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|---|---|
| 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**

**NORTH WEST DIVISION - MAHIKENG**

**CASE NO: CA 52/22**

In the matter between:

**JOSEPH SEUNTJIE GOREKWANG** **Appellant**

**and**

**THE STATE** **Respondent**

**Coram:** **Reddy AJ & Roux AJ**

**Heard:** **01 December 2023**

**Handed down:** **12 March 2024**

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**JUDGMENT**

**ROUX AJ**

## Introduction

[1] The appellant was charged with one count of contravening the provisions of section 3 read with sections 1,50, 55, 56A, 57, 58, 59 and 60 of the Criminal Law Amendment Act, read with the relevant provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997, read with sections 256 , 261 and 270 of the Criminal Procedure Act 51 of 1977, and further read with section 120 of the Childrens Act 38 of 2005, in that on 09 March, the appellant unlawfully and intentionally committed an act of sexual penetration with the complainant, to wit KM (14 year old female) by inserting his (penis) into her (vagina) without her consent.

[2] The provisions of Section 51(1) and Schedule 2 of Act 105 of 1997 providing for the prescribed minimum sentence applied as the complainant was a child under the age of 16 years.

[3] On 04 November 2020, the appellant duly represented pleaded not guilty and elected to exercise his right to remain silent. On 28 October 2021, after a full-blown trial the appellant was convicted of the charge. On the latter date, the appellant was sentenced to life imprisonment. Two consequential orders followed. Firstly, in terms of section 103(1) of the Firearms Control Act 60 of 2000,

the appellant was declared unfit to possess a firearm. Secondly, it was broadly ordered that the name of the appellant be entered in the register of sexual offences.

[4] Aggrieved by the conviction and sentence the appellant appeals to this Court against the conviction and sentence with the leave of the trial court, although the sentence of life imprisonment would have entitled the appellant to an automatic right to appeal, as is envisaged in Section 309(1) of the CPA. It provides that if a person was sentenced to imprisonment for life by a Regional Court under Section 51(1) of the Criminal Law Amendment Act 105 of 1977 should read 1997, an appellant may note an appeal without having to apply for leave in terms of Section 309(b) of the CPA.

**Background facts**

[5] The appellant is the biological father of KM who resided at a section called Skoti. KM was residing with her mother and her stepdad. On the day in question the appellant arrived at KM's home. He requested money for taxi fare from KM's mother to proceed to town.

Notwithstanding, that KM's mother and the appellant were no longer in a relationship, she acquiesced to his request. On returning, the appellant was under the influence of alcohol. The appellant produced a R100 00. which he handed over to KM for her to entertain herself with her friends. KM accompanied the

appellant until the graveyard whereafter KM indicated that she was to turn around. The appellant suggested that KM should not turn around, rather they should exchange phones. KM retorted that the battery of her cell phone was flat. The appellant responded that KM's flat battery could be resolved by her charging her cell phone where he had done so. To this, KM voiced no objection.

[6] At some point in time the appellant asked KM to buy him liquor at a tavern. She brought him Smirnoff Twist and they arrived at the place which he used to charge his phone. He took his phone out of the charger and put her phone on the charger. As she did not want to wait at the place until the phone was fully charged, he suggested that they could wait for the phone to charge, where he stayed.

They both went inside the house, and KM stayed behind at the door. The appellant then pulled KM inside the house, and she asked him why he was pulling her inside the house. The appellant replied that he did so because he did not want rumours that he brought a girlfriend to his house. KM questioned this as she said that she was his daughter. KM sat on the bed in the one-bedroom house. The appellant smoked a cigarette and asked her if she was also smoking because he heard from her mother that she was smoking. KM denied that she was smoking. The appellant extinguished his cigarette and started touching KM on her thighs. KM removed his hands and enquired as to what he was doing. The appellant stood up and remarked "Do you not see what I want to do. I want to sleep with you, have sex with you". KM replied by

saying “How could you have sex with me being your daughter?” The appellant informed KM that her mom also had sex with her father. The appellant then unleashed an unprovoked attack on KM. He started hitting KM with clenched fists next to her nose and under her chin. This caused an injury next to her nose and bleeding from the nose. KM attempted to fight back but the appellant overpowered her, culminating in the appellant throttling her on the bed. KM passed out.

