IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, DURBAN

CASE NUMBER: AR258/2023

NHLANHLA MNINI NTULI **APPELLANT**

and

THE STATE **RESPONDENT**

ORDER

On appeal: from the Empangeni Regional Court (sitting as court *a quo*):

(a) The appeal against sentence is dismissed.

(b) The sentences of the court *a quo* are confirmed.

JUDGMENT

ANNANDALE AJ (SIBISI AJ concurring):

[1] The appellant was charged in the regional court of Empangeni with two counts of rape[1] and one count of exposing a child to pornography in contravention of section 19(b)

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[1] As a contravention of section 3 of the Criminal Law Sexual Offences and related matters Amendment Act 32 of 2007 read with sections 1,56(1), 57, 58, 59, 60 and 61.

of the Sexual Offences and Related Matters Amendment Act 32 of 2007[2].Following a plea of guilty on all three counts, the regional magistrate convicted the appellant and imposed a life sentence for each count of rape and 8 years' imprisonment for the pornography charge. This is an appeal against sentence.

[2] The two counts of rape attracted the discretionary minimum sentence provisions in section 51(1) read with schedule 2 of the Criminal Law Amendment Act 105 of 1997, as the complainant was 9 years old at the time the appellant raped her. The learned regional magistrate was consequently obliged to sentence the appellant to life imprisonment unless he was satisfied as envisaged in section 51(3)(a) of the Criminal Law Amendment Act that substantial and compelling circumstances existed which justified the imposition of a lesser sentence than that prescribed.

[3] Having considered the well-known triad as set out in *S v Zinn* 1969 (4) SA 537(A) of the crime, the offender, and the interests of society, the regional magistrate concluded that there were no substantial and compelling circumstances which justified a departure from the prescribed sentence in respect of the rape convictions. Insofar as the pornography charge was concerned, this was not subject to any prescribed sentence and the period of 8 years imposed by the regional magistrate was that which was seen by him as appropriate in the circumstances.

[4] The matter serves before this court by virtue of an automatic right of appeal afforded to any person sentenced to imprisonment for life by a regional court under section 51(1) in terms of section 309(1)(a) read with 309(B)(1)(a) of the Criminal Procedure Act 51 of 1977.

[5] That automatic right of appeal does not extend to the pornography charge, in respect of which the appellant was required to obtain leave to appeal but did not.[3] The

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[2] But see para 4 below, I don't think there is an appeal against the sentence on the pornography charge and the notice to appeal was therefore also confined only to the sentences of life imprisonment.

[3] In terms of sections 309 and 309(B) of the Criminal Procedure Act

only appeal which is therefore competently before this court is against the life sentences in respect of the two rape convictions.

The threshold for intervention on appeal

[6] It is well established that a court exercising appellate jurisdiction cannot interfere with the sentence imposed by a lower court in the absence of a material misdirection or where the disparity between the sentence imposed by the trial court and the sentence which the appellate court would have imposed had it been the court of first instance is so marked that it can properly be described as shocking, startling or disturbingly inappropriate.[4]

[7] However, where the legislature has prescribed a sentence which must be imposed unless serious and compelling circumstances exist which justify a departure from the prescribed sentence, the second ground of potential appellate interference could only be engaged if the appellate court found that there had been no misdirection by the trial court in finding a lack of substantial and compelling circumstances. Put differently, if the appellate court concludes that the regional magistrate was correct in finding that no serious substantial and compelling circumstances existed as to warrant a deviation from the prescribed sentence, it would not be open to the appeal court to find that nonetheless the imposition of the prescribed sentence was disturbingly inappropriate. When dealing with prescribed sentence cases such as the present, then, there is no scope for an appellate court to intervene unless it finds that the trial court committed a misdirection by failing to find that there were serious and compelling circumstances.

[8] The appellant contends that the learned magistrate committed a material misdirection such as to warrant interference by this court because he overemphasised the seriousness of the offence and failed to strike a judicious balance with regard to all sentencing factors. This, the appellant submits, resulted in the sentence imposed being

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4 *S v Malgas* [2001] 3 All SA 220(A), para 12

disproportionate to the personal circumstances of the appellant, the interests of the society and the gravity of the offense.

