



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

CASE NO: AR785/16

In the matter between:

LUNGISANI CYPRIAN NYUSWA

Appellant

and

THE STATE

Respondent

Coram: Chetty J (Madondo DJP concurring)

Heard: 1 June 2017

Delivered: 30 June 2017

ORDER:

(1) The appeal against sentence is dismissed.

CHETTY J:

1. The appellant was charged in the Regional Court in Scottburgh, KwaZulu-Natal in terms of section 3 read with sections 1, 56(1), 57, 58, 59, 60 and 61 of the Criminal Law (Sexual Offences and Related Matters) Act 32 of 2007, on three counts of rape. The complainant was a physically disabled woman, aged 21.

2. The appellant pleaded not guilty to the charges, contending that the intercourse with the complainant was consensual. The evidence before the court *a quo* was that the appellant entered the house of the complainant on the night of 25 December 2009, armed with a knife. She was alone at home as her mother, who cared for her, was away visiting her sister. The appellant found the complainant asleep on her bed and proceeded to lift her blanket, after which he inserted his finger into the complainant's vagina. He covered her mouth, preventing her from screaming and threatened her with the knife. He thereafter inserted his penis into her vagina, and proceeded to having intercourse with her without her consent. The appellant then carried the complainant out of the house to a nearby bush where he again proceeded to have sexual intercourse with her without her consent. According to the complainant, the appellant had intercourse with her on three occasions on this night. The State adduced evidence of DNA analysis linking the appellant as the person who had intercourse with the complainant on the night in question.

3. The court *a quo* rejected the version of the appellant that he had a secretive love relationship with the complainant, and that the intercourse was consensual. The J88 compiled by the doctor who examined the complainant after the incident, confirmed that she was physically disabled and that she had not engaged in sexual intercourse prior to the incident on 25 December 2009. The photographic evidence, handed in by consent in the court *a quo*, reflected that the complainant is confined to a wheel chair. The evidence further established the complainant has little or no mobility and is unable to get in or out of her bed unaided. It would appear that she suffered some form of paralysis from the waist down.

4. The appellant was convicted on three counts of rape. The Court *a quo* found no substantial and compelling circumstances to depart from the minimum sentence prescribed by s 51(1) of the Criminal Law Amendment Act 105 of 1997 and sentenced him to life imprisonment, with all three counts taken as one for the purpose of sentence. The appellant now appeals against the sentence, exercising his automatic right of appeal in terms of the proviso to s 309(1)(a) of the Criminal Procedure Act.

5. Section 309 (1) (a) (ii) of Act 51 of 1977 provides

“309. Appeal from lower court by person convicted.—(1) (a) Subject to section 84 of the Child Justice Act, 2008 (Act No. 75 of 2008), any person convicted of any offence by any lower court (including a person discharged after conviction) may, subject to leave to appeal being granted in terms of section 309B or 309C, appeal against such conviction and against any resultant sentence or order to the High Court having jurisdiction: Provided that 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: Provided further that the provisions of section 302 (1) (b) shall apply in respect of a person who duly notes an appeal against a conviction, sentence or order as contemplated in section 302 (1) (a).”

6. Although this legislation was only passed in 2013, it is deemed to have come into operation on 1 April 2010 (see sec 43 (2) of Act 42 of 2013). The appellant was sentenced on 4 November 2011 and his right to appeal accordingly falls to be governed in terms of this section. In *S v Ndlovu* (unreported case of the South Gauteng High Court, Johannesburg, case no. A593/2013, 6 June 2014) Wright J held the following with regard to the automatic right to appeal against life imprisonment imposed by the regional courts:

“In my view it is clear that the appellant enjoys an automatic right to appeal his sentence. It seems to me that the words such an appeal include an appeal against conviction, a sentence of life imprisonment imposed by a regional magistrate and an order. They are not limited to an appeal against a life sentence. Absent the imposition of a life sentence, leave is needed for any appeal. The words sentence to imprisonment for life are descriptive of the person seeking to appeal. They do not qualify what is sought to be appealed.”

7. It transpired that the appellant did nothing after his conviction to process his automatic right of appeal. Only in December 2015 did the appellant deliver an application for leave to appeal, at the same time applying for condonation on the basis that he had been dependent on his family to finance the services of a private attorney to prosecute an appeal. Despite the lengthy delay, we are satisfied that condonation be granted, particularly as the appeal is one which falls within the ambit of section 309B of the CPA. The appellant has noted an appeal only against sentence, and has expressly abandoned an appeal against conviction, indicating that it was his initial intention to plead guilty to the charges.

