

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

Case No: CA & R 12/2020

In the matter between:

THEMBA MERILE

Appellant

and

THE STATE

Respondent

JUDGMENT

TOKOTA J:

[1] The appellant stood trial in the regional court, Zwelitsha, on four counts of rape. Count 1 was that on or about June 2010 and at or near Mgxotyeni location in the Regional Division of the Eastern Cape the accused did unlawfully and intentionally sexually violate the complainant, a 15 year old female person, by inserting his tongue into the mouth of the complainant without her consent in contravention of sections 5(1) r/w section 1, 56(1), 57,58,59,60 and 68(2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007;

Count 2. on or about June 2010 and at or near Mgxotyeni Location in the Regional Division of the Eastern Cape the accused did unlawfully and intentionally commit an act of sexual penetration with the complainant, a 15 year old female person, by penetrating his male organ, penis, into the vagina of the complainant without her consent in contravention of sections 3 r/w 1, 56(1), 57,58,59,60 and 68(2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act , 32 of 2007;

Count 3. on or about 1 September 2012 and at or near Mgxotyeni Location in the Regional Division of the Eastern Cape the accused did unlawfully and intentionally commit an act of sexual penetration with the complainant, a 17 year old female person, by penetrating his male organ, penis, into the vagina of the complainant without her consent in contravention of section 3 r/w section 1, 56(1), 57,58,59,60 and 68(2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007.

Count 4 was that of on or about 1 September 2012 and at or near Mgxotyeni location in the Regional Division of the Eastern Cape the accused did unlawfully and intentionally sexually violate the complainant, a 15 year old female person, by inserting his tongue into the mouth of the complainant without her consent in contravention of sections 5(1) r/w section 1, 56(1), 57,58,59,60 and 68(2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007 (the Act);

The appellant pleaded not guilty to all counts but was convicted as charged and sentenced as follows:

Count 1: To undergo 3 (Three) years imprisonment

Count2. To undergo 22 (twenty two) years imprisonment

Count 3: To undergo 10 (ten) years imprisonment'

Count 4: To undergo 3 (three) years imprisonment.

Sentences were ordered to run concurrently.

With leave of the magistrate the appeal is against sentence only.

[2] The facts giving rise to the conviction can be summarised as follows:

The appellant is the biological father of the complainant. On or about June 2010 the complainant was washing dishes in the kitchen. Appellant got in the kitchen to fetch water and on his way out kissed her by inserting his tongue into the complainant's mouth. Complainant resisted and pushed his father away. After telling him that she did not like what he was doing appellant stopped.

[3] During or about the same period in June 2010 the complainant was busy undressing herself after coming from school. She was alone in the house. Appellant arrived and instructed her to take off her skirt. She refused but the appellant went closer to her pushed her on to a bed. He was wearing short pants and was busy undressing himself. Complainant tried to run away but appellant grabbed her tight on to the bed. He inserted his penis into her vagina and had sex with her without her consent.

[4] Once again on 1 September 2012 on a Saturday when her mother had attended a funeral, the complainant was left at home with her sister and a brother of 5 and 14 years respectively. After cleaning the house the complainant went to rest in her room. Whilst she was sleeping there she noticed her father carrying a sword. He instructed her to stand up and when she screamed he threatened to stab her. He instructed her to take off her clothes. She obeyed. The appellant undressed himself and got on top of the complainant on the bed and inserted his penis into her vagina and had sex with her without her consent. After the sexual act he instructed her to wipe herself off with a handkerchief. She used her own handkerchief. Appellant kept the handkerchief under lock and key.

[5] On 5 September 2012, the police embarked on what they called a campaign in various schools including that of the complainant. They were informing learners on how they were performing their duties. Emphasis was placed on the prevention of domestic violence and rape cases. After the presentation the learners were given opportunity to ask questions. The complainant was sitting in front. She raised her hand but when she was asked to speak she cried. She reported the rape to the police and informed them that she never reported this to her mother because her father had threatened to kill her if she reported the incidents.

[6] After hearing the presentation complainant went home to fetch her handkerchief from her father under the pretext that she wanted to wash it. She wanted to hand over the same to the police for purposes of DNA tests. The handkerchief was kept in a separate room. Appellant told her to go and get it in

another room. When she got to that room appellant was inside and it was dark. He locked the door. He grabbed the complainant and kissed her by inserting his tongue into her mouth.

