

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
07/06/2019	
DATE	
 SIGNATURE	

CASE NO: SH 363/2014
DPP REF: SA 6/2018
APPEAL NO: A 18 /2018

In the matter between:

IONNAIDES CHRISTO

APPELLANT

and

THE STATE

RESPONDENT

 JUDGMENT ON APPEAL

MOOSA AJ:

[1] This is an appeal against the effective sentence of 20 (twenty years) imprisonment imposed by the Regional Magistrate Benoni on 16 February 2017, upon the appellant.

[2] On 11 August 2017, the trial court granted leave to appeal against the sentences imposed on counts 1, 3 and 4. Leave to appeal against his convictions as well as sentences imposed in count 2 (two) was refused. The appellant unsuccessfully petitioned this order and the Petition was refused on 20 November 2017.

[3] The Appellant was convicted and sentenced as follows:

- a). Count 1 – Rape of a minor child during the period 2003 -2005.
15 (fifteen) years imprisonment
- b). Count 2 – Indecent Assault.
5 (five) years imprisonment
- c). Count 3 – Contravening Section 50(1)(a) of the Child Care Act 74 of 1983 (Child Abuse).
5 (five) years imprisonment
- d). Count 4 – Crimen Injuria.
5 (five) years imprisonment

The court ordered that the sentences imposed on counts 2 and 4 to run concurrently with the sentences imposed on count 1.

[4] The crisp issue to be determined in this appeal is whether the effective period of twenty years imprisonment is a just and proportionate sentence in the circumstances of this case, and having due regard to the relevant sentencing principles.

[5] It is trite that the circumstances in which a court of appeal may interfere in sentencing discretion of a lower court are limited. There must be either a material misdirection by the trial court or the disparity between the sentence of the trial court and the sentence of the appellate court would have imposed, had it been the trial court is so marked, that it can properly be described as "shocking",

"startling" or "disturbingly inappropriate".¹

[6] (a) In **Anderson 1964(3) SA 494 (A) 495 D-E** Rumpff JA (as he then was) stated: *"Over the years our Courts of appeal have attempted to set out various principles by which they seek to be guided when they are asked to alter a sentence imposed by the trial court. These include the following: the sentence will not be altered unless it is held that no reasonable man ought to have imposed such a sentence, or that the sentence is out of all proportion to the gravity or magnitude of the offence, or that the sentence induces a sense of shock or outrage, or that the sentence is grossly excessive or inadequate, or that there was an improper exercise of his discretion by the trial Judge, or that the interests of justice require it."*

(b) In **S v Rabie 1975 (4) SA 855 (A)** at 857 D – E the following was stated: "In any appeal against sentence, whether imposed by a magistrate or a Judge, the court hearing the appeal -

(a) should be guided by the principle that punishment is pre-eminently a matter for the discretion of the trial court and;

(b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been 'judicially and properly exercised'.

The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate".

(c) In **S v Kgosimore 1999 (2) SACR 238 SCA** it was held that the approach of a Court of appeal on sentence should be the following: "It is trite law that sentence is a matter for the discretion of the court burdened with the task of imposing the sentence. Various tests have been formulated as to when a court of appeal may interfere. These include, whether the reasoning of the trial court is vitiated by

¹ **S v Malgas 2001 (1) SACR 469 (SCA)** at 478 d - g

misdirection or whether the sentence imposed can be said to be startlingly inappropriate or to induce a sense of shock or whether there is a striking disparity between the sentence imposed and the sentence the court of appeal would have imposed. All these formulations, however, are aimed at determining the same thing: viz. whether there was a proper and reasonable exercise of the discretion bestowed upon the court imposing sentence. In the ultimate analysis this is the true enquiry. (Cf **S v Pieters 1987 (3) SA 717 (A) at 727 G – I**). Either the discretion was properly and reasonable exercised or it was not. If it was, a court of appeal has no power to interfere; if it was not, it is free to do so”.

(d) In **S v Malgas 2001 (1) SACR 469 (SCA) at 478 D – G** the Court applied a broadened scope for the interference and held that: “However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as “shocking”, “startling” or disturbingly inappropriate”. It must be emphasised that in the latter situation the appellate court is not at large in the sense in which it is at large in the former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned”.

Having due regard to the aforementioned principles set out by the case authority it is clear that the court of appeal has a very limited scope to interfere with the discretion of the trial court.

