

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, BHISHO)**

Case No: CA&R: 27/2022

In the matter between:

S[...] M[...] Appellant

and

THE STATE Respondent

APPEAL JUDGMENT

BANDS J:

[1] The appellant, who was legally represented at trial, was convicted by the regional court, Zwelitsha, Eastern Cape on 8 September 2021 of one count of rape of his live-in partner's 10-year-old daughter on diverse occasions (per vaginum) in contravention of section 3 of the Criminal Law (Sexual Offence and Related Matters) Amendment Act 32 of 2007.

[2] Having been convicted of the rape of a child under the age of 16, and it being found by the sentencing court that there were no substantial and compelling circumstances to justify the imposition of a lesser sentence, the appellant was sentenced to life imprisonment in accordance with the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997 (*the Act*). The appellant

appeals against his sentence by way of an automatic appeal in terms of section 309(1) of the Criminal Procedure Act 51 of 1977.

[3] As is often the case, this appeal turns on whether: (i) the sentencing court erred in its finding that there were no substantial and compelling circumstances justifying the imposition of a lesser sentence than that prescribed; and (ii) the sentence imposed was disproportionate and accordingly, unjust.¹ The appellant, without advancing what he contends to be an appropriate term of direct imprisonment, seeks an order that the sentence of life imprisonment imposed by the sentencing court be set aside and replaced with a lesser term.

The approach to the minimum sentencing legislation

[4] A court is required to impose the prescribed minimum sentence unless it is satisfied that there are substantial and compelling circumstances which militate against its imposition. Whilst such circumstances may be comprised of any of the factors which the courts traditionally consider and may be the cumulative effect of any number of such factors, if the imposition of the prescribed minimum sentence would be disproportionate to the crime and brings about an injustice, this on its own constitutes a substantial and compelling circumstance justifying the imposition of a lesser sentence.²

[5] Put differently, in approaching the sentencing of the appellant, the sentencing court was to impose a sentence that struck an appropriate balance between the seriousness of the crime of which he was convicted; his personal circumstances; and the legitimate expectations and legal interests of the community. The decision whether substantial and compelling circumstances were present involved the exercise of a value judgment. It was necessary to have

¹ *S v Malgas* 2001 (2) SA 1222; 2001 (1) SACR 469 (SCA) Marais JA said as follows at paragraph [25]:

"If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence."

² *S v Malgas* [2001] 3 All SA 220 (A); *S v Vilikazi* 2009 (1) SACR 552 (SCA) at paras [14] and [15]; *Madikane v S* 2011 (2) SACR 11 (ECG); *De Beer v The State* (1210/2016) ZASCA 183 (5 December 2017) at paragraph [17].

regard to all factors relevant to both aggravation and mitigation, and to assess, upon a consideration of all the circumstances relevant to the matter, whether the prescribed sentence was proportionate to the offence.

[6] The court in *S v Malgas*³ emphasised the correct approach in establishing whether substantial and compelling circumstances exist as follows:

“[7] The very fact that this amending legislation has been enacted indicates that parliament was not content with that and that it was no longer to be “business as usual” when sentencing for the commission of the specified crimes.

[8] In what respects was it no longer to be business as usual? First, a court was not to be given a clean slate on which to inscribe whatever sentence it thought fit. Instead, it was required to approach that question conscious of the fact that the legislature has ordained life imprisonment or the particular prescribed period of imprisonment as the sentence which should ordinarily be imposed for the commission of the listed crimes in the specified circumstances. In short, the legislature aimed at ensuring a severe, standardised, and consistent response from the courts to the commission of such crimes unless there were, and could be seen to be, truly convincing reasons for a different response. When considering sentence the emphasis was to be shifted to the objective gravity of the type of crime and the public’s need for effective sanctions against it. But that did not mean that all other considerations were to be ignored. The residual discretion to decline to pass the sentence which the commission of such an offence would ordinarily attract plainly was given to the courts in recognition of the easily foreseeable injustices which could result from obliging them to pass the specified sentences come what may.

[9] Secondly, a court was required to spell out and enter on the record the circumstances which it considered justified a refusal to impose the specified

³ [2001] 3 All SA 220 (A).

sentence. As was observed in *Flannery v Halifax Estate Agencies Ltd* ⁵ by the Court of Appeal, “a requirement to give reasons concentrates the mind, if it is fulfilled the resulting decision is much more likely to be soundly based --- than if it is not”. 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. Parliament cannot have been ignorant of that. There is no indication in the language it has employed that it intended the enquiry into the possible existence of substantial and compelling circumstances justifying a departure, to proceed in a radically different way, namely, by eliminating at the very threshold of the enquiry one or more factors traditionally and rightly taken into consideration when assessing sentence. None of those factors have been singled out either expressly or impliedly for exclusion from consideration.

