



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

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

Appeal number: A125/2016

In the matter between:

M. P. S.

Appellant

and

THE STATE

Respondent

CORAM:

MOLEMELA, JP *et* CHESIWE, AJ

HEARD ON:

22 AUGUST 2016

JUDGMENT BY:

CHESIWE, AJ

DELIVERED ON:

4 OCTOBER 2016

- [1] The appellant in this matter was convicted in the Regional Court at Welkom on a charge of rape as contemplated in section 3 of the Criminal Law Amendment Act 51 contravening the provisions

of Section 3 read with Sections 1, 56(1), 56A as amended, 50(2)(a) and 50(2)(b) 57, 58, 59, 60 and 61 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, Act 32 of 2007, Further read with the provisions of Section 94, 256 and 261 of the Criminal Procedure Act, 51/1977. Further read with the provisions of Section 51(1) *51(2)(b) of the Criminal Law Amendment Act 105 of 1997, as amended, Furthermore read with Section 1, 2 and 120 of the Children's Act, 38/2005. The appellant at the time of the offence was 17 years old and the complainant was 16 years old. The trial court sentenced the appellant to twenty (20) years imprisonment.

- [2] Leave to appeal lies only against the sentence. Adv Tshabalala conceded, correctly so, that he had erroneously stated in his heads of argument that leave to appeal was against conviction and sentence.
- [3] At the trial, the appellant was legally represented by Mrs Maritz from the Legal Aid Board. Before his plea the court specifically advised him on the implications of section 51(1) read with Part 1 of the Schedule 2 of the Act, and the relevant minimum sentence of life imprisonment being applicable if he were to be found guilty as charged. The appellant pleaded not guilty and denied the allegation against him. In his plea explanation he raised an alibi, stating that he was at home with his mother and his girlfriend on the night of 16 December 2009. Because of the complainant's

age and the nature of the offence, the court room was cleared and proceedings were held in camera.

- [4] The appellant appeals on the grounds that the trial court erred on the following grounds:

That state proved the guilt of the appellant beyond reasonable doubt; that the complainant and the state witnesses, Aaron T. corroborated each other; that the contradiction between the complainant and the state witness, Aaron T. and the J88 are not material contradictions; that the sentence imposed by the trial court is unreasonably excessive and also that he was only seventeen at the time the offence was committed.

My learned sister, Molemela JP, brought it to the attention of the legal representative of the appellant that the heads of argument were not sufficiently detailed and thus are not helpful to the court as the heads did not address all the issues of the appeal.

Adv. Tshabalala submitted that he stands by his heads of argument and argued that the basis of the appeal to tamper with the sentence was largely because of the appellant's age. He however conceded that 20 years imprisonment under the circumstances the offence was committed, in this instance is appropriate.

Adv. Giorgi on behalf of the respondent submitted in the heads of argument and oral argument that the trial court did not misdirect itself and that the appeal court should not tamper with the sentence, as it is appropriate for the crime committed. She argued further that the court already took into account the appellants circumstances: that he was 17 years at the time of the

offence, he lives only with his mother, is unmarried, had no children, he completed only grade seven at school and he is a first offender.

[5] The facts of the matter are summarised as follows: the complainant testified that on the 16 December 2009, she and a friend, M. walked to the shops, when one K. approached them and started to pull her by the hand to a certain shack. K. was carrying a big knife. The complainant's friend was able to run away. K.'s friends followed him and the complainant closely to the shack. The complainant testified that she knows K.'s friends and she named them as S. (the appellant), M., T. M. and N.. She said that she knew them from school and that they lived all in the same area. When they got inside the shack, the complainant was instructed by K. to undress and lie down on the floor on her back. K. raped her first, followed by the appellant, T., M. and M..

[6] The complainant testified that she was raped by seven boys. The state witness, T., who was a co-perpetrator testified that five boys including, the appellant, participated in the rape. After they had all raped her, K. took the complainant to another house to rape her a second time. The complainant testified that K. forced her to accompany him to Stompie's place. Stompie intervened when he noted that K. had pulled the complainant aggressively. Stompie and K. had an argument and K. ran away. The complainant immediately told Stompie that K., S. and their friends had raped her.

The complainant stayed with Stompie till the morning and went to report the matter the next day at the police station.