[7] On coming to her senses, KM found the appellant supinely positioned making up and down movements with his private part inserted into her private part. KM noticed that next to her was a dressing table with a broken mirror. KM took possession of the broken mirror whilst the appellant was still positioned on top of her. She then stabbed the appellant on his cheek and on his neck. The appellant remained on top of her after he was stabbed. KM then got hold of the appellant by his dreadlocks and bumped him on the dressing table. KM picked up a brick that was by the door and hit the appellant on his head which caused him to fall. Using this opportunity KM quickly dressed and ran out.

[8] On the way back KM bought herself two banana flavoured Mageus’. She went home but everyone was asleep at home. KM decided to sit on top of a rock in front of the house. She did not tell her mother the same day what had happened because as she was shocked, and the appellant threatened her that if she was going to tell anybody he would kill her. She had however told the appellant’s cousin, Kgomotso, about the rape. She could not remember how many days after the incident, but she said that she

told her through her Facebook. She told Kgomotso that her father had raped her, and she was afraid to tell her mum and that Kgomotso should tell her mother. She did not know if Kgomotso was in Mogwase at the time or in Johannesburg. According to her, Kgomotso reported the incident to her mother who then reported the incident to her stepfather. She was taken to the Potchefstroom Hospital for medical treatment but could not recollect how long after the incident. Her mother had passed away before the court appearance and was affected by the incident in that she sometimes lost focus and she had suicidal thoughts.

[9] The evidence of what she told her friend of Kgomotso informing her mother of the incident and her mother reporting the matter would constitute hearsay evidence and for purposes of this appeal, I will only accept as admissible, the fact that she made a report to Kgomotso but not any of the actions of Kgomotso.

[10] The State called the police officer to whom the mother laid a complaint about the incident. I find that that evidence qualified as admissible hearsay evidence only insofar as it shows that the mother reported the matter to the police. I find sufficient safeguarding for the reliability of the evidence, and I find that it was in the interests of justice to accept the evidence to that extent. However, that evidence was not crucial even if a person did not make a so-called first report, it is ultimately the evidence of the complainant that must carry sufficient weight even if uncorroborated, to prove the incident beyond a reasonable doubt.

[11] The medical examination showed that her hymen was not intact which is consistent with sexual penetration, but no injuries were

found. It must be borne in mind that the examination took place several days after the incident.

[12] The appellant testified and gave evidence. He said that on the day he left with KM to go to the shop so that he could change R200.00. He gave KM R150 00 KM walked with him halfway to where he wanted to go. They parted ways. KM informed him that she was going to her residential place. The appellant denied the commission

of any offence. He provides three motives for KM incriminating him. Firstly, he had reprimanded KM for arguing with her mother which could possibly be a motive for KM incriminating him as she was still angry. Secondly, he had not cared for and maintained KM. Thirdly, the appellant intended to purchase a laptop for KM if she excelled academically. It seemed that his refusal to buy same may have spurred KM on to fabricate these allegations. He denied that he had requested KM to purchase alcohol for him.

**Legal principles**

[13] It is well established that an appeal court will be slow to interfere with the trials court's findings unless such findings are clearly wrong. In *S v Francis* 1991(1) SACR 198 (A) at paragraph [198 j- 199a] it was held:

"The powers of the court of appeal to interfere with the findings of fact of a trial are limited. In the absence of any misdirection the trials court's conclusion, including the acceptance of a witness' evidence is presumed to be correct. To succeed on appeal, the appellant must therefore convince the court of appeal on adequate grounds that the trial court was wrong in accepting the witness'

evidence -a reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage which a trial court has of seeing, hearing and appraising a witness, it is only in exceptional circumstances that the court of appeal will be entitled to interfere with a trial court's evaluation of oral testimony."

