



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

**APPEAL CASE A100/2021
DPP REF. 10/2/5/1 – (2021/067)**

DATE OF APPEAL: 28 APRIL 2022

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
	DATE
SIGNATURE	

In the matter between:

MBULAHENI, DANIEL RAVHENGANI

Appellant

and

THE STATE

Respondent

JUDGMENT

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **25 July 2022**.

MOORCROFT AJ (SUTHERLAND DJP AND MAZIBUKO AJ CONCURRING)Order

[1] In this appeal the following order is made:

1. *The matter is remitted to the Magistrates' Court in terms of section 304(2)(c)(v) of the Criminal Procedure Act, 51 of 1977 read with section 309(3) and the State is directed to place any report by medical professionals at the Sterkfontein Hospital together with any medical evidence or reports produced in respect of the appellant during the period of his referral to the Hospital, before the Trial Court for consideration;*
2. *The Legal Aid Board is requested to assist the appellant in placing this medical evidence before the Trial Court in accordance with the rules of evidence and criminal procedure;*
3. *The Trial Court is directed to consider the sentence imposed on the appellant in the light of the evidence so placed before the Trial Court, and if it is so decided to substitute a different sentence for the sentence imposed.*

Composition of the Bench

[2] This appeal was heard by Mazibuko AJ and me. At the conclusion of the hearing no consensus could be reached between us on the appropriate order. As a result, it was necessary, pursuant to Section 14(3) of the Superior Courts Act, to enlist a third judge to deliberate. Sutherland DJP thereupon joined the bench seized of the matter. We are in agreement with this judgment.

Introduction to the evaluation of the appeal

[3] The appellant was convicted in the Regional Court of contravening section 3 read with sections 1, 55, 56(1), 57, 58, 59, 60, 61 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007, read with sections 256, 257, and 281 of the Criminal Procedure Act, 51 of 1977, read with sections 51 and 52 read with Schedule 2 of the Criminal Law Amendment Act, 105 of 1997, read with sections 92(2) and 94 of the Criminal Procedure Act. The offence was committed in January 2019.

The applicable minimum sentence provisions

[4] By virtue of the fact that the victim of the rape was a minor, the offence falls within Part 1 of Schedule 2 of the Criminal Law Amendment Act of 1997. Section 51(1) of the Criminal Law Amendment Act 1997 is applicable. The subsection provides for the imposition of minimum sentences of an accused person convicted of an offence referred to in Part I of Schedule 2 of the Act, to imprisonment for life.

[5] The imposition of a life sentence is obligatory unless subsections (3) and (6) are applicable. Judicial discretion is therefore preserved.

5.1 Subsection (3)(a) provides that if the Court were satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence, the Court shall enter those circumstances on the record and impose the lesser sentence. Importantly, the subsection¹ lists a number of circumstances that do not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence. These include the accused's cultural or religious beliefs about rape.

5.2 Subsection (6) stipulates that the minimum sentence provisions are not applicable if the accused were under the age of 18 years at the time of the commission of the offence. The subsection is not relevant in this The circumstances of the appellant

[6] The appellant pleaded guilty to the charge and was legally represented at the trial in December 2020. He was convicted and sentenced to life imprisonment. He exercised his automatic right to appeal against sentence. The appellant did not testify at the trial but by agreement his counsel placed relevant facts before the trial court in mitigation of sentence and made submissions of law.

[7] The question before the Court on appeal is whether substantial and compelling circumstances exist that justify the imposition of a lesser sentence than life imprisonment.

¹ In s 51(3)(aA).

[8] I have regard to the following aspects:

- 8.1 The charge related to the rape of a four-year old boy, the nephew of appellant. The appellant was therefore in a position of trust vis á vis a defenceless victim.
- 8.2 The appellant was twenty-two years old when the offence was committed and he completed grade 12 at school.
- 8.3 He was a third-year student when the offence was committed and was studying towards a qualification in engineering.
- 8.4 He was a first offender and it is argued that he showed remorse by pleading guilty.
- 8.5 It was also argued that after committing the offence he pleaded for forgiveness from the mother of the child, his sister, and from his family. He was disowned by the family.
- 8.6 There was no victim impact report before the Court when the appellant was sentenced. (The Public Prosecutor informed the trial court that there was no such report as the mother of the victim had indicated that she wanted justice to take its course. No weight should in my view be attached to the submission.)
- 8.7 The so-called J88 form, the "*Report by Authorised Medical Practitioner on the Completion of a Medico-Legal Examination*" (entered on the record as evidence and marked "exhibit C") confirmed the presence of anal tears and bleeding. The report was completed the day after the incident and was not contested by the defence.
- 8.8 The State submitted that the crime of rape was prevalent in the area of the Court's jurisdiction.

