



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

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

DATE: **8 August 2022**

SIGNATURE:

Case No. A20/2022

In the matter between:

MKHUMBANI, DERRICK ABELO

APPELLANT

And

THE STATE

RESPONDENT

Coram: Millar J & Monyemangene AJ

Heard on: 27 July 2022

Delivered: 8 August 2022 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 10H00 on 8 August 2022.

Summary: Criminal law – appeal against sentence – appellant pleaded guilty to rape of complainant – whether individually or cumulatively personal circumstances of appellant sufficiently substantial and compelling justify deviation from imposition of minimum sentence – such circumstances not sufficient – appeal dismissed.

ORDER

It is Ordered:

1. The appeal against sentence is dismissed.

JUDGMENT

MILLAR J

1. This is an appeal against sentence only. On 1 April 2021 the appellant was arraigned in the Pretoria Regional Court on 2 counts of rape. He was informed that the respondent would seek the imposition of the minimum sentence prescribed by law for the offences for which he had been charged – life imprisonment.¹ The appellant was legally represented throughout the proceedings. He pleaded guilty to both counts. The Court accepted his plea and he was convicted on 10 August 2021.
2. In consequence of the guilty plea, the appellant was sentenced to life imprisonment, the guilty plea in respect of both counts being taken into account for purposes of sentencing. He was also declared unfit to possess a firearm in terms of Section 103 of the Firearms Control Act 60 of 2000.
3. The appeal in this matter is brought in terms of Section 309(1)(a) of the Criminal Procedure Act 51 of 1977.
4. It was held in *S v Kumalo* 1973 (3) SA 697 (AD) at 697B-C that *“Punishment must fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances. The last of these four elements is often overlooked.”*
5. The test to be applied, when considering sentence on appeal is set out in *S v Kgosimore*² - *“It is trite law that sentence is a matter for the discretion of the court burdened with the task of imposing sentence. Various tests have been formulated as to when the Court of appeal may interfere. These include whether the reasoning of the trial court is vitiated or whether the sentence imposed can be said to be startlingly inappropriate or to induce a sense of shock or whether there is a striking disparity between the sentence imposed and the sentence the Court of appeal would have*

¹ In terms of section 51(1) of the Criminal Law Amendment Act 105 of 1997

² 1999 (2) SACR 238 (SCA) at paragraph 10

imposed. All of these formulations, however, are aimed at determining the same thing; viz. whether there was a proper and reasonable exercise of the discretion bestowed upon the court imposing sentence.”

6. No *viva voce* evidence was led in regard to sentencing. Sentence was argued having regard to a pre-sentence psychosocial report prepared in respect of the appellant and a separate report prepared in respect of the complainant, both of which were accepted into evidence.
7. The appellant was convicted, on Count 1 of a crime referred to in Part 1 of Schedule 2 of The Criminal Law Amendment Act 105 of 1997 and the court a quo was obliged to impose the prescribed minimum sentence of life imprisonment in terms of Section 51(1)(a) of that Act, absent substantial and compelling circumstances. See *S v Malgas*³.
8. The court a quo explained to the appellant⁴ before he pleaded that the minimum sentence should he be convicted was life imprisonment and he confirmed he understood this.
9. Consideration must be had to whether the prescribed minimum life sentence was appropriate or whether there were substantial and compelling circumstances to impose a lesser sentence.
10. No evidence was led in mitigation of sentence, the parties electing to rely on a victim impact statement on the part of the state in support of the imposition of the minimum sentence and the appellant on a pre-sentence report in support of the imposition of a lesser sentence.
11. The appellant was 29 years old at the time of the commission of the offences. He was 30 years old at the time of the trial. He is unmarried and has no dependant children. His highest scholastic achievement was the completion of

³ 2001 (1) SACR 469 (SCA) at paragraph 8

⁴ *Mpontshane v S* [2016] 4 All SA 145 (KZP)

grade 4. He had previously lived with his stepfather, mother and younger sister but had absconded from the family home in 2014 and had since then lost all contact with his family. He did not know whether they were even still alive or not and was in the truest sense alone in the world.

12. The present matter was not his first brush with the law and had previously been convicted of robbery and sentenced on 25 September 2013 to 3 years of correctional supervision and 16 hours of community service per month for the period. He failed to abide the terms of his correctional supervision and had absconded from Witbank (where he had been living with his parents at the time) to Pretoria. He worked in Johannesburg as a waiter for a short time and then according to him, having stolen copper to the value of R8 000.00 for his employer, had decided to relocate to Pretoria. Upon relocation to Pretoria, he was unemployed and homeless and was living on the streets abusing both alcohol and narcotics.
13. He indicated that at the time of the commission of the offences, he had been under the influence of substances and that he now understood and accepted the gravity of what he had done to the complainant while he was under such influence.
14. The complainant's life has been devastated by the appellant's actions both on the day that she was raped and subsequently. Besides the violent nature of the manner in which she was raped and the internal injuries she suffered as a result of it, the social worker described in her report that she suffers and 'is overcome by shame and anger, which has tortured her emotionally daily. She is an introvert, has stopped socializing and going into public spaces on her own. Psychological and emotional trauma have manifested deeply on her, to such an extent that she has lost her self-esteem. The invisible scars and pain are slowly destroying her inner-self. She is severely humiliated; she feels she is failing in parenting her children as she is an emotional wreck constantly crying and failing to explain the situation to her children. The victim has received counselling, but she is still traumatized and finding it hard to let go.'

15. In its evaluation of the evidence before it, the trial court did not overemphasize the interests of the complainant (and the wider community) and was not dismissive of the personal circumstances of the appellant. The prevalence of this type of crime and the seriousness with which it is viewed are the very reason for the imposition of minimum sentences
16. On consideration of the personal circumstances of the appellant, both individually and cumulatively, none in my view rise to the standard of substantial and compelling reasons⁵ for the trial court to have departed from the minimum sentence.
17. In the circumstances, I make the following order:
 - 17.1 The appeal against sentence is dismissed.

A MILLAR
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I AGREE

T MONYEMANGENE
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

⁵ S v Salzwedel & Others 2000 (1) ALL SA 229 (AD) at 232I

HEARD ON: 27 JULY 2022

JUDGMENT DELIVERED ON: 8 AUGUST 2022

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