REPUBLIC OF SOUTH AFRICA

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

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

16 August 2023

DATE SIGNATURE

CASE NUMBER: A152/2022

In the matter between:

LEKGETHO WILLIAM APPELLANT

and

THE STATE RESPONDENT

JUDGMENT

DOSIO J:

Introduction

[1] The appellant was charged, in the Regional Court, held at Johannesburg, with contravening the provisions of Section 3 read with Section 1, 55, 56(1), 57, 58, 59, 60 and 61 of the Criminal Law (Sexual Offences and Related matters), Amendment Act 32 of 2007 rape

(read with the provisions of Section 51 and 52 and schedule 2 of the Criminal Law Amendment Act 105 of 1997, as amended) (count one) and robbery with aggravating circumstances (count two).

[2] The appellant pleaded not guilty to both counts and at the end of the State's case, made formal admissions in terms of s220 of the Criminal Procedure Act 51 of 1977 ('Criminal Procedure Act') in respect to count one and two. Pursuant to the formal admissions, the appellant elected not to testify and was convicted and sentenced to life imprisonment on count one and to 15 year's imprisonment on count two. The sentence on count two was ordered to run concurrently with count one.

[3] The appeal is in respect to sentence.

[4] The appellant was legally represented.

Ad sentence

[5] It is trite that in an appeal against sentence, a Court of Appeal should be guided by the principle that punishment is pre-eminently a matter for the discretion of the trial court and the Court of Appeal should be careful not to erode that discretion.

[6] A sentence imposed by a lower court should only be altered if;

(a) An irregularity took place during the trial or sentencing stage.

(b) The trial court misdirected itself in respect to the imposition of the sentence.

(c) The sentence imposed by the trial court could be described as disturbingly or shockingly inappropriate.[1]

[7] The trial court should be allowed to exercise its discretion in the imposition of sentence within reasonable bounds.

[8] In the matter of *S v Malgas,*[2] the Supreme Court of Appeal held that:

'A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it was the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would usurp the sentencing of the trial court.'

[1] See *S v De Jager and Another* 1965 (2) SA 616 (A), *S v Rabie* 1975 (4) SA 855 (A) and *S v Petkar* 1988 (3) SA 571 at 574 C.
[2] *S v Malgas* 2001 (1) SACR 496 SCA.

[9] In *S v Salzwedel and other*[3] the Supreme Court of Appeal stated that an Appeal Court can only interfere with a sentence of a trial court in a case where the sentence imposed was disturbingly inappropriate.[4]

[10] The following factors were presented in mitigation of sentence, namely:

(a) That the appellant was 22 years old when the sentence was imposed and that the appellant is relatively young and that there are prospects for rehabilitation.

(b) That he lived with his mother and that he has three siblings.

(c) That he had completed grade nine and failed grade ten.

(d) That he was working doing odd jobs as a plumber and paint remover. He assisted his mother whenever she needed assistance with the money that he earned from these jobs.

(e) That he spent fifteen months awaiting trial and that the cumulative effect of the sentence imposed should have been considered.

(f) That the admissions he made during the trial amounted to a plea of guilty.

(g) That the previous conviction of theft is unrelated to the crime that the appellant committed.

[11] The appellant's counsel contended that all the above-mentioned factors, considered together, constitute substantial and compelling circumstances justifying a deviation from the prescribed minimum sentence of life imprisonment. This Court disagrees. There are aggravating circumstances in this matter that do justify the imposition of a life imprisonment sentence. The following aggravating factors are present, namely:

(a) The appellant did not plead guilty at the commencement of the trial. He waited until the State had closed its case before making formal admissions.

(b) The evidence indicates that there was a measure of persistence on the part of the appellant in continuing with his actions over an extended period of time in that he raped the complainant three times. He dragged her to Ackerman street and when she refused to undress her trouser he pointed a knife at her. He then strangled her and that is when she took off her trousers. He then tore her T-shirt and raped her. He then raped her a second time. The appellant then pointed a knife at her and made her remove her top and bra which she did. That is when the appellant made her suck his penis whilst he pointed a knife at her. She started screaming and two coloured men walked past but

[3] *S v Salzwedel and other* 1999 (2) SACR 586 (SCA).
[4] Ibid at page 588a-b.

the appellant persisted and raped her for a third time. The appellant also took her phone when she was ordered to remove her top.

(c) The appellant was known to the complainant.

(d) The appellant did not wear a condom.

(e) The appellant assaulted the complainant which caused swelling to the complainant's face as well as scratches to her neck and back. The appellant punched her on her mouth.

(f) This incident traumatised the complainant causing her to leave school. This incident also caused her to develop suicidal thoughts and poor self-esteem. The incident has caused emotional pain to the complainant and has caused continuous flashbacks of the horrific experience of being raped. The incident has caused her to become moody with the result that she has isolated herself from others.

(g) The complainant had strong Christian and was a virgin prior to being raped.

(h) Due to her existing diabetic condition the complainant was admitted to hospital for two weeks after this incident and she almost went into a coma. The doctor testified that the emotional shock had an impact on her diabetic condition.

[12] The offences for which the appellant has been found guilty are serious offences. Section 51(1) of Act 105 of 1997 states that in an instance where the victim was raped more than once, then it resorts to a part 1 schedule II offence and such person will be sentenced to life imprisonment.

[13] In the matter of *Malgas*[5] the Supreme Court of Appeal 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.'[6]

[14] Section 51(3) of Act 105 of 1997 as amended is of importance in that it states that:

'(3) *(a)* 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 that the sentence prescribed in those subsection, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence.

[5] *Malgas* (note 6 above).
[6] Ibid paragraph I.

[15] In the matter of *S v Make* 2011[7] the Supreme Court of Appeal held that:

'When a matter is taken on appeal, a court of appeal has a similar interest in knowing why a judicial officer who heard a matter made the order which it did. Broader considerations come into play. It is in the interests of the open and proper administration of justice that courts state publicly the reasons for their decisions. A statement of reasons gives some assurance that the court gave due consideration to the matter and did not act arbitrarily. This is important in the maintenance of public confidence in the administration of justice'.[8] [my emphasis]

[16] The Court *a quo* in its judgment dealt fully with its reasons why a sentence of life imprisonment was imposed on count one and why a sentence of fifteen years imprisonment was imposed on count two. I find there was no misdirection on the part of the Court *a quo*.

[17] The mitigating factors alluded to by the appellant's counsel have been considered by this Court in determining whether the sentence imposed by the court *a quo* is appropriate. I am satisfied that the circumstances of this case do not render the prescribed sentence of life imprisonment too severe.

[18] In the premises, I find that the sentence imposed is not disturbingly inappropriate. The Court *a quo* correctly found that there were no substantial and compelling circumstances. The sentence imposed on count one does not induce a sense of shock.

[19] In the premises I make the following order:

The appeal in respect to the sentence on count one and two is dismissed.

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D DOSIO

JUDGE OF THE HIGH COURT

I agree, and it is so ordered

[7] *S v Make* 2011 (1) SACR SCA 263.

[8] Ibid page 269 paras 20.

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M MAKUME

JUDGE OF THE HIGH COURT

This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 16 August 2023

Appearances:

On behalf of the Appellant:	Adv. M. Milubi
On behalf of the Respondent:	Adv. R. Kau

Date Heard:	7 August 2023
Handed down Judgment:	16 August 2022