IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Appeal number: A108/2022

In the Appeal between:

MOTEBANG JOHANNES SEBOTSA Appellant

And

THE STATE Respondent

CORAM: DANISO, J *et* BARRY, AJ

HEARD ON: 13 MARCH 2023

JUDGMENT BY: DANISO, J

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' representatives by email and by release to SAFLII. The date and time for hand-down is deemed to 07 JUNE 2023 at 14H00.

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[1] The appellant appeared duly legally represented before the regional court Lejweleputswa for the rape of a 12-year-old girl thereby contravening the

provisions of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (The CLAA). He was subsequently convicted based on his guilty plea in terms of section 112(2) of the Criminal Procedure Act[1] (The Act).

[2] Based on the charge, the appellant's guilty plea and the deliberations in the record of the proceedings[2], the charge that the appellant was convicted of emanated from the incident which took place on 5 September 2021 at the appellant's house. The complainant and her younger brother sought shelter at the appellant's house after they were caught out in the rain where-after they asked to sleep over and he agreed. During the night he went over to where the complainant was sleeping, undressed her panties and raped her by penetrating her vagina with his penis. The complainant and her brother left the appellant's house on the next day in the morning. She was subsequently examined on 7 September 2021 at Bongani hospital. The medical report (J88) was handed in by concurrence of both the State and the defence as Exhibit "C" except for the evidence of penetration no indication of physical injuries was observed.

[3] Having regard to the provisions of s 51(1) of the CLAA on 24 March 2022 the court *a quo* found that there were no substantial and compelling circumstances warranting a deviation from the prescribed minimum sentence of life imprisonment, he was accordingly sentenced to life imprisonment.

[4] This appeal is directed at the sentence. The principles applicable in appeals where the sentencing discretion of the trial court is attacked are trite: namely, the circumstances under which the appeal court can interfere with sentence are limited. The test is whether the sentence is vitiated by an irregularity or a misdirection or it is disturbingly inappropriate.[3]

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[1] Act 51 of 1977.

[2] Pages 17 to 27 of the record of the transcribed proceedings.

[3] *S v Sadler* **2000 (1) SACR 331** SCA H-J. *S v Van de Venter* **2011 (1) SACR 238** (SCA) at para [14]

[5] It is common cause that section 51(1) of the *CLAA* prescribes a minimum sentence of life imprisonment for the rape of a child unless there are substantial and compelling circumstances warranting a deviation from the prescribed sentence.

[6] The appellant did not testify in mitigation of sentence at the trial. On the other side, the State relied on the complainant's victim impact statement in aggravation of sentence.

[7] The appellant is aggrieved that the following factors were not taken into account by the court *a quo* as factors warranting a deviation from the prescribed sentence of life imprisonment namely: the period he spent in custody awaiting trial; that he was a first offender; that he showed remorse for his actions and pleaded guilty and that the complainant did not sustain any physical injuries. He contends that the sentence of life imprisonment is excessive under these circumstances. It must accordingly be reduced to a sentence of twenty-two (22) years imprisonment antedated to 24 March 2022.

[8] The traditional mitigating factors such as an accused's personal circumstances, that he pleaded guilty, that he is a first offender including his incarceration pending trial may be taken into account as substantial and compelling reasons warranting the imposition of a lesser sentence than the one prescribed sentence. However, they must be weighed against the aggravating circumstances. On their own, they are those factors which have been described as flimsy to be elevated to the status of substantial and compelling reasons warranting a deviation from the prescribed minimum sentence.[4]

[9] The examination of the record of the proceedings reveals that the court *a quo* meticulously considered all the factors averred by the appellant and concluded that cumulatively, they are outweighed by the gravity and the nature of the

[4] *S v Malgas* **2001 (1) SACR 469** SCA- para 9.

offence the appellant was convicted of therefore do not justify a lesser sentence than the prescribed sentence of life imprisonment.

[10] I am unable to fault the learned magistrate's conclusions in this regard. For the reason that: it is aggravating that at the tender age of twelve (12) the complainant was violated by someone she trusted enough to seek refuge in his home when she and her little brother where confronted by a rainy nightfall instead, he took advantage of her vulnerability.

[11] It is also aggravating that complainant and her brother were clearly children in need of care and protection.[5] It was observed by the court *a quo* that they seemed to have lacked parental care as their parents' whereabouts on the day of the incident could not be explained by the State for that reason they needed to be taken care of and not to be taken advantage of. In *S v D*[6] it was held at page 260 f-g that:

> "*Children are vulnerable to abuse, and the younger they are, the more vulnerable they are. They are usually abused by those who think they can get away with it, and all too often do. …*" *Appellant's conduct in my view was sufficiently reprehensible to fall within the category of offences calling for a sentence both reflecting the courts disapproval and hopefully acting as a deterrent to others minded to satisfy their carnal desires with helpless children.*

[12] In *S v Vilakazi*[7] rape was describes as "*a repulsive crime. It was rightly described by counsel in this case as 'an invasion of the most private and intimate zone of a woman and strikes at the core of her personhood and dignity.*

[5] In terms of section 150 of the Children's Act 38 of 2005, a child who has been abandoned is a child in need of care and protection.
[6] **1995(1) SACR 259**(A).
[7] **2009 (1) SACR 552** (SCA).

[13] The emotional and psychological effects resulting from the appellant's actions are set out in the complainant's victim impact statement (Exhibit "B"). The complainant has been left traumatized by the incident. She states that before the rape incident she was a happy child and enjoyed playing anywhere without fear but since the incident she has become fearful. She is afraid to walk away from home or playing far from home. Her thoughts are constantly occupied by the incident, she has been questioning why out of all the children the appellant chose her and these thoughts have also affected her school performance with the result that she failed Grade 4.

