Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)

CASE NO: **CA&R 55/22**
DATE HEARD: **27 FEBRUARY 2023**
DATE DELIVERED: **27 OCTOBER 2023**

In the matter between:

SABAILE, DAVID AGISENG Appellant

and

THE STATE Respondent

Coram: Williams J *et* Nxumalo J

JUDGMENT

NXUMALO J:

1. The appellant, who was 40 years old at all material times hereto, appeals against his sentence to life imprisonment by the trial court after being found guilty of one count of raping one Miss RG between 25 to 27 November 2019 in Ikhutseng, Warrenton. Miss RG at the time of the offence was a 12 year old minor. The appellant pleaded not guilty and was legally represented in the court *a quo*. The basis for his plea was that the sexual intercourse with the complainant was

consensual and that at all material times, he was under the impression that she was an adult. He even professed to be in love with the complainant.[1]

2. The trial court found that, on his own version, he raped the victim more than once. He was thereafter convicted on 30 August 2022 and sentenced on 09 September 2022 by the Warrenton Regional Court. The impugned sentence is prescribed as a discretionary minimum sentence in terms of Section 51(1) of Act 105 of 1997, Part 1, Schedule 2.[2]

3. Having admitted to raping the complainant, who was below the age of 16, at all material times hereto; it is trite that the appellant ought to have shown that substantial and compelling circumstances existed which justified the imposition of a lesser sentence in terms of Section 51(3)(a) of the Act. The approach on appeal, where a prescribed sentence is imposed, is of course whether the facts that were considered by the sentencing court are indeed substantial and compelling or not.[3] In ***S v Malgas***[4], the following was said:

> *"...those circumstances had to be substantial and compelling. Whatever nuances of meaning may lurk in those words, their central thrust seems obvious.* ***The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances...*** "[5]

4. The appellant, in sum, submitted that the court *a quo* erred in finding that no substantial and compelling circumstances existed to deviate from the prescribed sentence, essentially because it, *inter alia*, overemphasised the seriousness of the offence and the interest of society; underemphasised his personal circumstances; and that the sentence imposed is shockingly inappropriate.

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[1] P286, ll8-10, Record
[2] "***The Act***"
[3] ***S v PB*** 2013 (2) SACR 533(SCA) at 539F-G
[4] 2001 (1) SACR 469 (SCA) at para 9
[5] Emphasis supplied

5. The respondent opposed the appeal and enjoined this Court to dismiss same. The respondent in sum maintained that the trial court considered all the factors and circumstances relevant to the case. That it took proper account of the gravity of the offence; the interest of the society and the personal circumstances of the appellant. And that the facts considered do not constitute substantial and compelling circumstances.

6. A sentencing court is however inherently entitled to impose a lesser sentence, if and only if on consideration of the circumstances of a 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 the prescribed sentence.[6]

7. Whilst the appellant conceded that the offence he is convicted of is of a serious nature; that a trial court has a right to question any witness at any stage of the proceedings; and that the rule against leading questions does not apply once a witness has been questioned by both parties. It was submitted on his behalf that the trial court questioned the appellant so extensively during the sentencing proceedings, and further that the trial court over-emphasised the seriousness of the offence which amounted to a misdirection.

8. The following was, *inter alia*, relied upon as examples that the trial court misdirected itself in this regard. Suggesting that the appellant had "*an eye for young small girls*"[7], despite his answer that he not only trained young girls, but young people.[8] That he took the complainant's childhood from her[9] and sexually groomed the complainant because he once gave her an amount of R10.00 to go with him.[10]

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[6] ***S v Malgas***, above n 4, para 25
[7] p265, ll22-24, Record
[8] p193, ll11-12 and 16-25, ***ibid***
[9] p266, ll1-2, ***ibid***
[10] p268, ll1-5, ***ibid***

9. The respondent, for its own part, whilst conceding that the comment of the court *a quo* relating to the appellant's interest in small young girls was uncalled for, maintained that same did not amount to an irregularity. That it is so since the appellant on numerous occasions during his evidence referred specifically to young girls and how he likes to interact with them.[11]

10. In ***S v Vilakazi***[12], rape was rightly described by counsel as "*an invasion of the most private and intimate zone of a woman and strikes at the core of her personhood and dignity.*"[13] It is a "*humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim*".[14] To state that rape is one of the most repulsive and pervasive crimes in our society, is thus to state the obvious.

