

IN THE HIGH COURT OF SOUTH AFRICA**(WESTERN CAPE HIGH COURT, CAPE TOWN)****CASE NUMBER:**

A342/2010

5 **DATE:**

15 OCTOBER 2010

In the matter between:

CHESLIN WILLIAMS

Appellant

and

10 **THE STATE**

Respondent

J U D G M E N T15 **BOZALEK, J:**

The appellant was charged with one count of robbery with aggravating circumstances, one count of murder and once count of rape committed between 13 and 14 July 2006 in Durbanville, in the Regional District of the Western Cape. It was alleged that he had raped and murdered Ms Renata Kellerman ("the deceased") in the guesthouse which she ran and occupied and then robbed her of goods to the value of R65 000,00, including her motor vehicle. The appellant pleaded not guilty to all the charges and was legally

/bw /...

represented both at the plea stage and during the trial.

On 25 June 2009, the appellant was convicted of theft, murder
and attempted rape. He was sentenced to life imprisonment
5 on the conviction of murder, five years imprisonment on the
theft conviction and eight years on the conviction of attempted
murder. He now appeals only against the conviction of
attempted rape and against the sentence of life imprisonment.
No application for leave to appeal appears to have been made,
10 but in terms of section 309(1)(a)(ii), as it then stood, of Act 51
of 1977, the appellant was entitled to appeal against his
conviction and sentence on the murder charge without leave to
appeal, since the sentence of life imprisonment was imposed
in terms of section 51(1) of the Criminal Law Amendment Act
15 105 of 1997.

This exception to the general rule was brought about by an
amendment of section 309 effected by section 6 of the Criminal
Law (Sentencing) Amendment Act 38 of 2007. Section 309(1)
20 of the Criminal Procedure Act was again amended with effect
from 1 April 2010 by the Child Justice Act 75 of 1997, which
apparently removed this exception. Counsel in fact advised
during the hearing, and after they had furnished supplementary
heads on this point, that the exception has in fact been
25 removed but apparently this was an omission, an oversight, on

A342/2010

the part of the legislature which has now been pointed out to the authorities and will be remedied. This is welcome in the sense that there is presently a lacuna, and has been since April of this year, in that, notwithstanding the legislature's
5 apparent intention, persons sentenced in the magistrate's court to life imprisonment have no automatic right of appeal against their conviction or sentence.

Be that as it may, the appellant was sentenced before 1 April
10 2010 and thus had the automatic right of appeal against his life sentence and conviction of murder. As far as the conviction for rape is concerned, that conviction triggered the sentencing regime established by section 51 of Act 105 of 1997. In these circumstances it would be anomalous were it
15 required of an appellant to still seek leave to appeal against the triggering conviction and, therefore, the provisions of section 309(1)(a)(ii), as it then stood, must be held to cover such a conviction as well. In any event this Court can exercise its review powers in terms of section 304(4) of the Criminal
20 Procedure Act to hear the appeal against the rape conviction and this would be an appropriate case to exercise such powers. I should add that the notice of appeal in this matter was filed a month or two late but the appellant has sought condonation therefor. It is not opposed by the State and it is,
25 therefore, granted.

/bw

/...

Ad conviction:

Although the accused pleaded not guilty to all charges, after pleading he made a series of admissions in terms of section 220 of the Criminal Procedure Act, in which, in essence, he
5 admitted all the elements of the murder charge and all the elements necessary to find him guilty of theft of the goods of the deceased after her death as listed in the robbery charge. He made no admissions, however, relating to any rape, attempted rape or sexual assault upon the deceased. The
10 appellant, in the same document, gave a version of what took place between himself and the deceased.

