



FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

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

Case No: A288/2018

In the matter between:-

MOHAU SAMUEL MPHUTHI

Appellant

and

THE STATE

Respondent

CORAM: NAIDOO, J *et* MOLITSOANE, J

HEARD: 11 MARCH 2019

JUDGMENT BY: MOLITSOANE, J

DELIVERED: 16 MAY 2019

- [1] The appellant stood trial in the Regional Court sitting in Kroonstad on a charge of rape of a 13 year old victim. He was convicted as charged and sentenced to life imprisonment. He has an automatic right to appeal and he appeals only against the sentence.

- [2] After the charges were put to him the accused tendered a plea of not guilty. In a plea explanation he denied all the allegations levelled against him. After the plea explanation the state handed in a statement in terms of s212 of the Criminal Procedure Act 51 of 1997 being the results of the analysis of swab taken from the cervix and vestibule of the complainant that matched the DNA result from the appellant.
- [3] After the DNA analysis was handed in evidence the defence requested a remand presumably to consult further on the course of action to be taken. Upon resumption of the case on the next hearing date the defence made the following admissions in terms of s220 of the CPA:
1. The appellant admitted that on the 27th October 2012 and in Maokeng he had sexual intercourse once with the complainant without her consent;
 2. He further admitted that at the time of the incident the complainant was 13 years of old;
 3. He further admitted that on the day of the incident he met the complainant at a tavern. He thereafter took her out of the tavern and had sexual intercourse with her at a nearby shack not far from the tavern.
- [4] After the admissions were formally noted the appellant was convicted as charged and sentenced.
- [5] The following are the grounds of appeal the appellant relies upon:

1. An effective sentence of life imprisonment is strikingly inappropriate in that it is out of proportion to the totality of the accepted facts in mitigation.
2. The Court *a quo* erred by finding that there were no substantial and compelling circumstances to deviate from the prescribed minimum sentence, more particularly in view of the following facts:
 - 2.1 The absence of planning;
 - 2.2 The age and personal circumstances of the Appellant;
 - 2.3 The Court did not take in consideration the time the appellant spend in custody awaiting the finalization of the trial.
 - 2.4 The fact that the Appellant did not have any previous convictions of a sexual nature.
3. The Court *a quo* further erred in over-emphasizing* the following factors:
 - 3.1 The seriousness of the offence;
 - 3.2 The interest of the society;
 - 3.3 The prevalence of the offence;
 - 3.4 The deterrent effect of the sentence;
 - 3.5 The retributive element of sentencing.

[6] Sentencing lies predominantly in the discretion of the trial court. It is now settled that an appeal court will only interfere with the sentence imposed by the trial court if the trial court has misdirected itself in the imposition of the sentence and thus imposed a sentence which is shockingly inappropriate or that

induces a sense of shock or outrage. The court in **S v Malgas**¹ laid the test as follows:

“[13] The test for interference with sentences on appeal were evolved in order to avoid subverting basic principles that are fundamental in our law of criminal procedure, namely, that the imposition of sentence is the prerogative of the trial court for good reason and that it is not for appellate courts to interfere with that exercise of discretion unless it is convincingly shown that it has not been properly exercised.”

[7] It is contended that the trial court erred in finding that there were no compelling and substantial circumstances warranting the imposition of a lesser sentence. In assessing whether there are compelling and substantial circumstances justifying the imposition of a lesser sentence this court is guided by the approach as laid down in **S v Malgas**² that, “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 needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.”

[8] It is contended in particular that the trial court erred in not taking properly into account the following factors:

1. That the appellant was a first offender in respect of the offence of rape.

First offenders are not necessarily entitled to non-custodial sentences in circumstances where serious offences have been

¹ 2001(1) SACR 469 (SCA).

² *Supra*.

committed. The court in **S v Kekana** 2013(1) SACR 101(SCA) said the following:

“It is true that the appellant has an unblemished record and that he was a useful member of society in gainful employment at the relevant time. Those circumstances, however, have to be weighed against the nature and severity of the offence and the requirements of society. Notwithstanding those mitigating factors being present, the seriousness of the offence makes it necessary to send out a clear message that behaviour of the kind encountered in this case cannot be countenanced. The natural indignation that the community would feel at conduct of this kind warrants recognition in the determination of an appropriate sentence.”

Rape, whether committed for the first time or not remains a heinous crime. Violence against women and children is a painful societal scourge that must be eradicated at all costs. This should also include first offenders. While each case must be adjudicated on its own merits it has to be borne in mind that in circumstances of a serious crime like the one before us, there is nothing untoward to send even first offenders to long terms of imprisonment.

2. The appellant was 32 years at the time of the commission of the offence and the possibility and the possibility of the rehabilitation of the offender.

Rehabilitation is one of the aims of punishment. In the case of *Mhlakaza and Another*³ the court pointed out that rehabilitation becomes less important when the seriousness of the crime demands a long term of imprisonment, amongst other things in

³ 1997(1) SACR 515(SCA) at 519 h-i.

order to remove the offender from society. In this case the appellant was 32 years of age at the time of the commission of the offence. It has not been demonstrated that he was immature. It is so that he had a child and maintained the said child and his grandmother from the odd jobs he was making. *In Vilakazi v The State*⁴ the court said the following:

“[58] In cases of serious crime the perceived circumstances of the offender by themselves, will necessarily recede into the background .Once it becomes clear that the crime is deserving of a substantial period of imprisonment the question whether the accused has two children or three, whether or not he is in employment, are themselves largely immaterial to what period should be, as those seem to me to be the kind of ‘flimsy ’grounds that *Malgas* said should be avoided.”

However, notwithstanding the seriousness of the offence, rehabilitation still remains an important sentencing consideration if the sentence has the potential to achieve it.[See *S v Nkambule*⁵.I am of the view that rehabilitation should recede to the background in this case.

3. The fact that the complainant did not suffer any serious injuries.

When considering whether substantial and compelling circumstances are present, an apparent lack of physical injury to the complainant shall not be taken into account-See s51(3)(aA)(iii) of Act 105 of 1997.It is indeed so that some rapes can be categorised as being more serious than others

⁴ (576/07) [2008] ZASCA 87 (2 September 2008).

⁵ 1993(1) SACR 136(A) 147.

but that does not detract from the fact that all rapes are inherently serious. Williamson J in **N v T**⁶ said:

“Rape is a horrifying crime and is a cruel and selfish act in which the aggressor treats with utter contempt the dignity and feelings of his victims.”

In **S v Chapman**⁷ the court said that rape is ‘a humiliating degrading and brutal invasion of the privacy, the dignity and the person of the victim’.

Even in circumstances where there are no physical injuries it cannot be argued that such a rape is not serious. This 13 year old suffered emotional trauma.

[9] I am not convinced that the trial court committed any misdirections or that the sentence imposed is inappropriate. In the result the appeal against the sentence cannot succeed.

[10] **ORDER:**

1. The appeal against the sentence is dismissed and the sentence is confirmed;
2. The order in terms of s103 (1) of the Firearms Control Act 60 of 2000 is confirmed.

P.E. MOLITSOANE, J

⁶ 1994(1)SA 862 CPD g-h.

⁷ 1997(2) SACR 3 (SCA).

I agree.

S. NAIDOO, J

On behalf of the appellant: Mr P L Van der Merwe
Instructed by:
Legal Aid South Africa
BLOEMFONTEIN

On behalf of the respondent: Adv. Harrington
Director of Public Prosecutions
BLOEMFONTEIN