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

Case No: AR 356/21

In the matter between:

SANELE ROBERT MHLONGO **Appellant**

and

THE STATE **Respondent**

ORDER

On appeal from: the Durban Regional Magistrates' Court (sitting as court a quo):

(1) The appeal is dismissed.

(2) The sentence of life imprisonment by the court a quo is confirmed.

JUDGMENT

Ngqanda AJ (Balton J concurring):

Introduction

[1] On 19 May 2021, the appellant was convicted of one count of rape of a minor by the Durban Regional Magistrates' Court. The appellant was found guilty of contravening the provisions of s 3, read with ss 1, 56, 57, 58, 59 and 60 of the Criminal Law (Sexual Offences and Related Matters Act) Amendment Act 32 of 2007 and read with s 51 of Part 1 and Schedule 2 of the Criminal Law Amendment Act 105 of 1997 ("the Act").

[2] The appellant was subsequently sentenced to life imprisonment on 26 May 2021 and in addition was declared unfit to possess a firearm in terms of s 103 of the Firearms Control Act 60 of 2000.

[3] The appellant's appeal is precipitated by his automatic right to appeal that applies to sentences of life imprisonment. As a consequence, the appellant is appealing only the sentence imposed by the trial court. Thus, this court is called upon to consider whether the sentence imposed by the trial court is appropriate or not.

[4] The appellant was at all material times legally represented during his trial and had pleaded not guilty to the one count of rape he was charged with.

Factual background

[5] The complainant SM, was seven years old at the time of the sexual assault in 2017 and was in grade one. She was resident at an informal settlement called Mathinini, in Chesterville, Durban, KwaZulu-Natal with her mother, two sisters and other relatives.

[6] According to SM, on 03 April 2017, she was playing with her friends in one of the passages of the informal settlement[1] when they decided to go looking for another friend. As she and her friends proceeded to look for the other friend, she noticed that the appellant, whom she referred to as 'Uncle Sanele' was following them. She recalled that there was an aunt (whom subsequently became known to her) who had

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[1] The informal settlement comprises of corrugated iron shacks (rooms) lined up in rows, close to each other, opposite facing and divided by passages.

enquired as to why 'Uncle Sanele' was following them. The question posed by the aunt was unanswered and the appellant himself did not respond.

[7] SM testified that the appellant then called her and instructed her to go to his room and fetch his cigarettes to which she obliged. There was nothing unusual about the appellant calling and sending SM to his room as he also testified that she would be called and sent to the shops by the woman he was staying with, whom SM identified as "aunt Maphi". SM, also testified that she had known the appellant for some time. What is clear and also admitted by the appellant is that SM was familiar with being called to or going to his house from time to time.

[8] According to SM, when she entered the appellant's room to take the cigarettes as instructed, he quickly closed and locked the door with her inside. At this point, SM was separated from her friends and was alone with the appellant in the room. As SM reached out for the cigarettes, the appellant pushed her onto the bed, removed her pants and underwear. The appellant made SM to lie facing upwards and pressed hard on her chest whilst taking off his pants.

[9] SM testified that she cried but the appellant covered her mouth with his hand and proceeded to undress himself, climbed on top of her and inserted his penis into her vagina and sexually assaulted her. When the ordeal was over the appellant gave a crying SM, money in the form a coin, which she described as R4 and R5. SM admitted during her evidence that at that time she did not know the value of money. Nonetheless, the appellant gave SM money in the form of a coin after the assault which she threw away upon the appellant opening the door.

[10] As SM was leaving the appellant's room, the appellant exited first and she followed. At this stage, she was seen by Ms Ntombizandile Mkhuzwa ("Ms Mkhuzwa")[2] who lives in a room directly opposite the appellant's, separated by a passage. Ms Mkhuzwa called SM and asked her what had happened at the appellant's house to which she proceeded to inform her of what had occurred. Ms Mkhuzwa is the one who

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[2] Ms Ntombizandile Mkhuzwa also known as Lisa's mom was called to testify as a witness on behalf of the State.

informed SM's mother of what had happened at the appellant's house. SM testified that she was terrified to inform her mother of what had happened because she was going to get a hiding as a consequence.

