IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: AR 60/2020

In the matter between:

PATRICK THEMBA KHOZA **APPELLANT**

and

THE STATE **RESPONDENT**

Coram:	Mossop J and Reddi AJ
Heard:	20 July 2022
Handed Down:	20 July 2022

ORDER

---

1 The appeal against the sentence is dismissed.

JUDGMENT

REDDI AJ (MOSSOP J concurring)

Introduction

[1] This is an appeal by Patrick Themba Khoza, brought under s 10 of the Judicial Matters Amendment Act 42 of 2013, against sentence only.

[2] On 22 November 2019, the appellant, almost 60 years old at the time, was convicted in the Regional Magistrates' Court, Ladysmith, on one count of rape of a ten-year-old girl. The conviction brought into play the minimum sentence provisions of s 51(1), read with Schedule 2 of the Criminal Law Amendment Act 105 of 1997 (‘the Act’). The effect of s 51(1) is that on conviction, the court is obliged to sentence an accused who rapes someone under the age of 16 to life imprisonment unless substantial and compelling circumstances are present to justify a deviation from the prescribed penalty.

[3] In this case, the trial court did not find any substantial and compelling circumstances and sentenced the appellant to imprisonment for life.

The charge and plea

[4] The allegation was that on or about 25 November 2018, the appellant had raped the complainant at his home. The girl had been sent by her uncle to the appellant's house to fetch a borrowed container.

[5] The appellant gave the complainant the container but asked her to return to his house once she had returned the item to her uncle. After running the errand, the girl, accompanied by a four-year-old female playmate, returned to the appellant's home, where a sick woman living in the house asked her to go to a shop to buy pain medication. When the complainant was about to set off to the shop, the appellant gave her some money to buy herself and her small friend a treat.

[6] Upon returning from the shop, the girl handed the sick woman her medication and told the appellant they were leaving. He, however, asked the girl and her playmate not to leave. The appellant then took the children into the dining room, gave them a cell phone to play with, later took off the complainant's panties, fetched a blanket from the bedroom, threatened the girl not to scream, and raped her in the presence of her young friend.

[7] The complainant did not report the rape to anyone at that time. Several months later, the incident came to light when the playmate related the details of the rape to her mother, who then informed the complainant's mother of the incident.

[8] The complainant was medically examined by a doctor whose report recorded that the girl's hymen was not intact.

[9] The appellant was charged with rape and pleaded not guilty.

The conviction and sentence

[10] In its assessment of the evidence before it, the trial court found the appellant a liar and dismissed his version as false. Not so with the complainant, who, despite her tender age, the court found to be an impressive witness who gave a clear and coherent account of the details surrounding the rape. The evidence of one of the defence witnesses also corroborated material aspects of the complainant's testimony. The court convicted the appellant of rape and sentenced him to imprisonment for life.

[11] Although the provisions of s 10 of the Judicial Matters Amendment Act entitle the appellant to appeal against both conviction and sentence, his appeal lies against the sentence only.

Appellant's submission on appeal against sentence

[12] The main thrust of the appeal is that the trial court had erred in not finding substantial and compelling circumstances present to merit the imposition of a lesser sentence than the minimum prescribed by the Act. In support of this contention, counsel for the appellant, Ms *Hulley*, made two core submissions:- In sentencing the appellant, the trial court (i) had not given due consideration to the appellant's personal circumstances; and (ii) had not taken into account differences in the degree of seriousness in rapes which in this case was reflected by the fact that the appellant had not inflicted additional violence on the complaint. Ms *Hulley* contended further that as a consequence of these lapses, the sentence pronounced upon the appellant was so grossly inappropriate as to induce a sense of shock. Moreover, the element of mercy was absent in the imposed sentence.

[13] Concerning the first ground, Ms *Hulley* advanced the following as factors which the sentencing court ought to have considered as constituting substantial and compelling circumstances as envisaged by s 51(1) of the Act:

(a) The appellant was a mature person aged 60 at the time of sentencing.
(b) He was a first offender.
(c) He was married with adult children.
(d) He had sustained leg and head injuries from an accident on 13 December 2017.
(e) He was unemployed and received a monthly government grant of R1 700, which he used to support his family.
(f) The trial court had not considered the elements of deterrence, retribution and rehabilitation.
(g) The appellant had had this case looming over his head for 20 years before it was finalised.

[14] Before proceeding further, I must point out the incorrectness of the last statement that this case had been looming over the appellant for 20 years before finalisation. It is common cause that the rape occurred on or about 25 November 2018, for which the appellant was convicted and sentenced on 22 November 2019. The case took a year to finalise and an additional two-and-a-half years to reach this appeal court. Clearly, counsel's submission of a total of 20 years is wrong and points to a regrettable level of inattention in the drafting of the appellant's heads of argument.

