IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

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

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DATE: 08/03/2024

Case number: A184/2022

Date: 08 March 2024

In the matter between:

PAULOS MOLAMUDI **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

BRAND AJ (with PHAHLANE J CONCURRING)

Introduction

[1] The appellant, Paulos Molamudi, was on 13 April 2022 convicted of rape in the Regional Court in Pretoria. On 4 July 2022, he was sentenced to life

imprisonment, in terms of section 51(1) of the Criminal Law Amendment Act 105 of 1997 ('the Act'). He was also declared unfit to possess a firearm and his name was to be registered on the National Register for Sex Offenders.

[2] On 11 July 2022, the appellant noted appeal against his sentence, utilising his right to do so in terms of section 309 of the Criminal Procedure Act 51 of 1977. It is this appeal that is now before us.

Background

[3] The appellant committed the rape for which he was convicted and sentenced on 22 November 2014. He was charged with this rape only in 2022, while in custody concerning another charge of rape, when a DNA sample taken from the complainant of the 2014 rape was matched to him.

[4] It is necessary to relay how the rape occurred in some detail, to enable proper evaluation of the sentence against which this appeal is brought. It happened as follows:

[4.1] On 22 November 2014, at around 19:00, the complainant was on her way back home from work, on foot. She reached a passage at a train bridge and as she entered this passage, she noticed a man to her left, with a stocking pulled over his face and a knife held behind his back.

[4.2] The man asked her whether she had arrived at her destination. When she answered that she had, he told her to turn back and come with him. He also instructed her not to scream, as he would stab her if she did. After she turned back with him, the man asked her who her boyfriend was. She gave her boyfriend's name (Given) and the man asked her where he lives. When she said that he lives in Mamelodi, the man said that Given was having an affair with his girlfriend and that they were going to go to Given in Mamelodi to confront him about that.

[4.3] The man instructed her to go with him down a flight of stairs at the railway bridge. When they reached the bottom, he told her to take off her jersey and lie down on top of it. As she did, he took out another stocking from his pocket. He told her to stretch her hands out behind her head and cross them. He then tied her hands to the fence behind her with the stocking.

[4.4] He proceeded to pull down her trousers. When the trousers came down to her knees, she tried to resist him pulling them off altogether. He said that when she sleeps with Given, she allows him to take it all off and then pulled the trousers fully from her legs and cast them to the side.

[4.5] When at this point she started crying, he told her to keep quiet or she would make him angry. He then took off her long-sleeve T-shirt and tied it over her mouth, stuffing part of it into her mouth.

[4.6] Next the appellant took off his trousers and took out his penis. He sat down on his knees in front of the complainant and tried to push his penis into her but couldn't. He asked her why it is that she does not feel him and forced his penis into her, saying that it is now in. He proceeded to push in and out of her. After a while, he pulled out and went to a nearby tree, where he ejaculated.

[4.7] Next, the appellant came back to the complainant. He said that it was time for 'round two', that the first round was only an introduction and that both she and he would enjoy the second round. He proceeded again to try to push his penis into her but couldn't. He tried to stimulate the complainant orally on her vagina, again asking her why she does not feel him. He then managed to insert his penis into her, pushing in and out of her. This time he said that he could now feel her and that it was so nice. He asked her why she was not his girlfriend. She could of course not answer, as her mouth was still gagged. This second time, he also after a while pulled out, went to the nearby tree, and ejaculated there.

[4.8] The appellant proceeded to put on his clothes. He untied the complainant's hands and used the stocking with which they had been tied to wipe her off. Once she had dressed herself, the appellant offered to accompany the complainant to where she was going, but she refused. He left her at the scene of the rape. She proceeded to her home, where she told her parents what had happened.

The appeal

[5] The Regional Court sentenced the appellant to life imprisonment by virtue of section 51(1) of the Act read with Schedule 2 of the Act. This section determines in relevant part that a person convicted of rape that was committed 'in circumstances where the victim was raped more than once whether by the accused or by any co-

perpetrator or accomplice' shall be sentenced to life imprisonment.

[6] The Regional Court found that, although part of the same sequence of events, the appellant raped the complainant twice – penetrating her, after some time pulling out and ejaculating against the tree and then coming back, penetrating her again and again pulling out after some time and ejaculating against the tree.[1]

[7] The appeal against sentence is not directed at this finding. The appellant accepts that there were two rapes and that this brings his case within the purview of section 51(1). The appellant instead invokes section 51(3) of the Act. This section authorises a court 'where it is satisfied that substantial and compelling circumstances exist that justify the imposition of a lesser sentence' than the life imprisonment prescribed in this case, to impose such lesser sentence. The Magistrate considered whether there were any such substantial and compelling circumstances; found that there were none; and consequently, imposed the prescribed sentence.[2]

[8] The appellant on appeal argues that she erred in this. He submits that, as a point of departure in determining sentence, life imprisonment 'should be reserved for the more serious and violent [rapes], unlike the one [he] was convicted of'.[3] He then proceeds to point to the following that the magistrate should have considered as substantial and compelling circumstances and that should have persuaded her to impose a lesser sentence:

> [8.1] His age (26 when he committed the rape, 32 at time of conviction and sentencing).
>
> [8.2] The fact that he has no children.
>
> [8.3] His show of remorse for the rape.
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> [8.4] The potential for his rehabilitation.
>
> [8.5] The fact that he didn't have a father figure growing up.

