

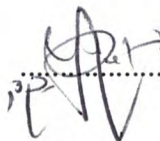
REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

- (1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

1 June 2021
DATE


SIGNATURE

CASE NO: A 111/2020
DPP REF: 2020/085
APPEAL NO: 14/2020

In the matter between:

MADONSELA, GIFT SIPHO

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

MOOSA AJ:

INTRODUCTION

[1] This is an appeal against the two convictions of Rape and effective sentence of life imprisonment imposed upon the appellant on 06 February 2019, by the Regional Magistrate, Protea.

[2] The appellant enjoyed legal representation during the trial and sentencing proceedings, and was convicted and sentenced on 06 February 2019, as follows:

- a). Count 1 – Rape (read with the provisions of section 51(1) of Act 105 of 1977)
- b). Count 2 – Rape (read with the provisions of section 51(1) of Act 105 of 1977)

Both counts were taken together for the purposes of sentence and the appellant was sentenced to life imprisonment.

[3] Aggrieved with the convictions and sentence imposed, the appellant lodged the present appeal, notwithstanding the fact that he enjoyed an automatic right to appeal due to the sentence of life imprisonment.

AD CONVICTION

[4] The State called three witnesses to testify, being the complainant, her mother and the doctor. The complainant, who was nine years old at the time of the incident, was a single witness regarding the allegations of rape against the appellant. The appellant testified in his own defence.

[5] Section 208 of the Criminal Procedure Act 51 of 1977 provides that an accused may be convicted of any offence on the single evidence of a competent witness. Further, a court is entitled to convict on the evidence of a single witness if it is satisfied that the evidence of the single witness is satisfactory in all material respects.

[6] It is trite that the cautionary rule does not apply automatically to all sexual offences. In **S v Jackson 1998 (1) SACR 470 (SCA)** Olivier JA held at 476 e - f as follows: *“In my view, the cautionary rule in sexual assault cases is based on an irrational and out-dated perception. It unjustly stereotypes*

complainants in sexual assault cases (overwhelmingly women) as particularly unreliable. In our system of law, the burden is on the State to prove the guilt of an accused beyond reasonable doubt – no more and no less. The evidence of a particular case may call for a cautionary approach, but that is a far cry from the application of a general cautionary rule.”

[7] In **S v Sauls and Others 1981 (3) SACR 172 (A)** at 173 it was held as follows: *“If a complainant was a single witness the further enquiry is whether she was credible. The evidence of a single witness must be clear and satisfactory in every material respect.”*

[8] I am reminded of the comments of Nestadt JA in **S v Mkhle 1990 (1) SACR 95 (A)** at 98 f – g wherein he held that: *“Contradictions per se do not lead to the rejection of a witness’ evidence... They may simply be indicative of an error (S v Oosthuizen 1982 (3) SA 571 (T) quoting from 576 G-H): And it is stated that not every error made by a witness affects his credibility; in each case the trier of fact has to take into account such matters as the nature of the contradictions, their number and importance, and their bearing on other parts of the witness’ evidence.”*

[9] The court a quo found that it had been proved beyond a reasonable doubt that the appellant had raped the complainant. I pause to mention that the complainant’s mother corroborated her first report of the incidents of rape. In addition thereto, the complainant’s evidence is further supported by the findings of the doctor that examined her.

[10] On the other hand the appellant contends that the court a quo erred in finding that it had been proved beyond reasonable doubt that he raped the complainant. Further, he contended that the complainant had a boyfriend and must have been sexually active.

[11] The complainant testified that the appellant who was related to her and residing at their residence asked to sleep with him and gave her some coins. She described how the appellant took her from the couch where she was

sleeping, to the bedroom. She further stated that the appellant inserted his penis into her vagina. She did not scream as he had covered her mouth, and the appellant had warned her not to tell anyone.

[12] She further testified that after a few days the appellant repeated what he had done previously to her. He picked her up from the couch and took her to the bedroom where he raped her.

