

Reportable:	YES / <b><u>NO</u></b>
Circulate to Judges:	YES / <b><u>NO</u></b>
Circulate to Magistrates:	YES / <b><u>NO</u></b>
Circulate to Regional Magistrates:	YES / <b><u>NO</u></b>

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



**IN THE HIGH COURT OF SOUTH AFRICA**  
**FREE STATE DIVISION, BLOEMFONTEIN**

**APPEAL NUMBER: A126/2022**

**In the Appeal of:**

**TEBOHO SANI**

**Appellant**

**and**

**THE STATE**

**Respondent**

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**CORAM:**

**S NAIDOO, J et M.E MAHLANGU, AJ**

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**JUDGMENT BY:**

**ME MAHLANGU AJ**

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**DATE OF HEARING:**

**27 FEBRUARY 2023**

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**DELIVERED ON:**

**MARCH 2023**

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**JUDGMENT**

## INTRODUCTION

[1] The appellant was tried in the Regional Court, Free State on two counts of the rape. The first count falls under the ambit of Section 51(1) of the Criminal Law Amendment Act 105 of 1997 (CLAA), the charge in contravention of section 3 Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the SORMA). The second count falls under section 3 of SORMA.

[2] The appellant was duly convicted and sentenced on 11 February 2020 on the first count. The conviction and resultant order reads as follows:

*"I am therefore satisfied that you are guilty of having contravened the provisions of Section 3 of the Criminal Law, which is the Sexual Offences and Related Matters Amendment Act, act 32 of 2007, read with the provisions of Section 51(1) Part 1 of Schedule 2 of act 105 of 1997.*

*In relation to count 2, I am in doubt as to whether the State proved that you raped the complainant M S on 1 June 2019, and for that reason I will give you the benefit of the doubt in relation to count 2 and I will find you not guilty and discharge you."*

[3] This appeal comes before this Court pursuant to an automatic right of appeal, as life imprisonment was imposed by the Regional Magistrate.

## SUMMARY OF THE FACTS

[4] The facts as they relate to count 1 are that, the complainant was a five years old at the time of the incident. Both the complainant and her mother gave testimony during the trial. A J88 relating to the complainant's injuries was handed to Court by consent.

[5] The complainant's mother testified that on the day of the incident, she woke up at around 5h30 to prepare herself to go to work. The complainant left the house at around 6h00 and she initially thought she went to the toilet which was outside the house. On realising that the complainant is not coming back to the house, her mother went outside the house to look for her. She could not

find her. She later saw her coming from the appellant's parental home which was opposite her home.

[6] The complainant's mother testified that, she called the complainant who was coming for the appellant's premises, she could note that the complainant was crying but the complainant denied to have been crying. They later went to her bedroom and she asked the complainant why she was crying. The complainant told her mother that, she was crying because one of the children she was playing with hit her with a stone on her vagina. The complainant's mother asked the complainant to lie on a bed to check her, she firstly resisted but she then allowed her mother to have a look at her vagina. She then took the complainant to the appellant's house where the child who was said to have hit the complainant with a stone on her vagina was questioned. The child disputed to have ever assaulted the complainant. The complainant's mother testified that, she took a stick and gave the complainant a hiding on her buttocks. The complainant then told her mother that the appellant assaulted her sexually and that the assault took place in the appellant's bedroom.

[7] The complaint's testimony corroborated that of her mother with non-material differences. The complainant further testified that, the appellant took her into his room, undressed her, spit on her vagina and then thereafter sexually assaulted her.

[8] The J88 medical report indicates that the complainant had lacerations on her posterior fourchette, on her labia minora and on her labia majora. The conclusion by the medical doctor is that these lacerations are highly suspicious of forced penetration.

[9] The appellant's version confirmed that the complainant did come to his parental home, she knocked at the door and he opened for her. He testified

that, the complainant told him that she is looking for the appellant's siblings. He referred the complainant to his siblings, as they were playing he left. The appellant denied having raped the complainant.

[10] The complainant denied the appellant's version.

### **GROUND OF APPEAL**

[11] The appellant assails the sentence imposed by the Magistrate on the basis that the court *a quo* erred in finding no substantial and compelling circumstances justifying a departure from the prescribed minimum sentence.

[12] The second ground is that the sentence is shockingly harsh and inappropriate and severe in the circumstances.

