IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Appeal no. **A192/2023**

In the appeal of:

LEBOHANG LESELI Appellant

and

THE STATE Respondent

CORAM:	**MUSI, JP et MANYE, AJ**
HEARD ON:	**29 APRIL 2024**
DELIVERED ON:	**25 JUNE 2024**
JUDGMENT BY:	**MANYE, AJ**

Criminal law procedure – rape – minimum sentencing legislation – Criminal Law Amendment Act 105 of 1997 – role of presiding officer in relation to finding of substantial and compelling circumstances.

[1] This appeal come before this Court against a sentence imposed by the Regional Court: Bloemfontein, for contravening s 3 of the Sexual Offences Act 32 of 2007 read with the provisions of s 51 of the Criminal Law Amendment Act 105 of 1997 (the Act) and a subsequent sentence of life imprisonment. It is so that the appellant enjoys an automatic right of appeal in terms of s 309(1)*(a)* of Criminal Procedure Act 51 of 1977 (CPA).

[2] The appellant was legally represented and tendered a plea of not guilty. His defence was that the complainant consented to the sexual intercourse as they were involved in a love relationship. It therefore became common cause that the accused, on the date in question, had sexual intercourse with the complainant in the manner stated in the charge sheet, to wit by penetrating her vagina with his penis.

[3] According to the complainant the alleged rape occurred on or about 18 October 2023 at Ferreira, near a railway line in Bloemfontein. The complainant testified that, upon leaving a tavern where she had just enjoyed her Namaqua beverage, she made her way home following a railway line. Upon arriving at the railway line, three people came running towards her, grabbed her, threw her on the grass, held her down and they had sexual intercourse with her without her consent, one after the other. The complainant managed to escape her attackers and fled to a house, inhabited by one Ace Rontang and his wife. During her ordeal she managed to recognize the appellant by his voice when he answered a cell phone call while she was at Ace's house. She testified that she knew him from the time that the Appellant had a love-relationship with her little sister. The state called both Mr Ace Rontang and his wife as witnesses.

[4] The appellant's case was simply that at the time of the alleged incident he had had a love-relationship with the complainant. He further testified that at one previous time, his wife caught him and the complainant having sexual intercourse at the appellant's house. He vehemently denied raping the complainant and stated that the only sexual intercourse that transpired was consensual. He testified that the only motivation he could think of as to why the Complainant would have laid this charge against him would have been that she wanted him to leave his wife.

[5] The magistrate, in his judgment, summarised and alluded to the evidence tendered by both the state and the defence. However, the appellant's grounds of appeal rests on his contention that the Court *a quo* erred when it did not find that his personal circumstances were substantial and compelling to the extent necessary for deviation from the prescribed minimum sentence of life imprisonment.

[6] It is so that rape, in the nature in which it is carried out, is outright distasteful and abhorrent. It violates its victim bodily integrity and strikes the core of the victim. It inflicts long lasting untold psychological and emotional damage.[1] The Constitutional Court previously put it as follows:

'Today rape is recognised as being less about sex and more about the expression of power through degradation and concurrent violation of the victim's dignity, bodily integrity and privacy.'[2]

[7] The question before this Court is whether this Court should interfere with the sentences imposed, by making an order in terms of s 280 of the CPA. Having regard to the minimum sentencing provisions of the Act that came into effect on 1 May 1998, a sentence of life imprisonment had to be imposed on the appellant unless substantial and compelling circumstances exist which justify the imposition of a lesser sentence.[3]

In considering the question of the existence, or otherwise, of substantial and compelling circumstances, the facts of the particular case must present some circumstances that are quite exceptional in nature. Their exceptionality must obviously and conspicuously expose the injustice of the statutorily prescribed sentence in the particular case that it can rightly be described as '*compelling*'.[4] In *S v Malgas*[5] (*Malgas*), the Court held that '[t]he imposition of the prescribed sentence need not amount to a shocking injustice . . . before a departure from it is justified. That it would be an injustice is enough.'[6]

[8] Section 51(1) of the Act reads as follows:

'Notwithstanding any other law but subject to subsection (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life.

The same Act continues by providing is s 51(3)*(a)*:

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[1] S v Chapman [1997] ZASCA 45; 1997 (3) SA 341 (SCA) para 3: 'Rape is 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.'

