶ Pickering J held that the trial court had not misdirected itself in taking the view that a rape became progressively more serious the younger the victims¹⁷. It was also noted that whilst the injuries suffered by the victim to her private parts were relatively minor, the psychological impact of the rape upon her had clearly been devastating. Medical evidence was to the effect that 'the rape would leave a lifelong, indelible imprint on [the victim's] psyche, negatively affecting her emotional growth, personality formation and psychosexual development'¹⁸.

[24] The seriousness of the offences, including the prevalence of rape perpetrated against women and children which are a scourge in our country, warrants a long term of imprisonment. Not only is rape a serious offence, its seriousness is exacerbated by its alarming incidence. This country is reported to have some of the highest incidents of rape in the world¹⁹. The victims were almost four times younger than the appellant respective age. This is not to suggest that the appellant's sentence was appropriate in order to set an example to others.

[25] In *S v DT*²⁰ the appellant's appeal against his life imprisonment for the rape of his 14-year-old daughter failed despite the fact that the daughter had suffered no physical injuries. The SCA held that 'in imposing punishment for rape relative to the circumstances one is evaluating degrees of heinousness'. The court found that there were no substantial and compelling circumstances and the appeal was dismissed.

¹⁶ 2013 (1) SACR 70 (ECG)

¹⁷ *S v SQ supra* at 74g)

¹⁸ *S v SQ supra* at (73f).

¹⁹ *S v Chuir & another* 2012 (2) SACR 391 (GSJ) at [10]:

²⁰ 2014 (2) SACR 630 (SCA) at para [8].

[26] In the recent case of *Maila v S*²¹ the court dealt with the onslaught of rape cases by stating as follows:

“Considering *Jansen*²², *Malgas*²³, *Matyityi*²⁴, *Vilakazi*²⁵ and a plethora of judgments which follow thereafter as well as regional and international protocols which bind South Africa to respond effectively to gender-based violence, courts should not shy away from imposing the ultimate sentence in appropriate circumstances, such as in this case. With the onslaught of rape on children, destroying their lives forever, it cannot be ‘business as usual’. Courts should, through consistent sentencing of offenders who commit gender-based violence against women and children, not retreat when duty calls to impose appropriate sentences, including prescribed minimum sentences. Reasons such as lack of physical injury, the inability of the perpetrator to control his sexual urges, the complainant (a child) was spared some of the horrors associated with oral rape, which amount to the acceptance of the real rape myth, the accused was drunk and fell asleep after the rape, the complainant accepted gifts (in this case, sweets) are an affront to what the victims of gender-based violence, in particular rape, endure short and long term. And perpetuate the abuse of women and children by courts. When the Legislature has dealt some of the misogynistic myths a blow, courts should not be seen to resuscitate them by deviating from the prescribed sentences based on personal preferences of what is substantial and compelling and what is not. This will curb, if not ultimately eradicate, gender-based violence against women and children and promote what Thomas Stoddard calls ‘culture shifting change’”.

[27] Rape of a child is an appalling and perverse abuse of male power. It strikes a blow at the very core of our claim to be a civilised society. The community is entitled to demand that those who perform such perverse acts of terror be adequately punished and that the punishment reflect the societal censure. It is utterly terrifying that we live in a society where children cannot play in the streets in any safety; where children are unable to grow up in the kind of climate which they should be able to demand in any decent society, namely in freedom and without fear. In short, our children must be able to develop their lives in an atmosphere which

²¹ [2023] ZASCA 3 delivered on (23 January 2023).

²² 1999 (2) SACR 368 (C) at 378 G to 379 B.

²³ 2001 (1) SACR 469 (SCA).

²⁴ 2011(1) SACR 40 (SCA)

²⁵ 2009 (1) SACR (1) SACR 552 (SCA).

behoves any society which aspires to be an open and democratic one based on freedom, dignity and equality, the very touchstones of our Constitution²⁶.

[28] This court is of the view that the court *a quo* has not misdirected itself in finding that there were no substantial and compelling circumstances for the court to deviate from the prescribed minimum sentence of life imprisonment. The appellants age alone is not enough to be regarded as a substantial and compelling circumstance in the present instance. There is no basis to depart from the overall approach of the trial court. Bearing in mind the established approaches to appeals against imposition of a prescribed minimum sentence, the conclusion is that the appeal must, for the reasons described, be dismissed.

[29] As result, the following order is issued that;

1. The late filing of the leave to appeal is condoned.
2. The appeal is dismissed.

S DUNYWA
ACTING JUDGE OF THE HIGH COURT

I agree

²⁶ *S v Jansen supra*.

A. GOVINDJEE
JUDGE OF THE HIGH COURT

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