

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, BHISHO)**

CASE NO. CA&R 09/2022

REPORTABLE

In the matter between:

MCEBISI MAKEKE

Appellant

and

THE STATE

Respondent

JUDGMENT

LAING J

[1] This is an appeal against sentence handed down in the Regional Court, Zwelitsha.

Background

[2] The appellant was charged with the rape of a ten-year old girl at or near Tolofiyeni, in the Eastern Cape. It was alleged that section 51(1) applied, read with Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 ('the CLAA'), since the complainant was alleged to have been raped more than once and had been under the age of 16 years at the time.

[3] The appellant pleaded not guilty, and the matter went to trial. The court *a quo* found him guilty and applied the provisions of the CLAA when handing down a sentence of life imprisonment.

[4] The appellant has not appealed against his conviction.

Issues to be decided and approach to be adopted

[5] The grounds of appeal relied on are that the court *a quo* erred in finding that there were no substantial and compelling circumstances to warrant the imposition of a lesser sentence. More specifically, the appellant argues that: (a) he was a first offender; and (b) he was 44 years old and capable of rehabilitation. The appellant also argues that the court *a quo* over-emphasised the seriousness of the offence in relation to the appellant's personal circumstances.

[6] A court of appeal will not interfere lightly with the trial court's exercise of its discretion.¹ In Du Toit's well-known commentary,² the learned authors observe that: 'A court of appeal will not, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court...'³

[7] Case law supports the cautious approach to be taken by a court of appeal. In *S v Bogaards*,⁴ Khampepe J held, at [41], that:

'It can only do so [i.e. interfere with the sentence imposed] where there has been an irregularity that results in the failure of justice; the court below misdirected itself to such

¹ See *S v Romer* 2011 (2) SACR 153 (SCA); *S v Hewitt* 2017 (1) SACR 309 (SCA); and *S v Livanje* 2020 (2) SACR 451 (SCA).

² E du Toit (et al), *Commentary on the Criminal Procedure Act* (Jutastat, RS 66, 2021), at ch30-p42A.

³ See, too, *S v Malgas* 2001 (1) SACR 469 (SCA); *S v Fielies* [2014] ZASCA 191 (unreported, SCA case no 851 / 2013, 28 November 2014); *S v Mathekga and another* 2020 (2) SACR 559 (SCA); and *S v Gebengwana and another* (unreported, ECG case no CA&R 186 / 2015, 21 September 2016).

⁴ 2013 (1) SACR 1 (CC).

an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it.⁵

[8] This is also apparent from *S v Hewitt*,⁶ where Maya DP held that:

'It is a trite principle of our law that the imposition of sentence is the prerogative of the trial court. An appellate court may not interfere with this discretion merely because it would have imposed a different sentence. In other words, it is not enough to conclude that its own choice of penalty would have been an appropriate penalty. Something more is required; it must conclude that its own choice of penalty is the appropriate penalty and that the penalty chosen by the trial court is not. Thus, the appellate court must be satisfied that the trial court committed a misdirection of such a nature, degree and seriousness that shows it did not exercise its sentencing discretion at all or exercised it improperly or unreasonably when imposing it. So, interference is justified only where there exists a "striking" or "startling" or "disturbing" disparity between the trial court's sentence and that which the appellate court would have imposed. And in such instances the trial court's discretion is regarded as having been unreasonably exercised.'⁷

[9] Consequently, the court in the present matter can only interfere with the sentence where the trial court's exercise of its discretion was patently incorrect. The sentence must otherwise be left undisturbed.

[10] The above principles must guide the determination to be made in relation to the appellant's grounds of appeal.

Substantial and compelling circumstances

[11] There is little in the record that serves to advance the appellant's case on appeal. His legal representative made submissions that were very limited in nature. In addition to the fact that the appellant was a first offender and that he was 44 years old and

⁵ At paragraph [41].

⁶ 2017 (1) SACR 309 (SCA).