[7] The appellant was convicted of one count of rape (count 1), under circumstances where it attracts a prescribed minimum sentence of life imprisonment in terms of Section 51 of the Criminal Law Amendment Act 51 of 1997, unless the court finds substantial and compelling circumstances present which will cause it to impose a lesser sentence.

[8] It is clear from the record that the rape was committed upon the complainant when she was 11 (eleven) years old by the appellant who by virtue of his family relationship to the complainant is likened to being her grandfather. The court having weighed the appellant's advanced age was of the view that the imposition of life imprisonment would induce a sense of shock and accordingly was of the view that the imposition of life imprisonment would be disproportionate in the circumstances.²

I pause to mention that the appellant was born on 19 February 1942 and was 75 years old when he was sentenced. He is now just over 77 years old at the time of the hearing of this appeal. The Supreme Court of Appeal confirmed in **S v Hewitt 2017 (1) SACR 309 SCA** at paragraph 15 held that "the courts have considered oldness as a mitigating factor, it is certainly not a bar to a sentence of imprisonment".

[9] I have duly taken into account the comments of the magistrate during sentencing of the appellant, and am of the view that the court had exercised its discretion correctly by deviating from the imposition of the prescribed minimum sentence on the count of rape. To this end, having due regard to the substantial and compelling circumstances present, I am unable to find any misdirection in the exercise of the discretion by the court *a quo* and am in agreement and find that the sentence imposed is just and appropriate in the circumstances. Accordingly, the sentence on count 1, in my view does not require any further scrutiny.

[10] I now turn my attention to the sentence of 5 (five) years imposed on count 3. I have duly taken cognisance of the nature and purport of the allegations in respect of which the appellant has been convicted of. To this

² Record page 771, lines 9 - 11

end, the allegations amount to the fact that the appellant assaulted and/or refused to take the complainant for medical treatment after she cut her wrists and pinching her. I further have taken due note of the evidence led regarding the undisputed evidence that the appellant had in fact taken the complainant for medical attention, which unfortunately fell short of the standard required of a responsible person.

Having carefully considered the totality of the evidence on this count, I am similarly unable to find any misdirection on the part of the court *a quo* when it sentenced the appellant as it did; and am satisfied that the discretion of the court was exercised correctly.

[11] The court *a quo* ordered that the sentences imposed of 5 (five) years each on counts 2 and 4 run concurrently with the sentence imposed on count 1. Further that the sentence of 5 (five) years imposed on count 3 is to be served separately; which essentially means that the appellant would only commence serving this sentence after having served the sentence on count 1. On the face of it and in the ordinary course of business, the appellant would only be released from prison at the age of 95 years; barring any parole that he may become eligible to.

Accordingly, in my view this state of affairs requires me to carefully scrutinise the overall cumulative effect of the sentences imposed and to determine whether it would, should and can pass muster by this court, having due regard to the advanced age of the appellant.

[12] In *S v Munyai* 1993 (1) SACR 252 (A) the Court held that: "One instinctively baulks at the thought of a person of this advanced age being sent to the gallows [in our case long term imprisonment]. And, it is seems to me, the objects of punishment do not require this. It is true that old age is generally speaking, not a ground for leniency (see the writers referred to by Rumpff JA in *S v Zinn* 1969 (2) SA 537 (A) at 541G-542A). Nevertheless, our courts have (as for example in *S v Heller* 1971 (2) SA 29 (A) at 55 C) treated old age *per se* as a mitigating factor when deciding on an appropriate period of imprisonment. This has been done on the basis of

compassion coupled I think with the perception that the community expect old people to be treated with sympathy (DP van der Merwe: Sentencing 5-26). Perhaps the reason for this is embodied in the saying "pity at least is due to a feeble octogenarian" (Oxford English Dictionary sv Octogenarian)".

[13] I am mindful of the fact that the Magistrate during his judgment duly verbalised and took the advanced age of the appellant into account when determining an appropriate sentence on count 1. I have also observed that the court a quo also briefly referred to the cumulative effect of the sentence when it determined to order the sentences on counts 2 and 4 to run concurrently on count 1.

However, I am of the view that despite the Magistrate verbalising the cumulative effect of the sentence, he simply did not seriously weigh, take into account, give credence and carefully apply his mind to the actual cumulative effect of the sentence upon the appellant, having due regard to his advanced age. In my view had he genuinely done so, the result would have been markedly different.

