IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: A145/2022
Date of hearing: 23 February 2023
Date delivered: 24 April 2023

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

24/4/23 .....
DATE SIGNATURE

In the matter between:

THABANG NDLANGAMANDLA **Appellant**

and

THE STATE **Respondent**

JUDGMENT

SWANEPOEL J: (Cowen J concurring)

[1] The appellant appeals against his conviction on two counts of rape, and against the sentence of life imprisonment imposed on him. The evidence of the State witnesses[1] is briefly to the following effect:

[1.1] On 18 July 2019 the complainant, then a fifteen-year old girl, met the appellant at her parents' home. She had planned to undergo training to become a sangoma, and the appellant was the person responsible for her training, her so-called 'gobela'. The complainant believed that the appellant was taking her to the initiation school. However, instead of taking her there, the appellant took the complainant to his home. On the way to his home the appellant told the complainant that there was a rumour circulating that he had sexual relations with the initiates.

[1.2] The complainant says that upon arriving at the appellant's home he told her to get undressed and to get into bed. The accused got into bed with her and forcefully pulled down her panty, whereafter he raped her, despite her attempts to fight him off. The following morning, the appellant told the complainant that she should not tell anyone of the incident. He said he would not be caught and if she told anyone, she might vanish. He told her that he uses muti. He said that if she tried to run, she might end up in a car accident or be bumped by a car.

[1.3] On 20 July 2019, at approximately 10h00, the appellant again approached the complainant at his home. He told her to go into the

[1] The complainant's evidence was given *in camera* in view of her age. At the time she testified she was in Grade 12 and 17 years old.

bedroom, which he also entered. He told her that he loved her, to which the complainant responded that if he loved her, he would not abuse her. He again had sexual intercourse with her despite her efforts to resist.

[1.4] The complainant kept her secret for more than a year, until shortly before her initiation process was over. During her initiation she was residing at the initiation school, the home of Ms Mbonane. The appellant was there much of the time. On 29 August 2020 another initiate, Zibusiso Motha, asked the complainant whether she had had sexual intercourse with the appellant. Initially she denied that they had had intercourse. Motha told her not to be embarrassed and that she should tell him the truth, mentioning that the appellant had told him that he had sex with 'the children'. The complainant ultimately told Motha of the incidents of 18 and 20 July 2019.

[1.5] They were joined later in the conversation by one Dabulamanzi. The complainant was evidently upset, which drew the attention of her mother, who was present to witness the initiation ceremony. The complainant's mother overheard the conversation and asked what was wrong. The complainant ultimately told her mother what had happened. Her mother confronted the appellant who told her to go and lay charges against him, because they never "stick". He also asked her what was so special about her daughter. The complainant and her mother thereafter reported the incident to the police, and the complainant was taken to the Far East Rand Care Centre for a medical examination conducted by a professional nurse, Sister Julia Segodi.

[1.6] Both Motha and the complainant's mother materially confirmed the complainant's version. Sister Segodi testified about the results of her examination recorded in a J88, which corroborated previous vaginal penal penetration.

[2] The appellant, in his testimony, denied the substance of the State evidence, both in its detail and denying ever having intercourse with the complainant. He said that the complainant's family had made up the allegations in order to escape having to pay initiation fees to the appellant. The Court called a witness to testify, one Ms Mbonane, at whose home the initiation had taken place. She testified that the appellant was not entitled to discuss initiation fees with the complainant's family, and that he was not owed any money. Her evidence effectively put paid to the appellant's defence. The appellant's version was rejected and he was convicted as charged.

[3] The offences attract a minimum sentence of life imprisonment by virtue of the provisions of section 51 (1), read with Part 1 of Schedule 2 of the Criminal Law Amendment Act, 105 of 1997 ("the Act"), unless substantial and compelling circumstances are found. The Court a quo could not find substantial and compelling circumstances, and consequently considered itself bound to impose the minimum sentence of life imprisonment, which the Magistrate regarded as a proportionate punishment. The charges were taken together for purposes of sentence and life imprisonment was imposed.

[4] On appeal against conviction the appellant raised several grounds of appeal, the following being central:

[4.1] The appellant argued that the Court had erred in rejecting his version, that the motivating factor behind the false charges was the complainant's family's wish to escape payment of the initiation fees.

[4.2] The appellant contended that the Court a quo had not taken into consideration at all, alternatively did not properly consider, that it took the complainant more than a year to report the rapes.

[5] Before us the appellant's counsel indicated that she could not sustain any grounds of appeal against conviction. However, she had no instructions to abandon the appeal against conviction and it is accordingly apposite to deal herein with the two central aspects. I have considered the other grounds: there is no merit in them and in any event, some are too broadly stated to constitute good grounds.

