



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

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Appeal No: A97/2022

In the appeal between:

FANIE WILLIAM MASEKO

Appellant

And

THE STATE

Respondent

CORAM:

REINDERS, ADJP *et* JORDAAN, AJ

JUDGMENT BY:

REINDERS, ADJP

HEARD ON:

2 OCTOBER 2023

DELIVERED ON:

26 OCTOBER 2023

This judgment was handed down in open court and on even date circulated to the parties' representatives by electronic mail communication.

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- [1] On 9 October 2018 the appellant was arraigned in the Regional Court of this Division held at Frankfort on a charge of rape of a minor child (aged 7 years at the time) in contravention of sec 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act¹, read with the provisions of sec 51 (1) of the Criminal Law Amendment Act.²

¹ 32 of 2007.

² 105 of 1997.

- [2] The appellant pleaded guilty to the charge and was subsequently convicted and sentenced to eighteen years imprisonment. Aggrieved with the imposed sentence, the appellant applied for leave to appeal the latter, which was granted by the trial court. Appellant's grounds for appeal entail in summary that the court a quo over-emphasized the seriousness of the offence and the aggravating circumstances at the expense of the personal circumstances of the victim, that the imposed sentence is inappropriate and out of proportion in relation to the totality of the facts in mitigation (inducing a sense of shock) and that another court "might have imposed another sentence".
- [3] It is trite law that the power of this court sitting on appeal, are limited when it comes to an imposed sentence in so far as interference with same is only warranted where the sentencing court committed a material misdirection, or the sentence imposed is not proportionate, or such a court did not exercise its discretion properly or at all.³
- [4] On a reading of the magistrate's judgment it is evident that the magistrate was well apprised of the principles set out in **S v Zinn** as well as the time honoured purposes of sentencing. She had proper regard to the personal circumstances of the appellant, the crime of rape, the interest of the community and that of the victim. Appellant was convicted of having raped the complainant (Part 1 of Schedule 2) and accordingly the crime was to be read with the provisions of sec 51(1) of Act 105 of 1997.
- 4.1 The trial court had proper regard to the personal circumstances of the appellant, including his age of 41 years, being a widower financially supporting two minor children of whom he is not the primary caregiver. He did piece jobs earning R 1 200-00 monthly. The magistrate took into account that the appellant had a long history of committing crime. She explained that, although the appellant was a first offender in respect of the crime of which he was convicted, previous sentences imposed

³ *S v Rabie* 1975(4) SA 855 (A) at 857 D-F; *S v Makondo* 2002 (1) All SA 431 (A).

seemingly did not give him “the incentive to turn away from criminal behaviour”. The magistrate considered that the appellant had been in custody at the time for a period of 9 months awaiting trial. She also deemed his plea of guilty to be indicative of his remorse.

4.2 In considering the interest of the community the learned magistrate emphasised that, failure by the courts to safeguard vulnerable children, the community might take the law into their own hands.

4.3 With reference to the complainant’s (victim) assessment report by a qualified social worker, the magistrate emphasised the devastating effect of the rape on the minor, including behavioural issues resulting from the incident. The magistrate deemed it aggravating that the appellant was approximately 38 years old at the time of the incident, rendering the victim an easy target. The medico-legal report of the victim revealed that she had suffered injuries.

[5] Although not listed as a ground of appeal, it was contended in appellant’s heads of argument and in submission before us that the trial court erred in not having taken into account the evidence of appellant that he was under the influence of alcohol when he committed the crime.

5.1 The typed record reveals that, on a question posed to appellant during cross-examination about his state of sobriety at the time of the incident, the appellant answered:⁴

“ACCUSED: I did drink on that day.

PROSECUTOR: Were you drunk or just medium.”

ACCUSED: I was drunk.”

5.2 The record then reflects that the legal representative of the appellant in the court a quo submitted:⁵

⁴ Record: p 26 lines 18-22.

⁵ Record: p 28 lines 14-16.

"Your worship, it came out that he was under the influence of liquor on the day of the incident. This is not *per se* a mitigating factor."

5.3 The magistrate in her judgment held as follows:

"With reference to the offender – and that is now your personal circumstances- I am not going to repeat everything that the legal representative said."⁶

5.4 The magistrate concluded towards the end of her judgment:

"After considering the factors placed before me by your legal representative I am then satisfied that the circumstances so put forward indeed constitute substantial and compelling circumstances. Therefore the court is at liberty to deviate from the prescribed minimum sentences."⁷

5.5 In my view therefore there is no merit in the contention that the magistrate did not take the appellant's status of sobriety into consideration in finding a just sentence in the circumstances to be a custodial sentence of 18 years.

[6] Taking into account the principles enunciated in the case law referred to above, it is clear that sentencing is the prerogative of the trial court. I am unable to find that the magistrate had misdirected herself in any way. She properly took into account and considered the factors placed before her when carefully exercising her discretion in balancing all of the mitigating and aggravating factors.

[7] Accordingly I do not find any reason to interfere with the imposed sentence. Having reached the conclusions as I did, it follows that the appeal stands to be dismissed.

[8] The following order is made:

The appeal is dismissed.

⁶ Record: p 37 lines 17-19.

⁷ Record: p 42 lines 5-9.


C. REINDERS, ADJP

I concur.


M. JORDAAN, AJ

On behalf of the appellant:

Ms S Kruger
Instructed by:
Bloemfontein Justice Centre
Legal Aid South Africa
BLOEMFONTEIN

On behalf of the respondent:

Adv S Tunzi
Instructed by:
Director: Public Prosecutions
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