[14] In *S v Skenjana* 1985 (3) SA 51 (A) 54I-55B Nicholas: JA stated: "A sentence of 20 years imprisonment is undoubtedly very severe, and it is not a sentence which I would have imposed had I been sitting as the trial Judge. My personal view is that the public interest is not necessarily best served by the imposition of very long sentences of imprisonment. So far as deterrence is concerned, there is no reason to believe that the deterrent effect of a prison sentence is always proportionate to its length. Indeed, it would seem to be likely that in this field there operates a law diminishing returns: a point is reached after which additions to the length of a sentence produce progressively smaller increases in deterrent effect, so that, for example, the marginal deterrent value of a sentence of 20 years over one of say 15 years may not be significant. Similarly in regard to the aspect of retribution: This has tended to yield ground to the aspects of deterrence and reformation, but it is not wrong that, in determining a proper sentence, the Courts should give some recognition to the natural indignation and the fears and apprehensions

of interested persons and the community at large."

See too *Morris* 1989 (2) SA 643 (A); *Machasa* 1991 (2) SACR 308 (A) and *M* 1993 (1) SACR 126 (A).

[15] In *S v Barendse* 2010 (2) SACR 616 ECG the appellant was a 72 (seventy two) year old man sentenced to 20 (twenty years) imprisonment for raping a minor on one occasion. The Full Court relying on another matter from the same division reduced the appellant's sentence to 10 (ten) years imprisonment. In *S v Vilakazi* 2009 (1) SACR 552 (SCA) the victim was under 16 years old. The sentence of life imprisonment was set aside and substituted with 15 (fifteen) years imprisonment from which two years are to be deducted when calculating the date upon which the sentence is to expire. Further, in *S v Tshoga* 2017 (1) SACR 420 (SCA) the victim was 10 (ten) years old. The sentence of life imprisonment was set aside and substituted with 10 (ten) years imprisonment. See also *S v Ngomane* 2007 (2) SA 535 (W) where the rape victim was 13 (thirteen) years old, the sentence of 25 (twenty five) years imprisonment was on appeal reduced to 15 (fifteen) years imprisonment.

[16] Section 12 (1) of the Constitution of the Republic of South Africa 108 of 1996 provides that:

Everyone has the right to freedom and security of the person, which includes the right-

"(e) not to be treated or punished in a cruel, inhuman or degrading way".

I pause to mention that the Constitutional Court has not declared the exact meaning of a cruel, inhuman or degrading sentence and in *S v Williams* 1995 (3) SA 632 CC elected to use the dictionary meaning of the words.³

[17] In *S v Dodo* 2001 (3) SA 382 CC at paragraph 37, the Constitutional Court went further and held that: The concept of proportionality goes to the heart of the inquiry as to whether punishment is cruel, inhuman or degrading,

³ [24] The Oxford English Dictionary defines 'cruel' as "causing or inflicting pain without pity," 'inhuman' as "destitute of natural kindness or pity, brutal, unfeeling, savage, barbarous" and 'degrading' as "lowering in character or quality, moral or intellectual debasement".

particularly where, as here, it is almost exclusively the length of time for which an offender is sentenced that is in issue."

[18] Having due regard to all the factors needed to be taken into account and more especially the cumulative effect of the effective sentence it is clear in my mind that the court *a quo* misdirected itself and thereby caused a disparity between the sentence imposed and the sentence that is proportional to all the relevant facts. It is clear that the effective sentence of 20 years imposed would extend beyond the appellant's natural life expectancy and therefore the sentence is shockingly inappropriate. Further, I am of the view that the sentence is vitiated by misdirection, is disturbingly inappropriate, cruel and inhuman. Accordingly, it warrants interference by this Court.

[19] In concluding I am reminded of the comments made by Harms J in **S v Mhlakaza 1997 (2) All SA 185 (A)** wherein he held as follows: "*The object of sentencing is not to satisfy public opinion but to serve the public interest.... A sentencing policy that caters predominantly or exclusively for public opinion is inherently flawed*".

[20]. In the result, I make the following order:

1. The appeal against the sentence on Count 1 is dismissed.
2. The appeal against the sentence on Count 3 is upheld.
3. It is ordered that the sentence on Count 3 run concurrently with the sentence on Count 1.
4. The Appellant will thus serve a sentence of 15 (fifteen) years imprisonment.
5. The sentence is antedated to 16 February 2017, being the date upon which the Court *a quo* imposed the sentence.



C. M. MOOSA
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION
PRETORIA

I agree and it is so ordered:



T A N MAKHUBELE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION
PRETORIA

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Date of Hearing:
Date of Judgment:

29 May 2019
03 June 2019