⁷ At paragraph [8].

capable of rehabilitation, his attorney mentioned only that there was no indication that the complainant suffered any serious physical injury or trauma. No evidence was led.

[12] Counsel for the appellant referred to the seminal decision in *S v Malgas*,⁸ which remains entirely relevant when deciding whether substantial and compelling circumstances exist. The pertinent portions thereof are repeated below, where Marais JA held as follows:

‘...The very fact that this amending legislation has been enacted indicates that Parliament was not content with that and that it was no longer to be “business as usual” when sentencing for the commission of the specified crimes.

...In what respects was it no longer business as usual? First, a court was not to be given a clean slate on which to inscribe whatever sentence it thought fit. Instead, it was required to approach that question conscious of the fact that the legislature has ordained life imprisonment or the particular prescribed period of imprisonment as the sentence which should *ordinarily* be imposed for the commission of the listed crimes in the specified circumstances. In short, the legislature aimed at ensuring a severe, standardised, and consistent response from the courts to the commission of such crimes unless there were, and could be seen to be, truly convincing reasons for a different response. When considering sentence the emphasis was to be shifted to the objective gravity of the type of crime and the public’s need for effective sanctions against it. But that did not mean that all other considerations were to be ignored. The residual discretion to decline to pass the sentence which the commission of such an offence would ordinarily attract plainly was given to the courts in recognition of the easily foreseeable injustices which could result from obliging them to pass the specified sentences come what may.

...Secondly, a court was required to spell out and enter on the record the circumstances which it considered justified a refusal to impose the specified sentence. As was

⁸ 2001 (1) SACR 469 (SCA).

observed in *Flannery v Halifax Estate Agencies Ltd* by the Court of Appeal, “a requirement to give reasons concentrates the mind, if it is fulfilled the resulting decision is much more likely to be soundly based- than if it is not”. Moreover, those circumstances had to be substantial and compelling. Whatever nuances of meaning may lurk in those words, their central thrust seems obvious. The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances. Nor were marginal differences in the personal circumstances or degrees of participation of co-offenders which, but for the provisions, might have justified differentiating between them. But for the rest I can see no warrant for deducing that the legislature intended a court to exclude from consideration, ante omnia as it were, any or all of the many factors traditionally and rightly taken into account by courts when sentencing offenders...’⁹

[13] The decision has had a significant impact on the approach to sentencing after the enactment of the CLAA. Over time, courts have extended the borders of its interpretation and application. For example, counsel for the appellant referred to *S v GN*,¹⁰ where Du Plessis J stated:

‘...As I understand the Malgas judgment, the prescribed minimum sentence may be departed from if, having regard to all the factors that play a role in determining a just sentence, the court concludes that the imposition of the prescribed minimum would in the particular case constitute an injustice or would be “disproportionate to the crime, the criminal and the legitimate needs of society”...’¹¹

⁹ At paragraphs [7] to [9].

¹⁰ 2010 (1) SACR 93 (TPD).

¹¹ At paragraph [6].

[14] In the present matter, the fact that the appellant was a first offender and 44 years old would usually count in his favour.¹² Where the CLAA applies, however, these factors are not sufficient on their own to justify a departure from the imposition of a minimum sentence. There must be substantial and compelling reasons to do so.

Proportionality

[15] The usual triad of the crime, the offender, and the interests of society, as enunciated in *S v Zinn*,¹³ must be considered. The case at hand entailed the rape, on 'diverse' occasions,¹⁴ of a ten-year-old girl. Her mother had left her and two younger siblings under the indefinite care of an uncle, living in a rural area. They slept on sheets of cardboard in a small shack. In the absence of any meaningful care and attention from the uncle, the girl was left on her own to look after her siblings. She cooked for them and changed the nappies of the youngest but resorted, ultimately, to begging for maize, bread, and sugar from neighbours.

