

Reportable:	YES / <b>NO</b>
Circulate to Judges:	YES / <b>NO</b>
Circulate to Magistrates:	YES / <b>NO</b>
Circulate to Regional Magistrates:	YES / <b>NO</b>



Editorial note: Certain information has been redacted from this judgment in compliance with the law.

**IN THE HIGH COURT OF SOUTH AFRICA  
NORTH WEST DIVISION – MAHIKENG**

**APPEAL CASE NO: CA63/2018**

In the matter between:

**JAN BONDE**

**APPELLANT**

And

**THE STATE**

**RESPONDENT**

***Quorum:* DJAJE DJP & SCHOLTZ AJ**

Heard: **28 NOVEMBER 2023**

Delivered: The date for the hand-down is deemed to be on **8  
FEBRUARY 2024**

**ORDER**

The following order is made:

1. The appeal against sentence is dismissed.

## APPEAL JUDGMENT

### SCHOLTZ AJ

- [1] On **7 December 2017** the Appellant was found guilty in the regional Court of North West, held at Klerksdorp on a charge of housebreaking with the intention to contravene Section 3 of Act 32/2007 as well as contravention of Section 3 read with Section 1 of Act 32/2007 and Section 51 Subsection 1 of Act 105/1997. This crime was previously known as housebreaking, with the intent to rape. On **24 April 2018** the Appellant was sentenced to life imprisonment. Disgruntled with this sentence imposed by the *Court a quo*, the Appellant appealed to this Court.
- [2] This appeal was decided on the papers upon request of the legal representatives of both the Appellant and the Respondent, as comprehensive Heads of Argument had been filed. Both legal representatives through their Heads of Argument, were *ad idem* that the Appellant only appeals his sentence.
- [3] The relevant facts pertaining to the Appellant's sentence, can concisely be summarized as follows:
  - (a) The complainant was sleeping in her house, located at **EXTENSION [...], J[...], KLERKSDORP** on the night of **5 JULY 2014**.

- (b) The Appellant (in the *Court a quo* Accused No.1) and his co-accused (there Accused No. 2) kicked the complainant's doors from its hinges, and it fell to the ground. The Appellant and his co-accused entered the residence of the complainant without her consent.
- (c) The Appellant and his co-accused took turns to rape the complainant. After his co-accused left the residence of the complainant, the Appellant remained for the night with the complainant against her will, and continued to rape her. The Appellant accordingly repeatedly raped the complainant during that night.
- (d) The complainant was so traumatised by these events that she moved back to the **EASTERN CAPE**, and only returned on an occasion to testify in the Appellant's criminal trial.

[4] The *Court a quo* sentenced the Appellant to life imprisonment, after finding that no substantial and compelling factors existed which justified a lesser sentence.

[5] It is against this sentence that the Appellant noted an appeal, stating that the mitigating factors raised by him constitute substantial and compelling circumstances which justified a lesser sentence. In other words, the Appellant contend that he should have been given a lesser sentence, as he indeed furnished substantial and compelling reasons as to why life sentence should not have been imposed upon him by the *Court a quo*.

[6] The mitigating factors referred to by the Appellant, can be summarised as follows:

- (a) Appellant was **21 (Twenty One)** years of age when the offence was committed, although he was about to turn **22 years** of age.
- (b) He went to school until **Grade 4**.
- (c) He had no previous convictions.
- (d) He had been in custody for **4 (Four) years**, at the date of his sentence.

[7] It is of importance to take note that the Appellant never testified about his personal circumstances during mitigation. His legal representative merely mentioned these factors from the Bar.

[8] It is trite law that for the purpose of sentencing, it is necessary to consider all factors traditionally considered by Courts imposing a sentence. This involves the consideration of the seriousness of the crime, the Appellant's personal circumstances as well as the interests of society. Courts should only impose lesser sentences if it is satisfied that there are substantial and compelling circumstances which would justify a departure from such minimum sentence.

[9] A Court of Appeal will also not lightly interfere with the sentencing discretion of a trial Court, in the absence of a material misdirection by such trial Court.

**(S v ROME 2011 (2) SACR 153 (SCA))**

[10] This Court now deals with the mitigating circumstances *ad seriatum*, in order to conclude as to whether substantial and compelling circumstances existed justifying a departure from the prescribed minimum sentence of life imprisonment. Although it is dealt with individually, I am mindful that these factors should be considered holistically, and was indeed so considered by this Court.