[13] In support of his ground of appeal, the appellant contends that he was 24 years old and he was the first offender. He ended school at grade 9 and was gainfully employed. That the complainant did not suffer any injuries.

### **SENTENCE**

[14] There are well-established principles governing the hearing of appeals against sentence. In short, punishment is pre-eminently a matter for the discretion of the trial court and a court of appeal should be careful not to erode that discretion. Interference is only warranted if it is convincingly shown that the discretion has not been judicially and properly exercised. The test is whether the sentence is vitiated by an irregularity, a material misdirection or is disturbingly inappropriate.

[15] It is trite that the sentence of an accused person must be balanced between the interests of society, the gravity of the offence and the personal

circumstances of the accused. The trial court took into account as mitigating factors the following personal circumstances of the appellant as well as the aggravating factors: The appellant was 19 years old when he committed the offence, he left school at Grade 9 because financial problems. He was employed at the time of the incident and had a baby girl whose whereabouts are unknown to him. He had no previous convictions.

[16] The appellant committed an offence of a serious nature. Rape is prevalent in our society. The learned Magistrate quite rightly found that a heavier sentence is required when the offence is prevalent in order to deter potential perpetrators. It must also send a clear message to other would-be offenders that it is not worthwhile to commit offences of this nature.

[17] The facts of this case indicate reprehensible conduct on the part of the appellant. The complainant was a five year old child who is defenceless. The trauma caused to the complainant by these acts of violence, without doubt, was severe and enduring. The victims of such crimes deserve the protection of the law and the sentences that are imposed should reflect that the law takes the victims' trauma into account.

[18] In **S v Bogaards 2013 (1) SACR 1 (CC)**, the following was stated at para 41:

"[41] Ordinarily, sentencing is within the discretion of the trial court. An appellate court's power to interfere with sentences imposed by courts below is circumscribed. It can only do so where there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it. A court of appeal can also impose a different sentence when it sets aside a conviction in relation to one charge and convicts the accused of another".

[19] In **S v Matyityi 2011(1) SACR 40 (SCA)**, the following is stated:

“[23] Despite certain limited successes there has been no real let-up in the crime pandemic that engulfs our country. The situation continues to be alarming. It follows that, to borrow from *Malgas*, it still is 'no longer business as usual'. And yet one 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 other arms of State, owe their fealty to it. Our constitutional order can hardly survive if courts fail to properly patrol the boundaries of their own 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 judicial officer, is foundational to the rule of law which lies at the heart of our constitutional order.”

[20] The Regional Court was therefore statutorily obliged to impose the prescribed minimum sentence of imprisonment for life for the appellant's conviction. In **S v Malgas 2001 (2) SA 1222 (SCA)** it was held at para 12 that:-

“The mental process in which courts engage when considering questions of sentence depends upon the task at hand. Subject of course to any limitations imposed by legislation or binding judicial precedent, a trial court will consider the particular circumstances of the case in the light of the well-known triad of factors relevant to sentence.... **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, an 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 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'. It must be emphasised that in the latter situation the appellate court is not at large in the sense in which it is at large in the former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned. No such limitation exists in the former situation". (my emphasis)

[21] The appellant showed no respect for the complainant's rights nor did he at any stage show the slightest remorse. The appellant only accepted responsibility of his action when tendering evidence before he was sentenced. He alleged that he may have been under the influence of the drugs that affected his way of thinking. Sexual assault is a widespread and serious problem in our society. Sexual assault is a pervasive crime. The imposition of a lesser sentence that is the mandatory minimum sentence will, in this instance, diminish the horror of rape.

[22] Therefore, I am unable to find that the sentence is vitiated by any irregularity or material misdirection. All the relevant factors and circumstances were duly taken into account by the trial court. Interference with the imposed sentence is not warranted.

### Order

[23] In the circumstances, I propose that the following order be made:

- (i) The appeal against sentence on the first count of rape is dismissed;

- (ii) The conviction and sentence imposed on the appellant are confirmed;
- (iii) The order in terms of which the appellant remains unfit to possess a firearm in terms of section 103(1) of the Firearms Control Act 60 of 2000, is confirmed;
- (iv) The order in terms of which the appellant's name is to be recorded in the National Register for Sex Offenders, is confirmed

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**E MAHLANGU, AJ**

I concur, and it is so ordered

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**S NAIDOO, J**



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