[11] It is common cause that the appellant was later that day assaulted by community members before being arrested by members of the South African Police Service ("SAPS"). SM was able to point out the appellant to the police and was later taken to the doctor for an examination.

Issue for determination

[12] The appellant has elected to appeal only the sentence imposed, that of life imprisonment by the trial court. What this court is called to consider is whether the sentence imposed is just. The appellant whilst accepting that rape is a crime of utmost gravity and that it is a repulsive offence, he submits that there are substantial and compelling circumstances justifying the imposition of a lesser sentence than life imprisonment.

[13] The factors that the appellant cites as compelling and justifying a lesser sentence are as follows:

(a) He was 45 years old at the time of sentence with no children;
(b) He was not married;
(c) He was a productive member of society, selling plastics and earning R60 per day;
(d) He was a good candidate for rehabilitation due to being a first offender;
(e) He had no pending cases against him;
(f) He tendered admissions in court in terms of s 220 of the Criminal Procedure Act 51 of 1977 ("the CPA"), thus curtailing the proceedings;
(g) That SM did not sustain any extra genital injuries and the gynaecological examination revealed no injuries;
(h) He co-operated with the police and attended to all his court appearances even when he was on bail; and that
(i) He was assaulted severely by the community prior to being arrested.

[14] The appellant submits that the trial court misdirected itself in over emphasising the seriousness of the offence and failed to strike a judicious balance when considering all the sentencing factors. It is for this reason that the appellant seeks this court's intervention as the sentence imposed is in disproportionate to his personal circumstances, interests of society and the gravity of the offence.

Summary of evidence led

[15] What follows is a summary of evidence of four witnesses out of the six witnesses that were called to testify on behalf of the State.

Evidence of Dr Naidoo

[16] The State called Dr Santhree Sagren Naidoo, who testified on the contents of the J88 report[3] dated 04 April 2017 which was completed by Dr S Antoniadis, who had examined SM a day after the sexual assault. Unfortunately, Dr Antoniadis retired in 2018 and all attempts to contact and serve him with a subpoena proved futile.

[17] The gynaecological examination of SM revealed that there were no extra genital injuries and no vaginal digital examination was attempted. The hymeneal diameter was found to be seven millimetres transverse and vertical. The examination was concluded to be normal. On anal examination, it was recorded that the rectal and anal examination could not support or refute allegations of rectal and or anal penetration. When Dr Naidoo was questioned on his understanding and interpretation of the findings, in particular the examination being recorded as normal, he conceded that a finding that does not refute or support any allegations of genital and or anal penetration is normal in a fair percentage of children who have been sexually abused.

[18] When probed further on possible reasons why a child that had allegedly been sexually abused would on examination be found to be normal, Dr Naidoo conceded that one of the reasons could be that the child had been groomed. He explained the grooming could consist of initial non-contact abuse followed by contact abuse and in some instances with the use of lubricants to groom a child into having sexual

[3] The J88 form was admitted as evidence and marked Exhibit 'C'.

intercourse. The result of grooming is that when a child is ultimately penetrated, on medical examination, no injuries would be visible for one to see.

[19] When Dr Naidoo was requested to comment on the findings of the examination despite SM being examined the following day, he remarked that a normal examination following sexual assault will depend on the nature of the abuse and the nature of the penetration. Dr Naidoo clarified that there is something called 'seductive rape', where the perpetrator usually does not want to injure the child and ensures that the child is not injured. Dr Naidoo further expounded and held that at times there may be 'intercrural sex', which means that there is rubbing of the penis between the thighs and there may be no contact with the vulva. This kind of assault will leave no genital injuries *per se* as the genital tissues are very vascular and elastic, more particularly the hymeneal tissue. Dr Naidoo concluded his evidence in chief by stating that the hymeneal tissue in a child of seven years or younger can stretch to accommodate an adult erect penis and not show any injuries.

