



IN THE HIGH COURT OF SOUTH AFRICA

(Gauteng Division, Pretoria)

- (1) REPORTABLE: ~~YES~~ / NO
- (2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
- (3) REVISED.

DATE: 16 MAY 2024

Case no: A305/2022

Heard on: 15 May 2024

Judgment handed down: 16 May 2024

In the matter between:

MOEKETSANE TSOLANE

APPELLANT

AND

THE STATE

RESPONDENT

JUDGMENT

STRIJDOM, J

1. The appellant was arraigned in the regional court, Benoni, on the following charges:
 - (a) Count 1: Contravention of section 3 of Act 32 of 2007; In that he had sexual intercourse with a minor on diverse occasions.
 - (b) Count 2: Contravention of section 49(1)(a) of the Immigration Act 13 of 2002 and read with the Immigration Act 13 of 2011 (Illegal entry – no valid documentation.)
2. The appellant was legally represented during the trial and sentencing proceedings.
3. The appellant has pleaded not guilty on count 1 and guilty on count 2.
4. The appellant was convicted on both counts and was sentenced in respect of count 1, to life imprisonment and count 2, to six months imprisonment.
5. The trial court also ordered that the particulars of the appellant must be included in the National Register for Sex Offenders in terms of section 50 of the Criminal Law (Sexual Offences and Related matters) Amendment Act 32 of 2007. In terms of section 103(1) of the Firearms Control Act 60 of 2000, the appellant was declared unfit to possess any firearms.

6. The appellant has an automatic right of appeal in terms of section 10 of the Judicial Matters Amendment Act 42 of 2013. The appellant is appealing against the sentence only.
7. The salient facts can be summarized as follows:

The complainant was born on 19 September 2002 and by the time she testified she was 18 years old. Her father passed away in 2011 and shortly thereafter her mother passed away. During January 2018 to 25 April 2018 she was staying with the appellant and accused no 2 in a shack at Gaborone Section Daveyton. The three of them were sharing a single bed. Accused 2 ordered the appellant and the complainant to sleep together on the floor because they were disturbing her on the bed. That is when the appellant had the freedom to penetrate the complainant on a daily basis every night when they were sleeping. She frequently reported this incident to accused no 2. Accused no 2 responded by saying that she cannot do anything because the appellant is her brother. The complainant later realized that the appellant impregnated her. At some stage Sgt Mbhele arrived at their place with appellant and accused no 2 and they were taken to the Police Station. On their way to the Police Station accused no 2 told the complainant that she must tell the police officer that she was impregnated by her boyfriend. The complainant was sent to Donato somewhere in Nigel where abortion was done.

8. The appellants personal circumstances and mitigating factors were recorded as follows:

- 8.1 He was 34 years old;
- 8.2 He is married in Lesotho;
- 8.3 He has five minor children;
- 8.4 He went to school up to grade 5;
- 8.5 He was doing piece jobs;
- 8.6 He is a breadwinner;
- 8.7 His wife is unemployed;
- 8.8 He has spent over three years in custody awaiting trial; and
- 8.9 He is a first offender.

- 9. The court *a quo* found that there are no substantial and compelling circumstances justifying deviation from the prescribed minimum sentence of life imprisonment.
- 10. It was submitted by the appellant that the court *a quo* erred in finding that the cumulative effect of the appellant's personal circumstances and mitigating factors does not constitute substantial and compelling circumstances.
- 11. It was further argued by the appellant that the sentence is disproportionate to the offence and that on its own constitute substantial and compelling circumstances justifying a lesser sentence.
- 12. It would be appropriate to state the applicable principles when an appeal court is asked to interfere with a sentence imposed by the trial court: Sentencing is essentially a matter within the discretion of the trial court. The

discretion must be exercised judicially. An appeal court will interfere only if the sentence is vitiated by an irregularity or a misdirection or is which no reasonable court would have come to, in other words, where there is a striking disparity between the sentence imposed and that which the appeal court considers appropriate.¹

13. A misdirection could also flow from a misapplication or misappreciation of a rule of law, whether arising from our Constitution, a statute, the common law or judicial precedent.