[6] In terms of section 59 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, in criminal proceedings involving the alleged commission of a sexual offence, 'the court may not draw an inference *only* (italics added) from the length of any delay between the alleged commission of such offence and the reporting thereof.' Courts are not at liberty to draw adverse inferences from only the length of a delay in reporting. The point thus has no self-standing relevance.

[7] To the extent that the appellant suggests that it corroborates his evidence including on false implication, the point must fail. It is so that the complainant kept silent on the rapes for more than a year. However, a few factors explain her silence. This is a classic case where there is a massive imbalance of power between the complainant and the appellant. He was 27 years old at the time of the offence; the complainant was 15 years old. The appellant was a 'gobela' who was supposed to assist with the initiation of the complainant. As an initiate she looked up to him as an older person with standing in that community. This statement is confirmed by the fact that the complainant referred to the appellant as "baba", a respectful term of address used towards an older person. It was as the initiation process was coming to a close, during which period she was residing in close proximity to the appellant, that she spoke out.

[8] This case concerns an alleged sexual offence against a child. In Bothma the Constitutional Court held (per Sachs J) that: 'Jurisprudence in this country and abroad abounds with reference to the special consideration that needs to be given to the manner in which sexual abuse of children, especially if prolonged, can provoke delay in their later lodging complaints as adults about such abuse.' [2] Furthermore, in my view one should consider in this case the approach taken by Cameron JA (in a

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[2] Bothma v Els and Others [2009] ZACC 27; 2010 (2) SA 622 (CC) ; 2010 (1) SACR 184 (CC) ; 2010 (1) BCLR 1 (CC) at [37] and see more fully the discussion and reference to case law in the judgment more fully.

minority judgment) in *S v M 2006 (1) SACR 135 (SCA)* where he considered the impact of youth, vulnerability, authority and subordination on a rape victim's conduct. In approving of this approach Mlambo JA (as he then was) said[3]:

> "I cannot accept the suggestion that L should be disbelieved simply because she did not behave in the manner suggested. This approach, in my view, unfairly puts her, as a rape complainant, in the position of an accused in which the appellant, as the real accused, stands to profit should it be found that the complainant's failure to conduct herself in a certain manner means she either consented or is simply falsely implicating the appellant."

[9] It must also be borne in mind that the appellant threatened the complainant with harm should she tell anyone of the events. He told her that he used powerful muti to protect himself, and as an initiate in these circumstances, that threat must have weighed heavily on the complainant. As was pointed out in *Vilakazi v The State [2015] ZASCA 103 (10 June 2016)* a rape victim's reluctance to report the crime is not necessarily an indication that the offence had been contrived:

> "Firstly, as Milton states, reluctance on the part of rape survivors, or some of them, to report the rape at the first opportunity is a firmly recognised fact. It is also generally accepted that with young children the

[3] In s v Egglestone 2009 (1) SACR 244 (SCA) at para 25

reluctance is compounded. In this case the complainant testified that she was afraid of the appellant."[4]

[10] Ultimately, there are many reasons why a rape victim might be reluctant to report the crime: fear, as in this case, a feeling of helplessness, shame, and a plethora of other reasons. In this case there is a substantial body of evidence supporting the appellant's conviction. In my view the complainant's delay in reporting the offences is completely understandable and there is no plausible basis to suggest that it can corroborate the appellant's denial of the events or his evidence of alleged false implication.

[11] Indeed, counsel for applicant, quite correctly, also did not persist in the argument that the Court a quo did not properly consider the fact that there were fees outstanding and the family's desire to escape payment of the fees provides the motive for a false complaint. It was suggested that there may have been a dispute regarding initiation fees. In my view the magistrate's rejection of the appellant's version in this regard cannot be faulted. The appellant testified that on 29 August 2020 he had had a discussion with the complainant's mother regarding the fees. He said that a disagreement on fees had led to the complaint. Upon being asked why this conversation had not been put to the State witnesses in cross-examination, the appellant sought to suggest that he may not have not told his attorney of the discussion. The appellant's

[4] At para 19

evidence leaves one with the distinct impression that this was a last-minute fabrication.

[12] The evidence of Ms Mbonane put the sword to the appellant's version. She testified that the appellant had no right to any payment, and that all negotiations regarding payment were to be had with her, and not with the appellant. Even if one accepts he may in due course have received a share of any payment made, her evidence disposes of the appellant's suggestion that the complaint was motivated by a desire to avoid payment of initiation fees.

[13] In my view the Court a quo correctly accepted the complainant's version, and rejected the appellant's evidence as false beyond a reasonable doubt. It follows then that the appeal against conviction must fail.

[14] As far as the appeal against sentence is concerned, the Act is peremptory when the facts of the case fall within the provisions of Schedule 2 to the Act. That is the case here, due to the fact that the complainant was under 16 years of age at the time of the rapes and the appellant raped the complainant twice. It is then for a Court to consider whether there are substantial and compelling circumstances which would justify a deviation from the prescribed minimum sentence. In this regard, the appellant's counsel submitted that substantial and compelling circumstances were present and proposed that a proportionate and just sentence would be 20 years.