[20] On cross-examination, Dr Naidoo was asked to comment on the fact that SM in her evidence stated that the appellant fully penetrated her and moved up and down and whether that would still result in no evidence of penetration on gynaecological examination, his response was that already proffered in his evidence in chief.

[21] It is important that I set out a summary of Dr Naidoo's evidence because one of the factors that the appellant wants this court to consider as a compelling and substantial factor justifying a lesser sentence is that SM did not sustain any genital injuries. Counsel for the appellant attempted to argue the point but hastily retreated on realisation of the danger in making such a submission. In any event there is no merit to the argument counsel for the appellant was attempting to make as it was held in *Monageng v S*,[4] that physical force is not necessarily used in rape and that the most common consequences from such an act are mental health and social well-being issues.

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[4] *Monageng v S* [2009] 1 All SA 237 (SCA) para 25.

[22] In *S v Nkawu*,[5] Plasket J considered the provisions contained in s 51(3) (*a*A)(ii) of the Act insofar as the absence of serious physical injuries to the complainant were concerned. The subsection provides that when a court sentences for rape 'an apparent lack of physical injury to the complainant' shall not be regarded as a substantial and compelling circumstance. When taking into account the explanation provided by Dr Naidoo there is no reason why this court should even consider the non-severity or lack of injury to SM as a substantial and compelling factor. Whilst Majiedt JA in *S v Mudau*,[6] agreed with Plasket J, that the proper interpretation of the provision 'does not preclude a court sentencing for rape to take into consideration the fact that a rape victim has not suffered serious or permanent physical injuries, along with other relevant factors, to arrive at a just and proportionate sentence', it has become 'settled law that such factors need to be considered cumulatively, and not individually'.[7]

[23] The distinguishing factor in the case of *Mudau*[8] and the present one is that, in *Mudau* the court was faced with a J88 form that suggested that some penetration might have occurred, with the conclusion being there was 'no obvious evidence suggestive of sexual assault, but cannot exclude it - specimen results still pending'. The court in *Mudau*, noted that the primary difficulty it was faced with was that there was no victim impact report before it and consequently, there was no evidence of the child's ongoing trauma. In this case, there is a victim impact statement which clearly states how SM has been affected by the rape. I am satisfied with the evidence of Dr Naidoo, explaining the possible reasons for lack of obvious evidence suggestive of sexual assault[9] on SM and I see no reason why a lack of physical injuries should be considered as a compelling circumstance in favour of the appellant. In addition, a DNA sample collected from a duvet bed cover belonging to the appellant had his DNA and the appellant confirmed the admission of the exhibits as evidence in terms of s 220 of the CPA.

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[5] *S v Nkawu* 2009 (2) SACR 407 (ECG) para 14.
[6] *S v Mudau* 2013 JDR 0938 (SCA).
[7] Ibid para 26.
[8] Ibid paras 6, 21 and 25.
[9] In *S v MM* 2012 (2) SACR 18 (SCA) para 24, the court held, wherever there is an issue about the fact of the rape, the doctor should be called as a witness, certainly whenever the implications of the doctor's observations are unclear, the doctor should be called to explain those observations and to guide the court on the correct inference to be drawn from them.

Evidence of Ms Ntombizandile Mkhuzwa

[24] The State called Ms Mkhuzwa who confirmed that the appellant was known to her and that they were neighbours living in dwellings opposite each other. Ms Mkhuzwa recounted the events of 03 April 2017 and testified that on arriving home around 15h30, she observed that the appellant's door was closed, which was easy for her to notice because their houses were facing each other. She then heard the sound of the appellant's door being opened and witnessed the appellant coming out and standing at the doorpost followed by SM. Ms Mkhuzwa then asked the appellant what SM was doing in his house with the door closed to which he responded *"I have just sent the child to the shops"*, to which she asked "*do you close the door when you send a child to the shop"*. The appellant failed to respond to the question posed.

