IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A038/2020

DELETE WHICHEVER IS NOT APPLICABLE (1) REPORTABLE: YES/NO (2) OF INTEREST TO OTHER JUDGES: YES? NO (3) REVISED DATE SIGNATURE

In the matter between:

DUMA, NHLANHLA ELLIOT Appellant

And

THE STATE Respondent

Coram: Malindi J et Graf AJ

Date of hearing: 12 August 2021- In a 'virtual hearing' during a videoconference on Microsoft Teams digital platform.

Date of Judgment: 16 August 2021

This judgment is deemed to have been handed down electronically by circulation to the parties representatives via email and uploaded to caselines.

JUDGMENT

GRAF AJ

INTRODUCTION

[1] The appellant appeals against the sentence imposed upon him by the Regional Magistrate, Protea. The appeal is pursuant to leave having been granted by the trial court.

[2] The appellant was charged with sexual assault in contravention of section 5(1) of the Criminal Law Amendment Act 32 of 2007 (Sexual offences and Related Matters Act) ("the Act") (count 1) and rape as contemplated in section 3 of the Act (count 2).

[3] The appellant was legally represented. He pleaded not guilty. After hearing the evidence of the complainant and other state witnesses, and that of the appellant, the trial court convicted him of both counts. The two counts were taken as one for purpose of sentencing and the appellant was sentenced to twenty (20) years imprisonment.

BACKGROUND

[4] The facts giving rise to the convictions and sentence are as follows: The complainant (hereinafter referred to as 'N') testified that when she was eleven (11) years old she lived with her mother and stepfather in a house that also operated as a tavern. The appellant was one of the patrons who frequented the tavern. On a certain day in June 2017 the appellant and N were in the dining room while the appellant was having his beer. At that moment N's mother was at church and her stepfather and other patrons were outside the house.

[5] The appellant started referring to N as "sweetie" and "lovey" and he told her that she was his wife. At some stage the appellant, seemingly deliberately, dropped the cover of his cell phone and it fell under the sofa. He requested N to pick it up, stating that he was too old to do so himself. When N bent down to pick up the phone cover, the appellant lifted her skirt, and he kissed her buttocks. N was startled and managed to get away from him and go outside as she was not comfortable with his conduct.

[6] A few days later while the appellant was at the tavern he told N's mother that he had meat at home that he wanted to share with them. The appellant suggested that N accompany him to fetch the meat. This was after he had dismissed N's stepfather's offer to fetch the meat. The appellant and N went to his place of residence. The appellant closed the door and latched it after they had entered the house.

[7] After having made some suggestive utterings to her, which she testified she did not understand and was confused thereby, he pulled N to his bedroom and pushed her onto the bed facedown. Although she was crying, her cry was muffled by the contact between her face and the bedding. He lifted her skirt, pulled her underwear down and inserted his penis into her vagina. The appellant stopped when N's stepfather knocked on the door. He straightened her skirt and pulled her underwear up. N's stepfather enquired what the delay was and the appellant replied that the meat was frozen and was in the process of defrosting in the microwave. After the meat was handed over, N accompanied her stepfather home.

[8] She did not report these incidents to anyone until, approximately one year later, when she told her teacher. The appellant was subsequently arrested and detained.

[9] The appellant testified in his own defence. His evidence was rejected as false.

EVIDENCE IN MITIGATION OF SENTENCE

[10] The appellant did not testify in mitigation of sentence. His personal circumstances were placed before the trial court by way of a pre-sentence report compiled by Andile Buthelezi, a probation officer employed by the Department of Social Development. From the information contained in the report and confirmed by the appellant's legal representative, it was established that the appellant was 57 years old at the time of sentencing. He was married and the father of four (4) adult children. At the time of his arrest he was employed as a builder and earning an income of R2300-00 per fortnight. He was the breadwinner and supported some of the children who were unemployed. He had no history of offending behaviour and stood before the court as a first offender. He spent approximately one (1) year in custody awaiting trial.