11. In *casu*, the appellant threatened the complainant with violence and death before and during the commission of the offence. She was raped more than once. The appellant occupied a position of trust in relation to the complainant, which he abused.[15] It was also so evinced during the gynaecological examination that the injuries sustained by the complainant were tears at the posterior fourchette and increased friability; as well as swelling of the hymen. She also stated that she experienced pain during the rape.[16]

12. It is so that an irregularity occurs whenever there is a departure from those formalities, rules and principles of procedure with which the law requires such a trial to be initiated or conducted.[17] It has, however, been correctly observed that:

> "*The difficult task is to ascertain the legal effect of an irregularity. The fundamental approach to this task has been defined in striking terms by Holmes JA in* ***S v Moodie*** *1961 (4) SA 752 (A) at 755 - 756A:*

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[11] p166, ll5-6; p169, ll2-5; p179, ll24-25; pp192, l18 to p193, ll22, ***ibid***
[12] 2009 (1) SACR 552 (SCA)
[13] ***Ibid***, Para 1
[14] ***S v Chapman*** 1997 (3) SA 341 (SCA) 345A-B
[15] pp93-94;109ll8-10; and 165-166, Record.
[16] pp289-272, Record
[17] ***S v Xaba*** 1983 (3) SA 717 (A) at 728d; ***S v Rudman and Another; S v Mthwana*** 1992 (1) SA 343 (A) at 375H-377C

'Now the administration of justice proceeds upon well-established rules, but it is not a science and irregularities sometimes occur. To meet this situation, the Legislature has enabled the Court to steer a just course between the Scylla of allowing the appeal of those obviously guilty and the Charybdis of dismissing the appeal of those aggrieved by irregularity.'

The legislative provisions to which Holmes JA referred, are those dealing with the powers of a court of appeal in criminal matters. At present the powers of this Court in such matters are circumscribed by section 322 *(1) of the* Criminal Procedure Act. The *proviso to that section reads as follows:*

'Provided that, notwithstanding that the court of appeal is of opinion that any point raised might be decided in favour of the accused, no conviction or sentence shall be set aside or altered by reason of any irregularity or defect in the record or proceedings, unless it appears to the court of appeal that a failure of justice has in fact resulted from such irregularity or defect'."[18]

13. The effect of a provision, incorporating the criterion of "*a failure of justice*" was first analysed in ***R v Rose*** 1937 AD 467 at 474 - 477. In ***S v Rudman and Another; S v Mthwana*** 1992(1) SA 343 (A) it was held that an irregularity could be said to result in a failure of justice whenever there had been "*actual and substantial prejudice to the accused*".[19] It is also trite law that there are two kinds of prejudicial irregularity resulting in a failure of justice: those which are, so to speak, mortal, and those which are merely venial.[20]

14. The first category consists of prejudicial irregularities which are regarded as resulting in a failure of justice *per se*. Whether a prejudicial irregularity falls within the first or the second category mentioned above, depends upon the nature and degree of the irregularity.[21] I am of the opinion that regard being had to the nature

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[18] ***S v Ramalope*** 1995 (1) SACR 616 (A), at 621
[19] See also Hoffmann and Zeffertt, *The South African Law of Evidence*. 4th Ed, at p487
[20] Hoffmann and Zeffertt, *op cit* at p488
[21] ***S v Moodie*** *(supra)*, at 758; ***S v Mushimba*** *1977 (2) SA 829 (A),* at 844

and degree of the irregularity, a failure of justice has in fact not resulted from same. In the premise, this ground must fail.