[14] In a criminal trial, the state bears the onus to prove the guilt beyond a reasonable doubt. An accused version cannot be rejected solely on the basis that it is improbable, but only once the trial court has found on credible evidence that the explanation is false beyond a reasonable doubt. See: *S v Van der Meyden* 1999(1) 447 (W) at 448F-G. The corollary is that if the accused's version is reasonably possibly true, the accused is entitled to an acquittal. . See: *S v V* 2000 (1) SACR 453 (SCA) at 455B

[15] It is trite law that a court of appeal will not likely intervene with the credibility findings of the trial court. In the absence of an irregularity or misdirection, the court of appeal is bound by such credibility findings, unless it is convinced that such findings are clearly incorrect. See: *S v Francis* 1991 (1) SACR 198 (A) at 204c - e; *S v Mkohle* 1990 (1) SACR 95 (A) at 100e

[16] In *S v Hadebe* Marais JA eloquently stated the approach in the following terms:

"Before considering these submissions it would be as well to recall yet again that there are well-established principles governing the hearing of appeals against findings of fact. In short, in the absence of demonstrable and material misdirection by the trial Court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong. The reasons why this deference is shown by appellate Courts to factual findings of the trial court are so well known that restatement is unnecessary."

[17] The appellant complains that the conduct of the Regional Court Magistrate throughout the trial leaves much to be desired. It is contended that the Regional Magistrate did not adhere to the cornerstone of an adjudicator in criminal matters by remaining impartial and neutral. This point is driven home by the assertion that the Regional Magistrate appeared to be far too receptive to the case for the state. A traversing of the record to my mind does not reinforce these contentions.

[18] In my view trial court took all the relevant factors into account in convicting the appellant. I could not find any misdirection as the conviction was in accordance with the evidence.

**Sentence**

[19] I turn now to consider the sentence that was imposed. The trial court imposed a sentence of life imprisonment on the basis that the trial court could not find substantial and compelling circumstances justifying a deviation from the prescribed sentence of life imprisonment.

[20] The appellant assails the sentence on the basis that the appellant was not informed with sufficient particularity as to the appropriate penalty that he was exposed too. At the commencement of the trial the correct penal provision as ensconced in section 51(1) and Schedule 2 of the CLAA 105 of 1997 which found applicability by virtue of KM being under the age of sixteen (16) years old. The Regional Magistrate however explained that the appellant was at

risk of being sentenced to a minimum sentence of ten (10) years imprisonment should he be convicted. This misperception as regards the correct minimum sentence that the appellant was exposed to was not corrected. Consequently, the court *a quo* should have sentenced the appellant to ten (10) years imprisonment.

[21] I am not persuaded by this submission. The law is settled on this point. It does not warrant an in-depth exposition of the law and a regurgitation of established legal principles. The SCA has decisively pronounced on provisions of s 51 of the CLAA. It has been decided that the question whether the accused's constitutional right to a fair trial has been breached at the sentencing phase, can only be answered after 'a vigilant examination of the relevant circumstances'. See *S v Legoa* 2003 (1) SACR 13 (SCA) and *S v Ndlovu* 2003 (1) SACR 331 (SCA) para 12.

[22] In this regard in *Legoa* at paragraph [21], the following was asserted:

> "The matter is, however, one of substance and not form, and I would be reluctant to lay down a general rule that the charge must in every case recite either the specific form of the scheduled offence with which the accused is charged, or the facts the State intends to prove to establish it. A general requirement to this effect, if applied with undue formalism, may create intolerable complexities in the administration of justice and maybe insufficiently heedful of the practical realities under which charge-sheets are frequently drawn up. The accused might in any event acquire the requisite knowledge from particulars furnished to the charge or, in a Superior Court, from the summary of substantial facts the State is obliged to furnish. Whether the accused's substantive fair trial right, including his ability to answer the charge, has been impaired, will therefore depend on a vigilant examination of the relevant circumstances."

[23] On a vigilant examination of the record, it cannot be found that the appellant's right to a fair trial had been breached in the sentencing phase.

[24] There is a multiplicity of jurisprudential authority re-iterating the trite position that, the imposition of sentence is pre-eminently within the discretion of the trial court. An Appeal Court will be entitled to interfere with the sentence imposed by the trial court only if one or more of the recognized grounds justifying an interference on appeal, has been shown to exist. (See: *S v Mtungwa en 'n Ander* 1990 (2) SACR 1 (A))

"The grounds on which a court of appeal may interfere with sentence on appeal are that the sentence is:

(i) disturbingly inappropriate.