[14] As correctly pointed out by the learned magistrate, there is nothing exceptional about the appellant's personal circumstances. It is recorded that at the time of sentencing he was 58 years old, unmarried and had no dependants. He was also employed as a Sheppard earning about R1000.00 (one thousand rand).

[15] The prevalence, repulsive and depravity of child rape causes an outrage in the society which looks up to the courts to impose sentences which speak to their plight by placing more emphasis on retribution and deterrence. It is for that reason that the age of the appellant, his employment background and family structure is irrelevant when sentence is considered in the circumstances where the crime is deserving of a prescribed minimum sentence.[8]

[16] The fact that the appellant was incarcerated pending trial is indeed a factor that a court may take into account as a substantial and compelling factor under these circumstances. The record of the proceedings reflects that the appellant abandoned bail at his third court appearance. He first appeared in the district court on 8 September 2021. The matter was then postponed to 15 September 2021 for Legal Aid thereafter to 30 September 2021 for bail application and it is on that date that he abandoned his bail and the matter was postponed to 20 October 2021 for further investigations.

[8] Supra at fn 7, para 58.

[17] On 20 October 2021 the matter was transferred to Regional Court for the appellant to appear on 15 November 2021. On that day he applied for Legal Aid again as a result the matter was further postponed to 29 November 2021. The postponements on 1 December and 14 December 2021, 16 February and 9 March 2022) were due to the unavailability of the appellant's legal representative, for the purpose of consultation with his legal representative and outstanding copies of the docket respectively.

[18] The appellant pleaded guilty to the charge on 15 March 2022 where-after the matter was postponed to 16 March 2022 and 23 March 2022 for the victim impact statement report. He was ultimately sentenced on the 24 March 2022 approximately six (6) months after he first appeared in court. The delay in the conclusion of the proceedings is not extreme. Except to raise this point nothing has been said regarding why this aspect should count in his favour in the sense that it was not by his own design that he was held in custody pending trial. The onus is on the appellant to adduce the facts that he relies on.

[19] Similarly, the fact that the appellant is a first offender on its own does not constitute a substantial and compelling reason to justify a deviation from the prescribed minimum sentence. It was pointed put by Satchwell, J in *S v Muller* **[2006] ZAGPHC 51** (23 May 2006) that:

> *"[55] The Statute prescribes one sentence for all rapists convicted of rape or rapes which fall within the categories or circumstances described in Part I irrespective of the rapist's previous clean or sullied criminal record."*
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> *[59] …There is no authority for the proposition that the previous clean record of an accused convicted of offences in Part I of Schedule 2 constitutes, in and of itself, a substantial and compelling circumstance. At most it would be one of the considerations considered for exploring the possibility that, in conjunction with other factors, it may persuade the sentencing court to make such a finding*."

[20] There is also no merit to the appellant's criticism of the trial court's conclusion that a guilty plea does not equate to remorse. The appellant had the opportunity to testify in mitigation he instead elected to verbalize his remorse through his

legal representative. Much as the appellant was entitled to exercise his constitutional right to remain silent, taking the court into his confidence and explain what had motivated him to commit such a heinous crime and to also offer an apology to the complainant would have counted in his favour. It is important to note that on the next morning after the rape the complainant and her little brother left the appellant's house and due to the fact they knew him very well evidence of his crime was bound to be overwhelming therefore it could have dawned on him that his arrest was imminent hence he pleaded guilty. It was said in *S v Matyityi*[9] that in "an open and shut case" a guilty plea cannot be regarded as indicator of remorse.

[21] The medical report (J88) does not allude to physical injuries however, lack of serious physical injuries does not make this rape less heinous. Rape leaves the victims with life-long emotional and psychological scars. The Supreme Court of Appeal in *Maila v The State*[10] quoting A*manda Spies 'Perpetuating Harm: Sentencing of Rape Offenders Under South African Law'* (2016) (2) *SALJ* 389 at 399 the court held that:

> *"[47] Counsel for the appellant submitted that the trial court did not take into account the appellant's personal circumstances. It also, according to counsel, did not take into account that this was not one of the 'brutal cases', as the complainant was not physically injured. Counsel was taken to task during the exchange with the members of the bench on this submission, but he could not take the argument further. Correctly so, because apart from this minimising the traumatic effects of rape on any victim and more so a child, it is well documented that 'irrespective of the presence of physical injuries or lack thereof, rape always causes its victims severe harm."*
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> *[48] The Legislature has specifically amended the Criminal Law Amendment Act to provide categorically that the fact that a complainant was not injured during a rape cannot be*

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9 **2011(1) SACR 40** (SCA).

10 (**429/2022) [2023]** ZASCA 3 delivered on 23 January 2023.

considered as compelling or substantial. In terms of s 51(3) (a A) of Act 105 of 1997, which came into operation in December 2007:

> *'When imposing a sentence in respect of the offence of rape the following shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence:*
>
> *….*
>
> *(ii) an apparent lack of physical injury to the complainant;*
>
> *….*
>
> *(iv) any relationship between the accused person and the complainant prior to the offence being committed."*

[22] Having regard to the circumstances of this matter, I am of the view that the court *a quo* exercised its discretion properly and judicially. The sentence of life imprisonment is appropriate under these circumstances. It reflects the gravity of the crime and speaks to the plight of the victims and the indignation of the society.

[23] In the result, the following order is made:

1. The appeal against sentence is dismissed.

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NS DANISO, J

I concur

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A BARRY, AJ

On behalf of appellant: Ms S. Kruger

Instructed by:	Legal Aid South Africa
	BLOEMFONTEIN
On behalf of respondent:	Adv. M.S. Matsoso
Instructed by:	The Director of Public Prosecutions
	BLOEMFONTEIN