

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

CASE AR308/2023

In the matter between:

Z[...] S[...]

APPELLANT

and

THE STATE

RESPONDENT

Coram: C Smart AJ (A D Collingwood AJ concurring)

Heard: 27 June 2024

Delivered: 5 July 2024

ORDER

On appeal from: the Regional Court for the Regional Division of Pietermaritzburg:

1. The appeal is dismissed.
 2. The convictions and sentences imposed are confirmed.
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JUDGMENT

C SMART AJ (A D COLLINGWOOD AJ concurring):

Introduction

1. Rape remains under-reported nationally, but there may be no rapes more hidden than those committed within families.¹

2. This appeal concerns the rape of a 13-year-old girl who was raped over a period of ten months in her home which she shared with her mother and her step-father (the appellant). The rape occurred during the day when her mother was not at home.

3. The appellant was charged with rape of a minor child (count 1) and exposure of pornography to a child (Count 2).

4. The appellant was convicted by the Pietermaritzburg Regional Court and sentenced to life imprisonment for count 1 and three years imprisonment for count 2, with both sentences to run concurrently.

5. Given that the appellant was sentenced to imprisonment for life by the trial court under section 51(1) of the Minimum Sentencing Act, the appellant noted this appeal against his conviction and sentence without having to apply for leave to do so, as he was entitled to do in terms of section 309(1)(a) of the Criminal Procedure Act 51 of 1977 (“the CPA”).

Factual background

6. In the court a quo the respondent relied on the evidence of the complainant and her cousin, R[...] N[...] (“R[...]”) and on the evidence of Dr Dyweli who examined the complainant and compiled a report on his findings.

¹ Maila v S (429/2022) [2023] ZASCA 3 (23 January 2023) at paragraph 1

7. The evidence of the complainant was that she lived with her mother and her stepfather, the appellant. Her evidence was that she had a good relationship with the appellant and regarded him as a father figure. During September of 2016, and whilst her mother was at work, the appellant, having closed the curtains and doors, called the complainant to his bedroom. The appellant inserted a pornographic video into the television, removed the complainant's clothing and kissed and fondled her whilst watching the pornographic video. He thereafter had sexual intercourse with her. According to the complainant, and subsequent to that first instance, the appellant raped her more or less every Sunday whilst her mother was at work. Under cross-examination she stated that she was unable to state exactly how many times this occurred but that it did not occur during the period she was at the home of her natural father for holidays.

8. In June of the following year, and upon her return from spending her holiday with her father, she told R[...] that the appellant had been sexually abusing her for some months. When asked by R[...] why she had not reported this to her mother, the complainant replied that she was afraid her mother would not believe her. R[...] then advised her mother of this. Her mother immediately reported this to the complainant's mother who telephoned the appellant and warned him not to return home.

9. It was put to the complainant under cross examination that she had falsely accused the appellant of raping her due to the bad relationship that had developed between them as a result of a dispute about the complainant's use of her cellphone. The complainant readily conceded that there was a conflict between her and the appellant about the contents of her cell phone but that this did not affect her relationship with him.

10. According to the evidence of R [...], the complainant had told her that the appellant had been touching her. When questioned further by R [...], the complainant told her that the appellant was sexually abusing her.

11. The evidence of Dr Dyweli was that he examined the complainant on 17 July 2017 and he found that there were injuries to the complainant's vagina as well as evidence of blunt force trauma to her anus. His evidence was that these injuries were chronic and were at least more than seven days old.

12. Dr Dyweli was not cross examined on behalf of the appellant.

13. The appellant's evidence was that he was 40 years of age, he was employed as a truck driver and he was in a long term relationship with the complainant's mother. He has two children one of whom was employed at that time. He pleaded not guilty to the charges.

14. His evidence was that the complainant falsely implicated him because she and her sisters believed that he was the cause of the breakdown of the relationship between her parents. It is significant that this version was not put to the complainant during cross examination. His further evidence was that he objected to the complainant's use of her cellphone which led to an altercation with the complainant. It was subsequent to this, and on her return from her father's home, that she falsely accused him of molesting her.

15. The magistrate convicted the appellant as charged after all the evidence was led.

16. The appellant was sentenced to life imprisonment in terms of section 51(1) read with Part I of Schedule 2 of the Criminal law Amendment Act² after a finding was made by the magistrate that there were no substantial and compelling circumstances justifying a departure from the imposition of the prescribed minimum sentence.

Ad Merits

² 105 of 1997

17. The first issue to be determined in this appeal is whether the magistrate misdirected herself in the assessment of the evidence. It was the submission on behalf of the appellant that the complainant's version was improbable and that the magistrate should have approached the evidence of the complainant with extra caution.

18. The fundamental principle on the evaluation of evidence on appeal is that an appeal court is not inclined to disturb findings by a trial court on the evaluation of evidence.³

19. The magistrate found that the complainant was 'candid and forthright' when giving evidence and that 'even under cross examination, she answered all questions without hesitation, contradiction or inconsistency'.

20. We do not find that there has been a clear misdirection by the magistrate or that his findings are clearly erroneous.

21. Having regard to the complainant's version we are of the view that there is nothing improbable about it. Although the appellant's Counsel argued that her version was improbable especially having regard to the complainant's delay in reporting the rapes or, for that matter, that she chose to report to the incidents to her cousin R[...] rather than to her own mother, we do not believe that this to be improbable at all.