[25] According to Ms Mkhuzwa, she noticed as she was speaking with the appellant, that his pants were unzipped and belt unbuckled. She called SM to her house and enquired what happened in the appellant's house. On probing, SM recounted, whilst in a state (she was shaking) how the appellant sexually assaulted her. As Ms Mkhuzwa was getting the account from SM, the appellant came to her house and said "*neighbour, could you please forgive me"* to which she replied *"okay"*. The appellant left and returned again and said *"neighbour, could you please forgive me. I will give you money to buy a drink"* at which point, he had a R50 note in his hand to which Ms Mkhuzwa responded that she also has girl children and cannot keep quiet about the incident.

[26] The State called Ms Somakahle, who was called by Ms Mkhuzwa after getting an account from SM. Ms Somakahle testified that when the appellant arrived at Ms Mkhuzwa's house the second time, she hid and was able to hear the exchange of words between the appellant and Ms Mkhuzwa. Ms Somakahle collaborated Ms Mkhuzwa's evidence in respect of the appellant offering to buy Ms Mkhuzwa a drink to which she responded she doesn't want a drink. Ms Somakahle further confirmed that Ms Mkhuzwa told the appellant that she also has girl children and could not be silent about what she was told by SM. Eventually, a group of community members apprehended the appellant and assaulted him before he was arrested.

[27] The appellant not only attempted to buy the silence of SM by giving her money in the form of a coin but he endeavoured to buy Ms Mkhuzwa's silence as well by offering the buy her a drink in exchange for her forgiveness and silence. Had it not been for the vigilance of Ms Mkhuzwa, SM's sexual assault would most probably have gone un-noticed by her mother and she may not have reported the assault to her mother. Indeed, the saying that "*it takes a village to raise a child*"[10] rings true and Ms Mkhuzwa's watchfulness ensured that the crime committed on SM did not go unpunished.

Evidence of appellant

[28] The appellant during his testimony denied sexually assaulting SM but admitted to knowing her. According to the appellant, on the day in question he was called by Ms Mkhuzwa to her house where he found SM. Ms Mkhuzwa then proceeded to enquire what he had done to the child and hit SM with an open hand and told SM to repeat what she had told her, a contention refuted by both SM and Ms Mkhuzwa. The appellant sought to explain that he was accused of sexually assaulting SM due to a feud he and Ms Mkhuzwa had regarding a house as a reason why she called the community on him, the submission was far-fetched and rejected by the trial court. Under cross-examination, the appellant conceded that Ms Mkhuzwa was his immediate neighbour and therefore, the evidence of Ms Mkhuzwa of having direct sight of the appellant's house was supported. The appellant further confirmed that SM had been to his room on numerous occasions and was at times sent to the shops. This of course cemented the fact that the appellant was in a position of trust with SM and she would not have thought that there was anything out of the ordinary by being sent to fetch the appellant's cigarettes from his room on the day of the incident.

Discussion on sentence

[29] In *S v Hewitt*,[11] the court laid down the approach to be adopted by the appellate court when considering interference with a sentence imposed by the trial court. The court held as follows:

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[10] The quote, "it takes a village to raise a child" is an African Proverb meaning: an entire community of people must provide for and interact positively with children for the children to experience and grow in a safe healthy environment. See: RC v HC 2022 (4) SA 308 (GJ) para 62

[11] *S v Hewitt* 2017 (1) SACR 309 (SCA).

'It is a trite principle of our law that the imposition of sentence is the prerogative of the trial court. An appellate court may not interfere with this discretion merely because it would have imposed a different sentence. In other words, it is not enough to conclude that its own choice of penalty would have been *an* appropriate penalty. Something more is required; it must conclude that its own choice of penalty is the appropriate penalty and that the penalty chosen by the trial court is not. Thus, the appellate court must be 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 when imposing it. So, interference is justified only where there exists a "striking" or "startling" or "disturbing" disparity between the trial court's sentence and that which the appellate court would have imposed. And in such instances the trial court's discretion is regarded as having been unreasonably exercised.'[12]

