

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



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

Case No: A 214/2022

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO.

(3) REVISED.

DATE 23/05/2023

SIGNATURE _____

In the Matter between:

J G

Appellant

and

The State

JUDGMENT

Maumela J.

1. This matter came before court as an appeal which is opposed. The appellant is J G, a female who was 23 years of age at the time she was arraigned. She was legally represented throughout the trial. Before the Regional Court for the District of Pretoria seated in Pretoria; the court *a quo*. The appellant was charged with the following:

1.1. On Count 1.

Rape in contravention of section 3, read with sections 1, 55, 56, 57, 58, 59, 60, 61 of the Sexual Offences Act: (Act No 32 of 2007) read with sections 256 and 257 of the Criminal Procedure Act 1977: (Act No: 51 of 1977) - CPA.

1.2. Count 2.

Distribution of child pornography in contravention of section 49 28, 24 (b) (1) of the Films and Publications Act 1996: (Act No 65 of 1996) as amended and read with section 92 (1) of the Magistrates Court Act 1944: (Act No 32 of 1944 as amended and also read with section 1, 2, 16, 18... 18 a), 22, 24 (c), and 30 of the said Act and also read with sections 256, 276, 337, of the CPA.

ALLEGATIONS.

2. The allegations against the appellant were as follows:

2.1. On Count 1.

In that upon or during May 2018, at or near East Lynn in Pretoria in the Regional Division of Gauteng, the appellant did unlawfully and intentionally commit an act of sexual penetration with a female person to wit, [.....] who was born on the 12th of October 2016, by putting her tongue in her vagina without her consent.

2.2. On Count 2.

In that upon or during May 2018, at or near East Lynn in Pretoria in the Regional Division of Gauteng, the appellant did unlawfully and intentionally, knowingly made available, exported, broadcast, distribute or caused to be distributed and made available any film, publication by storing and/or saving it on a cell phone or sending it to another person for financial gain which contains depictions, descriptions or scenes of child pornography or which advocates, advertises, encourages or promotes child pornography or sexual exploitation of children, to wit, images and/or video of the child victim in count 1

3. Later, by agreement, the charge sheet was amended and the date on which the offences are alleged to have been committed was noted to be between May 2017 and May 2018.
4. When the charges were put, the appellant pleaded Guilty to both. In terms of section 112 (2), a plea statement was submitted on her behalf. In that statement, the appellant stated that she is aware of the implications of section 51 (1), read with Schedule 2 of the Criminal Law Amendment Act 1997: (Act No 105 of 1997) – CLAA.
5. She also stated that she is aware of the fact that upon conviction on the charge of Rape involving an infant, a minimum sentence of Life Imprisonment stands prescribed. She understood that there may be a deviation from the imposition of that minimum prescribed sentence if substantial and compelling circumstances justifying deviation from the imposition thereof are found to be attendant to her person.
6. The Appellant stated further that in 2017, her sister, B G planted an idea in her mind and persisted as a result of which she ended up capitulating and

doing what her sister asked her to do. She said that Bianca told her that a certain male known as Carl requires pornographic photos of an infant and is prepared to pay an amount of money for it.

7. She said that her sister offered to capture the sexual act involving her own infant daughter known as C [...] G [...] who was born on 12/10/2016. She committed the suggested sexual act on her daughter while her sister Bianca filmed it on her cell phone. After a short while she stopped because she felt bad about doing what she was doing.
8. On the same day if not on the following, the video depicting her performing a sexual act on her infant daughter was relayed to Carl in return for payment at an amount of R 350-00. She knew at all relevant times that what she is doing is against the law. She stated that she knows that she has no defence regarding what she did.
9. Concerning **Count 1**, the appellant conceded that her tongue penetrated the child's vagina. Concerning **Count 2**, she admitted that early in 2017, on a date she can no longer recall, her sister Bianca recorded a video. In that video she is captured while performing acts of a sexual nature on her infant daughter. She admitted that she knew well that a video is being generated to capture the sexual acts she was performing on her infant daughter. At all relevant times, she was also aware that the video shall be forwarded to one Carl who shall in turn distribute it to third parties.
10. The appellant stated that Carl did pay for the video and she believes that he distributed it, much as her sister Bianca will also have distributed the video. The video was distributed without being edited. She has no defence for the crime she committed.