22. We are in agreement with the trial Magistrate as to the underlying probabilities in this case. Sight must not be lost of the fact that the complainant's mother was in a relationship with the appellant and so her concern that her mother would disbelieve her is not, in these circumstances, improbable. What is more, the suggestion made by the appellant that the complainant was acting maliciously in making the complaint is inherently questionable. There is, of course, no onus upon an accused person to prove his innocence, but where, however, a version is placed before the Court it must be closely scrutinised having regard to the inherent

³ A M and another v MEC for Health, Western Cape [2020] ZASCA 89

probabilities. The learned Magistrate made a favourable finding in respect of the complainant's credibility. Certainly, the complainant's evidence from the record, suggests that she was a reliable witness and telling the truth. For instance, as has already been noted, there had been conflicts between her and the appellant but, if anything, this adds greater credence to her version because, whilst conceding that there had been conflicts this is altogether different to the defence case that she deliberately falsely implicated him.

23. We accordingly find that the conclusion of the magistrate was correct.

Ad Sentence

24. The second issue to be decided is whether the magistrate erred in finding that there were no substantial and compelling circumstances which justified a deviation from the imposition of the prescribed minimum sentence of life imprisonment.

25. It is trite that sentencing is a matter of discretion of the trial court. Unless there is a material misdirection by the trial court, an appeal court cannot approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. However, even though there may not be a material misdirection, a court on appeal may yet be justified in interfering with the sentence imposed by the trial court when the disparity between the sentence of the trial court and the sentence which the appeal court would have imposed had it been the trial court is shocking or disturbingly inappropriate.⁴

26. The crime of rape of a minor child for which the appellant was convicted carries a minimum of a life sentence in terms of s 51 of the Criminal Law Amendment Act 105 of 1997 unless compelling and substantial factors are present to detract from the minimum sentence.

27. The facts and circumstances of this case bring the appellant's rape conviction within the ambit of the prescribed minimum sentence of life imprisonment in that the

⁴ *S v Malgas* 2001 (1) SACR 469 (SCA) para 12 and *Maila v S supra* at paragraph 44

complainant was thirteen years of age at the time she was raped and that she was raped over a period of some months. The court *a quo* found that further aggravating circumstances were that the appellant was the complainant's stepfather and in a position of trust and that the complainant was raped in the safety of her home.

28. The magistrate delivered a detailed and well-motivated judgment in which he weighed the mitigating factors against the aggravating factors and came to the conclusion that there were no substantial and compelling circumstances which justified the deviation from the imposition of the prescribed minimum sentence of life imprisonment.

29. The trial court had regard to the basic triad of sentencing and it took into account the appellant's personal circumstances. The appellant was a first offender, he was gainfully employed and he had two children of his own, both of whom had attained majority.

30. It was argued on behalf of the appellant that the personal circumstances of the appellant constituted compelling reasons not to impose the prescribed minimum sentence. We find that nothing in the personal circumstances of the appellant stands out as substantial and compelling to merit deviation from the minimum sentence.

31. The following aggravating factors were taken into account by the court *a quo*:

- 1) the complainant was thirteen years of age at the time she was raped;
- 2) she was raped by her stepfather in her home;
- 3) the complainant was raped over a period of months;
- 4) offences of a sexual nature committed against women and children are viewed by courts in a serious light.

32. Counsel for the appellant referred in her argument to cases where lesser sentences were imposed for a similar offence. One of those cases was S B Sangweni v S⁵ where Steyn J upheld the appeal against the sentence of life imprisonment and imposed a sentence of eighteen years. Steyn J found that the presiding magistrate had misdirected himself when he considered the minimum sentence as the norm without taking into consideration all of the facts and applying the proportionality test to depart from the minimum sentence. In this case, however, we find that the analysis of the evidence and the applicable law was carefully and thoroughly dealt with by the presiding magistrate in the court a quo and we can find no fault with that reasoning.

33. In S v Malgas 2001 (1) SACR 469 (SCA) the court set out the approach to be taken in assessing the existence of substantial and compelling circumstances for the purposes of section 51 of the Act. Unless there are truly convincing reasons for a different response, “the offences provided for in the Minimum Sentencing Act and its schedules are therefore required to elicit a severe, standardized and consistent response from the court.”

34. The Constitutional Court in S v Dodo 2001 (1) SACR 594 (CC) at para [40] approved the approach set out in Malgas as “undoubtedly correct”.

35. This court is in agreement with the sentiments of the Supreme Court of Appeal in the case of Maila v The State⁶ which are expressed as follows:

The message must be clear and consistent that this onslaught will not be countenanced in any democratic society which prides itself with values of respect for the dignity and life of others, especially the most vulnerable in society: children. For these reasons, this Court is not at liberty to replace the sentence that the trial court imposed. For an uncle, who is in the position of trust just as a father, to rape his own niece is unconscionable and deserves no other censure than that imposed by the trial court: life imprisonment. The sentence is not

⁵ 2010 (1) SACR 419 (KZP)

⁶ *Maila v S supra* at paragraph 60

disproportionate to the serious offence that the appellant committed on a 9-year-old child, his niece. The sentence is, thus, justified in the circumstances.

36. In the present case the sentence imposed on the appellant is far from inappropriate. The sentence imposed is not different from what this court would have imposed. Any lesser sentence would not serve the interests of justice, particularly in this case which involves the rape of a defenceless minor child in her home by her stepfather.

37. Accordingly, the following order is made:

37.1 The appeal is dismissed.

37.2 The convictions and sentences imposed are confirmed.

C SMART AJ

I agree

A D COLLINGWOOD AJ

Date reserved: 27 June 2024

Date delivered: 5 July 2024

APPELLANT: L Barnard

Instructed by: Chetty, Asmail & Maharaj Attorneys

RESPONDENT: E S Magwaza

Instructed by: Director of Public Prosecutions