[11] The Regional Magistrate concluded that there were substantial and compelling circumstances present that allowed her to depart from the minimum sentence of life imprisonment that was applicable to the rape charge.

[12] Before us, counsel for the appellant contended that the trial court over-emphasized the seriousness of the offence and the interest of society and without giving the necessary consideration to the personal circumstances of the appellant. It was submitted that a sentence of 15 years imprisonment would have been more appropriate under the circumstances.

CONSIDERATIONS ON APPEAL

[13] In *S v Romer*[1] the principles applicable to an appeal court's power to interfere with a sentence imposed by a trial court were discussed as follows:

> '[22] It has been held in a long line of cases that the imposition of sentence is pre-eminently within the discretion of the trial court. The appellate court will be entitled to interfere with the sentence imposed by the trial court only if one or more of the recognised grounds justifying interference on appeal has been shown to exist. Only then will the appellate court be justified in interfering. These grounds are that the sentence is '(a) disturbingly inappropriate; (b) so totally out of proportion to the magnitude of the offence; (c) sufficiently disparate; (d) vitiated by misdirections showing that the trial court exercised its discretion unreasonably; and (e) is otherwise such that no reasonable court would have imposed it.'
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> [23] In *S v Matlala* it was held that in an appeal against sentence the fact that the sentence imposed by the trial court is wrong is not the test. The test is whether the trial court in imposing it exercised its discretion properly or not. Consequently, the circumstances in which an appellate court will interfere with the exercise of such discretion are circumscribed. In S *v Sadler* Marais JA, writing for a unanimous court, had occasion to re-state them when he said the following:
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> 'The approach to be adopted in an appeal such as this is reflected in the following passage in the judgment of Nicholas AJA in *S v Shapiro* **1994 (1) SACR 112** (A) at 119j-120c:
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>> "It may well be that this Court would have imposed on the accused a heavier sentence than that imposed by the trial Judge. But even if that be assumed to be the fact, that

[1] 2011 (2) SACR 153 (SCA) at [22] and [23]

would not in itself justify interference with the sentence. The principle is clear: it is encapsulated in the statement by Holmes JA in S *v Rabie* 1975 (4) SA 855 (A) at 857D-F:

> "1. In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal –
>
> (a) should be guided by the principle that punishment is 'pre-eminently a matter for the discretion of the trial Court', and
>
> (b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been 'judicially and properly exercised'.
>
> 2. The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate".' (Footnotes omitted).

[14] The cases above highlight the limits imposed on a court of appeal in reviewing the sentence imposed by a trial court. The trial court exercises a discretion after hearing all the evidence, including the evidence in mitigation and aggravation. That discretion can only be interfered with if it was not exercised judicially and properly. As to what that means *S v Rabie* says that there must be a presence of irregularity or misdirection in the exercise of the discretion, or that the sentence must be disturbingly inappropriate. As to the last element of the test, it has also been said that the sentence must induce a sense of shock.

[15] The legislature has prescribed a minimum sentence of life imprisonment for the rape of a child under the age of 16 in terms of the Criminal Law Amendment Act 105 of 1997. In assessing whether the Regional Magistrate exercised her sentencing discretion judicially and properly when she imposed a sentence of twenty years imprisonment, instead of the prescribed minimum sentence, this court is guided by the approach laid down in *S v Malgas*[2] where Marais JA stated that:

> 'If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.'

[2] 2001 (1) SACR 469 (SCA) at [25]

[16] Therefore in the process of considering whether a deviation from the prescribed sentence is warranted, all aggravating and mitigating factors must be weighed up cumulatively to determine whether the prescribed sentence is indeed proportionate to the offence and whether compelling and substantial circumstances exist. It must however be borne in mind that the prescribed sentences should not be departed from for '*flimsy reasons'* and that the particular offence has been '*singled out for severe punishment and the sentence to be imposed in lieu of the prescribed sentences should be assessed paying due regard to the benchmark which the legislature has provided*'[3]. The words "compelling and substantial circumstances" require an identification of circumstances that constitute '*weighty justification'*[4] in order to depart from the prescribed sentence. It is in this light that the court has to consider the current appeal against sentence.