Briefly he explained that he had been a guest at the guesthouse and had been alone with the deceased late that
15 night. They had consumed alcohol and an argument had taken place. The version proceeds:

“Op die betrokke tyd het ek ’n mes in die kombuis geneem om die oorledene skrik te maak. Sy het haar egter nie
20 veel gesteur aan die mes nie en ons het verder beweeg na die kamer op die boonste verdieping, waar ek en Karin (I interpose, his partner) geslaap het. Sy moes die kamer vir my oopsluit, aangesien ek nie ’n sleutel gehad het vir die kamer nie. Dit was duidelik uit haar optrede
25 dat sy nie gedink het dat ek enige iets sou doen met die

mes nie. In die kamer het sy seksuele voorstelle
gemaak. Sy het haar langbroek uitgetrek en haar klein
broekie afgetrek. Dit was ongeveer die tyd wat Karin sou
huis toe kom. Ek wou nie gemeenskap met haar gehad
5 het nie. Sy het my gedreig dat sy vir Karin sal sê dat ons
seks gehad het. Ek het my bloediglik vir haar vererg en
haar op die ingewing van die oomblik met die mes
gesteek.”

10 This version was not accepted by the State. The balance of
the State's case was largely made up of the contents of
numerous documents and statements in the police docket,
which were admitted by and on behalf of the appellant, either
in terms of section 220 or 212 of the Criminal Code. Amongst
15 these documents and statements were the *post-mortem* report,
photographs taken at the crime scene, a video taken at the
scene, photos of the deceased taken during the *post-mortem*,
numerous witness statements and forensic evidence and
testing results, including DNA testing results. In addition the
20 State led three witnesses who gave forensic evidence relating
to the rape charge.

The first State witness was Captain Kunze, an assistant
forensic analyst in the forensic science laboratory. He
25 testified that vaginal swabs taken from the deceased had
/bw /...

tested positive for the presence or possible presence of seminal fluid but that no male DNA could be isolated from the swabs. A Mr D McPherson, a specialist auxiliary service officer at the same forensic science laboratory, testified in greater detail on these tests and finally, Dr E H Burger, a medical doctor in forensic pathology gave expert evidence. This she did on the basis of having considered all the relevant material to be found in the docket (and admitted on behalf of the appellant), relating to the crime scene, the *post-mortem* and the forensic tests conducted. She expressed the opinion that it was probable that there had been recent sexual penetration of the deceased and that this had been accompanied by a measure of force.

The appellant did not testify nor call any witnesses on his behalf. The magistrate concluded, on the basis of circumstantial evidence, that the appellant had attempted to rape the deceased and it is this finding which is attacked on appeal. Before setting out the basis upon which the magistrate convicted the appellant, a short summary of the background facts is appropriate. At the material time the deceased was separated from her husband and living with her two young children in the guesthouse cum house, which she ran in Durbanville.

On 11 July 2006, the appellant, his partner, a Ms Karin Kortje, and her manager booked into the guesthouse. On the night of 13/14 July, Ms Kortje and her manager were busy elsewhere and the appellant returned to the guesthouse at approximately 10 p.m. alone to find the deceased, her four year old son and her friend, a Ms Griesel. The three adults enjoyed some drinks in the course of which the deceased scolded the appellant for causing his partner to be late for an appointment and told him that he must not ruin her singing career. Ms Griesel left for home, leaving the appellant still in the lounge.

In the early hours of the morning Ms Kortje and her manager returned to find the deceased's vehicle missing and the front door the guesthouse standing open. They found her child sleeping in his mother's bedroom and eventually discovered the deceased's body on the floor of the room occupied by Ms Kortje and the appellant. The deceased was lying in a pool of blood, with gaping linear stab wounds on both the right and the left side of her neck which wounds had completely severed the respective jugular veins. The deceased was in a state of undress, being naked from the waist down save for the one shoe, sock and panty around her right ankle. Above her waist she wore a brassiere and a long sleeve top.

Her upper body and face was covered with a duvet. The
/bw /...

A342/2010

deceased's legs were spread and her pants were at the side of her head with a belt lying partly over her face. In addition to the stab wounds in her neck, the deceased had suffered another four stab wounds either to the neck or the chest. Her death had been caused by these multiple stab wounds. The pathologist also noted multiple bruises on the neck and chest, scratches and bruises on the right and left upper arm, bruises on the right elbow and the left forearm, as well as bruises on the medial inner aspects of both the left and right thighs. A laboratory test revealed that the deceased's blood alcohol level was 0,27 grams per 100 millilitres.

