

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NO. AR191/2020

In the matter between:

MASIBONGWE MSOMI

APPELLANT

and

THE STATE

RESPONDENT

ORDER

On appeal from: Umzimkulu Regional Court (sitting as court of first instance):

1. The appeal against conviction is dismissed.
2. The appeal against sentence is upheld.
3. The sentence imposed by the regional court is set aside and substituted with a sentence of 25 years' imprisonment.
4. The sentence is antedated to 27 June 2018, in terms of section 282 of the Criminal Procedure Act 51 of 1977.

JUDGMENT

Khallil AJ (Seegobin J concurring)

Introduction

[1] The appellant, who was legally represented throughout his trial in the Umzimkhulu Regional Court, stood accused on a single count of the rape of a 15-year old child in contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 ('SORMA'). It is unfortunate that the substantive charge, as it is framed in the charge sheet, whilst stipulating the relevant sections of SORMA, makes no reference to the Act and the part of the charge sheet where the Act ought to have been inserted was left blank.¹

[2] As the complainant was under the age of 16 years at the relevant time, the offence fell within the ambit of Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 ('CLAA') making the sentencing regime in section 51(1) of the CLAA applicable. The charge preferred was framed with reference to the CLAA.

[3] The appellant pleaded not guilty to the charge of rape, and elected to remain silent and to not disclose the basis of his defence.² At the end of proceedings, the appellant was convicted as indicted, and the learned magistrate, having found no substantial and compelling circumstances, imposed the prescribed sentence of life imprisonment.³

[4] The matter serves before us by way of an automatic right of appeal in terms of section 309(1)(a) of the Criminal Procedure Act 51 of 1977 ('CPA').⁴

¹ Record at A4.

² Record at 4, lines 2-9.

³ Record at 148, lines 7-8.

⁴ Section 309(1)(a) of Act 51 of 1977 provides that upon conviction of an accused by a regional court '... if that person was sentenced to imprisonment for life by a regional court under section 51 (1) of the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997), he or she may note such an appeal without having to apply for leave in terms of section 309B ...'

[5] Although the appeal noted is against both conviction and sentence, counsel for the appellant, at the inception of the hearing, did not pursue the appeal against the conviction. However, since the appeal against conviction was neither withdrawn or conceded, it becomes necessary for the sake of completeness to evaluate the evidence relating thereto.

Conviction

The State's case

[6] The charge arises from an incident which occurred on the night of 25 March 2017 at about 8.30 pm, when the complainant, whilst walking on her way home, was accosted by an unknown male person, who was later identified as the appellant.

[7] The complainant was grabbed by the neck and pushed to the ground by the assailant who removed her pants and underwear. He then proceeded to have sexual intercourse with her twice in quick succession, without her consent. On both occasions he ejaculated and when she began crying aloud, he threatened her with a knife. The injuries sustained were limited to scratch marks on the complainant's legs and right hand.

[8] Although the complainant saw the assailant for the first time on the night in question, she was able to see his face as he had switched the torch of his cellular phone on, and the screen light of his phone reflected on his face. She described the assailant as having dreadlocks and that he wore white gumboots, a straight cap, and grey trousers at the time of the incident. She was confident of being able to identify the assailant as she had clearly seen his face.

[9] She managed to escape in a half-naked state at a time when the assailant lay resting on the ground after he had ejaculated for the second time. She sought help from an educator from her school, Ms S[....], whose house was close-by. She related the incident to Ms S[....] and was eventually fetched by her mother and taken home. The complainant was asked by Ms S[....] not to bath as DNA tests would be conducted. She followed that advice.

[10] She was taken to the doctor for an examination the following day, and the medico–legal examination confirmed her injuries as well as an old rupture of the hymen. The fact that her vagina admitted two fingers was, according to the doctor, indicative of sexual intercourse.

[11] The medico-legal report was handed in by consent as Exhibit ‘B’. According to the report, a forensic specimen sample was taken from the complainant for analysis purpose. The kit was sealed and handed to the police officer, Mr Gambusha, who had taken the complainant for the medical examination. It was unfortunate that the doctor, when he testified, was not led nor cross-examined on this. The kit was kept under lock and key at the police station and entered into the SAP 13 register.