[16] The offences committed by the appellant, in the circumstances described above, are nothing short of horrendous. He abused her trust in him as her uncle, took complete advantage of her vulnerability, and used her to meet his own needs. Despite the argument of the appellant's attorney that there was no indication of serious physical injury or trauma, the complainant clearly testified that the rapes had been painful. It is likely, too, that the complainant, at so young an age, will not emerge from the experience emotionally unscathed. The effects will probably last a lifetime.

[17] The imposition of life imprisonment is, however, the most severe sanction available to the court. It is imperative, therefore, that the court is satisfied that the

¹² See, for example, *S v Ngobeni* 1992 (1) SACR 628 (A), at 631i; *S v Mosemeng* 1994 (1) SACR 591 (A), at 595c; and *S v Kruger* 1995 (1) SACR 27 (A), at 29f.

¹³ 1969 (2) SA 537 (A), at 540G-H.

¹⁴ The term appears in Annexure A to the charge sheet.

sentence is indeed proportionate to the offence. In *S v Dodo*,¹⁵ Ackermann J remarked as follows:

‘...The concept of proportionality goes to the heart of the inquiry as to whether punishment is cruel, inhuman or degrading, particularly where, as here, it is almost exclusively the length of time for which an offender is sentenced that is in issue. This was recognized in *S v Makwanyane*. Section 12(1)(a) [of the Constitution] guarantees, amongst others, the right “not to be deprived of freedom... without just cause.” The “cause” justifying penal incarceration and thus the deprivation of the offender’s freedom, is the offence committed. “Offence”, as used throughout in the present context, consists of all factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence and the culpability of the offender. In order to justify the deprivation of an offender’s freedom it must be shown that it is reasonably necessary to curb the offence and punish the offender. Thus the length of punishment must be proportionate to the offence.

...To attempt to justify any period of penal incarceration, let alone imprisonment for life as in the present case, without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity. Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end. Where the length of a sentence, which has been imposed because of its general deterrent effect on others, bears no relation to the gravity of the offence (in the sense defined in paragraph 37 above) 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 punishment is predominant and the offender sentenced to lengthy imprisonment, principally because he cannot be reformed in a shorter period, but the length of imprisonment bears no relationship to what the committed offence merits. Even in the absence of such features, mere disproportionality

¹⁵ 2001 (5) BCLR 423 (CC).

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.'¹⁶

[18] The principle of proportionality was also addressed in *Vilakazi v S*,¹⁷ where Nugent JA observed that a prescribed sentence cannot be assumed, *a priori*, to be proportionate in a particular case. This was an issue to be determined upon consideration of the circumstances. The essence of *Malgas* and *Dodo*, said Nugent JA, was that disproportionate sentences were not to be imposed and that courts were not vehicles for injustice.¹⁸

Sufficient information

[19] Dealing specifically with rape, the court in *Vilakazi* held as follows:

'...The prosecution of rape presents peculiar difficulties that always call for the greatest care to be taken, and even more so where the complainant is young. From prosecutors it calls for thoughtful preparation, patient and sensitive presentation of all the available evidence, and meticulous attention to detail. From judicial officers who try such cases it calls for accurate understanding and careful analysis of all the evidence. For it is in the nature of such cases that the available evidence is often scant and many prosecutions fail for that reason alone. In those circumstances each detail can be vitally important. From those who are called upon to sentence convicted offenders such cases call for considerable reflection. Custodial sentences are not merely numbers. And familiarity with the sentence of life imprisonment must never blunt one to the fact that its consequences are profound.'¹⁹

[20] The availability of evidence and the correct analysis and understanding thereof remain just as important considerations during sentencing proceedings as the trial itself.

¹⁶ At paragraphs [37] and [38].

¹⁷ [2008] 4 All SA 396 (SCA).

¹⁸ At paragraph [18].

¹⁹ At paragraph [21].

The exercise of formulating and handing down sentence is not simply an afterthought, added at the very end of the arduous process of deciding whether the accused is guilty or not. A court has a compelling duty to ensure that the punishment fits the crime (and, of course, the offender). This relies, to a great extent, on the quantity and quality of the information placed before the court.