8. It must be pointed out that the record in this matter had to be reconstructed as the original transcripts could not be obtained. This was perhaps due to the fact that no appeal had been noted by the appellant for more than 5 years after his conviction and sentence. Following his application for leave to appeal, the record was reconstructed from the notes of the prosecutor. This reconstruction was done on 11 July 2016 in the presence of the magistrate as well as the accused, who confirmed the correctness of the notes read out by the prosecutor. The attorney who represented the appellant in his trial could not be traced and was not available when the prosecutor read her notes into the record. The only parts of the proceedings which were mechanically recorded were the rather terse judgment of the magistrate and the address on sentence.

9. Rule 67(5) of the Magistrate Court Rules places an obligation on the clerk of the court to prepare a copy of the record of the case including a transcript thereof as soon as leave to appeal has been granted by the magistrate. Rule 51(3) of the High Court Rules provides that the ultimate responsibility for ensuring that all copies of a record on appeal are in all respects properly before the Court, shall rest on the appellant or his/her legal representative, provided that where the appellant is not represented the responsibility rests on the Director of Public Prosecutions. In *S v Chabedi* 2005 (1) SACR 415 (SCA) Brand JA said the following"

"[5] On appeal, the record of the proceedings in the trial court is of cardinal importance. After all, that record forms the whole basis of the rehearing by the Court of appeal. If the record is inadequate for a proper consideration of the appeal, it will, as a rule, lead to the conviction and sentence being set aside. However, the requirement is that the record must be adequate for proper consideration of the appeal; not that it must be a perfect recordal of everything that was said at the trial. As has been pointed out in previous cases, records of proceedings are often still kept by hand, in which event a verbatim record is impossible. ...

[6] The question whether defects in a record are so serious that a proper consideration of the appeal is not possible, cannot be answered in the abstract. It depends, *inter alia*, on the nature of the defects in the particular record and on the nature of the issues to be decided on appeal."

10. In the present matter we are concerned with an appeal against the sentence imposed by the trial court. We have before us a transcript of the address to the magistrate on behalf of the appellant and the state. We are satisfied that there has been a proper attempt to reconstruct the record. See *S v Zondi* 2003 (2) SACR 227

(W) 245. There is no dissatisfaction expressed by the either counsel with the reconstruction. For the purpose of this appeal, which lies against sentence, we are satisfied that the record accurately captures the relevant factors placed before the trial magistrate. What is not transcribed is the magistrate's judgment on sentence. The prosecutor in the matter fortunately retained a copy of her notes from which it was apparent that the court considered the personal circumstances of the appellant, but was not persuaded of the existence of substantial and compelling circumstances.

11. I now turn to the merits of the appeal. It was correctly submitted by both counsel before us that sentencing is a matter for the discretion of the trial court. As an appeal court we can only interfere with the sentence imposed on the appellant if we are convinced that the trial court committed a misdirection or that the sentence was shockingly inappropriate. *S v Pieters* 1987 (3) SA 717 (A) at 728B – C; *S v Mothibe* 1977 (3) SA 823 (A) at 830D; *S v Pillay* 1977 (4) SA 531 (A) at 535E – F. *S v Rabie* 1975 (4) SA 855 (A); *S v Petkar* 1998 (3) SA 571 (A).

12. As a general rule an appellant is confined to the grounds of appeal as set out in his notice of appeal in an application for to leave to appeal. On behalf of the appellant it was submitted that the trial magistrate erred in finding that there were no substantial and compelling circumstances to justify the imposition of a sentence less than the prescribed minimum sentence of life imprisonment. It was contended that the court *a quo* misdirected itself by attaching insufficient weight to traditional mitigating factors, in particular that the appellant was 28 years old at the time of the commission of the offences; that he was the father of two minor children and was temporarily employed at the time of his arrest. At the time of sentencing, the appellant's attorney informed the Court that the appellant's children were living with relatives, casting some doubt as to whether he was responsible for their care and upkeep. When the appellant testified at the trial, he admitted that he consumed alcohol on the night in question, but he was aware of what he was doing. In his grounds of appeal, he belatedly changes course, asserting that he committed the offences under the influence of alcohol.