[15] I move now to the second ground of Ms *Hulley's* submission that based on the authority of *Rammoko v Director of Public Prosecutions* 2003 (1) SACR 200 (SCA), in rape matters, differences in the degree of seriousness must be given consideration when deciding on an appropriate sentence. The obvious implication of this submission is that since the appellant had not inflicted on the complainant additional violence to that inherent in the act of rape, the less odious nature of his conduct deserved a lesser sentence than the prescribed minimum.

Assessment of the arguments

[16] That this court has the power to alter a sentence on appeal is undisputed. However, this is not an unfettered power.[1] The gold standard set in *S v Malgas* 2001 (1) SACR 469 (SCA) para 12, now commonplace, is that an appellate court may only alter a sentence if that which the trial court imposed was shockingly severe, or inappropriate, or where it had materially misdirected itself in carrying out its sentencing function. This principle was reiterated by Maya DP in *S v Hewitt* 2017 (1) SACR 309 (SCA) para 8, that before an appellate court can interfere with the sentencing discretion of the court *a quo*, it 'must be

[1] *S v Rabie* 1975 (4) SA 855 (A).

satisfied that the trial court committed a misdirection of such a nature, degree and seriousness that shows that it did not exercise its sentencing discretion at all or exercised it improperly or unreasonably…'

[17] In instances where there is a basis for a sentencing court to find the presence of substantial and compelling circumstances justifying a deviation from the prescribed sentence, but it fails to so conclude, this failure would constitute a material misdirection deserving of the appeal court's interference.

[18] Accordingly, before this court can interfere with the trial court's sentence in this matter, it would first have to be satisfied that the appellant's personal circumstances conjoined with the fact that he had not inflicted additional violence on the complainant amounted to substantial and compelling circumstances. Should this court find substantial and compelling circumstances to be present, then evidently, the sentencing court had misdirected itself in not considering these factors when it sentenced the appellant to life imprisonment.

[19] However, as was held in *S v PB* 2013 (2) SACR 533 (SCA) para 20, an appellate court is not confined to interfering only if it identifies a material misdirection or failure of justice. Instead, the focus on appeal is whether the facts that the sentencing court had considered are substantial and compelling.

[20] Appropriately, there has been no uniform definition or interpretation of the term 'substantial and compelling circumstances.' The peculiar conditions of each case play a pivotal role in determining if substantial and compelling circumstances are present. Therefore, courts are not fettered in determining what factors constitute such substantial and compelling circumstances.

[21] Nor are they bound by precedent when determining an appropriate sentence with regard to minimum sentences, especially in cases of child rape. This was the strongly expressed sentiment of the Supreme Court of Appeal in *S v PB* para 16, where Bosielo JA stated that if a court were to follow precedent slavishly, notwithstanding of a similar case, it would be acting inappropriately and failing in its duty to use its discretion to consider sentencing untrammelled by the sentences imposed by another court. To reinforce its stance, the appeal court, at para 17, cited with approval Van den Heever JA's dictum in *S v D* 1995 (1) SACR 259 (A) at 260*e*, that 'decided cases on sentence provide guidelines not straightjackets.'

[22] I turn now to the assessment of whether the factors raised by the appellant could conceivably be regarded as amounting to substantial and compelling circumstances to justify deviating from the minimum sentence of life imprisonment. The appellant's age has been cited as a mitigating factor, as have his head and leg injuries sustained a year prior to the rape incident. In my view, neither factor is defensible. At 60 years of age, the appellant would have been perceived as an elder in his community. This is reflected in the manner of address by the complainant, who referred to him as *Mkhulu*, meaning grandfather. Society's expectation of such an elder is that he would promote the wellbeing of the children and others in the community and take a strictly paternal interest in girls of the complainant's age, who was ten at the time. Instead of displaying protective decorum towards the girl, the appellant preyed on the child and saw her as nothing more than a sexual vessel. That the appellant's actions have irrevocably damaged the child's life and future is evident from her victim-impact statement. Therefore, in the context of this case, the appellant's age is nothing less than an aggravating factor. Moreover, the leg and head injuries he sustained a year before the rape did not make him so infirm as to be incapable of raping the complainant. Nor has any evidence been

tendered to show how or why these non-debilitating injuries are relevant in assessing whether substantial and compelling circumstances were present. Apart from a possible attempt to tug at the court's heartstrings, I fail to understand the relevance of this information to the issue of substantial and compelling circumstances.

[23] The appellant's status as a husband and father of adult children was also proffered in support of deviating from the prescribed minimum sentence. Likewise, the fact that he was unemployed and supported his family from the government grant he received monthly. None of these factors is mitigatory. The appellant's children are adults and, therefore, not entitled to his financial support. Moreover, the fact that the appellant is a married family man does not, in any way, ameliorate the situation as the expectation of a person in his position is exemplary behaviour and not the despicable conduct he exhibited in raping a child.

[24] The appellant is a first offender. While this is a mitigating fact, its influence on the sentence can only be determined later on, when the conspectus of all relevant factors are weighed in assessing if substantial and compelling circumstances are present.