11. In terms of section 112 (2) of the CPA, a statement being a plea explanation was prepared and read into the record of the proceedings of this case. The appellant confirmed knowledge of the contents of the statement, much as she confirmed having signed it. In the statement, the appellant stated the following under oath:

11.1. On Count 1, She admitted:

- 11.1.1. That she is aware that she stands charged with rape of a minor as contemplated in section 51 (1), read with Schedule 2 of the CLAA; contravention of the provisions of section 28 of the Films and Publications Act 1996: (Act No 65 of 1996) - Films and Publications Act.
- 11.1.2. That the offence of sexual assault only lasted for a short while after which she felt bad and stopped.
- 11.1.3. On the same day, she handed over a video recording of the offences committed to a person she remembers by the name Carl. That Carl paid money to a person by the name of Elsie Bannister via a ShopRite stop order after she gave her a pin-code and number.
- 11.1.4. She believes that her sister Bianca is the one who handed over the video recording to a person by the name of E B and that she was not involved in the process of handing over the video recording to E B.
- 11.1.5. She admitted that her actions amount to penetration within the meaning of Act 32 of 2007 and that the said act

constitutes rape of a minor child.

11.1.6. She knew at all relevant times that what she is doing is wrong. She further concedes that she has no defence to the charge of rape read with Act 32 of 2007.

11.2. On Count 2: Distribution of pornographic material, she admitted:

11.2.1. She admits that the video was taken on her Samsung JI cell phone

11.2.2. She admits that the video which was handed over to the police was in no way edited or changed. She further concedes that thereafter, without being edited or changed, the video was exported into a compact disc marked 'Villieria CAS 14705/2018 video'.

11.2.3. She confirms that thereafter without being edited or changed, the video was handed over to the Investigating Officer, and was kept under his control without editing, corruption, damages or alteration.

11.2.4. She knew all material times that the video would be distributed to accept person in exchange of payment by such third person.

11.2.5. She confirms that she allowed a video to be taken capturing her sexual attack on her infant daughter and that she acted in co-operation, association and common purpose with her

sister B [...] G [...] and a male person known to her as Carl.

11.2.6. She signed this document with amendments on the 23rd of January 2020 in confirmation of her agreement with its contents.

12. In answer to questions by the court *a quo*, the appellant stated that Carl was paid an amount of R 350-00. She said she doesn't have particulars of Carl anymore. She said however that she stored the said particulars on her cell phone which is in the possession of the police. She thinks that nothing happened to Carl or her sister Bianca. The child; (her infant daughter) was immediately placed under foster care and she has no right of access to the child.
13. After the charge sheet was amended by agreement, the state accepted the plea tendered by the appellant. The birth certificate of an infant child C [.....] was accepted by agreement into the record of the proceedings of this case as "Exhibit A".
14. On the basis of the pleas tendered by the appellant and the statement tendered in in terms of section 112 (2) of the CPA, the appellant was found Guilty as charged. It was agreed that a pre-sentence report and a victim impact report be obtained. The following reasons were advanced to motivate for the appellant to be on extended bail pending the said reports:
 - 14.1. That despite knowing that she will plead guilty and knowing what nature of sentence might be imposed on her, the appellant dutifully attended court each time she was supposed to do so.

- 14.2. That the appellant no longer has access to the child who is the victim in the offences committed.
- 14.3. That the appellant is heavily reliant on her mother due to a condition of intellectual disability with which she is laden. The condition is recorder in the psychiatric report as well as in the report of the GP and
- 14.4. That there shall be no further interference with the victim since the child has been taken away into foster care. The appellant no longer has access to the child.
15. Taking into consideration that the appellant was convicted and that she was facing a possible sentence of Life Imprisonment the subtle little appellant reported, the court *a quo* dismissed the application for the extension of the appellant's bail.
16. In mitigation of sentence, the following submissions were made on behalf of the appellant.
 - 16.1. That the appellant is 33 years of age.
 - 16.2. She is unmarried.
 - 16.3. She has one child who happens to be the victim of the offences which were committed.
 - 16.4. The appellant passed Grade 10 at Magaliesburg Special School.
 - 16.5. She has no previous convictions to her name.
 - 16.6. She is unemployed and she is effectively unemployable and
 - 16.7. She is considered to be too slow.

