



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

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

CASE NO: A103/2020

DATE

SIGNATURE

In the matter between:

MKHIZE, PHIWAYINKOSI

APPELLANT

and

THE STATE

RESPONDENT

JUDGEMENT

RAMLAL AJ

- [1] The Appellant in this matter was convicted and sentenced as follows:
Count 1: Convicted of rape in contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the Act). Sentenced to Life Imprisonment; and

Count 2: Sexual Assault, in contravention of section 5(1) of the Act. The Appellant was sentenced to serve a term of five years imprisonment.

[2] The Appellant has an automatic right to appeal. The matter is for consideration of the appeal against the conviction and the sentence on both counts.

[3] The Appellant was represented in this appeal by Advocate Henzen Du Toit (Legal Aid Board) and Advocate TJ Mbodi represented the Respondent.

[4] At the commencement of these proceedings, the Appellant applied for condonation for the late filing of his heads of argument. Counsel for the appellant made submissions and furnished a detailed chronology relating to the incomplete record and the attempts made to obtain the full and proper transcribed record of the proceedings of the trial court. The State did not oppose the application for condonation. Upon due consideration of the application the court concluded that it was in the interests of justice that the application for condonation be granted.

[5] The facts that gave rise to the conviction of the appellant on both counts are that the complainant, a fourteen-year-old girl testified that she is the stepdaughter of the accused. The accused is also the father of her younger sibling. They all lived in the same dwelling. During

October 2017 the accused touched the breasts of the complainant and the complainant felt it was inappropriate. She reported the incident to her mother. Her mother assured her that she had spoken to the accused and that she had reprimanded him for touching the breasts of the complainant. The matter was not reported to the police at that time.

- [6] On 1 December 2017 the complainant was at home washing dishes in the kitchen when she heard the cry of the baby, who was sleeping in the room. She entered the room where the baby was sleeping on one bed and the accused on another. The bed where the accused was sleeping was closer to the door. As the complainant passed the bed where the accused was sleeping, the accused stood up and closed the door and threw the complainant onto the bed. The accused pressed onto the breast of the complainant with one hand and with the other hand he inserted his finger into her vagina. The complainant was wearing pyjamas which consisted of a three- quarter trouser and a top. The accused put his hand inside the trouser and inserted his forefinger twice into her vagina. The complainant began crying loudly and uncontrollably which drew the attention of a neighbour. When the complainant refused to disclose why she was crying, the neighbour established telephonic contact with the mother of the complainant (who had left to go to work earlier that morning). The neighbour handed the phone to the complainant who merely told her mother that he has done it again¹. This led to the matter being reported to the police and the charges being laid against the accused.

¹ Transcribed record page 155 line20 and page 167 lines 10-20

[7] At the trial, the complainant, her mother, the neighbour and the doctor testified in the States case. The accused testified in his defence and denied having sexually assaulted the complainant. He also denied having raped the complainant. The accused explained that he merely hugged the complainant as he was on his way to his home in Kwa Zulu Natal. After he was confronted by the mother of the complainant about the report that the complainant made to her, he left the house and went to the tavern. He returned home at around 22:00 that night.

[8] The appeal against the conviction is premised on the following grounds:

- 8.1 That the court erred in accepting the State's version,
- 8.2 The court erred in accepting the evidence of the complainant without applying caution to her evidence as she was a single witness;
- 8.3 The court erred in not accepting the version of the Appellant;
- 8.4 The court erred in disregarding the Appellant's personal circumstances and over-emphasised the seriousness of the offence when it imposed the minimum sentence of life imprisonment on count 1 and that the court imposed a shockingly inappropriate sentence of five years imprisonment on count 2.