[9] This contention, when unpacked, straddles both bases upon which an appellate court is entitled to interfere on the issue of sentence. What it amounts to is a submission that the regional magistrate committed a material misdirection by failing to find that there were substantial and compelling circumstances that warranted a departure from the prescribed sentence of life imprisonment, and that because of this misdirection the sentence imposed was disproportionate.

The correct approach to prescribed sentences

[10] The principles which govern the correct approach to sentencing in cases where a prescribed sentence is being imposed by the legislature, are by now well settled. The *locus classicus* in this regard is the decision of the Supreme Court of Appeal in *S v Malgas* [2001] 3 All SA 220 A (*Malgas*). *Malgas* stressed that when a court judges whether the circumstances of any particular case are such as to justify a departure from a prescribed sentence, they must respect and not merely pay lip service to the legislature's view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of the specified kind are committed.[5]

[11] Of importance from the summary in paragraph 25 of *Malgas*, for present purposes, are the following principles:-

a. Firstly, that Courts are required to approach the imposition of sentence conscious that the legislature has ordained a 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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[5] *Malgas* para 25

b. Secondly, unless there are 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;

c. The specified sentences are therefore not to be departed from, lightly or for flimsy reasons;

d. All factors traditionally taken into account in sentencing, whether they diminish moral guilt or not, continue to play a role;

e. The statutory requirement of substantial and compelling circumstances, is a composite yardstick ,and the ultimate impact of all the circumstances relevant to sentencing must be such as to cumulatively justify a departure from the standardised response that the legislature has ordained;

f. If the sentencing court on consideration of the circumstances of a particular case is satisfied that they render the prescribed sentence unjust and 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;

g. Even if so satisfied, the sentencing court must assess the sentence to be imposed against the prescribed sentence paying due regard to the benchmark which the legislature has provided.

[12] It is convenient to structure consideration of whether the regional court committed a misdirection by considering the factors in relation to the three categories articulated in *S v Zinn.*

The crime

[13] Dealing first with the consideration of the crime, the regional magistrate correctly approached this issue on the basis that the court was obliged to accept the facts as contained in the appellant's guilty plea. Those facts reveal the following narrative.

[14] On 1 September 2018, the appellant came across the complainant near a footpath close to some bushes in Enseleni. The complainant was nine years old at the time and the appellant knew her as a child from the area. The appellant called her and told her that he would accompany her through the bush and show her a shortcut and so she came to him.

[15] Once they were in the bushes, however he asked her to take off her clothes. She was reluctant and so he instructed her to lay on the ground where he took off his clothes and hers. He then got on top of the complainant and forced her legs open, inserting his penis into her vagina and having intercourse with her until he ejaculated. He told the complainant to get dressed, which she did.

[16] Having already raped the 9 year old complainant once, the appellant took out his cellular telephone and showed her a pornographic video which depicted a woman sucking a man's penis and then asked the complainant to do what she had seen on the video with him. The complainant did as she was told until the appellant told her she could stop. The appellant knew that the complainant was complying reluctantly because he had to force the complainant by pushing her head forward and putting his penis into her mouth.

[17] The appellant admitted the contents of the J88 medical report which recorded the findings of the district surgeon who examined the complainant the following day. The J88 noted fresh tears and two clefts in the complainant's genitals and bruising and swelling, both of which were extensive in nature. These injuries in the opinion of the district surgeon provided evidence of what was described as *"fresh traumatic penetration through the vagina"*.

[18] The prosecutor introduced the victim impact statement into evidence without objection and an affidavit by the court preparation officer employed by the National Prosecuting Authority to assist with the preparation of that statement. The court preparation officer met with the complainant in June of 2023 almost five years after the date upon which she was raped. Despite the significant passage of time the complainant was emotional and cried a lot. She described herself as having been traumatised by the

incident in which, in her words, the appellant "*took (her) virginity in a painful manner*". After what happened to her, she was scared even to play with her friends because she is perpetually living in fear. She was also scared to go to the shops in case she saw the appellant. The incident also had an adverse effect on the complainant's academic performance because she failed two terms at school after the incident. The complainant described the incident as having been painful and stated that her life had changed badly after the incident.

[19] Not only are these offences extremely serious, there are also a number of aggravating features surrounding them. The appellant knew that the complainant was a young girl and took advantage of her, luring her into the bushes by promising to show her a shortcut. The regional magistrate therefore cannot be faulted for having found that there was a degree of premeditation which attached to the offences.

