



**IN THE HIGH COURT OF SOUTH AFRICA**  
**FREE STATE DIVISION, BLOEMFONTEIN**

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| Reportable:                  | NO |
| Of Interest to other Judges: | NO |
| Circulate to Magistrates:    | NO |

Case no: **A140/2022**

In the matter between:

**TSHOHOLO MANKANE**

Appellant

and

**THE STATE**

Respondent

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**CORAM:** DANISO J *et* BERRY AJ

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**HEARD ON:** 13 MARCH 2023

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**DELIVERED ON:** 24 MAY 2023

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**JUDGMENT BY:** BERRY AJ

This judgment was handed down electronically by circulation to the parties' representatives by email, and release to SAFLII. The date and time for hand-down is deemed to be 15h00 on 24 May 2023.

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**INTRODUCTION**

- [1] The appellant was convicted in the Regional Division, held at Bloemfontein on a charge of rape of a minor on 24 July 2019.
- [2] The appellant pleaded not guilty, but the trial court convicted him as charged and sentenced him to life imprisonment on 25 July 2019.

- [3] He was sentenced in terms of sec 51(1) of the Criminal Law Amendment Act<sup>1</sup> ("the Minimum Sentences Act"), as the trial court did not find any substantial and compelling circumstances to deviate from the prescribed minimum sentence.
- [4] He was declared unfit to obtain a firearm license in terms of Sec 103 of the Firearms Control Act.<sup>2</sup>
- [5] He was also found to be unsuited to work with children in terms of sec 120 of the Children's Act.<sup>3</sup> An order was issued that his name be entered into the Register of Sexual Offenders.
- [6] The appellant, having an automatic right of appeal in terms of sec 309(1)(a) of the Criminal Procedure Act,<sup>4</sup> filed a notice of appeal against conviction and sentence on 29 July 2019.

## **GROUND OF APPEAL - CONVICTION**

- [7] The grounds of appeal can be summarised as follows:
- a) The court erred in finding that the complainant was a credible witness.
  - b) The court erred in drawing a negative inference of the appellant's version and not making a credibility finding in favour of his testimony.
  - c) The court erred in finding that the state had proved its case beyond reasonable doubt.
- [8] The appellant pleaded not guilty and testified that he did not have intercourse with the complainant.

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<sup>1</sup> Act 105 of 1997

<sup>2</sup> Act 60 of 2000

<sup>3</sup> Act 38 of 2005

<sup>4</sup> Act 51 of 1977

- [9] The facts upon which the trial court convicted the appellant are:
- a) The appellant accosted the complainant on street and took her hand by force, indicating that she must walk with him to a friend's house.
  - b) The complainant asked her cousin to intervene. When he tried, the appellant tripped him and kicked him, whilst he was lying on the ground.
  - c) The complainant accompanied the appellant out of fear for her safety.
  - d) The appellant instructed her to enter the bedroom and when she refused, he threatened to assault her.
  - e) Once in the bedroom, the complainant refused to undress, and the appellant slapped her.
  - f) The complainant told the appellant that she was on her monthly cycle, but he still proceeded to rape her, whilst his friend watched.
  - g) After she got dressed the appellant took her to his home. On their way they met up with Mr Thabo Setlai.
  - h) Mr Setlai accompanied them to the appellant's home where they smoked dagga.
  - i) Mr Setlai testified that the complainant consistently asked the appellant to let her go whilst they were walking to his home and that she tried her best to loosen herself from his grip.
  - j) He testified that the appellant responded that the complainant is his wife and that they must go home to sleep together. On arrival at his home, the appellant again slapped the complainant when she refused to enter his home.
  - k) The appellant's wife was at home and when she went to the toilet, the appellant raped her again in front of Mr Setlai.
  - l) The appellant threatened that he would kill the complainant if she said anything to his wife.
  - m) The complainant asked Mr Setlai for help whilst she was being raped by the appellant, but he did not intervene because he was afraid of the appellant.
  - n) Mr Setlai testified that the complainant was an unwilling participant and confirmed that the appellant penetrated the complainant.



- [10] A Court of Appeal will not readily interfere with the findings of a trial court, in **R v Dhlumayo**<sup>5</sup> the court held:

"The trial judge has advantages which Appellate Court cannot have in seeing and hearing the witnesses and being steeped in the atmosphere of the trial. Not only has the court had the opportunity of observing their demeanour, but also their appearance and whole personality. This should never be overlooked. Consequently, the Appellate Court is very reluctant to upset the findings of the trial judge."

- [11] I agree with the finding of the trial court that the State proved its case beyond reasonable doubt, especially in view of the evidence of Mr Setlai.

### **FACTORS RELEVANT TO SENTENCE**

- [12] The court considered that the complainant was fourteen years old at the time.
- [13] The appellant raped her twice and during both instances it occurred in front of another male person.
- [14] The complainant was forced into submission with death threats and actual physical violence.
- [15] The complainant suffered serious injuries because of the forceful penetration.
- [16] The appellant is a first offender.
- [17] The appellant was in custody for four years and seven months at the time of sentencing.
- [18] The appellant was twenty-four years old at the time of sentencing.
- [19] The appellant committed the offence when he was nineteen years old.