The appellant's luggage was missing from the room. After a police search he was arrested the following day. He pointed out to the police where he had left the vehicle which he had stolen from the deceased, where he had thrown the deceased's bank cards and keys to the vehicle. It was duly recovered as was the deceased's cell phone which was found by a family member in one of the appellant's suitcases. The blood-stained clothing which the appellant had worn when he had stabbed the deceased were also recovered. Soon after his arrest the appellant was taken to the district surgeon who examined him and found nail scratch marks on his neck which the doctor estimated to be about two hours old.

25

/bw

/...

In the statements taken by the police from the appellant on the day after the murder, it is recorded that these scratch marks were respectively three, nine and 10 centimetres in length. The appellant made two statements to the police, the first on 5 14 July 2006 in which he stated that his father, accompanied by a friend, had stabbed the deceased in his presence, that is the appellant's presence, in the course of a robbery and after the appellant had rejected her sexual advances. Three days later the appellant made a further statement stating that he 10 had lied regarding the involvement of his father and his father's friend in the murder. He repeated his version of the deceased having made sexual advances to him. He stated that he had repeatedly stabbed her after she had threatened to tell Ms Kortje that he had raped her.

15

The magistrate based the conviction of attempted rape primarily on eight pieces of circumstantial evidence. These were the circumstances in which the deceased was found, including her state of partial undress, the bruises on her body, 20 tissue damage or bleeding in her posterior fourchette, indicative of blunt trauma, seminal liquid found in her vagina, a pubic hair of the appellant found on the carpet between the deceased's legs, fresh scratch marks on the appellant, blood on the appellant's tracksuit pants and the stab wounds to the 25 deceased which the magistrate regarded as being indicative of

/bw /...

having been inflicted during the course of a sexual assault.

The magistrate noted that the appellant's plea-explanation and the contents of the two statements which he had made were
5 not evidence. He nonetheless analysed their content and highlighted what he considered to be contradictions and discrepancies therein and between such contents and the proven evidence. Using the admitted evidence the magistrate considered the probabilities and concluded that,
10 notwithstanding the fact that she was under the influence of alcohol at the time, it was most unlikely that the deceased had made sexual advances towards the appellant. He emphasised that the circumstantial evidence needed to be considered as a whole and not on a piecemeal basis.

15

He concluded further that, notwithstanding the evidence regarding the tissue damage and the presence of seminal fluid, the State had not succeeded in proving that there had been penetration by the appellant of the deceased. He concluded,
20 however, that the State had, by virtue of the evidence referred to earlier, built a strong *prima facie* case of attempted rape against the appellant based on circumstantial evidence which in effect called for an answer from him but which had not been forthcoming. He concluded that the only reasonable inference
25 to be drawn from the accepted evidence was that the appellant

/bw

/...

A342/2010

had attacked the deceased intending to rape her and that his acts had reached such a stage that they amounted to an attempt to rape and that he thereafter fatally stabbed the deceased.

5

The Case on Appeal:

On appeal it was contended on behalf of the appellant that the magistrate erred in not accepting the appellant's version as reasonably possibly true, in relying on the expert opinion of Dr
10 Burger, in failing to ascribe a role to the effect that alcohol may have had on the behaviour of the deceased, in finding that the statements of the appellant had no evidential value yet drawing a negative inference therefrom. In particular, counsel criticised Dr Burger's opinion for focusing only on the
15 possibility of rape rather than other possibilities which could have caused the injuries which the deceased suffered. Counsel also pointed to the fact that Dr Burger admitted under cross-examination that other factors could have influenced the test for seminal fluids.

20

Analysis:

There can be no doubt that the substantial body of circumstantial evidence pointed towards a sexual assault by the appellant upon the deceased. The state of semi-
25 nakedness in which the deceased's body was found, as well as

/bw

/...

the position of her legs points, in my view, unmistakably towards some form of sexual contact or encounter. This was borne out or recognised by the appellant who sought to explain, both in his section 220 admissions and in his
5 statements to the police, that the deceased's state of undress was a result of her making sexual advances. A central question which arises is whether the circumstantial evidence found is compatible with an explanation other than an attempted rape of the deceased.