- [9] A Court of Appeal will not easily interfere with the trial court's factual findings unless such findings are clearly wrong. It is also well established that the guilt of the appellant must be proved beyond a reasonable doubt in order to secure a conviction.
- [10] In *S v Francis* [1991 \(1\) SACR 198](#) (A) at 198j-199a it was held that:
- “The powers of a court of appeal to interfere with the findings of fact of a trial court are limited. In the absence of any misdirection the trial court's conclusion, including its acceptance of a witness' evidence is presumed to be correct. In order to succeed on appeal, the appellant must therefore convince the court of appeal on adequate grounds that the trial court was wrong in accepting the witness' evidence - a reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage which a trial court has of seeing, hearing and appraising a witness, it is only in exceptional circumstances that the court of appeal will be entitled to interfere with a trial court's evaluation of oral testimony.”
- [11] The trial court was mindful of the cautionary rules applicable to the evidence of the single witnesses in respect of both counts. On the first count, the evidence of the complainant was evaluated in conjunction with the medical examination report that supported her narration of the occurrence. The evidence of the complainant was further substantiated by the evidence of the independent witness who assisted the complainant when she was crying hysterically. The independent witness summoned the assistance of the mother over the telephone when she realized that the complainant was unable to relate the reason why she was unable to discuss the cause of her distress. In respect of the second count, the evidence of the complainant, that she had reported the incident to her mother shortly after the occurrence was

evaluated by the trial court in conjunction with the evidence that when she spoke to her mother over the phone she merely said that he has done it again and the mother knew that the matter was serious and she made her way home to attend to the report that she had received from the complainant.

[12] In *Shackell v S* [2001] 4 ALL SA 279 [SCA] Brand AJA stated:

“a court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version. Of course, it is permissible to test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it be said to be so improbable that it cannot reasonably possibly be true.”

[13] The Appellant's version that the complainant falsely implicated him because her mother influenced her to do so was found to have no basis as it was not supported by the facts. Further, the accused's version that he merely hugged the complainant and kissed the baby as he was leaving to go home to Kwa-Zulu Natal was rejected by the trial court as it was so improbable that it cannot possibly be true.

[14] In the circumstances, I cannot find that the regional magistrate misdirected himself in any way when he evaluated the evidence placed before him in respect of both counts.

[15] A court may only interfere with a sentence imposed when there is a material misdirection by the sentencing court. In *S v Malgas [2001] ZASCA 30; 2001 (1) SACR 469 (SCA)* Marais JA, dealing with the minimum sentence legislation, stated that when considering sentence, the emphasis must shift to the objective seriousness of the type of crime and the public's need for effective sanction against it.

[16] At paragraph 12 in *S v Malgas (supra)*, Marais JA provided guidance as to when an appellate court can interfere with a sentence as follows: 'A court exercising appellate jurisdiction cannot, in the absence of 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 to usurp the sentencing discretion of the trial court.' But an appellate court may interfere with the exercise by the sentencing court of its discretion, even in the absence of a material misdirection, when the disparity between the sentence imposed by the trial court and the sentence which the appellate court would have imposed, had it been the trial court, is 'so marked that it can properly be described as shocking, startling or disturbingly inappropriate'.

[17] In *S v Vilakazi 2012[6] SA 353[SCA] para. 15* the court said:

"it is incumbent upon a court in every case, before it imposes a prescribed sentence, to assess, upon a consideration of all the circumstances of the particular case, whether the prescribed sentence is indeed proportionate to the particular offence."

- [18] To arrive at a just and appropriate sentence, a court must consider the personal circumstances of the Appellant, the nature of the offence, factor in the interests of the society, weigh this against the others and then blend them with the requisite measure of mercy. The court must act even-handedly, not over-emphasising the effect of the crime or under-emphasising any of the elements or purpose that are relevant to sentencing.
- [19] The court must also be mindful of the need to apply the established principles of deterrence, prevention, reformation, and retribution.
- [20] There is no established definition as to what constitutes compelling and substantial circumstances. The court must consider all the facts of the case in determining whether compelling and substantial circumstances exist. In the case of *S v Malgas* the court stated it is not possible to give “*an all-embracing definition*” of what the term substantial and compelling circumstances entails. It will depend on the facts of each case. The court cautioned against deviation from the minimum sentences prescribed for ‘*flimsy reasons*’.
- [21] The Regional Magistrate evaluated the personal circumstances of the Appellant, considered the seriousness of the offence, the interests of society and concluded that none of the submissions made to the court constituted substantial and compelling circumstances that justified a deviation from the prescribed minimum sentence in respect of count 1.