(ii) so badly out of proportion to the magnitude of the offence.

(iii) sufficiently disparate.

(iv) vitiated by misdirection showing that the trial court exercised its discretion unreasonably.

(v) is otherwise such that no reasonable court would have imposed it.

*bido* 1998 (2)

2) SACR

586 (SCA) para [10].)"

[25] In respect of the courts sentencing discretion where a mandatory sentence finds application, the guidance provided in *S v Malgas* 2001 (2) SA 1222 where the following was stated, is instructive:

"[12] The mental process in which courts engage when considering the questions of sentence depends upon the task at hand. Subject of course to any limitations imposed by the legislature or binding judicial precedent, a trial court will consider the circumstances of the case in the light of the well-known triad of

factors relevant to sentence and impose what it considers to be just and appropriate sentence. A court excising appellant jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellant court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellant court is large. However, even in the absence of material misdirection, an appellant court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellant court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate. " It must be emphasised that in the latter situation the appellant court is not at large in the sense in which it is at large in the former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned. No such limitation exists in the former situation.

[26] In *S v Matytyi* 2011 (1) SACR 40 (SCA) at paragraph [23], Ponnan JA stated as follows in respect of serious crimes, such as the present:

"[23] Despite certain limited successes there has been no real let-up jn the crime pandemic that engulfs our country. The situation continues to be alarming. It follows that, to borrow from Malgas, it still is "no longer business as usual". And yet one notices all too frequently a willingness on the part of sentencing courts to deviate from the minimum sentences prescribed by the legislature for flimsiest of reasons-reasons, as here, that do not survive scrutiny. As Malgas makes plain courts have a duty, despite any personal doubts about the efficacy of the policy or personal aversion to it, to implement

those sentences. Our courts derive their power from the Constitution and the like other arms of state owe fealty to it. Our constitutional order can hardly survive if courts fail to properly patrol boundaries of their own power by showing due deference to the legitimate domains of the power of the other arms of the 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. Courts are not free to subvert the will of the legislature by resort to vague. illdefined concepts such as "relative youthfulness" or other equally vague and ill-founded hypotheses that appear to fit the particular sentencing officer's personal notion of fairness- Predictable outcomes. not outcomes based on the whim of an individual judicial officer, is foundational to the rule of law which lies at the heart of our constitutional order. '** [own emphasis]

[27] I had regard to all the factors placed on record on behalf of the Appellant and considered by the trial court in imposing a life sentence. I also considered the approach in S v Malgas 2001 (1) SACR 469 SCA at paragraph 129 where the following was said:

*"I agree with Foxcroft J that this is not one of the worst cases of rape. That is not to say that rape can ever be condoned. But some rapes are worse than others, and the life sentence ordained by the Legislature should be reserved for cases devoid of substantial facts compelling the conclusion that such a sentence is inappropriate and unjust."*

[28] I have also considered the judgment in *S v G* 2004 (2) SACR 296 (W) where Borchers J made it clear that in assessing the appropriate period of imprisonment to be imposed, the court must be guided by the sentences passed by the Supreme Court of

Appeal in several cases relevant to where young children had been raped. The court specifically dealt with the approach to sentence in cases where the complainants were not serious physically injured as no excessive violence was employed. The court in that matter considered in mitigation that the accused was a first offender, that the violence he employed was not excessive and that he therefore did not inflict serious physical injuries to the complainant. The court, however, qualified this by the fact that the physical immature child of 10, in that matter, was no match for an adult man, and little violence was needed to achieve his purpose. The court also considered that the accused was in custody for almost 2 years at the time of sentencing. Instructively the court found at page 300:

*"I doubt that these features, viewed cumulatively, can be said to amount to substantial compelling circumstances as envisaged by Act 105 of 1997.*

*However, I am bound by the decisions of the Supreme Court of Appeal that as this is not one of the most serious manifestations of rape, the sentence of life imprisonment would be disproportionate to the gravity of the offence and therefore unjust. A sentence of life imprisonment will, for this reason, not be imposed."*