10

One such explanation is that found in the appellant's purported admissions and in his statements, namely sexual advances by the deceased upon him and therefore the magistrate was, in my view, correct in analysing the probabilities of this having
15 taken place, taking into account the unchallenged evidence admitted on behalf of the appellant. A highly relevant factor is the nature of the injuries which the deceased sustained and, to a lesser extent, those found on the appellant. The bruises found on the deceased's body were not only indicative of a
20 physical struggle between herself and the appellant but point towards an attempt by him to sexually assault or rape her. The pathologist identified bruises on the inside of both the appellant's thighs which would be consistent with an attempt to force her legs open.

25 In addition there was medical evidence, undisputed, that a
/bw /...

A342/2010

histological examination revealed at least four instances of soft tissue bleeding within the deceased's genitalia, suggestive of recent trauma. Further, there was the evidence of fresh nail scratch marks on the appellant's neck or throat and of the possible presence of seminal fluid in the deceased's vagina. Finally in this regard, there was undisputed evidence that a pubic hair emanating from the appellant was found between the deceased's legs. The closest that the appellant came to giving a version of the events were his purported admissions regarding the circumstances in which he stabbed the deceased. It should first be noted that these purported admissions hardly constitute evidence but were at most "probative or evidential material". See S v Sesetse 1981(3) SA 353 (A) 373H and S v Makgathla 1977-9 BSC 79 85E.

15

It must further be said that the version, namely that contained in paragraphs 2.3 and 2.4 of the section 220 admissions, bristles with discrepancies and improbabilities. On the one hand the appellant says that he and the deceased were involved in an argument but shortly thereafter she made sexual advances to him. He states that he seized the knife in the kitchen to frighten the deceased but that she paid little attention to this and in fact accompanied him upstairs to his room. Not only did he claim that the deceased made sexual advances to him, but in the very room which he occupied with

25

/bw

/...

his partners and in the early hours of the morning when his partner was expected back.

Equally improbable is that on her advances being rejected, the deceased threatened the appellant that she would tell his partner that they had had sex. There was undisputed evidence that the deceased had chided the appellant not to ruin Ms Kortje's career, an attitude which is difficult to reconcile with her making sexual advances to him in Ms Kortje's absence.

That evidence emanated from the deceased's friend, Ms Petronella Griesel (Exhibit J), who testified that she left the house on the night of the murder after 10 p.m. and after there had been an exchange of words between the deceased and the appellant. She added that upon leaving, feeling uneasy, she had advised the deceased to lock herself and her child into her room. Again this evidence appears inconsistent with the deceased making advances to the appellant after Ms Griesel's departure.

The appellant clearly implied that the deceased had removed her long trousers and her underpants. Again this was not consistent with the state of undress in which the deceased was found with one shoe and one sock still on and her underpants still around her one ankle, but is consistent with her clothing being forcibly removed by the appellant and with her putting up

resistance to this. Such a scenario would also account for the scratch marks on the appellant's neck/throat area.

The magistrate took the view that the contents of the
5 appellant's statements were similarly not evidence but that
nonetheless regard could be had thereto in order to evaluate
the probabilities and determine whether an attempted rape was
the only reasonable inference to draw from the accepted
evidence. These admitted statements were not evidence of
10 their contents of course, but having been admitted by the
appellant, were evidence that he had made these statements
shortly after his arrest. I can see no reason why regard cannot
be had to their contents in evaluating whether the inference of
rape or attempted rape could legitimately be drawn from the
15 proven evidence.

Here further difficulties arise for the appellant. The first
statement in which he falsely implicated his father and another
person in the deceased's murder illustrates that even after his
20 arrest he was seemingly prepared to lie about the
circumstances of the crimes which he had committed. In his
second statement the appellant confirms what he said in his
first statement, namely that the deceased accompanied him to
his room in order to unlock it since Ms Kortje had the key. He
25 again stated that the deceased then made sexual advances to
/bw /...

A342/2010

him and that he rejected these. He then grabbed her around the neck and tried to push her out of the room whereupon the deceased insulted him. Notwithstanding this, she removed her underclothing and said that she was going to tell Ms Kortje
5 that he had raped her whereupon the appellant lost his temper, ran down to the kitchen to fetch a knife and returned to his room where he again told the deceased to leave. The deceased then grabbed his neck and that is when, he thinks, she scratched him. He began to stab her and then left her on
10 the floor.