[2] *Masiya v Director of Public Prosecutions Pretoria and Another (Centre for Applied Legal Studies and Another as Amici Curiae)* [2007] ZACC 9; 2007 (5) SA 30 (CC) para 78.

[3] Section 51(3) of the Criminal Procedure Act 105 of 1997, Section 51(3)

[4] *S v Shongwe* 1999 (2) SACR 220 (O) at 223.

[5] *S v Malgas* 2001 (1) SACR 469 SCA

[6] Ibid para 23.

'If any Court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify 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 may thereupon impose such lesser sentence: . . .'

[9] Part 1 of Schedule 2 of the Act insofar as it is relevant to the crime of rape reads as follows:

'Rape, as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007–

'(a)

when committed-

(i) in the circumstances where the accused is convicted of the offence of rape and evidence adduced at the trial of the accused proves that the victim was also raped by-

(aa) any co-perpetrator or accomplice; or

(bb) a person, who was compelled by any co-perpetrator or accomplice, to rape the victim, as contemplated in section 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act , 2007, irrespective of whether or not the co-perpetrator or accomplice has been convicted of , or has been charged with, or is standing trial in respect of , the offence in question;

(ii) in the circumstances where the accused is convicted of the offence of rape on the basis that the accused acted in the execution or furtherance of a common purpose or conspiracy and evidence adduced at the trial of the accused proves that the victim was raped by more than one person who acted in the execution or furtherance of a common purpose or conspiracy to rape the victim, irrespective of whether or not any other person who so acted in the execution or furtherance of a common purpose or conspiracy has been convicted of , or has been charged with, or is standing trial in respect of , the offence in question;

(iii) . . .

(iv) by a person, knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus;'

The aforementioned legislation indicates, unambiguously, the clear intention of the legislator that the perpetrators of these serious offences against vulnerable and

defenceless women should be sentenced to long terms of imprisonment.[7] Such sentences shall only be departed from if a Court is satisfied that there are substantial and compelling circumstances which warrant such a deviation.

[10] In *casu*, the real issue was whether the effect of a sentence of life imprisonment imposed by the Court a quo on one count of rape, was shockingly or disturbingly inappropriate and whether this Court should interfere with the sentence imposed by making an order in terms of s 280 of the CPA. Mrs Kruger, for the appellant, submitted in mitigation that there were indeed compelling and substantial circumstances and the Court ought to consider the following in this regard:
That:

(a) the Appellant was 35 years old at the time of sentencing;
(b) the Appellant is married and with three minor children aged 17, 11 and three years old who depend on him for financial maintenance and support;
(c) He was a first time offender; and
(d) He had shown remorse and asked for forgiveness from the complainant.

[11] She further stated that since the complainant suffered no injuries, the decision in *Mudau v S*[8] was to be applied where the court held that:

'He correctly in my view concluded that the proper interpretation of the provision does not preclude a court sentencing for rape to take into consideration the fact that a rape victim has not suffered serious or permanent physical injuries, along with other relevant factors, to arrive at a just and proportionate sentence.'[9]

[12] Mrs N Mazwi, for the State, submitted that there was nothing compelling and substantial about the personal circumstances of the Appellant. She pointed out that the provisions of s 51(3)*(aA)*(ii)[10] and other relevant authorities find application, namely that the lack of physical injuries, permanent psychological trauma and rape not being the worst of its kind, alone, cannot and should not be considered compelling and substantial in order to deviate from the prescribed minimum sentence.

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[7] Footnote 3 at 4.
[8] *Mudau v S* 2013 (2) SACR 292 SCA at 26
[9] Ibid para 26.
[10] Act 105 of 1997

[13] The Supreme Court of Appeal, in Director of Public Prosecutions Eastern Cape, Makhanda v Coko (Women's Legal Centre Trust, Initiative for Strategic Litigation in Africa and Commission for Gender Equality Intervening as Amici Curiea),[11] stated as follows:

'For most women and children, in particular, the rights guaranteed everyone in the Bill of Rights, such as the right to be free from all forms of violence from either public or private sources; bodily and psychological integrity, including the right to make decisions concerning reproduction and security in and control of their bodies, ring hollow. Thus, it brooks no argument to the contrary that rape gratuitously violates the fundamental value of human dignity and related rights.'[12]