[7] Appellant initially denied having had sexual intercourse with his daughter to the police. The DNA test results linked him to the rape. In court he admitted having had sexual intercourse with the complainant in September 2012 but stated that it was with her consent. It seems to me that the admission of sexual intercourse, albeit alleged with complainant's consent, was prompted by the linkage to the rape by DNA results. He denied the rest of the charges. As mentioned hereinbefore appellant was found guilty as charged on all counts. There is no appeal against the conviction.

[8] In sentencing the appellant the magistrate took into account the following:

The appellant is an elderly person getting an old age grant. He was 66 years old at the time. He did not accept the responsibility for his actions by persisting that he was seduced by his daughter. He did not show any remorse. He subjected his daughter to cross-examination knowing full well that he raped her. He found that there were no substantial and compelling circumstances justifying a lesser sentence than that prescribed the Act. He found however that on the authority of **S v Malgas 2001(1) SACR 469 (SCA)** even if there are no substantial and compelling circumstances if the imposition of a minimum sentence would result in an injustice the court is free to deviate from the minimum sentence. He thereupon deviated from the minimum sentence prescribed by the Act without recording the reasons therefor.

[9] As alluded to above the magistrate found, correctly so in my view, that there were no substantial and compelling circumstances justifying a lesser sentence on count 2. This then called for a minimum sentence of life imprisonment. However the magistrate without giving any reasons imposed a sentence of 22 years imprisonment on this count. In my opinion in doing so he misdirected himself. This court is therefore at large to reconsider the sentence afresh.¹ In this regard we gave notice to the parties that they should file supplementary heads of argument addressing us as to why, in the event of the appeal failing, the sentence should not be increased. Both parties have duly complied with our request and we are truly indebted to them for their helpful submissions.

[10] Mr *Giqwa* for the appellant submitted that because of the advanced age of the appellant and the fact that he was a well known pastor and supporting his children he deserves a lenient sentence. He submitted that the appellant is a first offender and therefore a sentence of 15 years imprisonment would be appropriate. Relying on the cases of **S v Malgas 2001 (1) SACR 469 (SCA)** and **S v De Beer 2018 (1) SACR 229 (SCA) ([2017] ZASCA 183)** Mr *Giqwa* submitted that the sentence imposed by the magistrate was disproportionate to the crime committed. He conceded, however, that there were no substantial and compelling circumstances justifying a lesser sentence than that prescribed by the Act but submitted that in terms of the **De Beers'** case if the sentence would be disproportionate to the offence a lesser sentence may be imposed.

¹S v Malgas 2001 (1) SACR 469 (SCA) para. 33; S v Mathekga 2020 (2) SACR 559 (SCA) para.23

[10] Ms *Tokota* who appeared for the State submitted that the case of **De Beers** is distinguishable from the present matter. In that case the rape committed was what used to be common law indecent assault before the promulgation of the Act. Accordingly, so the argument ran, there must be substantial and compelling circumstances justifying a lesser sentence before a court can deviate. In this case the rape was perpetrated on a minor child by her biological father. In this regard she referred us to the case of **S v PB 2013 (2) SACR 533 (SCA) ([2012] ZASCA 154); and S v Abrahams 2002 (1) SACR 116 (SCA)**

[11] In my view reliance on *Malgas* for not imposing the minimum sentence was a misdirection on the part of the magistrate. As I understand the case it is not correct that even though there are no substantial and compelling circumstances the judicial officer is free to impose any sentence. The discretion to impose any other sentence arises once it is found that there are no substantial and compelling circumstances justifying such lesser sentence than that prescribed by the statute. In my view, the nub of the **Malgas**' case is that when considering the presence of substantial and compelling circumstances the court must consider whether or not the imposition of the minimum sentence would be disproportionate to the offence. Since sentencing on these specified offences is no longer 'business as usual' the minimum sentence may not be departed from lightly and on 'flimsy reasons'. The learned Judge of appeal expressed himself as follows:

"The greater the sense of unease a court feels about the imposition of a prescribed sentence, the greater its anxiety will be that it may be perpetrating an injustice. Once a court reaches the point where unease has hardened into a conviction that an injustice will be done, that can only be because it is satisfied that the circumstances

*of the particular case render the prescribed sentence unjust or, as some might prefer to put it, disproportionate to the crime, the criminal and the legitimate needs of society. If that is the result of a consideration of the **circumstances** the court is entitled to **characterise them as substantial and compelling** and such as to justify the imposition of a lesser sentence.*”(Emphasis added)

[12] In my view the feeling of uneasiness alluded to in the quoted paragraph signifies the presence of substantial and compelling circumstances justifying a lesser sentence. It could never have been the intention of the Learned Judge to permit deviation from the mandatory provision in the absence of substantial and compelling circumstances. To interpret his judgment in that way would be going back to ‘business as usual’ where the court would simply exercise its discretion on sentence.