[10] *To the extent therefore that there are dicta in the previously decided cases that suggest that there are such factors which fall to be eliminated entirely either at the outset of the enquiry or at any subsequent stage (eg age or the absence of previous convictions), I consider them to be erroneous. Equally erroneous, so it seems to me, are dicta which suggest that for circumstances to qualify as substantial and compelling they must be “exceptional” in the sense of seldom encountered or rare. The frequency or infrequency of the existence of a set of circumstances is logically irrelevant to the question of whether or not they are substantial and compelling.”*

[7] The Constitutional Court in *S v Dodo*⁴ approved the approach to sentencing as laid down in *Malgas*. With reference to the aspect of proportionality, the court held that what had to be considered in determining whether the length of a sentence was proportionate to the offence, was the offence in its broader context. This, Ackermann J described at paragraph [37] as consisting 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.*” Ackermann J went on to state at paragraph [38] that even when the legislature has prescribed the sentence ordinarily to be imposed in respect of an offence, the value of human dignity lies at the heart of the requirement that sentences must be proportionate to the offence.

[8] The Supreme Court of Appeal *S v Vilikazi*,⁵ in endorsing the approach set out in *Malgas*, stated that it is only by approaching sentencing under the Act in such manner that it is possible to avoid incongruous and disproportionate sentences. A prescribed minimum sentence cannot be assumed *a priori* to be proportionate in a particular case simply because a crime falls within a particular category. Disproportionate sentences, said Nugent JA, are not to be imposed. Courts are not vehicles for injustice.

The approach to sentencing on appeal

⁴ 2001 (3) SA 382 (CC).

⁵ 2009 (1) SACR 552 (SCA).

[9] It is well established that the approach of an appellate court, when considering a sentence imposed, in the exercise of a sentencing court's ordinary sentencing discretion, is to interfere therewith only if there is a clear misdirection on the part of the court or if the sentence is disturbingly inappropriate or induces a sense of shock. In the absence of this and given the applicability of the Criminal Law Amendment Act, this Court is in any event entitled to interfere with the trial court's sentence in respect of a finding as to substantial and compelling circumstances.

[10] Consequently, the proper enquiry on appeal is whether the facts which were considered by the sentencing court were substantial and compelling or not. In this regard, Bosielo JA, writing for the Supreme Court of Appeal in *S v PB*,⁶ formulated the approach as follows:

"[20] What then is the correct approach by a court on appeal against a sentence imposed in terms of the Act? Can the appellate court interfere with such a sentence imposed by the trial court's exercising its discretion properly, simply because it is not the sentence which it would have imposed or that it finds shocking? The approach to an appeal on sentence imposed in terms of the Act should, in my view, be different to an approach to other sentences imposed under the ordinary sentencing regime. This, in my view, is so because the minimum sentences to be imposed are ordained by the Act. They cannot be departed from lightly or for flimsy reasons. It follows therefore that a proper enquiry on appeal is whether the facts which were considered by the sentencing court are substantial and compelling, or not."

[11] As highlighted by Rogers J in *S v GK*,⁷ the learned judge of appeal did not mean that the appellate court was only permitted to consider only those circumstances which the trial court considered. All circumstances bearing on the question must be examined to determine the absence or presence of substantial and compelling circumstances (as the case may be). Put differently, the appellate

⁶ 2013 (2) SACR 533 (SCA) at paragraph [20].

⁷ 2013 (2) SACR 505 (WCC) at paragraph [7].

court's power to reconsider the matter of substantial and compelling circumstances is unfettered. In this respect, Rogers J went on to state that: “[t]he decision whether or not substantial and compelling circumstances are present involves the exercise of a value judgment; but a Court on appeal is entitled to substitute its own judgment on this issue if it is of the view that the lower court erred in its conclusion.”

The relevant facts

[12] The complainant who was 12 years of age at the date of trial suffers from mild cognitive impairment due to epilepsy rendering her mental age, 7, this being 5 years younger than her chronological age. This notwithstanding, she was psychologically assessed as having the ability to give evidence in court, via closed circuit television, with the assistance of an intermediary. I must mention that whilst the complainant's impairment was assessed as mild and as not falling within the definition of mentally disabled for the purposes of Act 32 of 2007, it is not insignificant. That this is so, is apparent from the record of proceedings.