14. There are a number of very aggravating factors in this matter which can be summarized as follows:

- 14.1 The appellant was approximately 34 years of age when the incident started, and the complainant was between 14 and 15 years old.
- 14.2 The appellant was in a position of trust, to bring up the complainant and protect her from harm as her biological parents passed away and she was left in their care. The appellant took advantage of the complainant, who is an innocent child and an orphan.
- 14.3 The appellant had sexual intercourse with the complainant almost on a daily basis to the extent that when she was medically examined new injuries were noted;
- 14.4 No remorse was shown by the appellant;

¹ **S v Malgas** 2001 (2) SA 1222 (SCA); **S v Truyens** 2012 (1) SACR 79 (SCA); **S v Sadler** 2000 (1) SACR 331 (SCA)

14.5 The complainant has no recourse, even accused 2, her aunt turned a blind eye of what was happening;

14.6 The neighbours started to intervene because the complainant got pregnant from the appellant.

15. It was submitted by counsel for the State that the following factors should also be considered as aggravating circumstances which were not dealt with by the court *a quo*.

15.1 The fact that the complainant was 10 weeks pregnant because of the actions of the appellant;

15.2 That the appellant wanted to hide the fact that he was having sexual intercourse with a minor child and hide her from the rest of the world by starting to have negotiations with his family in Lesotho to get married to the child and let her move to Lesotho where she has no assistance or recourse for her situation.

16. It is trite that as regards the consideration of the time spent by an accused awaiting trial, that the sentencing court should consider in all cases whether the period of imprisonment proposed was proportionate to the crime committed, taking into account, for that purpose, the period spent in custody awaiting trial.²

² Director of Public Prosecutions, North Gauteng Pretoria v Gewala and Others 2014 (2) SACR 337 (SCA).

17. The appellant and accused no 2 were in a position of trust over the child. They scandalously abused that trust.³
18. The court *a quo* correctly found that the appellant showed no remorse.⁴
19. Section 51 shifts emphasis to the objective gravity of the offence and the public's need for effective sanctions against it.⁵
20. The trial court carefully considered all the mitigating and aggravating circumstances and concluded that there are no substantial and compelling circumstances to deviate from the minimum prescribed sentence.
21. In my view, having regard to the aggravating factors in this case as opposed to the extenuating ones, and particularly the age of the child and the injuries sustained by her; it called for imposition of the ultimate sentence. The magistrate had no alternative but to impose it. The appellant's personal circumstances were outweighed by the seriousness of the offence and the need to protect society from any possible repetition of this kind of offence.
22. I am further of the view that the sentence is not disproportionate to the offence.
23. I would dismiss the appeal on sentence in respect of count 1.

³ *S v Chapman* 1997 (2) SACR 3 (SCA); *S v Abrahams* 2002 (1) SACR 116 (SCA)

⁴ *S v Matyityi* 2011 (1) SACR 40 (SCA)

⁵ *S v Malgas* 2001 (1) SACR 469 (SCA)

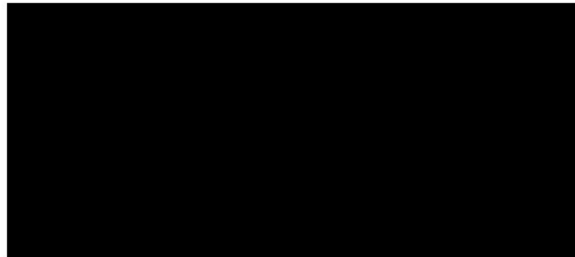
24.I propose the following order:

- (1) The appeal against sentence on count 1 is dismissed and the sentence of life imprisonment is confirmed.



JUDGE OF THE HIGH COURT OF SOUTH
AFRICA (GAUTENG DIVISION, PRETORIA)

I agree,



J HOLLAND-MUTER

JUDGE OF THE HIGH COURT OF SOUTH
AFRICA (GAUTENG DIVISION, PRETORIA)

APPEARANCES:

For the Appellant:

Mr MB Kgagara (Attorney)

Instructed by:

Pretoria Justice Centre Legal Aid

For the Respondent:

Adv. M Marriott

Instructed by:

National Director of Public Prosecutions