Immediately apparent are the glaring discrepancies between the appellant's two versions of how he came to be in possession of the murder weapon, as also the improbability of
15 the deceased refusing to leave the appellant's room, notwithstanding his rejection of her advances, and returning with the knife, as also the discrepancies between the deceased allegedly threatening to cry rape in one version as opposed to allegedly falsely claiming consensual sex in the other version.

20 Not only is the notion of the deceased making such persistent sexual advances to the appellant improbable, particularly in the light of the earlier quarrel, but his response, to savagely and repeatedly stab her with a steak knife, was out of all
25 proportion to any alleged provocation and adds to the
/bw /...

improbability of the overall picture.

The magistrate correctly noted, as a further relevant factor, that forensic evidence as well as the bloodstains on the
5 appellant's clothing, indicated that the deceased had been stabbed as she lay on the floor, probably whilst the accused knelt or sat astride her. The magistrate was criticised for not ascribing a role to the effect upon the deceased of her consumption of alcohol. However, he expressly took this
10 evidence into account. Furthermore, this criticism loses sight of the fact that only the appellant could testify directly on this score. Nor does it follow that because the deceased was under the influence of alcohol, even strongly so, that intemperate sexual behaviour must be ascribed to her. The
15 possible effect of alcohol upon the deceased is but one factor to take into account in the evaluation of the circumstantial evidence.

The appellant criticised the magistrate's reliance on the expert
20 opinion of Dr Burger, suggesting that she concentrated on the possibility of a rape or attempted rape to the exclusion of all other possibilities. I cannot find any undue reliance by the magistrate on Dr Burger's opinion, as opposed to his reliance on her observations about specific aspects of the injuries
25 suffered by the deceased and their incidence in rape cases.

A342/2010

Secondly, Dr Burger was called to furnish her opinion on the likelihood on the deceased's injuries being associated with the rape or sexual assault, which she did. It was not for her to invent other possibilities, farfetched or otherwise, which would
5 account for these injuries. Such alternative scenarios or explanations could either have been put to her in cross-examination, or dealt with by the appellant either through his evidence or by calling a witness, or simply dealt with in argument by defence counsel.

10

Finally, it was submitted that the magistrate erred in not accepting the version of the appellant as reasonably possibly true and, correctly so, that it was not for the appellant to prove his innocence but for the State to discharge the onus of
15 proving his guilt beyond reasonable doubt. The first part of the argument overlooks the fact that the appellant offered no version of what took place on the night in question. Instead, faced with the substantial body of circumstantial evidence pointing towards the sexual assault upon the deceased, he
20 chose to remain silent and this in circumstances where he admitted murdering the deceased.

The magistrate placed reliance on the following dictum of Zulman, AJA in S v Reddy & Another 1996(2) SACR 1 (A) page
25 8(c), dealing with the approach to circumstantial evidence
/bw /...

which dictum is indeed apposite:

5 “In assessing circumstantial evidence one needs to be careful not to approach such evidence upon a piece-meal basis and to subject each individual piece of evidence to a consideration of whether it excludes the reasonable possibility that the explanation given by an accused is true. The evidence needs to be considered in its totality. It is only then that one can apply the oft-quoted dictum in 10 R v Blom 1939 AD 188 at 202-3 where reference is made to two cardinal rules of logic which cannot be ignored ...”

The matter is well put in the following remarks of Davis, AJA in R v De Villiers 1944 AD 493 at 508-9:

15 “A Court must not take each circumstance separately and give the accused the benefit of any reasonable doubt as to the inference to be drawn from each so taken. It must carefully weigh the cumulative effect of all of them together and it is only after it has done so that the accused is entitled to the benefit of any reasonable doubt 20 which it may have as to whether the inference of guilt is the only inference which can reasonably be drawn. To put the matter in another way, the Crown must satisfy the Court not that each separate fact is inconsistent with the innocence of the accused, but that the evidence as a whole is beyond reasonable doubt inconsistent with such 25

innocence.”