13. The state on the other hand submitted that the trial court was mindful of the personal circumstances of the appellant and took those into account, alongside the

seriousness of the offence and the interests of society. In addition, it was submitted that the trial court took into account that the complainant was a disabled person, confined to a wheelchair, whom the appellant raped on more than one occasion, and while he was in possession of a knife. The appellant's contention in his application for leave to appeal that his victim was not injured in the course of the rape does not operate to his benefit in deciding whether substantial and compelling circumstances exist to deviate from the prescribed sentences. This assertion loses sight of the fact that rape is itself a violent intrusion of the rights of the victim.

14. What is also evident from the record is that appellant knew of the complainant's disability prior to the commission of the offence. As such, he knew of her vulnerability as a disabled person and preyed on her situation. Section 51 of the Criminal Law Amendment Act, read with Schedule 2 thereof provides for the imposition of life imprisonment where the victim was raped more than once, and further where the victim is a physically disabled person who, due to his or her physical disability, is rendered particularly vulnerable. The rape perpetrated against the complainant falls within this category on two fronts – disability and the repetition of the offence. On either score, life imprisonment is prescribed in the absence of substantial and compelling circumstances. The approach to substantial and compelling circumstances as set out in *S v Malgas* 2001 (1) SACR 469 (SCA) are now firmly part of our law and need not be repeated.

15. Our courts have stressed the need to send out a clear message to potential rapists' and to the community that they are determined to protect the equality, dignity and freedom of all women. Disabled women, like the complainant, are in need of even greater protection from the courts.

16. To the extent that the appellant contends that the court *a quo* failed to have proper regard to his age, the fact that he has two children or of his temporary employment at the time of arrest, the comments in *S v Makaleni* [2010] JOL 24878 (ECG) are apposite. The court there was concerned with the sentence to be imposed on a 21 year old offender who had no previous convictions. He was convicted for the rape of a 19 year old physically disabled girl, who was also mentally handicapped. The Court at para 16 noted that

“....his age and the absence of previous convictions are matters which fall to be weighed, along with other relevant facts, in the assessment of sentence. The court *quo* did indeed give consideration to these matters. I do not, however, consider them to constitute substantial and compelling circumstances justifying a deviation from the standard sentence set by the Legislature.”

17. In *S v Rooi* [2012] ZAGPJHC 159, Wepner J writing for a unanimous Court, considered an appeal against a life sentence handed down for one count of rape of a 15 year old girl who functioned at the mental age of a 5 year old. In replacing the sentence with one of 18 years the Court took into account the views expressed by Nugent JA in *S v Vilakazi* 2009 (1) SACR 552 (SCA) where the Court held at para [15] that

“[15] It is clear from the terms in which the test was framed in *Malgas* and endorsed in *Dodo* that it is incumbent upon a court in every case, before it imposes a prescribed sentence, to assess, upon a consideration of all the circumstances of the particular case, whether the prescribed sentence is indeed proportionate to the particular offence. The Constitutional Court made it clear that what is meant by the 'offence' in that context (and that is the sense in which I will use the term throughout this judgment unless the context indicates otherwise)

‘consists of all factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence and the culpability of the offender.’

If a court is indeed satisfied that a lesser sentence is called for in a particular case, thus justifying a departure from the prescribed sentence, then it hardly needs saying that the court is bound to impose that lesser sentence. That was also made clear in *Malgas*, which said that the relevant provision in the Act

‘vests the sentencing court with the power, indeed the obligation, to consider whether the particular circumstances of the case require a different sentence to be imposed. And a different sentence must be imposed if the court is satisfied that substantial and compelling circumstances exist which ‘*justify*’ . . . it”

18. Somewhat belatedly, and five years after his sentence, the appellant, in his Notice of Appeal, recognises the error of his ways and is remorseful for his conduct and seeks to be granted a ‘second chance in life’. By this I assume the appellant to contend that he is a candidate for rehabilitation and that the imposition of life imprisonment is an inappropriate and too harsh a sentence in the circumstances. It is important to bear in mind that the mere expression of the prospect of rehabilitation of every offender, without more, could be the basis for substantial and compelling

reasons to impose a lesser sentence. The views expressed by Theron AJA in S v Nkomo [2007] 3 All SA 596 (SCA) are relevant

“[30] There is hardly a person of whom it can be said that there is no prospect of rehabilitation. The appellant was 29 years old at the time and would ordinarily not be regarded as a youthful or immature offender. Employment in itself would not necessarily qualify as a substantial and compelling circumstance. In following the approach adopted in *Malgas* of balancing societal and personal interests, I can see no room to conclude that the totality of facts in this case are such that they constitute substantial and compelling circumstances. The basis therefore suggested by Lewis JA in para [4] of her judgment for interfering with the sentence is unwarranted.