[14] As indicated above, the question before this Court is whether this Court is at liberty to interfere with the sentences imposed, by making an order in terms of s 280 of the CPA. It is trite that in an appeal against a sentence, a court of appeal should be guided by the principle that punishment is pre-eminently a matter for the discretion of a trial court and the court of appeal should be careful not to erode that discretion. The sentence imposed by a lower court could be varied, only if:

(a) an irregularity took place during the trial or sentencing stage;
(b) the Court *a quo* misdirected itself in respect of the imposition of the sentence; or
(c) the sentence imposed by the Court *a quo* is disturbingly and shockingly inappropriate.[13]

[15] The appellate court in *Rex v Dhlumayo and Another*[14] stated that:

'Where the judicial officer in the trial court has taken every point into consideration and has not misdirected himself or been guilty of any error of law, an appeal court, in a case in which the ground of appeal is that the trial court ought to have had a doubt, will not be entitled to interfere with the verdict unless it is satisfied that the trial court ought to have had a doubt; but I am prepared to assume that in this appeal, because of the criticism to which I have referred, we should re-try the case in the sense of inquiring whether on the record of the

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[11] *Director of Public Prosecutions Eastern Cape, Makhanda v Coko (Women's Legal Centre Trust, Initiative for Strategic Litigation in Africa and Commission for Gender Equality Intervening as Amici Curiae)* [2024] ZASCA 59.
[12] Ibid para 7.
[13] *State v De Jager and Another* 1965 (2) SA 616 (A) 629 A-B.
[14] *R v Dhlumayo and Another* 1948 (2) SA 677 (A).

evidence, taken in conjunction with the impression made on the trial court by the witnesses, we ourselves are satisfied beyond reasonable doubt of the guilt of the appellants.'[15]

[16] In *casu*, the aggravating factors are numerous. The appellant and individuals only known to him perpetrated the rape and abuse of the complainant. The appellant consciously and voluntarily chose not to reveal his accomplices to the rape, even after he was identified and charged with this offence which carries consequences upon conviction. A further horrifying aspect of his actions was the fact that he knew his victim well as he previously had a relationship with her. As such, the aggravating factors far outweigh the mitigating factors*;* the gravity of the offence and the scourge of such offences in the society on helpless and vulnerable women cannot be downplayed and the effect of these crimes cannot be understated.

[17] This Court accepts that the sentence of life imprisonment imposed is indeed severe, but the facts of this case are such that a sentence of life imprisonment is not shockingly disproportionate to the crime. The appellant, without shame and with total disregard of his victim's older age as well as her inability to defend herself, chose to exploit those vulnerabilities. The worst part is that he tried to deceive the court a quo into believing that the unlawful and intentional sexual intercourse with the complainant occurred in the context of a so-called 'love relationship'.

[18] It is evident from a reading of the record that the magistrate was well aware of the guidelines enunciated *Malgas* and alluded them in respect of the imposition of or deviation from the prescribed minimum sentence for the offence of which appellant was convicted, namely a sentence of life imprisonment. The trial court had proper regard to the personal circumstances of the appellant, including his age of 24 years, being married and the father of three children. The seriousness of the offence of rape, with reference to trite case law, was considered by the magistrate. The court a quo further dealt with the interest of the community in having the crime of rape rooted out by our courts.

[19] Having assessed the aforementioned factors and having weighed the mitigating and aggravating factors, the magistrate concluded that he had not been

[15] Ibid at 687.

convinced that compelling and substantial circumstances existed that would cause him to deviate from the prescribed minimum sentence. In the premises of the reasoning above, this court accepts the factual findings, the conviction of the court *a quo* and concurs that there are no justifiable grounds to interfere with the sentence imposed.

ORDER:

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

The appeal is dismissed.

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MANYE, AJ

I concur

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MUSI, JP

APPEARANCES:

On behalf of the Appellant	Ms. S Kruger
Instructed by:	**Legal Aid South Africa** **BLOEMFONTEIN**
On behalf of the State	Adv. Mazwi
Instructed by:	**Director Public Prosecutions Free State** **BLOEMFONTEIN**