REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNEBURG

CASE NO: A03/2022
DPP REF NO: JPV 2005/32

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

[12 MAY 2022] ……..
SIGNATURE

In the matter between:

ZWANE, SIMPHIWE CHARLES **APPELLANT**

And

THE STATE **RESPONDENT**

Neutral Citation: *Zwane v S* (A03/22(12 May 2022)

Coram: MUDAU, WINDELL and MOLAHLEHI JJ

Date of Hearing: 25 April 2022

Date of Judgment: 12 May 2022

Summary: Gang Rape – sentence – life imprisonment - appellant aged 19 years and 4 months -factors to be considered cumulatively in determining whether substantial and compelling circumstances exist and proportionality of sentence – interference only if misdirection or trial court's sentence grossly disproportionate.

ORDER

On appeal from**:** Gauteng Division of the High Court (EM Du Toit AJ), Johannesburg it is ordered that:

The appeal is dismissed.

J U D G M E N T

MUDAU, J: (Windell and Molahlehi JJ concurring)

[1] This is an appeal against sentence. The appellant, who appeared as accused number 2 in the Regional Court, Boksburg was convicted on 3 November 2004 by that court of raping a girl who was under the age of 16 years. Pursuant to the provisions of the now repealed section 52 of the Criminal Law Amendment Act[1] ("the Act"), the appellant and his co-accused were committed for sentencing to the Gauteng Division of the High Court, Johannesburg. The matter served before EM Du Toit AJ who confirmed the conviction.

[2] On 15 November 2005, the appellant and his co-accused were sentenced to life imprisonment. The court *a quo* found no substantial and compelling circumstances justifying the imposition of a sentence lesser than that prescribed by the Act. The appellant qualified for a term of life imprisonment because: (a) the victim was raped more than once; and (b) the victim was below the age of 16 years. With leave of the Supreme Court of Appeal ("SCA"), he now appeals to the Full Court against sentence only. After an agreement with counsel, this appeal was disposed of on papers without

[1] 105 of 1997.

further oral submissions in open court, pursuant to section 19 (a) of the Superior Courts Act.[2]

[3] It is not necessary to deal in any extensive detail with the evidence on the merits. However, a brief background is needed in order to appreciate the ultimate sentence imposed. On 16 June 2004 at 18h30, the complainant, then 14 years of age and a male companion were accosted by the appellant and his co-accused on their way from a shop. She knew her assailants by sight. The two grabbed her by her arms and started pulling her away. During that process, the appellant was also kicking the complainant from the back. The complainant started screaming and crying but asked her companion to go and report the incident to her brother.

[4] The complainant was taken to an open field where she was tripped by the co-accused who thereafter took out a knife. After pulling down his trousers and undergarments, he proceeded to rape her. Once done, the appellant also raped the complainant. After the rapes, the co-accused left the scene. The appellant was arrested shortly thereafter whilst in the company of the complainant by the police who, in the meantime, were looking for her with the help of the complainant's mother. The appellant denied he raped the complainant, claiming that intercourse was consensual. This was rightly rejected by the regional court magistrate and the court *a quo*.

[5] It is trite that sentencing lies pre-eminently in the discretion of the trial court. A court exercising appellate jurisdiction cannot, in the absence of a 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 usurping the sentencing discretion of the trial

[2] 10 of 2013.

court. Accordingly, this court can only interfere with the sentence imposed by the trial court where it is vitiated by a material misdirection or where the disparity between the sentence of the trial court and the sentence that the appellate court would have imposed, had it been the trial court, is so marked that it can be described as 'shocking', 'startling', or 'disturbingly inappropriate'.[3]

[6] The appellant was 8 months short of his 20th birthday at the time the offence was committed. Although single, he fathered a child born on 20 September 2003. He was not formally employed but was earning a living doing part time jobs (such as working at a car wash) earning R30 per day. He was in custody for 1 year and 3 months as an awaiting trial prisoner and was a first offender. He only reached Standard Seven of his schooling. His personal circumstances were presented from the bar.

[7] From the written heads of argument an appeal, it was contended on behalf of the appellant that the trial judge erred in finding no substantial and compelling circumstances justifying a lesser sentence than the statutorily prescribed one (i.e. life imprisonment). It was contended that all the above factors, cumulatively taken, constituted substantial and compelling circumstances justifying a lesser sentence. He referred in this regard to the relatively young age of the appellant at the time of the commission of the offence and the fact that he was a first offender. It is contended that the victim did not suffer any serious physical injuries. The court *a quo* dismissed all these factors individually and cumulatively. Du Toit AJ concluded that these factors did not constitute substantial or compelling circumstances justifying a lesser sentence than that prescribed by statute. The court observed that the appellant was already an adult at the time of the incident.