[20] The fact that the appellant, having raped the child once, shortly thereafter committed a second act of rape and exposed her to pornography illustrates the appellant's total and utter disregard for the seriousness of what he had already done and its impact on the complainant, whom he knew was not consenting. In effect, the appellant rendered her an object for his sexual gratification.

The appellant

[21] Turning then to consider the personal circumstances of the appellant, the regional magistrate took into account that he was a first offender, 36 years old, employed as a general worker, earning R3 500.00 a month and a single father of three minor children aged 5, 8 and 11 years who live with their mother, an unemployed woman from Mozambique.

[22] The appellant submitted to the regional magistrate, as he did in this court, that his plea of guilty had spared the complainant the trauma of having testify, should be seen as a sign of remorse, and that he was a good candidate for rehabilitation as he had pleaded guilty. In addition to this, the appellant stressed that he had been arrested

on 6 October 2020 and had remained in custody for nearly three years before he was convicted and sentenced on 8 June 2023.

[23] A plea of guilty is not automatically a sign of remorse or an indication that an accused person is a good candidate for rehabilitation. Whether a plea of guilty can be seen as a sign of remorse or is simply a neutral factor needs to be evaluated on the evidence. This is because a plea of guilty may be induced by overwhelming evidence against an accused person[6] and because there is, as the Supreme Court of Appeal so eloquently put it, "a chasm between regret and remorse".[7]

[24] Here, the complainant was known to the appellant and there would therefore never be an issue regarding identification. In addition, the medical evidence was compelling.

[25] Further, consideration of the chronology in this case reveals in my view that the submissions by counsel for the respondent that the appellant's guilty plea was at best a neutral factor because the appellant delayed the matter for as long as he could until it got to a point where he realised there was no way he could escape liability and then decided to plead guilty is correct.

[26] The offences occurred on 1 September 2018. The appellant was known to the complainant and did not confess or turn himself in but was instead at large for nearly two years until his arrest on 6 October 2020.

[27] The appeal record reveals that the appellant was transferred to the Regional Court on 14 May 2021 and applied for legal aid. There is no record as to what happened between the time of his arrest and the transfer to the Regional Court and therefore no inferences can be drawn in relation to this period. However, the record shows that appellant has granted legal aid on 19 May 2021 and was legally represented consistently from that point onwards.

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6 *S v Mashanini* 2012 (1) SACR 604 SCA para 24.
7 *S v Matyityi* 2011 (1) SACR 40 SCA para13.

[28] From 19 May 2021, the appellant appeared at court on 8 occasions and on each of those the matter was either adjourned for a pretrial conference or, from July 2021 because, there were negotiations aimed at finalising a plea bargain. The regional magistrate records in his judgment that the reason why those negotiations failed was because the sentence the appellant was prepared to agree to was not acceptable to the State. Counsel for the respondent fairly accepted that the appellant could not be criticised for attempting to reach a plea agreement. By 16 September 2021 however, it was clear that no plea bargain would be struck, and the matter was adjourned to 27 October 2021 for trial.

[29] The trial did not proceed as scheduled, but there is no entry on the record for that day explaining why that was, although the Covid pandemic may explain this, because courts in this province did not sit remotely at that time. Be that as it may, a new trial date was set for 1 October 2022. Although the witnesses were present at court the trial could not proceed as the intermediary system was not working.

[30] After that second trial date, the appellant appeared in court no fewer than 16 times between 9 February 2022 and 7 June 2023 but on no occasion attempted to tender a plea. On 12 of those 16 occasions, it was recorded that the intermediary system was not working, on one occasion the trial could not proceed because there was no magistrate available and on other because the complainant was not present - it is common cause that she was writing exams. The appellant applied for bail during this period, citing prejudice at his continuing incarceration in the face of multiple postponements.

[31] Had the appellant genuinely been remorseful and wanted to spare the complainant the trauma of testifying, one would have expected that on at least one of the 17 occasions he appeared in court between October 2022 and June 2023 he would have tendered a plea. Indeed, one would have thought that on 16 September 2021, when it was apparent that there would be no negotiated deal a plea could and should have been tendered at that point if he was genuinely contrite.