[22] The Appellant in this matter was thirty-five years old at the time of his sentence. He was in custody for a period of 18 months awaiting the finalisation of this matter. Before his incarceration he was employed. He earned R11200-00 per month from which he contributed R4500-00 towards the maintenance of his 6 minor children. He has no previous convictions.

[23] Although the appellant was in custody for a period of eighteen months awaiting the finalization of this case, the record does not reflect any unreasonable delays being occasioned by the State. In fact, the long periods of postponements were as a result of the appellant having to consult with his legal representatives² and after conviction, the matter was postponed³ for the furnishing of a pre-sentence report that was requested by the defence, on behalf of the appellant.

[24] The appellant argues that the court *a quo* erred in not taking into consideration that a finger instead of a penis was used in the commission of the crime. The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 provides a full definition of sexual penetration⁴, thus confirming that the absence of the use of the genital organ does not reduce the gravity of the offence.

[25] It was submitted on behalf of the appellant that this was not the worst rape imaginable and when taken into consideration with the other

² Caselines 002-22 to 002-30

³ Caselines 002-56 to 002-60

⁴ “Sexual penetration includes any act which causes penetration including legal/medical penetration to any extent whatsoever by: (a) genital organs of one person into or beyond the genital organs, anus or mouth of another person (b) any other part of the body of one person or, any object, including any part of the body of an animal into or beyond the genital organs or anus of another person; or (c) the genital organs of an animal, into or beyond the mouth of another person.”

mitigating factors, the imposition of a lesser sentence is justified. In *S v Mahomotsa*⁵ Mpati JA stated:

“There is always an upper limit in all sentencing jurisdictions, be it death, life or some lengthy term of imprisonment, and there will always be cases which, although differing in their respective degrees of seriousness, nonetheless all call for the maximum penalty imposable. The fact that the crimes under consideration are not all equally horrendous may not matter if the least horrendous of them is horrendous enough to justify the imposition of the maximum penalty.”

[26] This court, having carefully considered the submissions of counsel for the appellant and the respondent and having taken the evidence in mitigation and aggravation of sentence into account, cannot find that the regional magistrate misdirected himself in any manner when he found that no substantial and compelling circumstances exist to justify deviation from the mandated sentence of life imprisonment.

[27] None of the factors that the Appellant relies on to establish substantial and compelling circumstances either singularly or cumulatively, equate to substantial and compelling circumstances to justify a deviation from the prescribed minimum sentence of life imprisonment being imposed. I am also satisfied that the sentence of life imprisonment is not disproportionate to the crime that has been committed against the fourteen-year-old stepdaughter of the appellant. In respect of count 2 the regional magistrate committed no misdirection in his consideration

⁵ *S v Mahomotsa* 2002(2) SACR 435(SCA) at 444

of a suitable sentence and this Court accordingly cannot overturn the sentence of the Court *a quo*.

ORDER

[28] As a result the following order is made:

1. Condonation for the late filing of the Appellant's heads of argument is granted;
2. The appeal in respect of the conviction and sentence on both counts is dismissed.
3. The convictions and sentences on both counts are confirmed.

A.K. RAMLAL
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT
JOHANNESBURG

I concur

G ALLY

**ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT
JOHANNESBURG**

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down in Court and circulated electronically by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be **14 June 2023**.

Date of hearing: 13 February 2023

Date of judgment: 14 June 2023

Appearances:

Counsel for the Appellant:

Adv Henzen-Du Toit

Instructed by:

Legal Aid South Africa

janette.law@outlook.com

Counsel for the Respondent:

Adv. T.J. MBODI

TMbodi@npa.gov.za

Instructed by:

**OFFICE OF THE DIRECTOR OF
PUBLIC PROSECUTIONS
JOHANNESBURG**