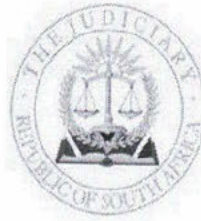


IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA



Case number: A 235/2023

Date of hearing: 12 August 2024

Date delivered: 6 September 2024

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO	
(2) OF INTEREST TO OTHERS JUDGES: YES/NO	
(3) REVISED	
6/9/24	[REDACTED]
DATE	SIGNATURE

In the appeal of:

RICHARD SMANGALISO MAMBA

Appellant

and

THE STATE

Respondent

JUDGMENT

SWANEPOEL J: (MOSHOANA J concurring)

[1] This is an appeal against the appellant's conviction and sentence in the Regional Court sitting at Soshanguve. The appellant was charged with rape in terms of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007 ("the Sexual Offences Act"). Section 51 (1) of the Criminal Law Amendment Act, 105 of 1997 ("the Act"), was applicable by virtue of the fact that the complainant was alleged to have been raped twice. The State therefore sought a minimum sentence of life imprisonment.

[2] The appellant pleaded not guilty and, although he admitted having intercourse with the complainant twice, he contended that the liaison had been by mutual consent. The trial court rejected the appellant's version, and on 26 July 2022 the appellant was convicted as charged. On 26 September 2022 the appellant was sentenced to the minimum sentence imposed by section 51 (1), namely life imprisonment.

[3] The complainant's version is briefly the following: During the late hours of the evening of 20 September 2020 the complainant was at a tavern together with a few of her friends. Sometime after midnight she left the tavern to check on a friend and to buy cigarettes. As she left the tavern the appellant grabbed her and started pulling her with him. He slapped her and punched her whilst pulling her some 25 to 30 meters away from the tavern entrance.

[4] Having dragged the complainant away from the tavern, the appellant pulled her skirt upwards all the while continuing to beat and choke her. He pulled her to her knees, and then he raped her from behind. The complainant says that the assault went on for between 30 and 40 minutes.

[5] Once the appellant had finished, he told the complainant to follow him. They approached a tar road. When the complainant tried to run away the appellant tripped her. He dragged her to a vegetable stall where he threatened to stab her. The complainant realized that she could not run

away. When the appellant suggested that they go to his house, her resistance had evidently been broken down, because she agreed to accompany him. The appellant was then living with his grandmother. He entered the house with the complainant, he took her to his bedroom, and he raped her again.

[6] The following day the appellant apologized to her, and allowed her to leave. The complainant took a taxi to her home. Her two uncles were home when she arrived there. They immediately noticed that the complainant had a bruise on her eye. She had blood on her knees from being dragged by the appellant. The complainant was taken to the police station where she reported the rape.

[7] The appellant says that he happened to meet the complainant in a passage near the tavern. She was crying. When he asked the complainant what was wrong, she said that she had been raped or that there had been an attempt to rape her. The appellant was not certain which it was. The person who had raped her had allegedly dragged her on her knees resulting in the injuries to her knees. The appellant offered to take her back to the tavern, but when they got there it was closed. The appellant then invited the complainant to go with him to his house, which invitation she accepted.

[8] When they got to the appellant's house they twice had intercourse by consent. The following morning the appellant gave the complainant R 220.00, and she left to go home. The appellant suggested that the complainant had been under the influence of alcohol, and that her version should, therefore, not be believed.

[9] There are two conflicting versions in this case. The court a quo accepted that the complainant had been intoxicated at the time of the incident. However, it also accepted that:

[9.1] The complainant and the appellant had met each other that night for the first time;

[9.2] The complainant had injuries to her knees and eye that were consistent with her version of events;

[9.3] The appellant admitted having had intercourse with the complainant twice;

[9.4] The vaginal injuries sustained by the complainant would have been extremely painful, making it unlikely that she would have agreed to have intercourse;

[9.5] Immediately upon returning home she reported the rape to her uncles and she laid charges with the police.

[10] From the appellant's evidence of the complainant's behavior, the court a quo deducted that the complainant could not have been as intoxicated as the appellant suggested.

[11] The court a quo also pointed out the implausibility of the complainant, having just been raped and assaulted, seeking out the comfort of a stranger instead of seeking out her friends.

[12] The court a quo provided a thorough analysis of the parties' evidence, and concluded that the appellant's evidence was false beyond a reasonable doubt. I cannot fault the trial court on any of its findings, and it is not for a court sitting in an appeal to second-guess the trial court's findings on credibility, unless such findings are clearly incorrect. The trial court obviously has the advantage of being able to assess the witnesses first hand.