[29] I also consider what was stated by the court in aggravation of sentence where the court aptly summarised the rape of sexually immature children. The court said the following:

*"The complainant was a young sexually immature child and a virgin. Her youth and physical under-development, in my view, is a fact which clearly distinguishes the present case from the Abrahams and Mahomotsa cases. The rape of a sexually mature, possibly a sexually attractive, teenager is not as dreadful as the rape of an immature child because of the degree of sexual perversity, when a young child is raped, on the part of the offender is greater. There is general outrage in South Africa at the moment over child abuse, and the prevalence thereof and the damage done by such crimes to society justifies that outcry. People are being exhorted to adopt the motto 'your child is my child'. All that this amount to is that the public knows that its children are*

*vulnerable and often cannot be protected for every moment of their lives. These people recognise these facts and help and protect children. They do not harm them, as the accused has done."*

In that matter the court weighed all the facts cumulatively and imposed a sentence of 18 years' imprisonment.

[30] I have given serious thought to factors that may ameliorate the conduct of the appellant to justify a departure from the prescribed sentence, which is mandatory. I considered comparable reported matters, such as *S v MDT* 2014 (2) SACR 630 (SCA) and found it to be instructive where the court at 632 said the following:

*"their mother was in receipt of child support grants. Their mother was caring for them. In respect of injuries, the doctor had regard to the fact that the medical evidence indicated that there was a tear in the victim's vagina and to the complainant's testimony that she experienced pain during the rape. The court below correctly regarded the offence as serious. One can rightly ask what could be considered more heinous than the rape of a child by the father. See the remarks of Cameron JA in S v Abrahams C 2002 (1) SACR 116 (SCA) paras 17 – 23.*

[7] In remarkably similar circumstances, this court in S v PB 2013 (2) SACR 533 (SCA) ([2012] ZASCA 154), after stressing that a prescribed minimum sentence cannot be departed from lightly or for flimsy reasons, refused to interfere with a prescribed sentence of life imprisonment imposed on a father who had raped his 12-year-old daughter. While this can only serve as a guideline, it emphasises the necessity to impose heavy sentences in cases such as the present, to prevent young girls from being abused. Before us counsel for the appellant was constrained to concede that child rape is becoming prevalent in Limpopo. Indeed, child rape is a national scourge that shames us as a nation.

[8] In imposing punishment for rape relative to the circumstances one is evaluating degrees of heinousness. Furthermore, counsel accepted that the

record shows that the court below had carefully considered the appellant's personal circumstances. In short, counsel for the appellant was unable to point to substantial and compelling circumstances justifying a departure from the prescribed minimum sentence. In our view the court below cannot be faulted for imposing life imprisonment. Consequently, the appeal against sentence is dismissed."

[31] I considered that it was one incident of rape and not what is often seen as a rape over several years in a family set up.

[32] However, this was the rape of the appellant's biological daughter who was 14 years of age at the time. She had the right to regard her father as a loving person deserving of her respect. A person that she could look up to and to provide to her a safety net in life. This came to a crashing disillusionment. As the trial court found that her virginity was broken by the person who brought into this world, she is bitter and ended up having a tendency to commit suicide. She fought back but he overcame her resistance. Clearly it was all about him and a total disrespect and disregard for his own daughter. Ultimately it was all about his violent lust.

[33] After a long and hard consideration, I find that this appeal falls within the category of rapes referred to in *S v MDT* and *S v PB* above and absent any substantial compelling circumstances or any justifiable factor to consider to deviate from the prescribed sentence of life imprisonment, I propose to dismiss the appeal against sentence.

**Order**:

[34] In the premises, the following order is made:

(i) The appeal against the conviction and sentence is dismissed.

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**B ROUX**

**ACTING JUDGE OF THE HIGH COURT,**

**NORTHWEST DIVISION, MAHIKENG**

**I agree.**

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**A REDDY**

**ACTING JUDGE OF THE HIGH COURT,**

**NORTHWEST DIVISION, MAHIKENG**

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| Date of hearing: | 01 December 2023 |
| Date of judgment: | 12 March 2024 |