[31] I cannot agree 'that the prospect of rehabilitation [of which there is no evidence] and the fact that the appellant is a first offender' constitute substantial and compelling circumstances within the meaning of that expression and are truly convincing reasons for departing from the minimum sentence ordained by the Legislature. Given the prevalence of rape in our society the brutality of this particular rape, even in the absence of a directive from Parliament, life imprisonment would not, in my view, have been an inappropriate sentence.”

19. In *S v Mahlangu and others* 2012 (2) SACR 373 (GSJ) at 377G – 378A Satchwell J said the following of the approach to be adopted where the prescribed minimum sentence is prescribed by the legislature:

“In *S v Malgas* 2001 (1) SACR 469 (SCA) (2001 (2) SA 1222; [2001] 3 All SA 220) the judgment, to which our courts always refer concerning minimum sentences and substantial and compelling circumstances, had much to say about the approach to be taken by the court. Firstly the legislature, in enacting the Act, aimed at ensuring a 'severe, standardised and consistent response from the courts'. Secondly, the emphasis in sentencing has shifted 'to the objective gravity of the type of crime'. Thirdly, substantial and compelling circumstances means 'truly convincing reasons'. There must not be marginal differences in personal circumstances or degrees of involvement. At the end of the day, 'the ultimate cumulative impact of the circumstances must be such as to justify a departure'.

Accordingly, what I, as a sentencing court, am obliged to do is to take into account all the relevant factors and look at their combined impact to see whether they are convincing enough to justify a deviation from the prescribed minimum sentence. In favour of the accused are their youth and the fact that at least two of them have been in custody for a lengthy period. Against the accused is this extremely brutal and vicious murder I am of the view that there are not substantial and compelling circumstances to justify a lesser sentence of imprisonment.”

20. Similarly, in *Vilakazi (supra)* the court noted that in cases of serious crime, “the personal 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 questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be...”.

21. In *S v De Jager and another* 1965 (2) SA 616 (A) at 628H-629B, Holmes JA made the following observation:

‘It would not appear to be sufficiently recognised that a Court of appeal does not have a general discretion to ameliorate the sentences of trial Courts. The matter is governed by principle. It is the trial Court which has the discretion, and a Court of appeal cannot interfere unless the discretion was not judicially exercised, that is to say unless the sentence is vitiated by irregularity or misdirection or is so severe that no reasonable court could have imposed it. In this latter regard an accepted test is whether the sentence induces a sense of shock, that is to say if there is a striking disparity between the sentence passed and that which the Court of appeal would have imposed. It should therefore be recognised that appellate jurisdiction to interfere with punishment is not discretionary but, on the contrary, is very limited.’

22. Rape is a very serious offence with profound consequences of emotional and psychological trauma for its victims, who often never fully recover from their ordeal, stripping them of their dignity. The complainant in this matter is a disabled person, confined to her wheel-chair. The legislature has given proper recognition to seriousness of rape, and particularly so where it is committed against those who are more vulnerable than others. In such instances, the offence of rape attracts life imprisonment, unless substantial and compelling circumstances exist. I am satisfied that the trial court correctly considered all the personal circumstances of the appellant and correctly concluded that the prescribed sentence of life imprisonment was not only appropriate, but proportionate to the particular offences. I can find no misdirection in the courts reasoning. I have no sense of ‘unease’ that an injustice would be done if the prescribed sentence of life imprisonment is affirmed.

Order

23. Accordingly I propose the following order:

The appeal against sentence is dismissed.

CHETTY J

I agree,

MADONDO DJP

Appearance

Appeal heard on:	01 June 2017
Counsel for the appellant:	Mr SB Madondo
Instructed by:	Durban Justice Centre
Counsel for the respondent:	ES Magwaza
Instructed by:	The Director of Public Prosecutions
Judgment handed down on:	30 June 2017