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<sup>5</sup> 1948(2) Supplementary Affidavit 677(a) at 705

- [20] The appellant passed Grade 9 and was arrested whilst he was attending Grade 10.
- [21] The appellant has a child who was six years old at the time of sentencing.
- [22] The legal representative for the appellant submitted that the time awaiting trial should be considered as a compelling reason why the court should deviate from the prescribed minimum sentence.
- [23] The trial court was well appraised of the time-honoured triad in **S v Zinn**<sup>6</sup>, the purposes of sentence and the principles to be applied in arriving at a fair and just sentence.
- [24] The personal circumstances of the appellant were considered by the trial court as well as the fact that the appellant spent four years and seven months in custody, before sentencing.
- [25] The trial court considered that the appellant was nineteen years old when he committed the crime.
- [26] The trial court then concluded that there did not exist any substantial circumstances or compelling circumstances to deviate from the minimum sentence.

### **ADJUDICATION OF THE APPEAL IN RESPECT OF SENTENCING**

- [27] Sentencing is the prerogative of the trial court, and a court of appeal should be careful not to erode this discretion<sup>7</sup>.

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<sup>6</sup> 1969 (2) SA 537 (A)

<sup>7</sup> S v Rabie 1975 (4) 855 (A) at 857 D - E

- [28] Interference with a sentence is warranted where there has been an irregularity that resulted in a failure of justice, or when the trial court misdirected itself to such an extent that its decision on sentencing is vitiated, or the sentence is so disproportionate or shocking that no reasonable court could have imposed it.<sup>8</sup>
- [29] The appellant's legal representative submitted that the sentence is shockingly inappropriate and induces a sense of shock. That the court over emphasised the offence at the costs of the appellant's personal circumstances and that the court erred in finding that no compelling and substantial circumstances exists to deviate from the minimum sentence.
- [30] The personal circumstances of the appellant are that he is twenty-four years old, has a child which was six years old at the time of sentencing, that he passed Grade 9, that he was nineteen years old when he committed the crime and he already spent four years and seven months in custody at the time of sentencing.
- [31] The trial court considered the factors but did not deem any or all factors combined as substantial and compelling circumstances to impose a lesser sentence than the prescribed minimum sentence.

## **IMPOSITION OF LIFE IMPRISONMENT**

- [32] The seriousness of rape can never be overemphasised. Our courts have consistently condemned rape in the strongest language as an invasion of the dignity, privacy, integrity, and freedom of a person.<sup>9</sup>
- [33] Rape of a fourteen-year-old girl is a reprehensible crime that cannot be tolerated.

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<sup>8</sup> S v Bogaards 2013 (1) SACR (CC) 1 at para [41]

<sup>9</sup> S v Chapman 1997 (3) SA 341 (SCA) at 344J – 345D; S v Tshabalala and Another 2020 (2) SACR 38 (CC) at paras [72] – [75]



- [34] **S v Nkomo**<sup>10</sup> the court held that life imprisonment as a sentence for rape should be imposed only where the case is devoid of substantial factors compelling the conclusion that such a sentence was inappropriate and unjust.
- [35] In **S v De Beer**<sup>11</sup> the Supreme Court of Appeal held:  
 "This court has pointed out on many occasions that injustices may occur if the prescribed minimum sentences are imposed without a proper consideration of the existence of substantial and compelling circumstances, including the question whether the prescribed sentence will be disproportionate to the offence, in the wide sense, in other words, including all the circumstances of not only the offence itself, but also the circumstances of the parties involved."
- [36] The court held that the four years and seven months imprisonment before sentence, will not make a substantial impact on the actual time to be served by the appellant.
- [37] In **DPP v Gcwala**<sup>12</sup> the court held:  
 "A better approach, in my view, is that the period in detention pre-sentencing is but one of the factors that should be taken into account in determining whether the effective period of imprisonment to be imposed is justified: whether it is proportionate to the crime committed. Such an approach would take into account the conditions affecting the accused in detention and the reason for a prolonged period of detention. And accordingly, in determining, in respect of the charge of robbery with aggravating circumstances, whether substantial and compelling circumstances warrant a lesser sentence than that prescribed by the Criminal Law Amendment Act 105 of 1997, the test is not whether on its own that period of detention constitutes a substantial or compelling circumstance, but whether the effective sentence proposed is proportionate to the crime or crimes committed: whether the sentence in all the circumstances, including the period spent in detention prior to conviction and sentencing, is a just one."
- [38] In **S v Malgas**<sup>13</sup> where Marais JA said:  
 "If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence."

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<sup>10</sup> 2007 (2) SACR 198 (SCA) at p 200 a - b

<sup>11</sup> 2018 (1) SACR 229 (SCA) at para [17]

<sup>12</sup> Director of Public Prosecutions North Gauteng: Pretoria v Gcwala and Others (295/13) [2014] ZASCA 44; 2014 (2) SACR 337 (SCA) (31 March 2014)

<sup>13</sup> 2001 (1) SACR 469 (SCA) para 25

[39] Considering all submissions, I am satisfied that the trial court correctly found that there are no substantial and compelling circumstances, warranting a deviation from the prescribed minimum sentence of life imprisonment.

## CONCLUSION

[40] The trial court correctly found the appellant guilty and correctly imposed the minimum life sentence.

## ORDER

[41] The appeal in respect of both conviction and sentence is dismissed.

I concur.

AP BERRY AJ

The Honourable Justice  
2023 -05- 24  
N.S. Daniso  
NS DANISO, J

On behalf of the Appellant:  
Instructed by:

Mr PL Van Der Merwe  
Bloemfontein Justice Centre  
Legal Aid SA  
BLOEMFONTEIN

On behalf of the Respondent:  
Instructed by:

Adv MS Matsoso  
Office of the DPP, Free State  
BLOEMFONTEIN