[9] He also submits that the magistrate overemphasised 'the interest of society and the seriousness of the offence.'[4] For all these reasons he concludes that the life imprisonment sentence imposed on him is shockingly inappropriate.

Discussion

[1] Sentencing judgment *a quo* p 5, Record p 123.
[2] Sentencing judgment *a quo* p 4-5, Record p 122-123.
[3] Appeal notice, Record p 128.
[4] Appeal Notice, Record p 126.

[10] I consider the appellant's appeal against sentence below cognisant of the general approach courts should apply in appeals against sentence: 'that the imposition of sentence is the prerogative of the trial court for good reason and that it is not for appellate courts to interfere with that exercise of discretion unless it is convincingly shown that it has not been properly exercised'.[5] Appellate courts should interfere in the trial court's exercise of its sentencing discretion only where that court is found to have materially misdirected itself, or, failing that, where the trial court's sentence diverges from the sentence which the appellate court would have imposed had it been the trial court to such a degree that it may be described as 'shocking', 'startling' or 'disturbingly inappropriate'.[6]

[11] The appellant's point of departure, that life imprisonment should be reserved for more serious and violent rapes than this rape was, accords neither with the law nor with the facts. That is, neither does the law recognise any such point of departure (quite the contrary), nor is this rape indeed somehow less violent and serious than others that resort under section 51(1) read with Schedule 2 of the Act.

[12] Since the decision of the Supreme Court of Appeal in *S v Malgas*,[7] it is settled that the sentence of life imprisonment is the sentence that should *ordinarily* be imposed on any crime that resorts under section 51(1) read with Schedule 2 of the Act.[8] This is the proper point of departure. Unless there are substantial and compelling circumstances indicating otherwise, life imprisonment should be imposed for any instance of rape in which the complainant was raped twice or more, whatever the degree of violence or so-called seriousness involved. The degree of violence and 'seriousness' accompanying a rape in which the complainant was raped twice or more has no bearing whatsoever on the question whether it resorts under section 51(1) of the Act so that the prescribed minimum sentence applies to it. This applies also to the appellant: he raped the complainant twice (this is not in dispute), so that the sentence that should be imposed is life imprisonment, unless he can point to substantial and compelling circumstances that justify a lesser sentence.

[13] Of course, any of the factors that usually play a role in determining sentence, such as, indeed, the degree of violence and seriousness of the rape can be considered as substantial and compelling circumstances justifying, in consort with

[5] *S v Malgas* 117/2000) [2001] ZASCA 30; [2001] 3 All SA 220 (A) at para [13].
[6] *S v Malgas* (above) at para [12].
[7] *S v Malgas* (above).
[8] *S v Malgas* (above) at para [8].

others, departure from the minimum prescribed sentence.[9] But that would only be so where a) the appellant is able to prove the factor relied upon, and b) seen in the circumstances of the specific case, that factor, considered with others indicate that imposition of the minimum prescribed sentence would cause an injustice.[10]

[14] In this case, despite the appellant's claim to the contrary, the rape is both violent and serious.

[15] It is violent for two reasons.

[15.1] First, although any rape, as the physical imposition of one person upon another is in and off itself violence,[11] the appellant's rape was particularly such: he could not at first attempt enter the complainant and had to force himself into her; his act of rape was explicitly itself violent.

[15.2] Second, although, apart from the rape itself, no additional act of violence was exerted on the complainant by the appellant, the rape was only possible because of the constant explicit threat of violence.

- When he first accosted the complainant, the appellant showed her the knife and told her that should she scream, he would stab her.

- When, after he had forced her to pull down her trousers completely instead of only to her knees, the complainant started crying. The appellant told her that she should stop or else he would get angry.

- The appellant also pulled her T-shirt over her face and stuffed it into her mouth, gagging her.

[16] In sum, violence was front and centre throughout her ordeal, although she was in the event not stabbed or punched or physically assaulted in another way than through the rape itself. Of course, that the absence of any such overt additional acts of violence does not render her rape somehow non-violent (or non-serious) is explicitly gainsaid by 51(3)(Aa) of the Act, which determines that the absence of apparent physical injury (ie evidence of acts of violence) to a rape complainant may not be regarded as a circumstance justifying imposition of a sentence lesser than the prescribed minimum.

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[9] *S v Malgas* (above) at para [10].
[10] *S v Malgas* (above) at para [22] and [23].
[11] *Mudau v S* [2013] ZASCA 56; 2013 (2) SACR 292 (SCA) at para [17].