17. Before her incarceration, the appellant used to live with her parents. She was dependant on them financially for purposes of maintenance. She has remained in custody from the 5th of March 2020. Although the appellant started at a normal school, when it emerged that she is laden with mental challenges, she was moved to a special school where she progressed up to Standard 10.
18. A mental report by Dr. Saulus, a psychologist report by Dr. Mathabela as well as the pre-sentence report by a doctor whose name is inaudible on the record as well as the pre-sentence report by R.H. Nel, reflect the personal circumstances of the appellant. It was stated that the offences were committed in the presence of a sister to the appellant known as L[...] G[...]. Leandra recorded a video which was forwarded by the appellant and another person to a third party in exchange of payment at an amount of about R 300-00.
19. It was stated that the appellant's sister Leandra continuously pestered the appellant with requests for her to commit the sexual acts on her daughter. Eventually, the appellant capitulated and committed the act. The offences committed are serious and they were motivated by a desire to gain financially. It was stated in a report that the child-victim has shown some disturbing abnormal behaviour.
20. It is submitted that the child victim will experience long-term emotional and mental scars because of the sexual assault she suffered. While the appellant did not show remorse for what she has done, it is also submitted that she lacks the necessary cognitive ability to enable her to appreciate the wrongfulness of her act. This was also confirmed by Dr. Saulus and the psychiatric people. It was submitted that they appellant is not like any normal person who has the ability to act in line with her knowledge of what is right or wrong and what the consequences of her action may be.

21. It was submitted that as a result, the appellant is not able to display remorse or a sense of guilt in the ordinary or normal way. It was submitted however that this does not mean that the appellant does not feel a sense of guilt in her own way. It is that feeling of guilt which caused her not to prolong the unlawful act. She cries frequently because she lost custody of her child. This shows that she appreciates the wrongfulness of what she did. In pleading guilty and fully disclosing her actions, the police and before court, the appellant was displaying her appreciation of the wrongfulness of the acts.
22. It was also pointed out that the appellant is gullible and can be influenced and manipulated. She was also influenced by Bianca, her sister. There is not clear explanation on the record regarding why charges against Bianca, the appellant's sister, were withdrawn. At the same time, there is no clear explanation on why Bianca's influence on the appellant does not seem to have contributed in increasing mitigation against her sentence.
23. If the appellant committed these offences while a video was being recorded with a cell phone, it clearly means that she was not alone in committing the unlawful acts. If she had no other use for the video clip other than to distribute it in return for money, then clearly she should not have stood trial alone. From the record, there is no clarity about what happened to all the other people who were directly or indirectly involved.
24. If the appellant was scientifically proven to be of a compromised mental condition, then her blameworthiness would have been somewhat reduced at the time of the commission of the crimes. All the factors listed either to demonstrate that the appellant was to a certain extent influenced by another if not others to commit the offences or to demonstrate that her mental capacity was not capable of fully appreciating the wrongfulness of her actions when taken together should have the effect of mitigating notably against the sentence imposed upon her.

25. It is trite that there is no exhaustive list of circumstances that fulfil a definition of what is referred to as 'substantial and compelling' circumstances. In the case of *S v H*¹, Labe J held as follows:

"I do not think that one should attempt an exhaustive definition of what is meant by the word exceptional circumstances."

It was submitted on behalf of the appellant that the court *a quo* should find that substantial and compelling circumstances are attendant to the person of the appellant and therefore that a sentence lesser than the minimum prescribed ought to be imposed.

26. It was submitted that the appellant's diminished criminal capacity was notably reduced by her intellectual impairment. The appellant herself has been a victim of sexual abuse. It was further submitted that the fact that the appellant was using drugs at the time of the commission of the crimes should also mitigate against sentence.