15. Our children's fundamental rights to be protected from maltreatment, neglect, abuse or degradation are now entrenched in Section 28 (1)(d) of the Constitution. The rape of children is one of the most brutal forms of degrading women and children. It is indeed so that rape generically has become a scourge in our society and that our Courts are obliged to send a clear message, not only to the accused, but to other potential rapists and to the community that it will not be tolerated.[22]

16. In particular, the raping of children is an appalling and perverse abuse of male power which strikes a blow at the very core of our claim to be a civilised society. It is also important that the public retains confidence in the criminal justice system and the sentences imposed by our courts. The community is therefore correctly entitled to demand that those who commit such perverse *"acts of terror"* be adequately punished and that the punishment reflect the social censure *"which society should and does demand, as well as the retribution which it is entitled to extract"*.[23]

17. The sentences that our courts impose when offences of this nature are committed, should therefore strive to ensure that people are not driven to take the law into their own hands, but rather to scare away would-be offenders. It is therefore the kind of sentences which our courts impose that will drive the ordinary members of our society either to have confidence or lose confidence in the judicial system.[24]

18. It is so that the approach to appeals against sentences imposed under the Act has been held in ***S v PB***[25] to be different to other sentences imposed under the ordinary sentencing regime because the minimum sentences are ordained by

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[22] ***S v Chapman*** 1997(2) SACR 3 (SCA)
[23] ***S v Jansen*** 1999 (2) SACR 368 (C)
[24] ***S v WV*** 2013 (1) SACR 204 (GNP)
[25] 2013 (2) SACR 533 (SCA)

the Act. Specified sentences are not to be departed from lightly and for flimsy reasons or speculative hypotheses favourable to the offender. Maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation and like considerations are equally obviously not intended to qualify as substantial and compelling circumstances.[26]

19. Whilst in ***S v N***[27], the Supreme Court of Appeal cautioned that it is well to bear in mind that too harsh a punishment serves neither the interest of justice nor those of society. It is so that neither does one that is too lenient. Our courts are therefore enjoined to strive for a proper balance that has due regard to all the objects of sentencing. Regard being had to the facts and circumstances of this case, I am of the considered opinion that the court *a quo* struck a proper balance and had due regard to all the objects of sentencing.

20. It is common cause that the trial court considered the following personal circumstances of the appellant. That he was 40 years old and self-employed as a small businessman for a period of 20 years at the time he committed the offence in question. He is now 43 years old; unmarried and does not have any children. His income varied between R2 000.00 and R5 000.00, per week. He contributed towards the maintenance of his unemployed sister's children. He also employed 5 to 15 employees, whom he paid R120.00 per day. Whilst the appellant had no previous conviction pertaining to rape, it is so that he was previously convicted of theft.[28]

21. It is against this backdrop that it was submitted for the appellant that the trial court misdirected itself in de-emphasising the foregoing. It is against this backdrop too that it was submitted for the respondent that the trial court had due regard to the appellant's personal and all mitigating circumstances and juxtaposed same against the aggravating factors as well as the interests of

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[26] ***S v Malgas***, above fn 4
[27] 2008 (2) SACR 135 (SCA), para 31
[28] pp260-262, Record

society.[29] Gender-based crimes have, with justification recently been highlighted as particularly prevalent and serious offences.

22. The following was appositely held in ***S v Vilakazi***[30], with regard to the consideration of the personal circumstances of the offender as a factor in the determination of an appropriate sentence:

"[58] ... In cases of serious crime, the personal circumstances of the offender, by themselves, will necessarily recede into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be, and those seem to me to be the kind of 'flimsy' grounds that ***Malgas*** *said should be avoided ..."*

21. Crimes must be combated with appropriate or suitable means. I am of the view that the trial court did not underemphasise the appellant's personal circumstances. Considering all the facts in this case cumulatively, I am of the opinion that same do not constitute substantial and compelling circumstances. The sentence imposed is not shockingly inappropriate. To this extent, it would not be justifiable to depart from imposing the statutorily prescribed sentence.

22. In the premise, the following order is granted:

(a) THE APPEAL AGAINST THE SENTENCE IMPOSED IS DISMISSED.

JUDGE APS NXUMALO
HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION
KIMBERLEY

[29] p288, ll2-5, ***ibid***
[30] Above Fn 13

JUDGE CC WILLIAMS
HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION
KIMBERLEY

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Edited:	*YES*/NO
Revised:	*YES*/NO
Checked:	*YES*/NO
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