[12] The uncle of the complainant, Mr Dlamini, after he had been provided with a description of the apparel worn by the assailant, stated that he had earlier on the day in question attended a traditional ceremony in the area and had seen only one person at the ceremony who had dreadlocks and who had worn white gumboots and a straight cap. This person served the guests food at the ceremony. Mr Dlamini made enquiries on the same night of the incident and the name of the person was obtained as well as his employment details.

[13] A few days after the incident, the complainant was taken by the police to the suspect’s workplace, and without prompting, pointed out the appellant as the perpetrator. The appellant was arrested and it is common cause that a DNA sample was taken from him for analysis. The investigating officer, Sergeant Hlongwa, testified to this effect.

[14] The complainant, who was 16 years old, and in grade 12 at the time of testifying, was a credible witness who testified in a clear, coherent, and satisfactory manner in all material respects. She withstood cross-examination well and did not contradict herself. The trial magistrate was mindful of the need to treat her evidence with caution, not only because she was 16 years old at the time of testifying but also because she was a single witness. Our appeal courts have said it often enough that

the exercise of caution, in assessing evidence, should however not be allowed to displace the exercise of common sense.⁵

[15] An assessment of the record reveals that the complainant was an honest, trustworthy and intelligent witness whose evidence was bound to be reliable. We have little hesitation in endorsing the findings of the trial magistrate that the complainant made a good impression on the trial court and that her evidence was credible.

[16] The evidence of Ms S[...] (to whom the first report was made) not only established consistency in the version of the complainant⁶ but also corroborated the complainant's version of her condition at the time, and of what had happened from the time that the complainant sought assistance at her place until the time she was fetched by her mother.

[17] The DNA evidence, which was handed in by consent and marked Exhibit 'A',⁷ clearly establishes that the reference DNA sample obtained from the appellant upon his arrest, matched the result of the DNA sample obtained from the complainant (swab under serial number 15DIAC2294). The most conservative occurrence for the DNA result is one in 23 billion people.⁸

[18] The chain evidence relating to the DNA evidence, and not the result of the analysis, was challenged at trial. We are satisfied that the evidence of Sergeant Hlongwa, who procured the DNA sample from the appellant, and Constable Gambusha, who received the sealed kit containing the DNA sample of the complainant from the examining doctor, that the samples together with the relevant serial numbers were stored safely, free of contamination, until such time as the samples were handed to the forensic science laboratory for analysis. There has been no suggestion to the contrary. The apparent contradiction relating to which of the aforementioned two police officers handed in the samples for analysis, is of no

⁵ *S v Artman and another* 1968 (3) SA 339 (A) at 341.

⁶ *S v Ganga* 2016 (1) SACR 600 (WCC) paras 27-30, *S v Heroldt* 2018 (2) SACR 69 (KZP); and *Director of Public Prosecutions, Western Cape v Regional Magistrate, Wynberg and others* 2022 (1) SACR 8 (WCC); [2022] 1 All SA 154 (WCC) para 63.

⁷ Record at 23, lines 1-15 and at 150-153.

⁸ Record at 18 and at 151-152.

consequence, and does not in any way detract from the reliability of the chain evidence.

[19] The Supreme Court of Appeal in *S v SB*⁹ held that DNA evidence is circumstantial evidence, the probative value of which depends on:

- ‘(i) The establishment of the chain evidence, ie that the respective samples were properly taken and safeguarded until they were tested in the laboratory.
- (ii) The proper functioning of the machines and equipment used to produce the electropherograms.
- (iii) The acceptability of the interpretation of the electropherograms.
- (iv) The probability of such a match or inclusion in the particular circumstances.
- (v) The other evidence in the case.’¹⁰

These factors (save for the factor listed in (v)) are dealt with in the section 212¹¹ affidavit, and the appendix thereto, by Colonel Khelawanlall (Exhibit ‘A’), which was admitted into evidence by consent.¹² There is accordingly no issue that these factors have been satisfactorily established to the requisite degree. The DNA evidence, in my view, assists in overcoming the cautionary rule applicable when assessing the evidence of the identification of the perpetrator and enhances the reliability of the complainant’s version.