[30] I am satisfied that the trial court correctly found that there were no compelling circumstances presented by the appellant that would have justified a deviation from the minimum sentence as prescribed by Act. The crime committed by the appellant on SM is one deserving of the requisite punishment as set down by law. The rape of a child, especially a child under the age of 16 years is a heinous act that destroys not only the child's innocence but leaves emotional scars and the stigma of having been humiliated and violated for the rest of his or her life.[13]

[31] The victim impact statement completed by SM when she was eight years old and dated 28 March 2018 was handed in as evidence by consent and in that statement, SM drew two female figures and in the first picture, the girl was depicted as happy and in the second picture the girl had tears rolling down her face. SM interpreted the drawings as herself, the first image of being, happy and not afraid and playing with her friends prior to the sexual assault. The second drawing she explained it as a young girl crying, sad, hurt and did not want to play anymore. From the victim impact statement, it is clear that SM suffered immensely from the sexual assault and has been left scarred forever. No child should ever be stripped of their innocence and freedom of childhood which involves care-free playing with friends.

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[12] Ibid para 8.
[13] *Director of Public Prosecutions, Grahamstown v Peli* 2018 (2) SACR 1 (SCA) para 11.

[32] When the trial court was considering all factors relating to sentencing, it remarked that the appellant despite there being overwhelming evidence against him, showed no remorse for the wrongful act he committed. The court further commented that instead, the appellant plunged the court into a full trial for *"him to say almost anything he wanted"*.

[33] I am of the view that there were no circumstances, substantial and compelling to justify the departure from the sentence imposed by the trial court.[14] It was held in *Moyo v S*,[15] that courts have a duty to protect children younger than ten years and that it cannot be 'business as usual' when it comes to their protection.[16] The younger the child and further away from the age of 16 years, the chances of substantial and compelling circumstances being found become remote and far-fetched. Opperman AJ dismissed the appeal against the sentence of life imprisonment in *Moyo* and concluded that she was unable to find any misdirection by the trial court in respect of the sentence and further held that 'specified sentences are not to be departed from lightly or for flimsy reasons and that speculative hypothesis favourable to the offender, undue sympathy, aversion to imprisoning first offenders are to be excluded'.[17]

[34] Rape on its own is a brutal crime but the rape of a child, particularly a child under the age of 16 years[18] is not only humiliating, degrading, traumatic and confusing to the child but also strips the child of her dignity and the right to be protected by society and the community in which she lives. The appellant was trusted by SM and the appellant was a member of a community she grew up in. The respect afforded by SM to the appellant is evidenced by her referring to him as "Uncle Sanele" during the trial. The appellant, in turn betrayed the trust and respect afforded to him by SM by sexually assaulting her.

[35] In *S v Jansen,*[19] the court held that rape of a child is appalling and a perverse abuse of male power. It was further held that:

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[14] *R v Dhlumayo and Another* 1948 (2) SA 677 (A).
[15] *Moyo v S* (A435/2013) [2014] ZAGPJHC 204 (4 April 2014).
[16] Ibid para 58.
[17] Ibid para 62.
[18] *Director of Public Prosecutions, Grahamstown v Peli* above fn 13 para 11.
[19] *S v Jansen* 1999 (2) SACR 368 (C).

'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.'[20]

[36] For all the aforgoing reasons, I am not persuaded that the trial court erred in finding that there were no substantial and compelling circumstances that would have required it to deviate from the sentence of life imprisonment for the rape of a child under the age of 16. As a consequence, the appeal must fail.

Order

[37] I accordingly, make the following order:

(1) The appeal is dismissed.

(2) The sentence of life imprisonment by the court a quo is confirmed.

Ngqanda AJ

Balton J

[20] Ibid at 378i-379a.

Appearances

Counsel for Appellant	: Mr P Mkhumbuzi
Instructed by	: Durban Justice Centre
Counsel for Respondent	: Mr K.M Shah
Instructed by	: The Director of Public Prosecutions
Date of Hearing	: 28 October 2022
Date of Judgement	: 20 January 2023

Delivered electronically: The judgment was handed down electronically by circulation to the parties' legal representatives by email and released to SAFLII. The date for hand down is deemed to be 20 January 2023.