

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case Number: A215/22

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED: YES/NO

DATE: 13 June 2023

SIGNATURE:

In the matter between:

THAPELO STANLEY DLAMINI

Appellant

V

THE STATE

Respondent

Coram: Kooverjie J et Tshombe AJ

Heard on: 18 May 2023

Delivered: 13 June 2023 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the CaseLines system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 12H00 on 13 June 2023.

SUMMARY: Sentences imposed for rape of a minor child is justified. No material misdirection on the part of the trial court exists. Sentences should run concurrently when the offences are inextricably linked and were committed with one intent.

ORDER

It is ordered: -

1. The appeal against the sentences is dismissed.

The order of the trial court in respect of the kidnapping sentence not to run concurrently with the rape sentences is set aside and replaced with the following order:

2. The sentences of life imprisonment of counts 1 and 2 on the conviction of rape are to run concurrently with the charge of kidnapping for a period of 8 years.

JUDGMENT

KOOVERJIE J (Tshombe AJ concurring)

THE SENTENCE

- [1] The appellant was convicted on two charges of rape (in contravention of Section 3 of the Sexual Offences and Related Matters Act 32 of 2007) and one charge of kidnapping. The sentence upon conviction of the crime of rape is subject to a minimum sentence of life imprisonment where the victim was raped more than once or where the victim is a girl under the age of 16 years.¹ Consequently, the appellant was sentenced to life imprisonment on each of the two counts of rape and 8 years on the count of kidnapping.

¹ Section 51(1) of the Criminal Law Amendment Act 105 of 1997 (“the Minimum Sentences Act”)

- [2] The appellant pleaded not guilty to the charges. In terms of Section 280(2) of the Criminal Procedure Act (51 of 1977) the Court ordered that the sentence in respect of counts 1 and 2 would run concurrently. However, the kidnapping charge, count 3, was not to run concurrently with counts 1 and 2. In this appeal, the appellant seeks the reconsideration of his sentence only.

GROUND OF APPEAL

- [3] In his grounds of appeal it was alleged that the trial court misdirected itself in that the sentence was shockingly harsh, inappropriate and disproportionate. The court failed to consider the prospects of rehabilitation. The court erred in ordering that the sentences pertaining to the rape and kidnapping should not run concurrently.
- [4] It was pointed out that the court overemphasized the seriousness of the offences but failed to consider the relevant substantial and compelling circumstances.² These factors allow for a deviation from the minimum sentence as prescribed in the Minimum Sentences Act. The court took into account the aggravating factors which were not presented as evidence by the State.
- [5] The substantial and compelling factors proffered were, *inter alia*, that he was: only 32 years of age at the time of the incident; not married but had three minor children whom he had to take care of; under the influence of alcohol at the time of the incident; unemployed at the time of the incident; not a first offender; and that his previous conviction was one of assault.

THE STATE'S CASE

- [6] The State argued that aggravating factors cannot be ignored, namely the seriousness of the offences for which the appellant had been convicted. The

² As envisaged in section 51(3)(a) of the Minimum Sentences Act

victim was a minor, only 15 years of age at the time of the incident. She was not only dragged to the shack of the appellant, but raped twice, thereafter and locked up and robbed of her cellphone. She had to escape from the shack. The version of the appellant that she requested to be left in his shack and remove her cellphone from her possession remains a fabricated version. More significantly, the court is required to take cognisance of the fact that the appellant showed no remorse at all during the trial proceedings.

- [7] It was further brought to the court's attention that the complainant had been left traumatized and emotionally distressed. The respective victim impact statements (psycho-social reports) formed part of the record. Therefrom it is noted that the incident had left the complainant with deep wounds and scars that took time to heal. She found it very hard to express herself during the interview and was very emotional. She stopped socializing and felt that everyone looked at her differently. After the rape she bled for days and had difficulty walking. The fear of stigmatization has created a secondary trauma for the victim.
- [8] The complainant thereafter suffered a breakdown and had to be admitted in a psychiatric hospital. This affected her schooling and other normal activities that a young girl of her age normally attends to.

