**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**JUDGMENT**

**Not Reportable**

Case no: 300/15

In the matter between:

**TERRENCE MAROTA** **APPELLANT**

**and**

**THE STATE** **RESPONDENT**

**Neutral citation:** *Marota v The State* (300/15) [2015] ZASCA 130 (28 September 2015)

**Coram:** Lewis, Mhlantla and Petse JJA

**Heard:** 26 August 2015

**Delivered:** 28 September 2015

**Summary**: Sentence – imposition of – power of appellate court to interfere with the exercise of discretion by sentencing court circumscribed – cumulative effect of sentence – not such as to warrant interference.

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## ORDER

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**On appeal from**: Gauteng Local Division of the High Court, Johannesburg (Du Toit AJ sitting as court of first instance):

The appeal is dismissed.

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## JUDGMENT

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**Petse JA (Lewis and Mhlantla JJA concurring):**

[1] The appellant (Mr Terrence Marota) was charged in the regional court, Tembisa, Gauteng with the rape and abduction of a 14 year old girl. The charge sheet explicitly stated that the provisions of s 51 of the Criminal Law Amendment Act 105 of 1997 (the minimum sentencing legislation) applied to the count of rape.

[2] On 20 September 2004 and despite his plea of not guilty to both counts, the appellant was convicted as charged. In consequence the regional court stopped the proceedings and committed the appellant to the Gauteng Local Division of the High

Court, Johannesburg for confirmation of the convictions and for sentencing as contemplated in s 52 of the minimum sentencing legislation.

[3] Section 52, as it then applied, required a regional court when it has convicted an accused person of an offence for which life imprisonment is the prescribed sentence to stop the proceedings and commit the accused to a Division of the High Court having jurisdiction for confirmation of the conviction and for sentence.

[4] In the court below the case served before Du Toit AJ who, having satisfied himself that the conviction of the accused was supportable on the evidence led at the trial in the regional court, which he then confirmed, proceeded to consider the question whether or not substantial and compelling circumstances as contemplated in s 51(3)*(a)* existed.

[5] In the event he concluded that substantial and compelling circumstances existed that justified a lesser sentence than the prescribed sentence of life imprisonment in respect of the count of rape. In reaching this conclusion the learned judge had regard to the following factors as were presented to the court below. That the appellant was a first offender and 19 years of age when the offences were committed. That the objective gravity of the offence was not of such a nature as to warrant the imposition of the most severe of sentences. That the appellant had exhibited a sense of social responsibility in that he cared for his grandmother whilst, at the same time, pursuing his studies. That the appellant had the benefit of good upbringing.

[6] As to the question of what would be a suitable punishment the court below took into account the personal circumstances of the appellant; the interests of society and the nature of the crimes of which he had been convicted. Concerning the latter, the court a quo said that: (a) rape constitutes the most brutal invasion of privacy to which a woman can be subjected; (b) as the rape involved a child it had the effect of scarring her both psychologically and physically; (c) that for the complainant this was her first sexual encounter with attendant severe and traumatic psychological consequences;

(d) the rape was premeditated; and (e) given the unprecedented high levels of rape in the country long-term imprisonment was imperatively called for.

[7] The court below then proceeded to impose a sentence of 20 years' imprisonment for the count of rape and three years' imprisonment in respect of the count of abduction, two years of which were ordered to run concurrently with the term of 20 years' imprisonment. Thus, the appellant was sentenced to an effective term of 21 years' imprisonment. The court below subsequently granted the appellant leave to appeal against the sentence to this court, hence the present appeal.

[8] The complainant's evidence led at the trial was briefly as follows. On 31 October 2003 at about 17h00 she was walking with her friend, Ms Chauke, on their way home. A Toyota motor vehicle emerged and pulled up parallel to them. The appellant, who was a passenger in the motor vehicle, called the complainant. She did not respond. The appellant then alighted, called her again and when she ignored him, he caught hold of her and assaulted her. He was joined by the driver in assaulting the complainant. The complainant was forcibly bundled into the motor vehicle, leaving her friend standing helplessly on the side of the road. She was then driven and dropped off at the appellant`s home together with the appellant after which the motor vehicle drove away.