#### THE APPELLANTS YOUTH AND THE FACT THAT HE ATTENDED SCHOOL UNTIL GRADE 4

[11] From perusal of the trial record, it is clear that the *Court a quo* took the Appellant's youth into consideration during sentencing. It can therefore not be said that the *Court a quo* misdirected itself with the relative young age of the Appellant.

[12] In **SV MATYITYI 2011 (1) SACR 40 (SCA)**, the following passage bears relevance regarding youthfulness in sentencing procedure.

*"The question, in the final analysis, is whether the offender's immaturity, lack of experience, indiscretion and susceptibility to being influenced by others reduces his blameworthiness. Thus while someone under the age of 18 years is to be regarded as naturally immature, the same does not hold true for an adult. In my view, a person of 20 years or more must show by acceptable evidence that he was immature to such an extent that his immaturity can operate as a mitigating factor."*

[13] The Appellant's limited school career, and the fact that he merely obtained Grade 4, can also not be used as a justification for the serious crime which he committed. Clearly, the Appellant, despite

his level of education, did neither allege nor prove that he could not distinguish between right and wrong.

[14] The Appellant did not tender any acceptable evidence that he was so immature that it should be considered as a substantial and compelling reason to deviate from the prescribed minimum sentence which the Appellant faced.

[15] Consequently, this Court finds that the Appellant's age and level of education do not constitute substantial and compelling circumstances to diverge from the life sentence imposed on him.

#### THE FACT THAT THE APPELLANT WAS A FIRST OFFENDER

[16] Due to seriousness of the offences to which the Appellant had been found guilty, his status as a first offender do not constitute substantial and compelling circumstances in my view.

[17] I fully agree with Counsel on behalf of the Respondent, that the circumstances surrounding the commissioning of these serious offences, water down the fact that the Appellant was a first offender. The seriousness of the offence by far outweighs the fact that the Appellant was a first offender.

#### THE PERIOD OF PRE-SENTENCE INCARCERATION

[18] It seems like the Appellant alleged that he was in custody for almost 4 (Four) years prior to his sentence. This averment was however disputed by the State, who alleges that he had only been incarcerated for a period of 2 years and 9 months.

[19] In **MBELE and ANOTHER v S (A129/2021)[2022] ZAGPPHC 213**, the position regarding pre-sentence detention was set out:

- “26. *In the present case the Magistrate concluded that the lengthy period in custody prior to sentencing was not a substantial and compelling matter either when the mitigating and aggravating factors were viewed in their totality or in isolation.*
- “27. *In **SV RADEBE AND ANOTHER 2013 (2) SACR 165 (SCA)** it was held pre-sentence period in detention is only one factor that should be taken into account “in determining whether the effective period of imprisonment to be imposed is justified: whether it was proportionate to the crime committed.*
- “28. *Pre-sentence detention is a factor to be taken into account when considering the presence or absence of substantial and compelling circumstances. It must be weighed as factor and as part of the consideration of other mitigating and aggravating factors in determining whether the effective minimum period of imprisonment to be imposed is justified in the sense of it being proportionate to be crime committed.*
- “29. *Our Courts are precluded from considering the period of pre-sentence detention independently of all the other mitigating and aggravating circumstances. It becomes a part of the totality of factors that must be weighed in order to determine whether substantial and compelling circumstances exist to reduce the sentence from the prescribed minimum. In casu the trial Court did not find any substantial and compelling reasons to deviate from the prescribed minimum sentences.”*

[20] This Court has duly considered the Appellant’s pre-sentence detention. However, due to the seriousness of the offence, this period of incarceration cannot be considered as substantial and

compelling circumstances for the possible imposition of a lesser sentence.

[21] After considering the aforesaid factors holistically, this Court finds that the *Court a quo* correctly found that no substantial and compelling circumstances existed to deviate from the prescribed sentence. It can also not be found that the *Court a quo* misdirected itself, in any respect as far as the sentence is concerned.

### **Order**

[22] Consequently, the following order is made:

1. The appeal against sentence is dismissed.

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**H.J. SCHOLTZ**  
**ACTING JUDGE**  
**NORTH WEST DIVISION, MAHIKENG**

**I Agree**

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**J T DJAJE**  
**DEPUTY JUDGE PRESIDENT**



**NORTH WEST DIVISION  
MAHIKENG**

**APPEARANCES**

**DATE OF HEARING : 28 NOVEMBER 2023**

**DATE OF JUDGMENT : 08 FEBRUARY 2024**

**COUNSEL FOR THE APPELLANT : ADV M NDULI**

**COUNSEL FOR THE RESPONDENT : ADV G R ZAZO**