Evidence by the appellant

[20] The appellant testified that on the day in question, he had indeed attended the traditional ceremony, and that he had served food, thereby confirming the evidence of the uncle of the complainant, Mr Dlamini.¹³ Importantly, he also conceded that at the time of the incident, he had dreadlocks which have since been cut off. He further confirmed that a DNA sample had been taken from him.¹⁴ He however denied owning any white boots, and when being led by his counsel, he could not remember

⁹ *S v SB* [2013] ZASCA 115; 2014 (1) SACR 66 (SCA).

¹⁰ *Ibid* para 18.

¹¹ Of the CPA.

¹² Record at 18 and 150-153.

¹³ Record at 104, lines 1-4.

¹⁴ Record at 100, lines 16-17.

if any white boots were recovered from his home by the police.¹⁵ He could not explain how his DNA got onto the complainant but denied knowing the complainant. When confronted with the DNA evidence, his response was 'No comment your Worship'.¹⁶

[21] The complainant's description of the clothing worn by the perpetrator on the day in question was not disputed when she was cross-examined. The appellant alluded to having a problem with his ear when he encountered difficulty in answering straightforward questions. During cross-examination, after he had initially testified that he did not discuss the DNA results with his legal representative, later recanted by saying: 'No its lies your Worship, that I did not discuss with him'.¹⁷

[22] An assessment of the appellant's evidence reveals that he was not only dishonest and evasive but even went to the extent of blaming his legal representative for not disputing material aspects of the complainant's version. In short, the appellant was a poor witness.

[23] It is trite that the appellant's conviction can only be sustained if, on a consideration of all the evidence, his version of events is so highly improbable that it cannot reasonably possibly be true or where his version, in the face of credible evidence, can be rejected as false beyond a reasonable doubt.

[24] In *S v MM*¹⁸ the Supreme Court of Appeal stated that:
'Whilst in many cases the fact that an accused person gives a false version of events is not decisive of the merits of a conviction, in this case, where the falsity relates to events on a particular day at a particular place involving him and the complainant, if his version cannot reasonably possibly be true, its falsity lends strong support to the truth of the complainant's evidence.'

[25] In the light of the evidence (both direct and circumstantial), I am of the view that the court a quo was correct in rejecting the version of the appellant as false

¹⁵ Record at 99, line 25 and at 100, lines 1-3.

¹⁶ Record at 106, lines 18-22.

¹⁷ Record at 105, lines 4-5.

¹⁸ *S v MM* [2011] ZASCA 5; 2012 (2) SACR 18 (SCA); [2012] 2 All SA 401 (SCA) para 18.

beyond a reasonable doubt. I am satisfied that the undisputed and objective evidence considered in totality, establishes the guilt of the appellant beyond a reasonable doubt. The conviction, to my mind, is sound.

[26] There is one further issue relating to the conviction that merits comment. The learned magistrate, in her analysis of the evidence, concluded that:¹⁹

‘Therefore the court cannot just reject the evidence of these witnesses of the State because of these DNA results. Because there is also other evidence and even the other bit of that (sic). The defence was also proved to be false by state, which means therefore that the evidence of the state is accepted as reasonably possibly true and that of the defence is totally rejected.’

[27] Firstly, upon the rejection of the defence’s version, it is not axiomatic that the evidence led by the State is to be accepted. The one does not follow the other. The correct approach is whether, in the light of all the evidence adduced at the trial, the guilt of the appellant has been established beyond a reasonable doubt.²⁰

[28] Secondly, it is apparent from the passage quoted above that the learned magistrate applied the incorrect standard of proof. The magistrate appears to have convicted the appellant on the basis that the evidence led by the State was accepted as reasonably possibly true. It is trite that in the criminal matters, the State must prove its case beyond a reasonable doubt.²¹

[29] I am however satisfied that this misdirection (if not a slip of the tongue by the magistrate), in the light of the totality of evidence, had no impact on the finding of guilt.

Sentence

¹⁹ Record at 137, lines 17-22.

²⁰ *S v Trainor* 2003 (1) SACR 35 (SCA) para 8.