[13] In my view the appellant's version is so far-fetched as to be rejected out of hand as false beyond a reasonable doubt. The notion that the complainant, having just been raped and beaten would agree to a romantic liaison with a stranger is beyond belief.

[14] The appellant's conviction of contravening section 3 of the Sexual Offences Act, coupled with the fact that the complainant was raped twice, brings with it the minimum sentences provided for in section 51 (1) of the

Act, which provides that a person who is convicted of committing an offence contained in Part 1 of Schedule 2 to the Act is liable to be sentenced to life imprisonment. One of the offences listed in Part 1 of Schedule 2 is rape, where the complainant is raped more than once.

[15] A court may only deviate from the minimum sentence when it is satisfied that substantial and compelling circumstances exist to justify the imposition of a lesser sentence.¹

[16] The meaning of the phrase “substantial and compelling” has been the subject of many judgments. Most authoritative was the judgment in *S v Malgas*². There it was pointed out that the legislature did not provide any guidance as to what constituted ‘substantial and compelling circumstances’:

“It signals that it has deliberately and advisedly left it to the courts to decide in the final analysis whether the circumstances of any particular case call for a departure from the prescribed sentence. In doing so they are required to regard the prescribed sentences as being generally appropriate for crimes of the kind specified and enjoined not to depart from them unless they are satisfied that there is weighty justification for doing so.”

[17] The Court went on to say³:

¹ Section 51 (3) (a) of the Act

² 2001 (2) SA 1222 (SCA)

³ At 1230 I

"Moreover, those circumstances had to be substantial and compelling. Whatever nuances of meaning may lurk in those words, their central thrust seems obvious. The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances. Nor were marginal differences in the personal circumstances or degrees of participation of co-offenders which, but for the provisions, might have justified differentiating between them. But for the rest I can see no warrant for deducing that the legislature intended a court to exclude from consideration, ante omnia as it were, any or all of the many factors traditionally and rightly taken into account by courts when sentencing offenders. The use of the epithets "substantial" and "compelling" cannot be interpreted as excluding even from consideration any of those factors. They are neither notionally nor linguistically appropriate to achieve that. What they are apt to convey, is that the ultimate cumulative impact of those circumstances must be such as to justify a departure. It is axiomatic in the normal process of sentencing that, while each of a number of mitigating factors when viewed in isolation may have little persuasive force, their combined impact may be considerable."

[18] It is necessary to consider the three considerations that guide sentencing, the personal circumstances of the convicted person, the nature of the offence, and the interests of society.

[19] The appellant was 28 years old at time of sentencing. He is a first offender. A probation officer's report showed that he is the eldest of three siblings with whom he has a good relationship. He was brought up in a loving household by his mother and grandmother (the latter since deceased). He has never had a relationship with his father.

[20] The appellant completed matric and then pursued tertiary studies at the Tshwane South College. He did not complete his studies. He was unemployed, single, with no dependants. The appellant apparently has a brief work history, and although he had managed to obtain employment, he lost his employment for reasons that are not explained. He is healthy, and although he consumes alcohol, there is no evidence of abuse of alcohol or any other substance.

[21] There is nothing remarkable about the appellant's personal history, and especially nothing that one can describe as substantial and compelling enough to deviate from the minimum sentence.

[22] On the other hand, society has a substantial interest in rapists being punished severely. Gender based violence (which is most often what rape entails) is a scourge that harms our nation and especially the women of our nation. For that particular reason the legislature thought it fit to provide for minimum sentences. Society expects the Courts to

impose the sentences provided for in the Act, unless there are clear, substantial and compelling reasons not to do so.

[23] The court a quo also heard evidence on the devastating effect that the offence had on the complainant, and it is not necessary to emphasise how demeaning and intrusive rape is. It is an offence the effects of which a victim carries with him/her forever. It is a scar that will never heal.

[24] In my view there were no circumstances present that justified the trial court imposing a lesser sentence than the minimum prescribed by the Act.

[25] In the circumstances, I propose the following order:

[25.1] The appeal is dismissed.


SWANEPOEL J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree:


MOSHOANA J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

AND IT IS SO ORDERED:

Counsel for the appellant:

Adv. H. Alberts

Counsel for the respondent:

Adv. N. January

Date heard:

12 August 2024

Date of judgment:

6 September 2024