[13] The complainant subsequently reported the matter to her mother in the presence of the appellant.¹ To this end, it is clear that the complainant spontaneously made such report to her mother without being forced, and in the presence of the appellant.

[14] It is clear from the evidence before the court a quo that there were no material contradictions between the evidence of the complainant and her mother. Further, the evidence of the doctor regarding her examination of the complainant and her findings that there was more than one instance of penetration was not in dispute.

[15] On the other hand, from a careful reading of the documents of record it is clear that save for the ipse dixit of the appellant that the complainant was involved in a sexual relationship; there is absolutely not an iota of evidence to support such spurious allegation. It is clear in my mind that the court a quo was correct in rejecting the appellant's version as not being reasonably possibly true.

[16] The appellant testified that his relationship with the complainant was good, save for the occasions when he would reprimand her, or report her for misbehavior. From the evidence before the court a quo, I find it highly improbable that both the complainant would falsely implicate the appellant. Further, that the complainant was raped by another person and then falsely implicated the appellant.

¹ Record - page 51, lines 8 - 21

[17] In the circumstances, having duly considered the totality of the evidence and am satisfied that the court a quo was correct in accepting the evidence of the complainant, finding that it was satisfactory in all material respects and rejecting the evidence of the appellant.

[18] Accordingly, in my view the convictions of rape do not require any further scrutiny.

AD SENTENCE

[19] It is trite that the circumstances in which a court of appeal may interfere in sentencing discretion of a lower court are limited. There must be either a material misdirection by the trial court or the disparity between the sentence of the trial court and the sentence of 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”.²

[20] (a) In **S v Anderson 1964 (3) SA 494 (A) 495 D-E** Rumpff JA (as he then was) stated: *"Over the years our Courts of appeal have attempted to set out various principles by which they seek to be guided when they are asked to alter a sentence imposed by the trial court. These include the following: the sentence will not be altered unless it is held that no reasonable man ought to have imposed such a sentence, or that the sentence is out of all proportion to the gravity or magnitude of the offence, or that the sentence induces a sense of shock or outrage, or that the sentence is grossly excessive or inadequate, or that there was an improper exercise of his discretion by the trial Judge, or that the interests of justice require it."*

² S v Malgas 2001 (1) SACR 469 (SCA) at 478 d - g

(b) In **S v Rabie 1975 (4) SA 855 (A)** at 857 D – E the following was stated: “In any appeal against sentence, whether imposed by a magistrate or a Judge, the court hearing the appeal -

- (a) should be guided by the principle that punishment is pre-eminently a matter for the discretion of the trial court and;
- (b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been ‘judicially and properly exercised’.

The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate”.

(c) In **S v Kgosi 1999 (2) SACR 238 SCA** it was held that the approach of a Court of appeal on sentence should be the following: “It is trite law that sentence is a matter for the discretion of the court burdened with the task of imposing the sentence. Various tests have been formulated as to when a court of appeal may interfere. These include, whether the reasoning of the trial court is vitiated by misdirection or whether the sentence imposed can be said to be startlingly inappropriate or to induce a sense of shock or whether there is a striking disparity between the sentence imposed and the sentence the court of appeal would have imposed. All these formulations, however, are aimed at determining the same thing: viz. whether there was a proper and reasonable exercise of the discretion bestowed upon the court imposing sentence. In the ultimate analysis this is the true enquiry. (Cf **S v Pieters 1987 (3) SA 717 (A) at 727 G – I**). Either the discretion was properly and reasonable exercised or it was not. If it was, a court of appeal has no power to interfere; if it was not, it is free to do so”.

(d) In **S v Malgas 2001 (1) SACR 469 (SCA) at 478 D – G** the Court applied a broadened scope for the interference and held that: “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”. It must be emphasised that in the latter situation the appellate 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”.