The magistrate also drew an adverse inference from the appellant’s silence in the face of the case made out by the State. In doing so he noted that the stronger the State’s case the greater is the expectation that an accused will give an explanation, particularly where an accused does not testify whilst at the same time he is the only person aware of the true facts. In Osman v Attorney General Transvaal 1998(2) SACR 493 (CC), the Constitutional Court stated as follows:

“Our legal system is an adversarial one. Once the prosecution has produced evidence sufficient to establish a *prima facie* case, an accused who fails to produce evidence to rebut that case is at risk. The failure to testify does not relieve the prosecution of its duty to prove guilty beyond reasonable doubt. An accused, however, always runs the risk that absent any rebuttal, the prosecution’s case may be sufficient to prove the elements of the offence. The fact that an accused has to make such an election is not a breach of the right to silence. If the right to silence were to be so interpreted, it would destroy the fundamental nature of our adversarial system of criminal justice.”

See also S v Boesak 2001(1) SACR 1 (CC) at 24, where the

Court held that the fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer and an
5 accused person chooses to remain silent in the face of such evidence, a Court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilty of the accused. Whether such a conclusion is justified will depend on the weight of the evidence.

10

Ultimately, however, the test is whether the State has managed to prove its case beyond reasonable doubt. The other salient principle applicable in the present case is that where the fact or facts in issue are to be proved by
15 circumstantial evidence alone, then the inference which is drawn must be consistent with all the proved facts and no other reasonable inference should be capable of being drawn from those facts. In my view, there were no facts proved by the evidence inconsistent with the inference that the appellant,
20 at the very least, attempted to rape the deceased. Nor, in my view, is there any other reasonable inference to be drawn from the proven facts before the Court, most notably the nature of the injuries which the deceased sustained and the circumstances in which her body was found, other than a rape
25 or an attempted rape.

/bw

/...

In reaching this conclusion, it must be borne in mind that it is not incumbent upon the State in order to discharge the onus which rests upon it to "indulge in conjecture and find an answer to every possible inference which ingenuity may suggest any more than the Court is called upon to seek speculative explanations for conduct which, on the face of it, is incriminating", per Diemont, JA in S v Sauls & Another 1981(3) SA 172 (A) at G-H.

10

I consider that the absence of direct evidence of penetration [in the pre-Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 sense] and the questionable strength of the evidence relating to the presence of seminal fluid in the deceased's vagina, it was a salutary finding that a rape had not been proved. But the overall circumstances, including the bruises on the deceased's inner thighs, her state of undress, the evidence of the forcible and/or hasty removal of her clothing, the scratch marks on the appellant and, crucially, the presence of his pubic hair found between her legs, combine to powerfully suggest both that the appellant's actions amounted to more than merely an indecent assault and that they had gone beyond the stage of preparation for a rape, and in fact constituted an attempt to rape.

25

/bw

/...

These circumstances were sufficient to prove the elements of the offence of which the appellant was convicted. At the very least they established a *prima facie* case, calling for a rebuttal from the appellant, which was never forthcoming. In the result

5 I am not persuaded that the magistrate erred in finding that the State had proved a case of attempted rape beyond reasonable doubt.

Ad Sentence:

10 In terms of the Criminal Law Amendment Act 105 of 1997, as amended, read with Part I of Schedule 2, the magistrate was obliged to impose a sentence of life imprisonment in respect of the murder conviction unless satisfied that "substantial and compelling circumstances" existed which justified the
15 imposition of a lesser sentence. Section 51(1) was brought into play as a result of the death of a victim being caused by the accused attempting, or after having attempted, to rape the deceased. The magistrate found no such substantial or compelling circumstances warranting a lesser sentence.

20

On appeal it was contended that the magistrate erred in this regard and should have let the appellant's youth, the fact that he had a minor child, that he had been in custody for almost two and a half years awaiting trial, that he could be
25 rehabilitated and that he showed remorse, were factors which

constituted, singly or cumulatively, such circumstances. In addition, relying on S v Vilakazi 2009(1) SACR 552 (SCA), it was argued that the appellant's previous convictions were not so serious as to ascribe a lawless character to him.