- [7] The complainant's case was corroborated and bolstered by the state witness, T., who pointed out and placed the appellant on the scene on the night the offence was committed. T. testified that he knows the appellant very well. It cannot be an issue of mistaken identity as they went to initiation school together. T. pleaded guilty to the same offence and informed the court that the other four also pleaded guilty to the same offence. The testimony of Mabel Mkhatsi, a registered nurse, shows that she medically examined the complainant. She testified that though there were no visible injuries, she noted a whitish discharge, semen-like on the complainant's vagina. She explained that ejaculation into the vagina causes lubrication and thus it is possible for a victim not to have physical injuries despite being sixteen years old. She indicated on the J88 that the complainant was raped by approximately six unknown men. This issue was not taken further by the defence at the trial.
- [8] As I pointed out the fact that the complainant was 16 years and was raped by a gang of boys, and one boy K. raped her twice, this brought the application of the Criminal Law Amendment Act into operation. The authoritative case in this application is **S v Malgas**¹. In line with this decision the sentencing court should not depart from the prescribed minimum sentence simply because of flimsy reasons². On the other hand the prescribed minimum

¹ *S v Malgas* 2001 (1) SACR 469 (SCA).

² *Ibid* at 481j–482e. See also *S v Price and Another* 2003 (2) SACR 551 (SCA).

sentence should not be “shocking”, “startling” or “disturbingly inappropriate”³.

[9] It is trite that the notion “compelling and substantial circumstances” differs from one case to another⁴, as evidenced from the decision of **S v Malgas**⁵. When a trial court is faced with a case in which a minimum sentence is prescribed, the sentencing court must still have regard to all the traditional factors taken into account when considering sentence⁶.

[10] The trial court in this regard took into consideration the following factors. Appellant was 17 years at the time of the offence, he resides with his mother, is unmarried, has no children, has no proven previous convictions and is a first offender with regard to the rape. The trial court took into consideration the appellant’s circumstances and deviated from the prescribed minimum sentence of life. Du Plessis J in **S v GN**⁷ said:

“Accordingly, in its quest to do justice, a court will more readily impose a lesser sentence where the prescribed minimum sentence is imprisonment for life. That is where the prescribed minimum is life imprisonment, a court will more readily conclude that the circumstances peculiar to the case are substantial and compelling, to the extent that justice request a lesser sentence than life.”⁸

³ *S v GN* 2010 (1) SACR 93 (T) at 95j - 96a.

⁴ *Mofokeng v S* [2015] JOL 34851 (FB). See also *S v Abrahams* 2002 (1) SACR 116 (SCA).

⁵ *S v Malgas* above

⁶ *S v Abrahams* above and *S v Nkomo* 2007 (2) SACR 198 (SCA).

⁷ *S v GN* above

⁸ *Ibid* at 97f-g.

- [11] **S v Matyityi**⁹ informs us to be victim-centred when considering an appropriate sentence. A serious aggravating factor is the fact that the victim had to relocate because of the trauma of the incident, which was worsened by the threats that were directed at her.
- [12] It is indeed so that, imprisonment must be a last resort when the offender is youthful¹⁰. At the end of the day, every case must be judged on its own facts. A serious factor is the fact that gang-related violence has become rampant in the court's area of jurisdiction and that it is unfortunately rampant among the youth. Another aggravating factor is the fact that the appellant showed no remorse whatsoever and has clearly not taken any responsibility for his actions. All these aggravating factors weigh heavily on the consideration of an appropriate sentence. I am of the view that given all these aggravating circumstances, a relatively lengthy term of imprisonment is the only appropriate sentence for the appellant.
- [13] In order to determine whether in a particular case substantial and compelling circumstances exists, a court will follow the guidelines as set out in **S v Malgas**¹¹ and consider the trite triad of factors propounded in **S v Zinn**¹² that are relevant to the sentence, the crime, the criminal and the interests of society¹³.

⁹ *S v Matyityi* 2011 (1) SACR 40 (SCA).

¹⁰ *S v B* 2006 (1) SACR 311 (SCA) para [19] – [20].

¹¹ *S v Malgas* above at 482c

¹² *S v Zinn* 1969 (2) SA 537 (A)

¹³ *Ibid* at 540g

- [14] A fine balance needs to be struck between society's needs to punish crime whilst not overlooking the right and interests of a youthful offender, to be accorded an opportunity to be rehabilitated in suitable and appropriate cases¹⁴. It is trite that a teenager is *prima facie* to be regarded as immature and that the youthfulness of an offender will be invariably a mitigating factor. In general a sentencing court will not punish an immature young person as severely as it would an adult¹⁵.
- [15] In concluding that compelling and substantial circumstances warrant deviation from the prescribed sentence. The trial court took cognisance of the fact that the appellant was 17 years at the time of the offence and that he has no previous conviction and he is a first offender, and has been in custody during the duration of the trial. These are weighty factors, which cumulatively must contribute greatly to the appellants benefit as substantial and compelling circumstances justifying the imposition of a sentence lesser than the minimum prescribed sentenced.¹⁶
- [16] The trial court already deviated from the prescribed sentence. I agree with Adv. Giorgi on behalf of the respondent that the trial court did not misdirect itself and that the appeal court should not tamper with the sentence, as it is appropriate for the crime committed. As stated in **S v SMM** 2013 (2) SACR 292 (SCA)

“Rape is undeniably a degrading, humiliating and brutal invasion of a person's most intimate, private space, the very act itself, even

¹⁴ *S v Nkosi* 2002 (1) SACR 135 (W) at 143b. See also *S v Phulwane and Others* 2003 1 SACR 631 (T).