EVALUATION

- [9] It is accepted law that this court may only interfere with the sentence if it is satisfied that the trial court had not exercised its sentencing discretion reasonably, thereby justifying this courts interference.³ Our courts have emphasized that the imposition of a minimum sentence cannot be departed from for any flimsy reason.

³ S v Monyani and Others 2008 (1) SACR 543 (SCA)

[10] The appellant is required to show that the trial court materially misdirected itself by not exercising its discretion reasonably, thereby imposing a sentence that was startlingly excessive and disturbingly inappropriate.⁴

[11] The approach adopted by our courts is that when imposing a sentence, consideration must be given to the crime, the offender as well as the interests of society. These factors must be weighed together.⁵ The general purpose of imposing a sentence is said to be fourfold; retributive and preventative, rehabilitative (reformative) and to act as a general deterrent.⁶ In **Rabie** the court concluded that:

“Punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances.”

[12] Ultimately the cumulative effect of all relevant circumstances and facts should demonstrate that the prescribed sentences were disproportionate or otherwise unjust when considering the factors outlined above.

[13] I am mindful that there is no prescribed test laid in determining what constitutes substantial and compelling circumstances. As part of the court’s evaluation in considering such circumstances it would have regard to the triad factors explained above together with the circumstances of the victim.⁷ The impact of the crime on the victim and the victim’s family is of paramount importance.

[14] No doubt, our Constitution has given prime consideration to children and requires citizens and the State to provide the best possible future for them. Section 28 of the Constitution sets out in detail the rights specifically enjoyed by children.

⁴ Malgas at paragraph 12

⁵ S v Zinn 1969 (2) SA 537 (AD)

⁶ S v Rabie 1975 (4) SA 855 (A) at 862 G-H

⁷ See Matyityi 2011 (1) SACR 40 (SCA) at paras 16 and 17

Among them is the right *“to be protected from maltreatment, ... abuse or degradation.”*⁸

[15] It has time and again been echoed by our courts that rape directly impacts on the victim’s right to dignity, equality, bodily integrity, freedom of association and the entitlement to choose with whom to share the most intimate relationship. Rape erodes the victim’s right to bodily and emotional integrity because the violation cannot be undone. In this manner a victim’s constitutional right to freedom of security of person has been trampled on.⁹

[16] The appellant, however, argued that due consideration must be given to the varying degrees of the crime committed. It was argued that the crime was not of such a serious nature that warranted the harsh sentence that was imposed on the appellant. Reliance was placed on the propositions that if substantial and compelling circumstances are found to exist, then life imprisonment is not mandatory. Moreover even in cases where the offences attract the minimum sentences, there may be differences in the degree of their seriousness. Simply put, some offences will be more serious than others.¹⁰ In the case of rape it was suggested that some rapes are more serious than others and life sentences should be reserved for cases devoid of substantial factors.

[17] It was also contended that the trial court failed to enquire into the proportionality reasoning. Reference was made to the matter of **Dodo**¹¹ where the court held:

“Where the length of the sentence which has been imposed because of its general deterrent effect on others, bears no relation to the gravity of the offence the offender is being used essentially as a means to another end and the offender’s dignity assailed. So too where the reformatory effect of the

⁸ S 28 of the Constitution

⁹ S 12(2) of the Constitution

¹⁰ S v Mahomotsa 2002 (2) SACR 435 SCA at para 18

¹¹ S v Dodo 2001 (1) SACR 594 (CC)

punishment is predominant and the offender is sentenced to a lengthy imprisonment is principally because he cannot be reformed in a shorter period, but the length of the imprisonment bears no relationship to what the committed offence merits. Even in the absence of such features, mere disproportionality between the offence and the period of imprisonment would also tend to treat the offender as a means to an end thereby denying the offender's humanity."

[18] Ultimately the circumstances of every matter have to be weighed and must be seen in the context of the factors alluded to above.

[19] In ***S v Matyityi 2011 (1) SACR 40 (SCA) at para 23***, the court reminded us that Parliament:

"... 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, ill-defined 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, [are] foundational to the rule of law which lies at the heart of our constitutional order."