[32] The appellant's plea also fails to reveal remorse. In *S v Matyityi*[8] the Supreme Court of Appeal noted that:-

> *"Many accused persons might well regret their conduct, but that is not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus, genuine contrition can only come from the appreciation and acknowledgement of the of the extent of one's error ... In order for remorse to be a valid consideration the penitence must be sincere, and the accused must take the court fully into his or her confidence. Unless and until that happens, the genuineness of the contrition alleged to exist, cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of inter alia what motivated the accused to commit the deed? What has since provoked his or her change of heart? And whether he or she does indeed have a true appreciation of the consequences of those actions. There is no indication that any of this, all of which was peculiarly in the respondent's knowledge, was explored in this case".*

[33] Those observations are entirely apposite in this case. Nothing was said in the appellant's plea explanation to explain his motivation or what provoked his plea.

[34] I therefore conclude that his guilty plea is a neutral factor and the time spent in custody prior to conviction and sentence was simply in the ordinary course and scope of trial proceedings because the appellant remained adamant to go to trial until the very end.

[35] None of the appellant's personal circumstances constitutes anything out of the ordinary much less are they substantial and compelling reasons to deviate from the

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[8] Note 7 *supra*, para 13.

prescribed sentence. I am mindful, however that one must not adopt a compartmentalised approach and must instead consider the whole picture.

The interests of society

[36] I turn then to the last facet of the triad of *Zinn,* the interests of society.

[37] The prescribed sentences for rapes of minors are a legislative choice which reflect the seriousness with which society views those offences. Prescribed sentences are intended to ensure, "a severe, standardised and consistent response from the courts to the commission of such crimes".[9] The objective gravity of the type of crime and the public's need for effective sanctions against it are important aspects in the analysis of this portion of the *Zinn* triad.

[38] It is in my view, not without significance that the relevant provisions of the Criminal Law Amendment Act are no longer in the form in which they were originally enacted. At inception, only High Courts were entitled to impose the prescribed life sentence in terms of section 51(1), but this jurisdiction was extended to regional courts by was of amendments to the Act in 2015.

[39] More significant still, there was a savings provision in section 53(1) in terms of which the prescribed sentences were to have effect only for two years from the commencement of the Act which was on 13 November 1998, although the President could extend this period with the concurrence of parliament for a year at a time in terms of section 53(2).

[40] That temporal limitation was removed by way of the amendments to the legislation which took effect on 31 December 2007. This reveals– sadly - that the original intention of the legislation, described in paragraph 7 of *Malgas* as "a relatively short term response to a situation which it was hoped would not persist indefinitely", namely, "an alarming burgeoning in the commission of crimes of the kind specified and

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[9] *Malgas supra* para 8.

an attempt to stem the tide of criminality which threatened and continues to threaten to engulf society" did not have the desired effect.

[41] *S v Chapman* 1997 (3) SA 341 (SCA) is a joint judgment penned by Mahomed, CJ, Van Heerden and Olivier JJA. In it, the Supreme Court of Appeal held as follows:-

> *"The Magistrate gave consideration to all the other circumstances impacting on the appellant, but he correctly balanced such circumstances against the legitimate interests of the community. This, in our view is a correct approach. Rape is a very serious offence, constituting as it does, a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, to privacy, and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilization. Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, or to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives. The appellant showed no respect for their rights ... The Courts are under a duty to send a clear message to the accused, to other potential rapists and to the community: we are determined to protect the equality, dignity and freedom of all women, and we shall show no mercy to those who seek to invade those rights."*

[42] Those words and sentiments are entirely apposite here. Indeed, female children deserve even greater protection than their adult counterparts.

[43] In my view the learned regional magistrate committed no misdirection. His able judgment demonstrates that he carefully considered all the relevant factors against the appropriate test as articulated in terms of settled jurisprudence. He cannot be faulted for

finding that there were no substantial and compelling circumstances which warranted a departure from the prescribed sentence in this case. There is nothing disproportionate about the sentence either, to the extent that this can be a separate consideration in the present context.

[44] In the result, the appeal is dismissed and the conviction of the court *a quo* is confirmed.

A M ANNANDALE AJ

I concur:

M SIBISI AJ

JUDGMENT RESERVED: 24 JUNE 2024

JUDGMENT HANDED DOWN: This judgment was handed down electronically by circulation to the parties' legal representatives by email publication. The date and time for hand-down is deemed to be 12h00 on 26 June 2024.

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