27. Ms. R. H. Nel, the social worker who had opportunity to assess the appellant reported that she regards her to be like someone who functions at the level of a young teenager. She reported that she finds the appellant to be of a mental development age of about 16 years. The fact that the appellant lost custody of her child because of the crimes she committed imposed on her the worst punishment a mother should ever endure. It was pointed out that when the offences in issue in this case, were committed, the child-victim suffered neither violence no scars. It is submitted that the rape committed in this case compares better to others. Although one can hardly talk of any rape being better, it is so that there are instances where the violence, the cruelty and the effect of the rape is worse when compared to others.

28. In the case of *S v Mahomotsa*², the court stated the following:

¹. 1999 (1) SACR 72 (W), at 77 c – e.

². 2002 (2) SACR 435 (SCA).

“Even in cases falling within the categories delineated in the Act there are bound to be differences in the degree of their seriousness. There should be no misunderstanding about this: they will all be serious but some will be more serious than others and, subject to the caveat that follows, it is only right that the differences in seriousness should receive recognition when it comes to the meting out of punishment. As this Court observed in S v Abrahams³ some rapes are worse than others and the life sentence ordained by the Legislature should be reserved for cases devoid of substantial factors compelling the conclusion that such a sentence is inappropriate and unjust. (para 29).

29. The state argued that at the time of the commission of the crimes, the appellant was able to distinguish between right and wrong. It pointed out that the commission of the offences was motivated by the urge to gain financially. The state emphasized that in determining a fitting sentence to be imposed, the court has to take into consideration the interest of the victims of the crimes, especially where those victims are children. The State urged the court take a dim view of the fact that the victim of the crimes in this case was only 18 months old.

30. In the case of *S v Malgas*⁴, where the court had to consider the imposition or otherwise of a prescribed minimum sentence, it stated as follows:

“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.”

31. The court imposed the following sentences upon the appellant:

³. 2002 (1) SACR 116 (SCA).

⁴. 2001 (2) SA 1222 (SCA).

- 31.1. On Count 1, the Appellant was sentenced to undergo 25 (twenty-five) years imprisonment.
- 31.2. On Count 2, the appellant was sentenced to undergo eight years' imprisonment.
- 31.3. In terms of section 280(2) of the Criminal Procedure Act 1977: (Act No 51 of 1977) – CPA, the sentence of eight (8) years imprisonment was ordered to run concurrently with the sentence in Count 1.
- 31.4. No order was made in terms of Section 103 (1) (g) of the CPA.
32. In *S v Katman*⁵, a decision which was repeated in *S v Promo*, the court stated the following:
- “Remorse was said to be manifested in pleading guilty and apologizing through the counsel, who did so on his behalf from the bar, to both Ms. KD and Mr. Canon. It has been quite correctly that to plead guilty, even in the case of an open and shut case against the accused person is a neutral factor. There is moreover a chasm between the ... Many accused persons might well regret their conduct but but that does not, without more translate to genuine remorse. Whether the offender is sincerely remorseful in not seeking even ... on herself ... is a factual question. In order for the remorse to be really a consideration the context must be sincere and the accused must take the court fully into his or her confidence,”*
33. The court *a quo* took into consideration the harsh effects of rape against the victim. it also took into consideration the fact that the appellant was using drugs around the time when she committed the offences. Because of this crime, the child now has to be brought up by people other than her biological mother.

⁵. (1) SALR 286

34. On count 1, the appellant was sentenced to undergo twenty-five (25) years imprisonment. On count 2 the accused was sentenced to undergo eight (8) years imprisonment. It was ordered that the eight (8) years imprisonment imposed in respect of counts 2 shall run concurrently with the sentence of twenty-five 25 years imposed in respect of Count 1.
35. The sentences imposed against the appellant do not exceed what the relevant minimum sentences legislation provided for. Loss of the custody of her infant child, has a punitive effect on the appellant. She constantly cries about it. It is not clear why the appellant's sister who influence her to commit the crimes faced no consequences.
36. The opinion of the social worker who assessed the appellant is that viewed that the mental development age of the appellant is about 16 years. This evidence has not been disputed. The court takes into consideration the inferior mental quality of the appellant. It views that such consideration should lead to the imposition of a sentence which is less than a sentence that should be imposed upon someone whose mentality is fully developed.
37. It also takes into consideration the reality that the appellant is not likely to subject the child-victim, or any other child the kind of abuse, especially sexual abuse to which the child in this case was subjected. While the sentences imposed upon the appellant are of magnitudes that are within what the prescribes minimum sentence legislations provides for, it is necessary in this case to look at the crime committed, the circumstances of the accused and the interests of the community. The court in the case of *S v Zinn*⁶ stated that in imposing the sentence, courts have to take into consideration, the crimes committed, the interests of the accused, and the interests of the community.
38. The appellant is a person with limitations in that her mental development had limitations. Her uncontroverted evidence is that she did not commit the