[20] Having regard to these particular circumstances in which the rape occurred and weighing same together with the jurisdictional factors, I find no reason for the appeal court to interfere. In fact, no substantial and compelling circumstances exist. I have considered the trial court's judgment and have noted that it had in fact taken into account all the relevant factors. The trial court was further privy to the pre-sentencing report prepared by Correctional Services as well as the psycho-social reports in respect of both the appellant and the complainant.

[21] I find it necessary to emphasize the factors highlighted in the pre-sentencing report, and which the trial court took into consideration, namely:

21.1 the appellant showed no remorse and maintained his innocence. It was recommended that rehabilitation is not appropriate in this instance. The appellant failed to take full responsibility for his actions;

21.2 the fact that he had a stable upbringing with a stable loving and supportive father, as well as the fact that his children were still young are not compelling.

21.3 It was recommended that imprisonment would be appropriate and that the offence of rape constitutes a very serious offence;

21.4 the victim assessment reports clearly set out the circumstances of the complainant post the incident which cannot be ignored;

21.5 She was not only violated sexually but physically abused as well. Her vaginal area was very painful and she had bled for days. The after effects of the incident left her with “deep rooted psychological scars”. Even though she is currently performing well at school, shortly after the incident she was unable to focus on her studies and did not attend school regularly. She was in and out of the psychiatric hospital.

21.6 Notably the report did however record that alcohol may have clouded his judgment. This fact does not, in any way, outweigh the circumstances of the complainant and the interests of society.

21.7 A further factor considered was the interests of the community. The administration of justice and the confidence of the public in the courts must not be undermined by light sentences for serious crimes.

- [22] I find the aggravating factors to be serious. The complainant, only 15 years at the time, was subjected to physical abuse, sexually violated, locked up in dark unknown surroundings and robbed of her cellphone. The question that begs an answer: What would have become of her if she had not forcefully escaped? This left her in a long term emotional and psychological state.
- [23] The sentencing court in fact emphasized that the appellant should have appreciated that the victim was a minor and helpless at the time. Instead of guiding and assisting her, he took advantage of her. Surely, being a father, he should have appreciated her vulnerability.
- [24] Under these circumstances, I find that no basis has been laid for the conversion of the sentences to rehabilitation. At no point does the appellant take responsibility for his actions. Such lack of remorse has been considered as an aggravating factor by our courts.¹²

CONCURRENT RUNNING OF SENTENCES

- [25] I am mindful that S 39(2)(a)(i) of the Correctional Services Act 111 of 1998 makes provision for the sentences to run concurrently. The State in fact conceded that the sentences of rape and kidnapping should run concurrently.
- [26] In determining whether the sentences ought to run concurrently, one must consider whether there is an inextricable link between the offences in the sense that they form part of the same transaction or were committed as part of the overall criminal conduct. In ***S v Nemutandani***¹³ the court stated:

“The murder committed by the appellant was inextricably linked to the robbery It is trite law that an order for sentences to run concurrently is always called for

¹² S v R 1996 (2) SACR T at 344

¹³ S v Nemutandani [2014] ZASCA 728 (Unreported, SCA case no 944/13), 22 September 2014

where the evidence shows that the relevant offences are inextricably linked in terms of locality, time, protagonists and importantly the fact that they were committed with one common intent.”

[27] Under these circumstances, this court finds that the sentences of rape should run concurrently with the sentence of kidnapping.

[28] In conclusion, I do not find any material misdirection on the part of the trial court. The appeal can therefore not succeed insofar as both sentences for rape and kidnapping are concerned.

H KOOVERJIE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree,

NL TSHOMBE
ACTING JUDGE OF THE HIGH COURT

Appearances:

Counsel for the appellant: Mr MG Botha

Instructed by: Pretoria Justice Centre, Legal Aid Board

Counsel for the Respondent: Adv M Jansen van Vuuren

Instructed by: Director of Public Prosecution

Date heard: 18 May 2023

Date of Judgment: 13 June 2023