[13] Furthermore, as I understand the **Malgas’** case even if there are no substantial and compelling circumstances the court is not bound to impose the minimum sentence only. Depending on the nature and gravity of the offence and other relevant factors the court still has a discretion to impose a greater sentence than the minimum sentence prescribed by the legislation. The discretion to impose a sentence less than the minimum one arises if there are substantial and compelling circumstances. In the matter of **De Beers**, the Learned Judge of Appeal said

“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".²(My underlining)

[14] On the question of advanced age Ms *Tokota* submitted that the appellant abused his position of trust in his daughter. She referred to the case of **S v JA 2017(2) SACR 143 (NCK)** where the appellant who was 59 years of age was sentenced to life imprisonment for the rape of his 12-year-old daughter. I agree with Ms *Tokota* that the issue of the advanced age can only be relevant in the event it is taken as contributing to substantial and compelling circumstances justifying a lesser sentence. In my view, once it is found, as was found in this case, that there are no substantial and compelling circumstances justifying a departure from the minimum sentence the age of the appellant becomes irrelevant.³ Furthermore the fact that the appellant is a pastor in church is a factor which militates against him.

[15] The advancement of age as such is not in itself a compelling circumstance for deviation. *'A sentence of life imprisonment must, from the viewpoint of the courts, be seen as exactly that — imprisonment for the rest of the natural life of the offender'*.⁴ A sentence of life imprisonment therefore authorises the State to keep the person sentenced in prison for the rest of his life.⁵ That must also be assumed to have been the intention of the legislature in enacting section 51(1) of the Act. Accordingly there is also no merit in Mr *Giqwa's* argument.

² Para.17

³S v JA 2017 (2) SACR 143 (NCK) paras 31-37

⁴ C/F S v Mhlakaza 1997 (1) SACR 515 (SCA) at 521d-e

⁵S v T 1997 (1) SACR 496 (SCA) at 498

[16] In **S v Heller 1971 (2) SA 29 (A) at 55C – D. and S v Munyai and Others 1993 (1) SACR 252 (A)** the advanced age of the accused was considered as a mitigating factor. None of these cases concerned a prescribed minimum sentence of life imprisonment, and the issue was therefore not whether the fact, that an accused of advanced age might spend the rest of his or her life behind bars if life imprisonment is imposed, could be a mitigating factor which could constitute substantial and compelling circumstances justifying a lesser and determinate sentence.

[17] The Supreme Court of Appeal in the **Abrahams**⁶ case, where the prescribed sentence of life imprisonment was applicable, held that the age of the appellant (53 years old at the time of the rape and 54 years old at the time of sentence) was not a mitigating factor when it came to the issue of substantial and compelling circumstances.

[18] It is by now well established in a long line of cases that rape is one of the most despicable, heinous crimes infringing, as it does, the rights entrenched in the Constitution which include the right to inherent dignity, privacy, and the right to security and protection thereof. Stiff sentences such as life imprisonment have not yielded any positive results thus far. The country continues to be plagued with this kind of criminal behaviour. The only option open to courts is to continue to apply the law relating to rape cases in a standardised form as required by the legislature.

⁶S v Abrahams 2002 (1) SACR 116 (SCA) para 27.

[19] Rape committed by a relative, not to mention a biological father, is a serious threat to a safe environment of children. The interests of society demand that such criminals deserve to be kept away from the community.

[20] In **S v D 1995 (1) SACR 259 (A)** the SCA said the following at 260f – i with reference to the vulnerability of young children:

'Children are vulnerable to abuse, and the younger they are, the more vulnerable they are. They are usually abused by those who think they can get away with it, and all too often do. . . . Appellant's conduct in my view was sufficiently reprehensible to fall within the category of offences calling for a sentence both reflecting the Court's strong disapproval and hopefully acting as a deterrent to others minded to satisfy their carnal desires with helpless children.'