[21] Having due regard to the aforementioned principles set out by the case authority it is clear that the Court of Appeal has a very limited scope to interfere with the discretion of the trial court. The Court of Appeal is in any event able to interfere with the trial Court on sentence in respect of a finding as to substantial and compelling circumstances even in the absence of material misdirection or a failure of the exercise of discretion.³

[22] The appellant was convicted of two counts of rape, under circumstances where it attracts a prescribed minimum sentence of life imprisonment in terms of Section 51(1) of the Criminal Law Amendment Act 51 of 1997, unless the court finds substantial and compelling circumstances present which will cause it to impose a lesser sentence.

[23] For the purpose of the appeal, it is necessary to address two main issues being firstly whether or not, having regard to the minimum sentencing legislation, there were substantial and compelling circumstances which entitled the court a quo to impose a discretionary sentence of less than life imprisonment and secondly, whether the sentence imposed was appropriate and in accordance with justice and equity. Put differently, was it a just sentence that was imposed upon the appellant.

³ S v Tafeni 2016 (2) SACR 720 at 723

[24] The complainant testified that the appellant was drunk when he asked her to sleep with him the first time. However, the evidence is unclear as to the state of sobriety of the appellant on the second occasion when he raped the complainant. To this end, there is no mention of his state of sobriety during the second occasion. However, from the totality of the evidence, as well as the overall ordinary conduct of the appellant as described by the complainant and her mother, I am inclined to accept that the appellant had a problem in predominantly remaining sober whilst at home.

I am further impelled not to make much of the state of sobriety of the appellant on the second occasion, as the court *a quo* took both counts as one when imposing sentence, and I shall accordingly treat the two counts as one for the purposes of determination in this appeal.

[25] I have duly taken into account the fact that the appellant was 46 (forty six) years old when sentenced, married with three children. He has a Grade 5 education and was unemployed at the time of his arrest. He had an unrelated previous conviction that was more than 20 (twenty) years ago. Lastly, the appellant spent a period of just over 18 (eighteen) months in custody pending his trial.

[26] It is trite that no single factor can be substantial and compelling circumstances, and the correct approach is to look at all the factors cumulatively. I am mindful of the fact that alcohol on its own cannot interfere with a prescribed minimum sentence. However, the consumption of alcohol is relevant in the consideration of a sentence since it can affect an accused's moral blameworthiness. To this end, I am satisfied that the court *a quo* correctly analysed and applied the remaining factors relevant to aggravation and mitigation (excluding the intoxication issue), as well as the appellant's personal circumstances.

[27] In **Fowlie v Rex 1906 TS 505 at 511** Wessels J stated as follows:
"It would be absurd to say that if a man in his cold, sober senses did the act he should be punished with no greater severity than the man who did it whilst under the influence of liquor. That there should be a difference in the degree

of punishment has been recognised in almost every system of jurisprudence. In the Digest, (48, 19, 11), we find the distinctions drawn between the punishment of a sober man and of a man who had been drinking; and Matthaeus says: Ebrius aliquo mitius puniri debet quia non proposito sed impetu delinquit. Although a man may not be so drunk as to be excused the commission of a crime requiring special intent, yet he may have been so affected with liquor that his punishment should be softened."

[28] In **S v Babada 1964 (1) SA 26 (A) 28 C - D** the Court held as follows:
 “ ‘n Verhoorhof wat homself regtens gedwonge ag om sekere feite van oorweging uit te sluit, wat regtens nie uitgesluit behoort te word nie, began ‘n mistasting. So-ook, wat invloed van drank betref, wanneer ‘n Verhoorhof by die uitoefening van sy funksie sy bevoegdheid beperk deur ‘n assumpsie dat regtens ‘n bepaalde graad van beskonkenheid vereis word alvorens die beskokenheid as versagende omstandigheid kan dien, begaan so ‘n hof ‘n mistasting omdat regtens geen bepaalde grad vasgestel is nie.”