²¹ *S v Heslop* [2006] ZASCA 127; 2007 (4) SA 38 (SCA) para 10; and *Shusha v S* [2011] ZASCA 171 para 9.

[30] The ground of appeal against sentence is premised on the court a quo's failure to find substantial and compelling circumstances to deviate from the mandatory sentence of life imprisonment.

[31] It is trite that an appeal court can only interfere with a sentence imposed if there is a material misdirection by the trial court or if there is such a grave disparity between the sentence imposed by the trial court and the sentence which the appeal court would have imposed if it were the trial court. It is also trite that the disparity should be shocking or disturbingly inappropriate or vitiated by irregularity, to justify interference.²²

[32] Rape, particularly of women and children, has reached alarming levels in South Africa. It constitutes a vile, humiliating, degrading, and brutal invasion of their privacy, dignity, and self-worth as human beings. Children look up to adults in society to nurture, guide, care for, and protect them. They comprise one of the most vulnerable of all vulnerable groups in society.

[33] When the duty of care owed to them by adults and their trust is breached, it often leaves children in a helpless situation. Society looks to the courts to act decisively against persons convicted of such shameless acts. The severe sentence of life imprisonment that the Legislature has prescribed for the kind of rape as in this matter, underlies its gravity and abhorrent nature.

[34] The prescribed sentence to be imposed for an offence referred to in Part 1 of Schedule 2 is life imprisonment, unless of course, there are substantial and compelling circumstances which justify the imposition of a lesser sentence or if the prescribed sentence is found to be disproportionate to the crime, the offender and members of society, so that an injustice would be done by imposing that sentence, which then entitles the court to impose a lesser sentence.²³

²² *S v Malgas* 2001 (2) SA 1222 (SCA); [2001] 3 All SA 220 (A) para 12, *S v Bogaards* [2012] ZACC 23; 2013 (1) SACR 1 (CC) para 41.

²³ *S v Malgas* 2001 (1) SACR 469 (SCA); [2001] 3 All SA 220 (A) para 25, and *S v Dodo* 2001 (3) SA 382 (CC); 2001 (5) BCLR 423 (CC) para 40.

[35] Counsel for the appellant, in her written heads of argument, submitted that the cumulative effect of the appellant's personal circumstances should be regarded and treated as substantial and compelling circumstances. Those personal circumstances are the following: he was 23 years old at the time of his conviction and sentence, he was a first offender, he was self-employed selling meat, and his highest level of education was standard 10 (grade12).

[36] It was also submitted that the rape in this matter was not the worst type of rape that warrants life imprisonment, and further that no victim impact statement was submitted in the court a quo to evaluate the extent of the trauma that the complainant suffered.

[37] I did not think that the absence of a victim impact statement by itself, can lead to the conclusion that this is not the worst kind of rape as suggested by the appellant. The complainant was 15 years old at the time. She was walking alone, returning home at 8.30 pm when the appellant grabbed her by the neck, pushed her to the ground, forcibly removed her pants, tights, and underwear. When she began to cry, he threatened her with a knife. He opened her legs and forcibly inserted his penis into her vagina. She described this act as painful. As he perpetrated this act, he had gripped her roughly with up and down movements. No condom was used. After he ejaculated for the first time, he did not remove his penis and shortly thereafter continued having sexual intercourse with the complainant until he ejaculated for the second time. He thereafter refused her permission to urinate. She escaped and went to her teacher's house for assistance in a state of semi-nakedness. She understandably cried during this ordeal, and suffered scratch injuries to her legs and hand. Whilst a victim impact statement would have been helpful to assess how the complainant is coping, if at all, its absence, in my view, does not make the rape any less serious. The complainant was a soft target, walking alone in the dark when she was accosted and raped. It remains however that there is very little upon which to measure the emotional and psychological impact of the offence on the complainant. The court a quo ought to have informed itself sufficiently on this aspect. It is regrettable that this was not done, and has become a common feature in many rape cases that serve on appeal.