¹⁵ *S v Matyityi* 2011 (1) SACR 40 (SCA) para [14]

¹⁶ *S v Malgas* above.

absent of any accompanying violent assault inflicted by the perpetrator, is a violent and traumatic infringement...¹⁷”

- [17] The invasive and humiliating nature of rape, the discrimination inherent therein and the unfortunate prevalence thereof in society demands protection against this kind of conduct, especially if the complainant is raped by a gang, this makes it the worst kind of brutality against any human being¹⁸. In **F v Minister of Safety and Security** 2012 (1) SA 536 (CC), the Constitutional Court stated that:

“It is deeply sad that a few of our women and girls dare to venture into public spaces alone, especially when it is dark and deserted. If official statistics are anything to go by, incidents of sexual violence against women occur with an alarming regularity.¹⁹”

- [18] Rape is a very serious offence, especially gang rape. I align myself with the remarks of Goldstein J in **S v Ncheche** 2005(2) SACR 386(W):

“Rape is an appalling and utterly outrages crime, gaining nothing of any worth for the perpetrators and inflicting terrible and horrific suffering and outrage on the complainant and her family.²⁰”

- [19] The impact that the rape had on the complainant is an aggravating factor. The complainant had to relocate and change schools as the friends of the appellant threatened her. After

¹⁷ *S v SMM* 2013 (2) SACR 292 (SCA) para [17] and *S v Uithaler* 2015 (1) SACR 174 (WCC) para [10] – [12]

¹⁸ *S v Mabaso* 2014 (1) SACR 299(KZP) para [87]

¹⁹ *F v Minister of Safety and Security* 2012 (1) SA 536 (CC) para [56]

²⁰ *S v Ncheche* 2005(2) SACR 386(W) para 35

enduring the brutality of a gang rape she had to relocate, thus separating her from her support structure.

“It has affected me a lot and in a negative way because I lost trust especially to male persons and I also had to leave school and move away from there because some of their friends were busy threatening me.”

[20] It is trite that the appeal court may interfere with the sentence imposed by a trial court if *inter alia* there is a disparity in the sentence imposed or where the trial court failed to exercise its discretion properly or exercised it unreasonably or where there is misdirection by the court²¹. I am of the view that the trial court came to an informed and processed decision on whether compelling and substantial circumstances were indeed such that it should deviate from the prescribed sentence.

[21] The legislature has deliberately left it to the courts to decide whether circumstances of any particular case call for a departure from the prescribed sentence²². I am of the view that taking into consideration the principles set out in *Malgas*²³, the sentence imposed for the offence committed is reasonable and is not harsh and inappropriate nor did the trial court misdirect itself in any manner.

[22] It is trite that a court of appeal should not replace the sentence imposed by the trial court with its own, unless it is justified to do

²¹ *S v Malgas* above para [12]-[13]. See also *S v Salzwedel and Others* 1999 (2) SACR 586 (SCA) and *S v Sadler* 2000 (1) SACR 331 (SCA).

²² *S v Dodo* 2001(3) SA 382 (CC) para [11]. See also *S v Malgas*, 2001 (2) SA 1222 (SCA).

²³ *S v Malgas* above.

so²⁴. As indicated above, I see no reason to interfere and replace the sentence imposed.

[23] In view of the aforesaid I am not persuaded that the court *a quo* misdirected itself or that the sentence is shockingly inappropriate. Therefore there is no justification to tamper with it. In the circumstances I make the following order.

ORDER

[23.1] The appeal against sentence is dismissed.

[23.2] The sentence imposed by the trial court is confirmed.

S. CHESIWE, AJ

I concur

M. MOLEMELA, JP

On behalf of Appellant: Adv. Tshababala
 Instructed by:
 Legal Aid Board
 Bloemfontein

²⁴ *S v Obisi* 2005 (2) SACR 350 (W) para [7]

On behalf of Respondent: Adv. Giorgi
Instructed by:
Office of the Director of Public Prosecutions
Bloemfontein