

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

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

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

CASE NO: CA 39/2021

In the matter between:

V[...] M[...]

APPELLANT

AND

THE STATE

RESPONDENT

CRIMINAL APPEAL

DJAJE DJP; MFENYANA J

Heard: **16 FEBRUARY 2024**

Delivered: The date for the hand-down is deemed to be on

15 MARCH 2024

ORDER

The following order is made:

1. The appeal against sentence is dismissed.

APPEAL JUDGMENT

DJAJE DJP

[1] The appellant in this appeal appeared before the Regional Court in Klerksdorp and was convicted of two counts of rape read with the provisions of section 51(1) and schedule 2 of the Criminal Law Amendment Act 105 of 1997 as amended. In both counts the complainants were minors. He was sentenced to life imprisonment on each count and the two sentences were ordered to run concurrently. He now appeals against the sentence of life imprisonment in both counts, relying on his automatic right of appeal.

[2] The complainant in count 1 testified that she was staying in the same place with the appellant and on the day of the incident, he sent her to buy cigarettes for him. On her return the appellant who is also her uncle took her to the bedroom, undressed her and had sexual intercourse with her. At the time of the incident the



complainant was 11 years old. A witness named Daniel testified that he saw the complainant going into the house of the appellant and he went to look through a small opening what was happening. He saw the appellant undressing the complainant and placing her on the bed. He left to go and make a report of what he saw. He does not know what transpired afterwards.

- [3] The evidence of the complainant in count 2 was that she was called to the appellant's house together with the complainant in count 1. The appellant sent them to go buy cigarettes for him. On their return he locked them inside the house and took the complainant in count 1 to the bedroom and had sexual intercourse with her. After he was done, he took the complainant in count 2 to the bedroom and had sexual intercourse with her as well. The appellant went outside to fetch some water and wiped the two complainants. He threatened them not to report to anyone. The two eventually reported to the aunt of the complainant in count 1.
- [4] The doctor who examined both the complainants testified and concluded that there was forceful penetration.
- [5] In his evidence the appellant denied sending the two complainants to buy him cigarettes. He denied that he had sexual intercourse with any of them both of them.

[6] In the main the appellant argued that the sentence of life imprisonment imposed is shockingly severe and induces a sense of shock. It was submitted that at the time of sentencing the appellant was 29 years old and capable of rehabilitation, he had no children and still single. Further, that he was employed and taking care of his mother financially. In addition, the appellant's argument for reduction of sentence was that the complainant did not suffer serious injuries as a result of being raped, and that should be considered as substantial and compelling to deviate from the minimum sentence of life imprisonment.

[7] In contention, the respondent argued that the appellant abused his position of trust against the complainants. His personal circumstances do not justify a deviation from the minimum sentence and that the sentence imposed is appropriate.

[8] Section 51(1) of the Criminal Law Amendment Act 105 of 1997 ("the Act") provides that:

"(1) Notwithstanding any other law, but subject to subsection (3) and (6), a Regional Court or a High Court shall sentence a person who has been convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life"

In Part I Schedule 2 the offence of rape

"Rape as contemplated in section 3 of the Criminal Law (Sexual Offences and related matters) Amendment Act 32 of 2007-

(a)

(b) *Where the victim-*

(i) *Is a person under the age of 16 years.”*

[9] In sentencing the appellant the Court *a quo* applied the provisions of section 51(1) of the Act and imposed life imprisonment having found that there were no substantial and compelling circumstances.

[10] In **S v Bogaards 2013 (1) SACR 1 (CC)** the Constitutional Court held:

“[41] Ordinary, sentencing is within the discretion of the trial court. An appellate court’s power to interfere with sentence imposed by courts below is circumscribed. It can only do so where there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it. A court of appeal can also impose a different sentence when it sets aside a conviction in relation to one charge and convicts the accused of another”.

[11] In the matter of **Marota v The State (300/15) [2015] ZASCA 130 (28 September 2015)** Petse JA stated as follows:

“The imposition of sentence is primarily a matter of judicial discretion by a sentencing court save where the legislature has decreed otherwise. This 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.”

See also: S v Malgas 2001 (1) SACR 469 (SCA)

[12] In the case of the **S v Vilakazi 2009 (1) SACR 552 (SCA)** Nugent JA said at par 15:

*"It is clear from the terms in which the test was framed in **Malgas** and endorsed in **Dodo** that it is incumbent upon a court in every case, before it imposes a prescribed sentence, to assess, upon a consideration of all the circumstances of the particular case, whether the prescribed sentence is indeed proportionate to the particular offence. The Constitutional Court made it clear that what is meant by the 'offence' in the context (and that is the sense in which I will use the term throughout this judgment unless the context indicates otherwise) consist of all factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence and the culpability of the offender.*

*If a court is indeed satisfied that a lesser sentence is called for in a particular case, thus justifying a departure from the prescribed sentence, then it hardly needs saying that the court is bound to impose that lesser sentence. That was also made clear in **Malgas**, which said that the relevant provision in the Act vests the sentencing court with the power, indeed the obligation, to consider whether the particular circumstances of the case require a different sentence to be imposed. And a different sentence must be imposed if the court is satisfied that substantial and compelling circumstances exist which **'justify'...it.**"*

[13] The appellant herein was convicted of serious offences where young children were exposed to sexual intercourse by a trusted person. The appellant as the uncle of the complainant in count 1 was in a position of trust. He abused that position when he should have been the one to protect the complainants. The complainant in count 2 was a friend and neighbour to the appellant and she



trusted him. The rape of a child has been described as appalling and inhuman. It causes trauma to the child which affects their wellbeing. There is no telling when and how a child would recover from such an ordeal. The two complainants acted innocently agreeing to be sent to the shop by the appellant only to be sexually assaulted on their return.

[14] The seriousness of these offences and the circumstances under which they happened far outweigh the personal circumstances of the appellant. The appellant showed no remorse and caused the trial to proceed maintaining his innocence throughout. The court *a quo* correctly found that there were no substantial and compelling circumstances and imposed a sentence of life imprisonment in both counts.

[15] Having considered the submissions on behalf of the appellant and the respondent, the appeal against sentence stands to be dismissed.

Order

[16] Consequently, the following order is made: -

1. The appeal against sentence is dismissed.

J T DJAJE

DEPUTY JUDGE PRESIDENT

NORTH WEST DIVISION; MAHIKENG

I agree

S MFENYANA

JUDGE OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG

APPEARANCES

DATE OF HEARING : 16 FEBRUARY 2024

DATE OF JUDGMENT : 15 MARCH 2024

COUNSEL FOR THE APPELLANT : MR MADIBA

COUNSEL FOR THE RESPONDENT : ADV MAMPO