[17] The rape, in addition to being violent, was serious because of the extent to which it was pre-planned and pre-meditated[12] and because of the extent to which the appellant exerted his control over the complainant over an extended period of time, through the threat of violence. This appears from the following:

[17.1] The appellant came to the rape fully prepared. He not only had a stocking to pull over his head and a knife with which to threaten the complainant but brought along an additional stocking with which to tie the complainant up.

[17.2] There is a clear inference to be drawn from the testimony of the complainant about how the rape unfolded and particularly how the appellant instructed the complainant what to do, that the appellant had scouted the area beforehand and had pre-planned the rape, step by step; also, that he had not randomly selected the complainant but had watched her beforehand and made himself familiar with her movements.

[17.3] Once the appellant had the complainant fully under his control (having tied her hands above her head to the fence and gagged her with her own t-shirt) he exerted that control to its full extent, proceeding at a leisurely pace to rape her twice.

[17.4] The faux familiarity and chumminess with which he did so (ie, his remarks about them both going to enjoy the second round and his attempt to stimulate her orally so that she would 'feel' him) constituted a particularly egregious invasion of her privacy and dignity, in addition to the rape, further illustrating the extent to which he was exerting his control.

[17.5] Equally so, the fact that he was twice able in the midst of the deed to pull out and go and ejaculate against the tree, illustrates how calculated and controlled his actions during the course of the rape were.

[18] In sum, the appellant cannot rely on any absence or lesser than usual degree of violence and seriousness to the rape as a circumstance justifying imposition of a lesser sentence than the prescribed minimum, because the rape was not particularly devoid of violence and in no way non-serious – quite the contrary.

[19] What remains is to consider whether the other factors that the appellant lists as substantial and compelling justify departure from the prescribed minimum

[12] Premeditation of a rape, as with other violent crimes, is regarded as an aggravating factor for purposes of sentencing. See *S v L.M.M* (CCD14/2022) [2022] ZAKZDHC 13 (18 March 2022) at p 9.

sentence.

[20] In *S v Malgas*, the Supreme Court of Appeal held that the ordinary factors that can play a role in a trial court's determination of sentence are not excluded from the evaluation in terms of section 51(1) of the Act by virtue simply of the fact that the section refers to 'substantial' and 'compelling' circumstances. A trial court at sentencing where a crime resorts under section 51(1) must, against the background of the assumption that the prescribed minimum sentence ordinarily applies, simply consider, in the ordinary course of deciding whether the punishment is proportionate to the crime, whether there are circumstances which viewed cumulatively and in the context of the specific case indicate that imposition of the prescribed minimum sentence would amount to an injustice. If so, then the minimum prescribed sentence should be departed from. The reasons for deciding so, although they need not be extraordinary, may not be light or 'flimsy'.[13]

[21] None of the circumstances listed by the appellant, whether taken individually or in consort with the others, justify departure from the prescribed minimum sentence.

[21.1] The appellant doesn't indicate at all why the fact that he has no children justifies imposition of a lesser sentence.

[21.2] The fact that he was relatively young at the time that he committed the rape (26 years) also does not *per se* count against imposition of the prescribed minimum. As held by Ponnan JA in *S v Matyiyiti*,[14] when someone older than 20 years of age relies on youth as a mitigating factor in sentencing, they must with acceptable evidence show that they are or were at time of commission of the crime so immature that it could mitigate sentence. The appellant provides no such evidence.

[21.3] The appellant's supposed remorse comes several years after he raped the complainant, only once he had, by a stroke of luck, been caught out. The veracity of his remorse is also brought into question by the extent to which he had planned and then in cold blood executed the rape.

[21.4] The probation officer's sentencing report does not show any particular propensity for rehabilitation of the applicant; but it does show that, although the

[13] *S v Malgas* (above) at para [25].
[14] *S v Matyiyiti* 2011 (1) SACR 40 SCA at paras [9]-[14].

appellant grew up without a father figure, his childhood was uneventful, settled, and stable.

[22] Against this must be weighed the violent, premeditated, and calculated nature of the rape and the clearly debilitating impact that the rape has had on the complainant (she testified that she moved away after the rape, left her job and is still unemployed, and is fearful, hardly ever going out).

[23] In this light, there is nothing to indicate that the sentence imposed by the trial court is anything but appropriate, let alone that it is 'shocking', 'startling' or 'disturbingly inappropriate'. As it was not alleged (and nor was it found) that the trial court had misdirected itself, materially or otherwise, this means that the minimum prescribed sentence of life imprisonment imposed by the trial court, should be left undisturbed.

[24] In the circumstances, the following order is made:

1. The appeal is dismissed.

JFD Brand
Acting Judge of the High Court
Gauteng Division, Pretoria

I agree

PD Phahlane
Judge of the High Court

Gauteng Division, Pretoria

APPEARANCES

Counsel for the Appellant	: Adv. M.G. Botha
Instructed by	: Legal Aid South Africa
Counsel for the Respondent	: Adv. C. Pruis
Instructed by	: Director of Public Prosecutions, Pretoria
Date of the Hearing	: 01 February 2024
Date of Judgment	: 08 February 2024