[9] The appellant threatened to assault her if she called out for assistance. He took her to an outbuilding at his home. There he undressed her against her will and, after undressing himself, he proceeded to have sexual intercourse with her against her will. Once he was finished he instructed the complainant to get dressed and leave, which she then did. On her way home she met up with her friend in the street and informed her about her ordeal at the hands of the appellant. On her arrival at her home she reported the incident to her mother. She was then taken to the police station where she laid a charge against the appellant. Later she was, at the instance of the police, examined by a Dr Bermudas.

[10] As I have already said, the appellant was sentenced to 20 years' imprisonment on the rape count and three years' imprisonment on the count of abduction, two years of which were ordered to run concurrently with the 20 year term of imprisonment.

[11] In this court the sentence imposed on the appellant was assailed on several grounds. It was argued on behalf of the appellant that the court below gave no or insufficient consideration to the following factors: (a) that the appellant was under the influence of liquor at the time of the commission of the offences; (b) the complainant did not suffer any bodily injuries; (c) no dangerous weapon was used in the commission of the offence; (d) whilst traumatised by the incident, there was no indication that the complainant will not recover from her ordeal; (e) the sentence imposed on the rape count was, in any event, out of kilter with the sentences imposed by this court in comparable circumstances; (f) that the whole of the sentence imposed on count two ought to have been ordered to run concurrently with the sentence imposed on count 1, for the abduction was inextricably part of the same criminal transaction whose object was to facilitate the rape of the complainant. I shall return to these later.

[12] The imposition of sentence is primarily a matter of judicial discretion by a sentencing court save where the legislature has decreed otherwise. This then requires that a sentencing court should have regard to, inter alia, the peculiar facts of each case, the nature of the crime and the personal circumstances of the offender. (See eg *S v Zinn* 1969 (2) SA 537 (A) at 540G.) Accordingly, a court of appeal will interfere with the exercise of such discretion only on limited grounds.

[13] In *S v Malgas* 2001 (2) SA 1222 (SCA) this principle was elaborated upon in these terms (para12):

'A court exercising appellate 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 appellate 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 appellate court is at large. However, even in the absence of material misdirection, an appellate 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 appellate 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'.

[14] I now turn to deal, in reverse order, with the contentions advanced on behalf of the appellant.

**Partial concurrence**

[15] In the court below both counsel were agreed that whatever sentence the court saw fit to impose in respect of count 2 should be ordered to run concurrently with the sentence imposed in respect of count 1. But the court below held a different view. It took into account both the age of the complainant and the prevalence of the offence and, in the exercise of its discretion, ordered that only two years of the three years should run concurrently with the sentence imposed on count 1. Counsel for the appellant, despite readily accepting that ordering the whole of the sentence imposed on count 2 to run concurrently with the sentence on count 1 would make a minimal difference to the overall punishment, were we disposed to interfere, argued that doing so would nonetheless ameliorate the appellant`s situation. The court below motivated its decision in ordering partial concurrence on the basis that abduction of young girls was prevalent.

[16] Ordinarily it is desirable when an offender has been convicted of offences that are inextricably linked in terms of time and location that the cumulative effect of the sentences imposed must be brought to the fore. (See eg *S v Schrich* 2004 (1) SACR 360 (C) at 370b-c.) And the sentencing court must pay due regard to the offender`s blameworthiness in determining the effective sentence to be imposed so as to ensure that such effective sentence is not inappropriate. In *S v Mhlakaza* (386/96) [1997] ZASCA 7; 1997 (1) SACR 515 (SCA) this court had occasion to consider whether on the facts of that case the cumulative effect of the sentences imposed was so inappropriate that the court was permitted to substitute its discretion for that of the trial court. There

the two appellants had been convicted of murder, attempted robbery, possession of a firearm and possession of a machine gun and were sentenced to 47 and 38 years' imprisonment respectively. This court concluded that an effective sentence of 47 years exceeded acceptable limits.