8.9 The State also submitted that while the appellant had spent almost two years in custody awaiting trial this was due to him not raising the intended plea of guilty at the inception of the proceedings.

The correct approach to an appropriate sentence on appeal

[9] In *S v Rabie* Holmes JA discussed guidelines of general application in considering an appropriate sentence.² In general, the punishment “*should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances.*”

[10] In an appeal against sentence the court of appeal must be guided by the principle that punishment is “*pre-eminently a matter for the discretion of the trial Court*” and the court hearing the appeal should not intervene unless the discretion of the trial court was not “*judicially and properly exercised*”. A discretion is not judicially and properly exercised when the sentence is vitiated by irregularity or misdirection, or when the sentence is disturbingly inappropriate.³

The correct approach to the imposition of a minimum sentence and the discretion of the Court

[11] In *S v Malgas*⁴ Marais JA analysed the minimum sentence provisions. In paragraph 25 of the judgment he summarised the principles as follows:

A. Section 51 has limited but not eliminated the courts' discretion in imposing sentence in respect of offences referred to in Part 1 of Schedule 2 (or imprisonment for other specified periods for offences listed in other parts of Schedule 2).

B. Courts are required to approach the imposition of sentence conscious that the Legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.

² *S v Rabie* 1975 (4) SA 855 (A) 861A - 863H.

³ *R v Mapumulo and Others* 1920 AD 56 at 57; *R v Freedman* 1921 AD 603 at 604; *S v Anderson* 1964 (3) SA 494 (A) 494B-H; *S v De Jager and Another* 1965 (2) SA 616 (A); *S v Narker and Another* 1975 (1) SA 583 (AD) 585C; *S v Rabie* 1975 (4) SA 855 (A) 857D – G; *S v Pillay* 1977 (4) SA 531 (A); *Kgosimore v S* [1999] JOL 5360 (A) para 10.

⁴ *S v Malgas* 2001 (2) SA 1222 (SCA) paras 7 - 25.

C. Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts.

D. The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded.

E. The Legislature has, however, deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored.

F. All factors (other than those set out in D above) traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process.

G. The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick ('substantial and compelling') and must be such as cumulatively justify a departure from the standardised response that the Legislature has ordained.

H. In applying the statutory provisions, it is inappropriately constricting to use the concepts developed in dealing with appeals against sentence as the sole criterion.

I. 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.

J. In so doing, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the bench mark which the Legislature has provided.

[12] In the present matter there are quite simply no compelling circumstances on the record of the proceedings that justify the imposition of a lesser sentence. In my view the appeal cannot be upheld.

[13] However, it is a matter of concern that the appellant was referred to the Sterkfontein Hospital for mental observation where he was declared fit to stand trial, but that no reports were made available to the trial court and no evidence led by the State or by the Defence. This Court does not know the findings of the experts other than the conclusion reached that he was fit to stand trial. Nor does the Court know why he was sent for observation. There must have been a reason for referring him for observation but the reason is not disclosed.

[14] Even though the appellant might have been fit to stand trial,⁵ the findings of medical experts might conceivably (not necessarily) establish substantial and compelling circumstance for the purposes of section 51(3) of the Criminal Law Amendment Act of 1997.

[15] The failure by the State and the defence to place the medical evidence before the Court may, unintentionally, lead to a failure of justice because relevant evidence was available but not considered by the trial court.

[16] The remedy is to be found in the Criminal Procedure Act. In terms of section 304(2)(c)(v) of the Criminal Procedure Act read with section 309(3) this Court has the power to remit the case to the Magistrates Court to deal with the matter in such manner as this court may think fit.

[17] For these reasons the order in paragraph [1] was made.

⁵ His fitness to stand trial was not contested.

MOORCROFT AJ

SUTHERLAND DJP

MAZIBUKO AJ

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INSTRUCTED BY:	OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS, GAUTENG
DATE OF THE HEARING:	28 APRIL 2022
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