[3] S *v Malgas* 2001 (1) SACR 469 (SCA) at para [12].

[8] It was also contended that the victim did not suffer any serious physical injuries. In this regard counsel also referred to cases such as Malgas[4], S v Abrahams[5], S v Mahomotsa[6], and S v Vilakazi[7]. But, as Bosielo JA stated in S v PB[8] those cased do not, constitutes a benchmark or a precedent binding other courts but are nothing more than guidelines. It is trite that each case must be decided on its own merits. Sentence must always be individualised, for punishment must always fit the crime, the criminal and the circumstances of the case[9].

[9] Rape is a very serious offence. In *S v Chapman*[10] it was described as "a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim".

[10] The approach to be adopted by courts when considering a sentence for a conviction which attracts a minimum sentence under the Act is set out in a number of cases including *Malgas*[11].The court *a quo* was alive to this issue. Although all the factors traditionally taken into account in sentencing continue to play a role, courts are required to approach the imposition of sentence conscious that the Legislature has ordained life imprisonment as the sentence that should ordinarily, and in the absence of weighty justification, be imposed for the listed crimes in the specified circumstances.

[11] Plainly, and as indicated, unless there are and can be seen to be, truly convincing reasons for a different response, the crimes such as multiple rapes involving a child require a severe, standardised and consistent response from

[4] Foot Note 3 above
[5] 2002 (1) SACR 116 (SCA)
[6] 2002 (2) SACR 435 (SCA)
[7] 2009 (1) SACR 552 (SCA)
[8] 2013 (2) SACR 533 (SCA) at 539 para 19
[9] S v SMM and Others 2013 (2) SACR 292 (SCA) at para 13
[10] 1997 (3) SA 341 (SCA) at 344I–J
[11] Fn 3 above.

the court. Gang rapes are, and gender based violence cases in general, regrettably, an all too frequent occurrence in this Division and, obviously from reports of cases emanating from other Divisions, throughout the country as well. The rape of a child, as the complainant was at the time, is "an appalling and perverse abuse of male power"[12] which strikes a blow at the very core of our claim to be a civilised society. As Mathopo AJ (as he then was) also observed in *Tshabalala v S; Ntuli v S*[13] which is apt: "for far too long rape has been used as a tool to relegate the women of this country to second-class citizens, over whom men can exercise their power and control, and in so doing, strip them of their rights to equality, human dignity and bodily integrity".[14]

[12] Aggravating in this case is that the appellant and his co-accused, in public, abducted a child of 14 years going about her business with a friend and dragged her away into the veld where they both raped her in spite of her protestations. There is no suggestion on record that the appellant was remorseful for his conduct. The court *a quo* also took into account the fact that the child, from the reports of two probation officers who were *ad idem*, appeared to be severely traumatised by the rape ordeal from various symptoms, notably with regard to her school work and antisocial behaviour. That was almost 18 months after the incidents of rape.

[13] The suggestion that the physical injuries were not serious is completely without merit, the rape of a young girl of that age as Du Toit AJ observed, can have serious and long-lasting effects psychologically. In terms of section 51 (3) (aA) (ii) of the Act: "[w]hen imposing a sentence in respect of the offence of

[12] *S v Jansen* 1999 (2) SACR 368 (C) at 378G.
[13] 2020 (2) SACR 38 (CC).
[14] At para [1].

rape… an apparent lack of physical injury to the complainant" shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence. In any event, I am inclined to agree with the learned AJ in his observation that the psychological injuries have a negative impact and mar her ability and enjoyment of being inter alia, a woman.

[14] Consequently, I can find no irregularity or misdirection on the part of the sentencing trial judge in his consideration of the sentence. I find that the sentence is not disproportionate to the rapes committed, but is proportionate to the crime, the appellant and the legitimate needs of society. The community at large is entitled to demand that those who commit such perverted acts of terror on the most vulnerable members of our society be effectively punished and that the punishment reflect societal disapproval. The court *a quo* was, in my view, correct in finding that no substantial and compelling circumstances exist to justify a departure from the prescribed minimum sentence of life imprisonment in this case.

[15] Accordingly, I make the following order:

[15.1] the appeal against sentence is dismissed.

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MUDAU J

[Judge of the High Court]

I agree

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WINDELL J

[Judge of the High Court]

I agree

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MOLAHLEHI J
[Judge of the High Court]

APPEARANCES

For the Appellant:	Mr A Mavatha
Instructed by:	Johannesburg Justice Centre
For the Respondent:	Adv. C Mack
Instructed by:	DPP – Johannesburg.
Date of Hearing:	25 APRIL 2022
Date of Judgment:	12 MAY 2022