[17] Whilst the deterrent utility of a sentence of 21 years' imprisonment over one of 20 years' imprisonment is doubtful one must, however, not lose sight of the fact that the imposition of sentence is, as I have already said, pre-eminently a matter in the discretion of the sentencing court. In the absence of a misdirection or where the effective sentence is not disturbingly inappropriate there would be no basis to interfere with the exercise by the court below of its sentencing discretion. To my mind the difference between the effective sentence imposed by the court below and 20 years' imprisonment is not sufficiently striking so as to warrant interference. Nor can I discern anything to suggest that the court below committed a misdirection in imposing the effective sentence. On the contrary the court a quo gave anxious consideration to this aspect and furnished reasons as to what moved it to impose the sentence it did.

**Severity of the sentence of 20 years' imprisonment**

[18] On this score, as I have said, counsel for the appellant placed much store, inter alia, on decisions of this court in support of his contention that the sentence imposed by the court a quo was out of kilter with sentences imposed in those decisions. In my view, what Marais JA said in *Malgas*, albeit in a different context, puts paid to this argument. The learned judge of appeal said (para 21):

'It would be foolish of course, to refuse to acknowledge that there is an abiding reality which cannot be wished away, namely, an understandable tendency for a court to use, even if only as a starting point, past sentencing patterns as a provisional standard for comparison when deciding whether a prescribed sentence should be regarded as unjust. To attempt to deny a court the right to have any regard whatsoever to past sentencing patterns when deciding whether a prescribed sentence is in the circumstances of a particular case manifestly unjust is tantamount to expecting someone who has not been allowed to see the colour blue to appreciate and gauge the extent to which the colour dark blue differs from it. As long as it is appreciated that the mere existence of some discrepancy between them cannot be the sole

criterion and that something more than that is needed to justify departure, no great harm will be done.'

And as this court made plain in *S v Fraser* 1987 (2) SA 859 (A) '. . . it is an idle exercise to match the colour of the case at hand and the colours of other cases with the object of arriving at an appropriate sentence'. Ultimately each case must be decided in the light of its peculiar facts encompassing the personal circumstances of the convicted person.

**Effect of liquor on appellant**

[19] That the appellant was under the influence of liquor came out only from the complainant who said in her evidence-in-chief that the two persons in the vehicle were drunk and threw bottles of Hunters Dry out of the vehicle. The appellant himself did not testify as to his state of sobriety at the time. Nor is there any evidence, if indeed the appellant had consumed liquor, as to what extent – if at all – his mental faculties were affected by the intake of alcohol. Consequently this argument does not avail the appellant.

**Absence of bodily injuries**

[20] That the complainant did not suffer any bodily injuries, so the argument went, ought to have mitigated the severity of the sentence imposed on the appellant. In my view this submission loses sight of the fact that apart from physical injuries, rape invariably results in psychological and emotional harm to the victim with their attendant enduring effects. Moreover, that the complainant was deprived of her virginity in her early teens is also a relevant factor in determining a suitable sentence. Accordingly, that the complainant may not have suffered physical injuries does not, in my view, render the rape less serious.

[21] In *Director of Public Prosecutions, Western Cape v Prins & others* 2012 (2) SACR 183 (SCA) Wallis JA observed that no judicial officer is unaware of '. . . the extent of sexual violence in this country and the way in which it deprives so many women and children of their right to dignity and bodily integrity and, in the case of children, the right to be children, to grow up in innocence and, as they grow older, to awaken to the

maturity and joy of full humanity'. To my mind the fact that the complainant, who was fourteen years and eleven months of age when she was raped, was deprived of that opportunity is a factor that aggravated the seriousness of the rape.

[22] In the result the appeal cannot succeed. Accordingly the following order is made. The appeal is dismissed.

X M Petse
Judge of Appeal

APPEARANCES:

For Appellant: W A Karam

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| | Instructed by: |
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