[21] In *Ndou v S*,²⁰ Shongwe JA stated that:

‘...Trial courts take months, and in some instances years, dealing with evidence and principles of law to establish the guilt or innocence of an accused person. However, my observation is that when it comes to the sentencing stage, that process usually happens very quickly and often immediately after conviction. Sentencing is the most difficult stage of a criminal trial, in my view. Courts should take care to elicit the necessary information to put them in a position to exercise their sentencing discretion properly. In rape cases, for instance, where a minor is a victim, more information on the mental effect of the rape on the victim should be required, perhaps in the form of calling for a report from a social worker. This is especially so in cases where it is clear that life imprisonment is being considered to be an appropriate sentence. Life imprisonment is the ultimate and most severe sentence that our courts may impose; therefore a sentencing court should be seen to have sufficient information before it to justify that sentence...’²¹

[22] It is of no assistance to the accused, the court, or the administration of justice, for practitioners to place a bare minimum of information at the disposal of the presiding officer. There is a time and a place for submissions made from the bar, but more is expected when what is at stake is a lifetime of incarceration.

Discussion

²⁰ [2012] JOL 29522 (SCA).

²¹ At paragraph [14].

[23] In the present matter, the submissions made in mitigation occupied no more than 16 lines of the record. Much of that was qualified by the transcriber's comment that the submissions were inaudible. In aggravation, the record reflects a total of 12 lines of argument. There was no victim impact assessment, there was no pre-sentencing report. To be frank, there was simply no information at all that permitted the court *a quo* the reflection necessary to ensure that the prescribed minimum sentence of life imprisonment was indeed proportional to the offence in question.

[24] It cannot be disputed that, notwithstanding the possibility that sufficient information could have been made available to the court *a quo*, it might well have concluded, nonetheless, that there were simply no substantial and compelling circumstances to have justified the imposition of a lesser sentence. This is clearly apparent from a consideration of recent case law that deals with similar facts.²² The rape of a ten-year-old girl by her 44-year-old uncle is and remains a most heinous and shocking offence.

[25] In the absence of sufficient information, however, a court of appeal cannot read into the record, so to speak, the existence or otherwise of substantial and compelling circumstances. The Supreme Court of Appeal addressed the subject in *Rammoko v Director of Public Prosecutions*,²³ where Mpati JA indicated that:

'...Life imprisonment is the heaviest sentence a person can be legally obliged to serve. Accordingly, where section 51(1) applies, an accused must not be subjected to the risk that substantial and compelling circumstances are, on inadequate evidence, held to be absent. At the same time the community is entitled to expect that an offender will not escape life imprisonment- which has been prescribed for a very specific reason- simply because such circumstances are, unwarrantedly, held to be present. In the present matter evidence relating to the extent to which the complainant has been affected by the

²² See, for example, *S v FM* 2016 JDR 1564 (GP); *S v Mgandela* 2016 JDR 1748 (ECM); *S v Radebe* 2019 JDR 1257 (GP); and *S v Daile* 2021 JDR 1879 (GP). The decision of the Supreme Court of Appeal in *Director of Public Prosecutions, Grahamstown v Mantashe* [2020] JOL 47313 (SCA), to which the court *a quo* in the present matter referred, is also of relevance (at paragraphs [11] and [12]).

²³ [2002] JOL 10353 (SCA).

rape and will be affected in future is relevant, and indeed important. Such evidence could have been led from the complainant's mother, her school teacher or a psychologist. No attempt was made to do so.

...And the placing of this important information before the sentencing court is not the responsibility of State counsel alone. The presiding officer, who must satisfy himself before imposing the prescribed sentence that no substantial and compelling circumstances are present, also bears some responsibility. Van der Walt J, in *S v Dlamini* 2000 (2) SACR 266 (T), correctly sums up the position, when he says (at 268d-e):

"The Court that imposes sentence in a criminal case plays an active role in the trial and does not sit by passively when evidence is led. Indeed, section 186 of the Criminal Procedure Act 51 of 1977 provides that the court can at any stage of criminal proceedings subpoena or cause to be subpoenaed any person as a witness at such proceedings and the court shall in this manner cause a witness to be subpoenaed if the evidence of such witness appears to the court necessary for the fair adjudication of the case."²⁴

In the present case nothing prevented the court *a quo* from directing, for example, that the complainant be interviewed by a psychologist or other appropriately qualified or trained person to establish the effects of the rape on her, present and future.²⁵

[26] The more active role expected of a court for purposes of sentencing was reiterated by the Supreme Court of Appeal in *Olivier v S*,²⁶ where Majiedt JA held:

'...It is trite that during the sentencing phase, formalism takes a back seat and a more inquisitorial approach, aimed at collating all relevant information, is adopted. The object of the exercise is to place before the court as much information as possible regarding the perpetrator, the circumstances of the commission of the offence and the victim's circumstances, including the impact which the commission of the offence had on the

²⁴ Own translation.

²⁵ At paragraphs [13] and [14].

²⁶ [2010] JOL 25319 (SCA).

victim. The prosecutor, defence counsel and the presiding officer all have a duty to complete the picture as far as possible at sentencing stage. Material factual averments made during this phase of the trial ought, as a general proposition, to be proved on oath.²⁷

[27] At the very least, the personal circumstances of the accused must properly be taken into account. Overall, however, the court must ensure that it has been placed in possession of as much relevant information as possible before imposing the prescribed minimum sentence. A life sentence must be reserved for cases devoid of substantial factors that would otherwise compel the conclusion that such a sentence was inappropriate and unjust.²⁸

Relief and order to be made

[28] The court cannot ignore the sense of shock and outrage that accompanies a crime such as the one in the present matter. The rape of a child remains an anathema and it is in the interests of society that it continues to be treated as such by the courts.

[29] Nevertheless, a presiding officer is required to ensure that he or she has sufficient information for deciding whether substantial and compelling circumstances exist to justify the imposition of a lesser sentence. The court *a quo*, here, relied on the most perfunctory of submissions made by the defence and the state before handing down a life sentence. From the record, it is simply not apparent that enough was known about the accused, the situation at the time that the offence was committed, or the complainant's circumstances, including the impact that the commission of the offence has had on her. It cannot be said that the court was in possession of enough information to have been satisfied that the prescribed minimum sentence would not infringe the principle of proportionality.

²⁷ At paragraph [8].

²⁸ See the full court decision in *S v FJH* 2015 JDR 0073 (GP), where Southwood J observed that a case marked by extreme violence and humiliation would usually be regarded as such (at paragraph [23]).

[30] Consequently, I am of the respectful view that the court *a quo* committed a material misdirection in not ensuring that it had been placed in possession of sufficient information before imposing the prescribed minimum sentence. The discretion of the court *a quo* was exercised unreasonably and incorrectly.

[31] The court of appeal, however, is not able to consider sentence afresh. Instead, the approach adopted in *Rammoko* provides, in my view, the basis upon which the matter can be remitted to the court *a quo* for reconsideration.

[32] In the circumstances, the following order is made:

- (a) the appeal is upheld and the sentence of the court *a quo* is set aside;
- (b) the matter is remitted to the court *a quo* for reconsideration of the sentence to be imposed; and
- (c) the appellant shall remain in custody, pending the outcome of such reconsideration.

JGA LAING

JUDGE OF THE HIGH COURT

I agree.

L RUSI

JUDGE OF THE HIGH COURT

APPEARANCES

For the appellant: Ms Mtini,

instructed by the Legal Aid South Africa, King Williams Town.

For the respondent: Adv Tokota,

instructed by the Director of Public Prosecutions, Bhisho.

Date of hearing: 16 September 2022.

Date of delivery of judgment: 31 January 2023.