These sentiments are apposite in the present matter.

[21] The prevalence of this kind of offence in this division cannot be over-emphasized. During the week in which we were hearing appeals, out of six appeals two of them, including this one, concerned rape of the girls under 16 years by their biological fathers. Courts must be vigilant and send a strong message to the public at large that in their performance of duty they will do the best they can to ensure the protection of women's right to dignity and privacy. The intention of the Legislature in prescribing the minimum sentences of life imprisonment on certain offences was to make sure that the criminals are kept in prison for the rest of their lives. The duty to do so is placed in the judiciary.

[22] I am mindful of the fact that sentence is a matter which is pre-eminently within the discretion of the trial court. The court of appeal will be very slow in interfering with that discretion. It will only interfere where the discretion has not been judicially exercised. Interference is called for where the sentence -

(a) is vitiated by irregularity or misdirection; or

(b) is disturbingly inappropriate.⁷ The fact that the appeal court may not have imposed the same sentence is not enough.

[23] In **S v Shaik 2008 (2) SA 208 (CC)** para.72 the Constitutional court said:

*“The function of any court adjudicating an appeal against a sentence must be kept in mind, for it is relevant to whether there are prospects of success. It has been stated repeatedly by courts that an appeal court will not easily interfere with a sentence imposed by a trial court exercising its discretion. The question is not which sentence the appeal court would have imposed, but rather whether the sentence is shockingly inappropriate, or whether an irregularity or misdirection occurred.”*⁸

⁷S v Rabie 1975 (4) SA 855 (A) at 857D - G.

⁸ S v Kibido 1998 (2) SACR 213 (SCA) at 216g - j; S v Brand 1998 (1) SACR 296 (C) at 303c - e; S v Pillay 1977 (4) SA 531 (A) at 535A - G; S v Rabie 1975 (4) SA 855 (A) at 857C - F; S v Sibiya 1973 (2) SA 51 (A) at 56A - B and 57B - C; S v Berliner 1967 (2) SA 193 (A) at 200G; S v Fazzie and Others 1964 (4) SA 673 (A) at 683A and 684A - C; S v Anderson 1964 (3) SA 494 (A) at 495C - H; R v Zulu and Others 1951 (1) SA 489 (N) at 494A - G and 497A - D; R v Reece 1939 TPD 242 at 243 - 244; R v Taljaard 1924 TPD 581 at 582 and 583; R v Mapumulo and Others 1920 AD 56 at 57.

[24] In my view, the sentence imposed by the magistrate on count 2 was incompetent and vitiated by a misdirection. Counsel for both parties conceded that this court is, in terms of section 309(3) of the Criminal Procedure Act 51 of 1977, empowered to set aside a sentence and impose a more severe one. Before the hearing of the matter, we invited the parties to give us reasons, by way of supplementary heads of argument, why this should not be done in the present case. The State has argued that we should increase the sentence to life imprisonment and the defence has argued that we should not do so. I am not persuaded that we should either reduce or leave the sentence as it is. The intention of the Legislature must be given effect to.

[25] It has been held that with the advent of the enactment of the legislation prescribing minimum sentences '*society is clamant for retribution and deterrence must also play a major role in the sentences imposed. The personal circumstances of the appellant must recede into the background*'.⁹

[26] For the above reasons, I am of the view that the appeal must fail instead the sentence imposed by the magistrate on count 2 must be set aside and substituted by an appropriate sentence.

[27] In the result I make the following order.

1. The appeal is dismissed.

⁹S v Mokoena 2009 (2) SACR 309 (SCA) para.11

2. The sentence imposed by the magistrate on count 2 on 9 May 2014 is set aside and replaced with “on count 2 the accused is sentenced to life imprisonment.”

The sentence on count 2 is to run concurrently with sentences on counts 1, 3 and 4.

**B RTOKOTA
JUDGE OF THE HIGH COURT**

I AGREE

**N NONGOGO
ACTING JUDGE OF THE HIGH COURT**

APPEARANCES:

For the appellant: Mr A Giqwa

Instructed by Legal Aid SA

For the respondent: Adv N Tokota

Instructed by DPP

Date of Hearing 7 May 2021

Date delivered: 11 May 2021