5

In S v Malgas 2001(1) SACR 469 (SCA), the Court held that the ultimate test when sentencing in terms of the minimum sentencing dispensation, was that:

10 "If the sentencing court, on consideration of the
circumstances in that particular case, is satisfied that
they render the prescribed sentence unjust in that it will
be disproportionate to the crime, the criminal and the
needs of society so that an injustice would be done by
15 imposing that sentence, it is entitled to impose a lesser
sentence."

It was also held in Malgas, that, of the factors traditionally taken into account in sentencing, "none is excluded at the
20 outset from consideration in the sentencing process". It must
also be borne in mind that a court of appeal will interfere with
the sentence imposed by a trial court only in limited
circumstances. Scott, JA summarised the test to be applied in
these circumstances in S v Van Eck 2003(2) SACR 563 (SCA):

25

“As has been said time without measure, the power of a court of appeal to interfere with a sentence imposed by the trial court, is limited. It may do so only when the exercise of a trial court’s discretion is vitiated by
5 misdirection or the sentence imposed is so inappropriate as to indicate the discretion was not properly exercised.”

In this regard it is also important to bear in mind that:

10 “The decisions clearly indicate that a court of appeal will not alter a determination arrived at by the exercise of a discretionary power, merely because it would have exercised that discretion differently. There must be more than that.”

15

See S v M 1976(3) SA 644 (A) at 649E.

As regards the circumstances contended for as falling into the category of or comprising substantial and compelling
20 circumstances, two can be disposed of without much ado. The fact that the appellant had a minor child and that he had been in custody pre-trial for some two and a half years, carry little, if any, weight in the greater scheme of things.

25 It is then contended that the accused showed remorse and that

A342/2010

he can be rehabilitated. The record of this matter shows little indication of any genuine remorse. The appellant pleaded not guilty and did not testify either before or after conviction. Neither his admissions in terms of section 220 nor his
5 statements to the police suggest any remorse and neither do his actions after the murder. He did not immediately flee the scene of the crime, but systematically gathered the deceased's valuables and stole them, leaving in her vehicle. He did not surrender himself to the police, but was found by them the
10 following day. His first statement to the police was, to no small degree, a tissue of lies in which he blamed the murder on his father and a friend.

It was contended that a further mitigating factor was that the
15 appellant could be rehabilitated. This may be so, but the appellant's previous convictions, his lack of remorse and his history of making threats of violence, suggests that he is less than promising material for early rehabilitation. In this regard the probation officer reported that Ms Kortje had advised that
20 she personally knew of five to seven instances where the appellant had used a knife to threaten or intimidate someone. Despite being only 21 years old at the time of the commission of the offence, the appellant had been convicted on three previous occasions of offences involving dishonesty and had
25 served direct imprisonment. It appears that at the time he

/bw

/...

committed the murder, he was serving parole. In my view the only factor which could be said to constitute a substantial mitigating factor, was the appellant's youth.

- 5 As was observed in S v Du Toit 1979(3) SA 846 (A), in dealing with the meaning of the interests of society:

“Die belange van die gemeenskap by 'n straf wat opgelê word, is veelledig. In sommige gevalle tree die belang
10 na vore wanneer die gemeenskap beskerm moet word teen die gedrag van 'n bepaalde individu.”

To my mind this is such a matter. The murder which the appellant committed was of a particularly brutal and heinous
15 nature. The appellant inflicted at least five stab wounds upon the deceased, including two savage and fatal wounds to her neck. The deceased was a defenceless woman, murdered in her own home whilst her young child slept in a nearby room. All this was known to the appellant. In S v Malgas it was held
20 that the prescribed minimum sentences are not to be departed from for flimsy reasons. As I have indicated, the only mitigating factor present was the appellant's youth. This factor is far and away outweighed by the numerous aggravating features of the murder.

25

Taking all these circumstances into account, I can see no basis for a finding on the part of this Court that the life sentence imposed was based on any misdirection on the part of the magistrate, either as to the law or the facts, that the sentence was inappropriate in relation to the offence, the
5 appellant or society or that it constitutes an injustice.

In the result, I would dismiss the appeal against both the conviction of attempted rape and the sentence of life
10 imprisonment on the conviction of murder.

BRUSSER, AJ: I agree.

15

BRUSSER, AJ

BOZALEK, J: It is so ordered.

20



BOZALEK, J