[15] The Supreme Court of Appeal set out the approach to be followed in S v Malgas [2001] ZASCA 30; [2001] 3 All SA 220 (A) at 1235E-J in a paragraph (paragraph 25) endorsed by the Constitutional Court in S v Dodo.[5] The paragraph reads:

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

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[5] S v Dodo [2001] ZACC 16; 2001 (3) SA 382 (CC); 2001 (5) BCLR 423 (CC) at para 10 and 11. The Constitutional Court said of the process set out in Malgas: 'It steers an appropriate path, which the Legislature doubtless intended, respecting the legislature's decision to ensure that consistently heavier sentences are imposed in relation to the serious crimes covered by s 51 and at the same time promoting 'the spirit, purport and objects of the Bill of Rights.' See too *S v Vilakazi* 2009 (1) SACR 552 (SCA) (2012 (6) SA 353; [2008] 4 All SA 396).

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.'

[16] This court is exercising appellate jurisdiction in respect of the exercise of the Magistrates discretion,[6] and does so in light of the grounds of appeal. These are very broadly stated. The only specific ground is that the Magistrate overlooked that the appellant had been in custody since his arrest. On a consideration of the Magistrate's reasoning, and on a conspectus of all circumstances, I am satisfied that there is no basis for overturning the sentence imposed.

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[6] For the test applicable to sentencing on appeal, see *Bogaards v S* [2012] ZACC 23; 2013 (1) SACR 1 (CC); 2012 (12) BCLR 1261 (CC) at para 41, set out as follows: (footnotes omitted). 'Ordinarily, sentencing is within the discretion of the trial court. An appellate court's power to interfere with sentences imposed by courts below is circumscribed. It can only do so where there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it. A court of appeal can also impose a different sentence when it sets aside a conviction in relation to one charge and convicts the accused of another.'

[17] As to the appellant's personal circumstances, he was 27 years old when he committed the offences. Although both his parents died when he was 9 years old, he was raised by his grandmother and has extended family. He completed Grade 12 and has been formally employed from time to time including during the periods 2015 to 2017 and during 2018 to 2019. The appellant earns a living as a traditional healer. He has a chronic illness for which he takes medication. He has no previous convictions and no pending cases. He has two children by two different mothers. The children are ten and four years old respectively. The appellants' circumstances were duly considered by the Magistrate.

[18] As opposed to his personal circumstances, which do not, viewed alone, ground a deviation, the case concerns not only gender-based violence, far too prevalent in our society and profoundly damaging to its victims and survivors, but rape of a child of 15, a formative time of life. The specific circumstances in which the offences were committed are, in my view, egregious. In order to become a sangoma, an initiate is expected to leave her parents' home and to find a new home in the intitiation school. The young women who go through this process are especially vulnerable to abuse. They find themselves away from their normal support structures, and they are exposed to strangers whom they had never known before. The appellant took full advantage of the complainant's youth and vulnerability. He also took advantage of his position of authority over the complainant, when it was in fact incumbent on him to protect and guide her. The victim impact statement –

considered by the Magistrate – speaks vividly to the traumatic impact on the complainant.

[20] After the two rapes had occurred, the complainant was forced to see the appellant on a daily basis over a period of a year while undergoing initiation, adding, as she explains, to the trauma of the rapes. The appellant forced the complainant to remain silent by threatening her with harm, further adding to her trauma. In my view the appellant's conduct was abhorrent. At no stage has the appellant demonstrated any remorse, continuing to deny the events and accusing the complainant of fabrication.

[21] It is no doubt clear from the above that I do not find any substantial and compelling circumstances that would have justified the Magistrate deviating from the minimum prescribed sentence. Nor is the sentence disproportionate, as the Magistrate concluded. It is correct, that the Magistrate did not expressly deal in the judgment with the period the appellant spent in custody pre-sentence. In this regard, it appears from the record that the appellant was arrested over a year after the events in question in December 2020. He was sentenced on 23 February 2022. However, even assuming the pre-trial incarceration was not specifically considered, this consideration does not in my view, justify any deviation on the facts and in the circumstances of this case.[7] The appeal against sentence must also fail.

[7] S v Radebe and another 2013 (2) SACR 165 (SCA) at para 14.

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

"The appeal against conviction and sentence is dismissed."

SWANEPOEL J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

I agree.

COWEN J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

COUNSEL FOR APPELLANT	**Adv.L A Van Wyk obo Legal Aid SA**
COUNSEL FOR RESPONDENT:	**Adv. S Lalane**
DATE HEARD:	**23 February 2023 2023**
DATE HANDED DOWN:	**24 April 2023**