⁶. 1969 (2) SA 537 (A).

offences as soon as the idea of doing so was planted in her mind. She took time pondering over whether she does it or not. Compared to her sister, her capacity to make sound decisions was weaker. The sister kept on influencing and goading her until she got convinced to do it when promises of financial gain were made to her.

39. Our courts have always viewed that the consideration of sentences to be imposed on offenders should be tinged with a measure of *mercy*. In the case of *S v V*,⁷ at page 614D-E, Holmes JA emphasised that:

“the element of mercy, a hallmark of civilised and enlightened administration, should not be overlooked”. Holmes JA added that mercy was an element of justice and referred with approval to *S v Harrison*⁸ at 686A, where the learned judge had said that, *“justice must be done; but mercy, not a sledge-hammer, is its concomitant”*.

40. The appellant is a first offender. Mentally, she is not as developed as a normal person of her age should be. Her capacity to reason is compromised. For the commission of the offence in Count 1 to be captured on a video, more than one person was required to participate. Yet the appellant was tried, convicted and sentenced alone. It is not clear how that came about. Evidence suggests that manipulation by the appellant’s sister also played a role in driving her to commit this offence.
41. I view that the cumulative set of circumstances surrounding the appellant should influence towards a lesser sentence than that which was imposed upon the appellant for purposes of Count 1. For that the reason, the sentence of 25 years imprisonment imposed upon the appellant in respect of Count 1 stands to be reduced in recognition of the influence she was under at the time of the commission of the offensive Count 1.

⁷ . 1972 (3) SA 611 (A).

⁸ . 1970 (3) SA 684 (A).

42. Given the overall circumstances of the appellant, the court views that the court *a quo* did not give sufficient consideration to her circumstances. I find that the sentence imposed upon the appellant in respect of the offence in Count 1 is overly harsh. I find that whereas the court *a quo* exercised its discretion in imposing the sentence it did upon the appellant, the manner in which it did so is unreasonable. As a result, I find that in determining sentence, the court *a quo* misdirected itself with serious consequences..

43. In the case of *S v Pillay*⁹, at page 535E-F, the court stated the following concerning whether a sentencing court exercised its discretion correctly:

“Now the word “misdirection” in the present context simply means an error committed by the court in determining or applying the facts for accessing the appropriate sentence. As the essential inquiry in an appeal against sentence, however, is not whether the sentence was a right or wrong, but whether the court in imposing it exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence; it must be of such a nature, degree, or seriousness that it shows directly or inferentially, that the court did not exercise its discretion at all or exercised it improperly or unreasonably. Such a misdirection is usually and conveniently termed one that vitiates the court’s decision or sentence”

44. I therefore find that there is cause to interfere with the sentence. Consequently, the court makes the following order:

ORDER:

⁹. 1977 (4) SA 531 (A).

- 44.1. The appeal against sentence in respect of Count 1 is upheld.
- 44.2. The appeal against sentence in respect of Count 2 is dismissed.
- 44.3. The sentence in respect of Count 1 is set aside and is substituted by the following sentence:
- 44.3.1. On Count 1; the accused is sentenced to undergo 12 (twelve) year's imprisonment.
- 44.4. In terms of Section 280 of the Criminal Procedure Act 1977: (Act No 51 of 1977), the sentence in respect of Count 2 is ordered to run concurrently with the sentences in Count 1.
- 44.5. No order is made in terms of section 103 of the Firearms Control Act, 2000: (Act No 60 of 2000).

T.A. Maumela.

Judge of the High Court of South Africa.

I agree.

P. D. Phahlane.

Judge of the High Court of South Africa.

Date of hearing: 07 March 2023

Date of judgment: 23 May 2023