[17] In our view the Regional Magistrate properly considered the appellant's favourable personal circumstances and carefully balanced them against the gravity of the offences and the interest of society. It was mainly the appellant's advanced age and his clean record, coupled with the time that he spent in custody, that led to the substantial reduction of the mandatory minimum sentence.[5]

[18] The Regional Magistrate also had regard to the devastating effect of the rape on N.[6] From the victim impact report compiled by Ms Mbanjwa, a probation officer, it is clear that N's schoolwork suffered as a result of the offences. She went from being a top ten learner to a child who failed numerous subjects. She had difficulty to sleep at night, which resulted in loss of concentration during the daytime. N was extremely perturbed about the fact that the loss of her virginity at such a young age prohibited her from participating in a traditional coming of age ceremony for women, known as 'umemulo'. N started isolating herself and she did not have any friends. She told Ms Mbanjwa that she felt dirty, stupid and useless and that she feared that people in the community would judge her because of what had happened. She developed suicidal thoughts and had doubts about her sexual identity. According to N's teacher N used to be bold and dynamic in her opinion, but after the incident she avoided eye contact and seemed to have given up on life.

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[3] Malgas (*supra*) at [25]
[4] Ibid
[5] Record p. 247 - 249
[6] Record p. 247 - 249

[19] The seriousness of the offences can hardly be over-emphasised. In *S v Ncheche*[7] Goldstein J stated the following:

‘Rape is an appalling and utterly outrages crime, gaining nothing of any worth for the perpetrator and inflicting terrible and horrific suffering and outrage on the victim and her family. It threatens every woman and particularly the poor and vulnerable. In our country it occurs far too frequently and is currently aggravated by the grave risk of the transmission of Aids. A woman’s body is sacrosanct and everyone who violates it does so at his peril and our Legislature and the community at large correctly expect our courts to punish rapists very severely.’

[20] In *S v C*[8] it was said that:

‘Rape is regarded by society as one of the most heinous of crimes, and rightly so. A rapist does not murder his victim- he murders her self-respect and destroys her feeling of physical and mental integrity and security. His monstrous deed often haunts is victim and subjects her to mental torment for the rest of her life- a fate often worse than loss of life.’

[21] Due to the high incidence of sexual offences against women and children in our society the legislature saw it fit to prescribe certain sentences for identified crimes so that is may serve as a deterrence to would be offenders. It deemed it crucial to send out a clear message that such behaviour will not be tolerated. The courts can convey that message effectively only in the sentences that they impose in cases of this nature. Such sentences are to take due regard to the prescripts of the law and only deviate therefrom in cases where substantial and compelling circumstances exist. ‘*Speculative hypotheses favourable to the offender*’ and ‘*personal doubts as to the efficacy of the policy underlying the legislation*’ do not play any role in this exercise.[9] Counsel for the appellant sought such speculation to be drawn from the fact that the appellant is of advanced age and might die in prison if he were to serve the imposed sentence. There is no evidence to support this.

[22] The Regional Magistrate considered all the principles relevant to sentencing the appellant and it cannot be said that she failed to exercise her discretion judicially, or that it was exercised improperly. No misdirections on her part have been identified. The

[7] 2005 (2) SACR 386 (W) at [35]
[8] 1996 (2) SACR 181C at 186E -F
[9] Malgas at [25]

sentence that she imposed does not induce a sense of shock, nor is it disturbingly inappropriate. The cumulative assessment of the mitigating factors is far outweighed by the harm that the appellant has caused. Any sentence that is less than the one imposed by the Regional Magistrate would not be just.

[23] I am satisfied that there is no legal basis to interfere with the sentence. In the circumstances I propose the following order:

23.1 The appeal against sentence is dismissed.

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A. GRAF

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree and it is so ordered.

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G. MALINDI

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG