



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

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

Case No: A64/2021

In the Appeal of:

JACOB MOTAUNG

APPELLANT

And

THE STATE

RESPONDENT

CORAM: MBHELE, DJP *et* VAN ZYL, J

HEARD ON: 15 NOVEMBER 2021

DELIVERED ON: 1 FEBRUARY 2022

JUDGMENT BY: MBHELE, DJP

- [1] This is an appeal against sentence. The appellant was convicted by the Regional Magistrate, Brandfort, of raping a 9 year old complainant. He was sentenced to 28 years imprisonment on 07 June 2019. The appeal is with leave of this court.
- [2] The offence took place on 07 March 2010. The complainant had visited her friend, T[....], to play. While the two of them were playing in front of the gate at T[....]'s parental home, T[....] just took off and ran into the house, without any warning, leaving the complainant alone at the gate. While the complainant was still wondering why T[....] hurriedly ran into the house the appellant came towards her, grabbed her and took her into some room at a house nearby. She screamed and cried for help as the appellant was carrying her to no avail. When they got into this room the appellant locked the door and took off her T- shirt, dress and underwear. The appellant thereafter took his T-shirt, trouser as well as the underwear off and inserted his penis in the complainant's vagina. When the complainant cried the appellant put his hand on her mouth and threatened to kill her if she told her mother or anyone about the incident. When he was done he threw her outside.
- [3] On her way home she stopped at T[....]'s house and told her that she will never pay her a visit again. Upon her arrival at home her mother sent her to the bedroom, where her sister was, to take a bath. It is at that time that she complained to her sister about a pain in her vagina. Upon enquiry she reported that she was raped by someone who threatened to kill her if she divulged what happened to her to other people. She then took the police to the place where she was raped and pointed the appellant as her assailant.
- [4] In his notice of appeal the appellant contended that the court *a quo* erred in not taking into consideration the fact that he was a 31 year old sole bread winner for his wife and 5 year old child at the time of sentencing. He submitted, further, that the trial court over emphasized the seriousness of the offence and the interests of society at the expense of his personal circumstances.

- [5] The issue in this appeal is whether the trial court erred in imposing a prison term of 28 years on the appellant after concluding that there were substantial and compelling circumstances present that justified the imposition of a lesser sentence than the prescribed minimum sentence of life imprisonment for the rape of a child under the age of 16.
- [6] Before us Ms. Kruger submitted that the sentence of 28 years is shockingly inappropriate in the circumstances of this matter. Mr. Mpemvane submitted that the appellant was fortunate to escape life sentence and that nothing justifies interference with the sentence imposed by the trial court.
- [7] The sentencing powers are pre-eminently within the judicial discretion of the trial court, the court of appeal should be careful not to erode such discretion. The court sitting on appeal will interfere if the sentencing court exercised its discretion unreasonably or in circumstances where the sentence is adversely disproportionate.¹
- [8] The offence committed by the appellant is a serious one. He violated a minor child in the most despicable manner. In **S v Chapman**² Mahomed CJ said the following on the brutality of rape.
- “Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, to privacy, and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilization.”
- [9] Sexual violence is directly linked with inequality. Perpetrators of sexual violence often target people that they perceive to be having less power in the society due to factors like age, gender identity, religious or spiritual beliefs, sexual orientation and other factors where power dynamics are at play. The appellant attacked a helpless 9 year old whom he knew would never be able

¹ S v Rabie 1975 (4) SA 855 (A) at 857 D-E also S v De Jager and Another 1965 (2) SA 616 (A).

² S v Chapman 1997 (3) SA 341 (SCA); [1997] 3 All SA 277 (A).

to raise a finger to defend herself. As if it was not enough, he even threatened her with death if she reported the incident to anyone.

- [10] It has been generally accepted that rape is not about sexual pleasure but it is used as a tool to exert power over the victim. In **Masiya v Director of Public Prosecutions Pretoria and Another**³ the following was said:

“Today rape is recognized as being less about sex and more about the expression of power through degradation and the concurrent violation of the victim's dignity, bodily integrity and privacy. In the words of the International Criminal Tribunal for Rwanda the "essence of rape is not the particular details of the body parts and objects involved, but rather the aggression that is expressed in a sexual manner under conditions of coercion.”

- [11] Section 28 (2) of the Constitution of South Africa⁴ provides that a child's best interests are of paramount importance in every matter concerning the child. The constitution demands that the best interest of a child must take a centre stage whenever an issue concerning a child comes to the fore. It is the single most important factor to be considered when balancing or weighing competing rights and interests concerning children. All competing rights must defer to the rights of children unless unjustifiable. Whilst children have a right to inter alia, protection from maltreatment, neglect, abuse or degradation, there is a reciprocal duty to afford them such protection. Such a duty falls not only on law enforcement agencies but also on right thinking people and, ultimately the court, which is the upper guardian of all children.⁵

- [12] It is clear from the above dictum that the society as a whole, including the court as the upper guardian , have a duty to ensure that children are safe from harm and grow up in nurturing environments. The extent of damage caused by sexual violence on children is well documented. Sexual violence against a child denies the child a sense of security, it alters their worldview to

³ Masiya v Director of Public Prosecutions Pretoria and Another (CCT54/06) [2007] ZACC 9; 2007 (5) SA 30 (CC); 2007 (8) BCLR 827 (10 May 2007) 13.

⁴ The Constitution of the Republic Of South Africa, 1996.

⁵ De Reuck v DPP WLD 2003 (1) SACR 448 (WLD) at 457 par 10.

the worst and negatively interferes with their complete development. Sexual violence against children evokes communities' indignation and often prompts them to resort to self-help to keep their children safe. It is necessary for the courts to protect the society against predators of the appellant's caliber.

- [13] Section 51 (1) and (3) of the Criminal Law Amendment Act 105 of 1997 (CLAA) prescribes that the court can depart from the prescribed minimum sentence of life imprisonment only if the court is satisfied that substantial and compelling circumstances exist warranting imposition of a sentence lesser than life imprisonment. In **S v Malgas**⁶ it was held that courts are required to regard the prescribed sentences as “being *generally appropriate*’ for crimes of the kind specified and enjoined not to depart from them for flimsy reasons. Malgas tells us that courts have to provide sound reasons for departing from prescribed sentences.
- [14] As stated above the harm suffered by victims of rape cannot be understated. When the legislature enacted Section 51 of the CLAA and prescribed life imprisonment for a rape of a minor child it was sending a message that rape, especially of a minor child, must be viewed in a serious light by all. It placed a duty on our courts to send a clear and unambiguous message to the community and would be offenders that failure to treat women and children with respect and dignity has dire consequences.
- [15] It is widely accepted that the statistics of rape in this country are escalating at an alarming proportion. The Minister of Police reported on 19 November 2021 that 9556 people were raped in a period of 3 months spanning between 1 July 2021 and 30 September 2021.⁷ The above statistics are an indication that rape is endemic in this country. Courts are called upon to ensure that women and children enjoy the human rights guaranteed in the

⁶ S v Malgas 2001 (1) SACR 469 SCA.

⁷ <https://www.gov.za/speeches/speaking-notes-delivered-police-minister-general%C2%A0bheki-cele-mp-occasion-release-%C2%A0quarter>

constitution and are given some sense of security that the perpetrators of violent crimes against them shall be brought to book.

[16] When sentencing, the court must consider the main objectives of punishment, being the prevention of crime, retribution, the deterrence of criminals, and the reformation of the offender. Simultaneously, the court must strike a balance between the crime, the offender and the interest of society. The court should also take into consideration the provisions of Section 51 of CLAA where applicable. The sentence imposed must be proportionate to the offence.

[17] In **Masuku v S** the court said the following when dealing with departure from prescribed minimum sentences:

“In my judgment, the fundamental approach in a case such as this has to be one that accepts that the mandatory sentence of life imprisonment should only be departed from where there is a weighty justification for doing so. And the extent of the departure must be proportionate. It cannot be so lenient that it loses altogether the importance of giving effect to the Legislature's concern about the severity of the crime, and the interests of society to put an end to it by at the very least making it clear to all perpetrators and would be perpetrators that "it is no longer business as usual".

[18] The sentence imposed after departing from the prescribed minimum sentence must still send a message that the sentencing court took heed of the concerns of the legislature. I accept that the trial court was correct when it found that the following constitute substantial and compelling circumstances warranting deviation from the prescribed minimum sentence of life imprisonment: That: The appellant was 26 years old at the time of the commission of the offence, he lost his parents at a young age, he was a bread winner before his incarceration, he was awaiting trial for five years with excessive financial loss as he had to travel from Bethlehem to Bloemfontein on every court appearance.

[19] When weighing mitigating factors, the offence and interest of society, I am unable to find that the sentence imposed by the trial court after finding the existence of substantial and compelling circumstances is out of proportion with the offence committed. The sentence of 28 years cannot be considered to be inordinately long in the circumstances of a person convicted of the rape of a minor child. The offence justifies a lengthy period of imprisonment. The appeal ought to fail.

[20] In the circumstances I make the following order:

1. The appeal against the sentence is dismissed.
2. The sentence is confirmed.

N.M. MBHELE, DJP

I concur

VAN ZYL, J

On behalf of the applicants:

Ms. Kruger
Instructed by:
Legal Aid South Africa
BLOEMFONTEIN

On behalf of the respondent:

Adv. Mpemvane

Instructed by:

Director Public Prosecutions

BLOEMFONTEIN