[29] In **S v Ndhlovu (2) 1965 (4) SA 692 (A) 695 C – D** the following was stated: *“Intoxication is one of humanity’s age-old frailties, which may, depending on the circumstances, educe the moral blameworthiness of a crime, and may even evoke a touch of compassion through the perceptive understanding that man, seeking solace or pleasure in liquor, may easily over-indulge and thereby do the things which sober he would not do.”*

[30] I have carefully considered the record of proceedings and am satisfied that the court a quo did not properly take into account all the relevant factors that needed to be taken into account when determining whether there were substantial and compelling circumstances present; and which would cause it to deviate in the imposition of the prescribed minimum sentence.

To this end, it is clear from the record of proceedings the court a quo did not place sufficient emphasis upon the fact that the consumption of alcohol on the part of the appellant played a role in his conduct.

[31] I am full well aware that this was an abhorrent crime upon a nine-year-old child and which will have devastating lifelong psychological consequences. In addition thereto, the complainant is related to the appellant and he grossly abused his position of trust. He showed no remorse for his heinous actions whatsoever.

[32] However to the above must now be added the issue of intoxication. All the factors including the traditional and otherwise, must be assessed both to establish whether there are, or are not, substantial and compelling circumstances, as also whether life imprisonment is in any event a fair and just sentence.⁴

[33] I am mindful of the fact that the appellant's state of intoxication does not detract from the moral reprehensibility of the offence but is such as requiring to be taken into account (at the sentencing stage) as relevant to moral blameworthiness and thus also relevant to both substantial and compelling circumstances, and sentence.

[34] Accordingly in my view, taken cumulatively, these factors when including intoxication, viewed correctly, establish the presence of substantial and compelling circumstances, entitling this Court to intervene having due regard to the case law and for the reasons set out. Further, this is also such as to establish life imprisonment to be other than a just and equitable sentence.

[35] It is trite that once substantial circumstances have been found to exist that all the relevant factors must be considered cumulatively to establish an appropriate, just and equitable sentence.

[36] Having considered all the evidence that was led in mitigation of sentence, it is clear that there are no substantial mitigating factors of consequence other than the reduction of moral blameworthiness due to the appellant's state of intoxication.

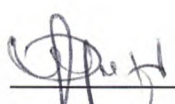
⁴ Mpongoshé v The State (ECG) CA 24/2019, line 43, judgment delivered on 11 February 2020

[37] As previously stated, it is clear that rape and more especially of a child is extremely serious and abhorrent, with devastating effects and consequences for the complainant, and which warrants a heavy sentence of 25 (twenty five) years imprisonment, taking all relevant mitigating and aggravating factors into account.

[38] In concluding I am reminded of the comments made by Harms J in **S v Mhlakaza 1997 (2) All SA 185 (A)** wherein he held as follows: *“The object of sentencing is not to satisfy public opinion but to serve the public interest.... A sentencing policy that caters predominantly or exclusively for public opinion is inherently flawed”*.

[39] In the result, I would make the following order:

- [a]. The appeal against sentence is upheld, the conviction of the appellant is confirmed, and the sentence is set-aside to the extent as set out below.
- [b]. The sentence of life imprisonment is replaced with a sentence of 25 (twenty five) years imprisonment.
- [c]. The sentence is antedated to 06 February 2019, being the date upon which the Court a quo imposed the sentence.



C I MOOSA

**ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION
JOHANNESBURG**

I agree and it is so ordered:



T P MUDAU

**JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION
JOHANNESBURG**

Counsel for Appellant:

Instructed by:

Mr AJ Greyling

**Legal Aid South Africa
Johannesburg**

Tel: 0118701480

Mobile: 0824401747

riaang@legal-aid.co.za

Counsel for Respondent:

Instructed by:

Mr R Ndou

**Director of Public Prosecutions
Johannesburg**

Tel: 0112204102

RNdou@npa.gov.za

Date of Hearing:

22 March 2021

Date of Judgment:

20 May 2021