[25] I now turn to the appellant's second submission that the rape was not the worst kind as he had not inflicted additional violence on the complainant. The argument is that the lack of additional violence is a substantial and compelling circumstance which justifies a deviation from the prescribed minimum sentence. There are several hurdles that the appellant must overcome to succeed with this argument. First, the submission that there are degrees of rape ignores that rape in itself is a most heinous act that equates with the most debasing and invasive attacks on a person's bodily integrity and mental wellbeing. Worst still with

child rape. The emotional devastation and trauma wreaked on the survivors of child rape risk the loss of a fulfilling life for these children owing to the long-term consequences of rape.[2] That child rape is a special species of crime deserving of the strongest possible censure finds support in Davis J's statement in *S v Jansen* 1999 (2) SACR 368 (C) paras 378G – 379A that:

'Rape of a child is an appalling and perverse abuse of male power. It strikes a blow at the very core of our claim to be a civilised society…The community is entitled to demand that those who perform such perverse acts of terror be adequately punished and that the punishment reflect the societal censure. It is utterly terrifying that we live in a society where children cannot play in the streets in any safety; where children are unable to grow up in the kind of climate which they should be able to demand in any decent society, namely, in freedom and without fear. In short, our children must be able to develop their lives in an atmosphere which behoves any society which aspires to be an open and democratic one based on freedom, dignity and equality, the very touchstones of our Constitution.'

[26] Legislative acknowledgement that rape per se deserves the imposition of the most severe punishment possible is reflected in the rape offences provisions of s 51 of the Act, more especially in s 51(3)(*a*A)(ii). This provision rules out an apparent lack of physical injury to the victim as a basis for concluding that substantial and compelling circumstances are present. According to Spilg J in *S v Radebe* 2019 (2) SACR 381 (GP) para 33, the provision indicates that:

'The legislature…understood that, aside from actual physical injury, or threat of physical injury, rape per se is a grievous assault, constitutes a gross violation of bodily integrity, and degrades, humiliates and renders the victim vulnerable. The legislature would also have been aware of the overwhelming body of professional literature on both the immediate and long-term emotional and psychological trauma and degradation generally experienced by rape victims.'

[27] The minimum punishment of life imprisonment prescribed for child rape, regardless of the infliction of additional violence, makes clear that Parliament

[2] See also *S v Masuku* 2019 (1) SACR 276 (GJ) para 30.

deems this offence a most egregious instance of rape. It also serves as an unequivocal confirmation of 'the gravity with which the legislature considers how the rape of a child will impact on his or her general wellbeing and development, as well as on the interests of society, and its revulsion towards such a crime.'[3]

[28] In my assessment of all relevant aspects in this case, several aggravating factors outweigh the sole mitigatory fact – that the appellant is a first offender. In brief, the aggravating factors are that the appellant acted with singular premeditation when he planned to rape the complainant; he raped a ten-year-old child; he did so in the presence of a four-year-old girl who, evidently, was so affected by what she saw that she recalled and related the incident to her mother several months later; and the appellant showed no remorse for his actions or compunction for subjecting the complainant to the trauma of having to testify to her rape in court.[4]

[29] The appellant's submission that the court should look at him favourably because he did not inflict additional violence on the complainant is without merit for the reasons already mentioned above. Based on these reasons, I can find no justifiable basis to deviate from the provisions of s 51(3)(*a*A)(ii) of the Act. Unless a constitutional challenge is raised to the exclusions listed in the provisions of s 51(3)(*a*A), and none has, the appellant does not have a basis to rely on the absence of the infliction of additional violence as constituting substantial and compelling circumstances.

[30] The obligation that courts bear to respect the legislature's will is reflected in Ponnan J's statement in *S v Matyityi* 2011 (1) SACR 40 (SCA) para 23, that:

[3] *S v Radebe* para 39.

[4] Compare for instance *S v JN* 2020 (2) SACR 412 (FB), where the appellant had been under the influence when he raped the complainant and he showed remorse by pleading guilty. The court in this case substituted the sentence of life imprisonment with 10 years' imprisonment.

'Our courts derive their power from the Constitution and, like other arms of State, owe their fealty to it. Our constitutional order can hardly survive if courts fail to properly patrol the boundaries of their own power by showing due deference to the legitimate domains of power of the other arms of State. Here Parliament has spoken. It has ordained minimum sentences for certain specified offences. Courts are obliged to impose those sentences unless there are truly convincing reasons for departing from them.'

[31] In the circumstances of this case, I cannot find any 'truly convincing reasons' for departing from the prescribed minimum sentence of life imprisonment. In my view, the sentencing court was correct in finding that no substantial and compelling circumstances were present to justify a deviation from the imposition on the appellant of a sentence of life imprisonment.

Order

[32] The appeal against the sentence is dismissed.

REDDI AJ

I agree and it is so ordered.

MOSSOP J