[38] It is so that the appellant was relatively young and a first offender, which increases his prospects of being rehabilitated. In dealing with serious and violent crimes, retribution and deterrence, however, overshadow rehabilitation. Sight cannot however be lost that the appellant was 23 years old at the time and a first offender which increases his prospects of being rehabilitated.

[39] It seems from the record²⁴ that the learned magistrate, in arriving at the conclusion of an absence of substantial and compelling circumstances, misdirected herself by searching for factors out of the ordinary. The learned magistrate stated as follows:

'I don't see (sic) and I don't find any compelling and substantial circumstances. There is nothing out of the ordinary which means therefore, that the penalty clause which is contained in this section 51 (1) (2) of the Criminal Procedure Amendment Act 105 of 1977 (sic) is the suitable sentence. The court will not deviate from that, which means therefore that you are sentenced to life imprisonment.'²⁵

[40]] Section 51(3)(aA) of the CLAA provides that when imposing a sentence in respect of the offence of rape, the complainant's previous sexual history and apparent lack of physical injury, among other factors provided therein, shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence.

[41] There is clearly no such requirement of 'out of the ordinary' in section 51(1) of the CLAA. The circumstances to be considered include those factors traditionally taken into account in sentencing; both mitigating and aggravating. But none of these need to be out of the ordinary.

[42] In my view, this constitutes a material misdirection justifying interference. The sentence of life imprisonment is the most serious that can be imposed. It effectively denies the appellant the possibility of rehabilitation. Moreover, the mitigatory factors alluded to above are not speculative or flimsy, particularly when considered cumulatively. Given the aggravating and mitigating factors in this matter, while being

²⁴ Record at 148, lines 4-8.

²⁵ Record at 148, lines 3-8.

conscious of the fact that the Legislature has ordained life imprisonment, I consider the prescribed sentence of life imprisonment disproportionate and unjust.

[43] The learned magistrate, in suggesting that because the appellant had pleaded not guilty, he had wasted the court's time and was therefore deserving of severe punishment, also committed a misdirection.²⁶ There is no onus on the appellant to prove his innocence, and it is his constitutionally guaranteed right to plead not guilty. To punish the appellant 'severely' for exercising this right is unjust and untenable. At most, one can perhaps conclude that he was not remorseful. Nothing more.

[44] The appellant must of course be suitably punished and society demands this of our courts. At the same time, the imposition of sentence should not be likened to taking revenge but should be the culmination of a process, having proper regard to the personal circumstances of the appellant, the nature of the offence, and the interests of society, mindful all the while of the sentence that the Legislature has considered appropriate for the rape of a child under the age of 16 years.

[45] In *S v Malgas*,²⁷ the 'determinative test' espoused by the Supreme Court of Appeal, which was endorsed by the Constitutional Court in *S v Dodo*,²⁸ for when the prescribed sentence may be departed from was expressed as follows:

'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.'

Conclusion

[46] For the reasons stated above, life imprisonment is not only unjust but also disproportionate. However, a lengthy sentence of imprisonment is warranted. I consider that a period of 25 years' imprisonment is justified and will send a message

²⁶ Record at 147, line 5.

²⁷ *S v Malgas* 2001 (2) SA 1222 (SCA); [2001] 3 All SA 220 (A) para 25.

²⁸ *S v Dodo* 2001 (3) SA 382 (CC); 2001 (5) BCLR 423 (CC) para 11.

to the community that rape, and especially the rape of a young girl, will be visited with severe punishment.

Order

[47] In the result, the following orders are proposed:

1. The appeal against conviction is dismissed
2. The appeal against sentence is upheld.
3. The sentence imposed by the regional court is set aside and substituted with a sentence of 25 years' imprisonment.
4. The sentence is antedated to 27 June 2018, in terms of section 282 of the Criminal Procedure Act 51 of 1977.

KHALILL AJ

I agree.

SEEGOBIN J

Appearances:

For Appellant: Ms P. Andrew

INSTRUCTED BY: Legal Aid South Africa

Pietermaritzburg

For Respondent: Mr M Gula

INSTRUCTED BY: The Director of Public Prosecutions

Pietermaritzburg

DATE OF APPEAL : 19 AUGUST 2022

DATE OF JUDGMENT: 02 SEPTEMBER 2022