[13] The appellant has known the complainant since she was an infant, at which time he entered into a romantic relationship with her mother, playing the role of her father figure. On 3 and 4 January 2018, the complainant, who was 10 years old at the time, was raped in her home (in which she lived with her mother, the appellant and her siblings) by the appellant. Both incidents occurred in a similar fashion, whilst the complainant was at home alone with the appellant. On each occasion, she was asleep in her bed. She awoke to the appellant removing her clothing. The appellant got on top of her and raped her. Firstly, by penetrating her digitally, and thereafter by penetrating her with his penis. He threatened to slit her throat should she tell her mother about what had happened. For this reason, the complainant elected not to report the incidents on either 3 or 4 January 2018.

[14] The following day, on 5 January 2018, the complainant had difficulty urinating. This led to her becoming emotional. Having observed this, her mother and other members of the homestead enquired what was wrong. It was at this stage that the complainant reported the incidents, including the identity of her

rapist. The police were immediately informed, and the appellant was arrested. The complainant was taken to the hospital for a medical examination. The content of the J88, was admitted into evidence in its entirety. The gynaecological examination confirmed the absence of hymenal tissue from 7 to 12 o'clock and from 1 to 3 o'clock, with the presence of bumps at 4 o'clock and clefts at 3 and 10 o'clock. These findings were consistent with a history of sexual assault and suggestive of vaginal penetration.

[15] The appellant, during evidence, denied the allegations against him and maintained his innocence throughout. According to him, when confronted with the alleged rape and his subsequent denial, he was assaulted by the complainant's grandfather and various members of the community. He contended that he had falsely admitted to having penetrated the complainant digitally to stop the assault on him. The court, unpersuaded, and having found the complainant to be an honest and reliable witness, convicted the appellant as aforesaid.

[16] In sentencing the appellant, the court imposed the prescribed minimum sentence, having found no substantial and compelling circumstances to be present. Whilst no specific reference is made to proportionality (in such terms), it appears from the wording of the judgment itself, albeit that it is somewhat concise, that the magistrate was alive to this aspect.

[17] The appellant's personal circumstances were recorded from the bar. He was raised by his mother, having lost his father at a young age. His highest level of education is grade 11. At the date of sentencing, he was 40 years of age. He was 37 years old at the time of the commission of the offence. As stated, he is well known to the complainant and played the role of her father figure. He is the biological father of four children, whose respective ages at the date of trial were 8; 7; 6 years'; with his youngest being 3 months old. The youngest two of his four children were born from the relationship between the appellant and the complainant's mother and resided together with them in their common home. Prior to his arrest, he worked, cutting down poles, receiving approximately R1,200.00 per week, from which he supported his family.

[18] In summary, the appellant in his notice of appeal contends that: (i) the trial court erred in not considering the cumulative effect of the above factors, which constituted substantial and compelling circumstances; (ii) the trial court overemphasised the seriousness of the offence; (iii) and that sentence imposed by the trial court is so severe and disproportionate that it induces a sense of shock. The appellant also contends that “*at the time of the commission of the offence he was drunk as a result, alcohol might have play (sic) a role in the commission of the offence and the victim although she was seven years old did not suffer severe injuries.*”

[19] In respect of this latter aspect, the complainant, in essence, sought to rely on his state of intoxication at the time of the incidents in favour of a finding of diminished blameworthiness, which was to be considered as a mitigating factor. In doing so, the appellant’s counsel made reference to an unreported authority of the Eastern Cape Division of the High Court, Grahamstown (as it then was) in the matter of *Luxolo Mandita Mpongoshe v S* (CA24/2019),⁸ in which Lowe J embarked on a careful examination of the consequences of intoxication on sentencing, concluding on the facts of that case that the circumstances, taken cumulatively, including the issue of intoxication, established the presence of substantial and compelling circumstances.

[20] Whilst I accept that in appropriate circumstances intoxication, if shown to have impaired the mental faculties of an offender, can serve to diminish moral blameworthiness, that this was one such case is not borne from the record. The only evidence pertaining to the intake of alcohol by the appellant (which in any event is insufficient on its own) surrounds the events of the night of 4 January 2018 and the following day on which he was arrested – this being after the occurrence of the incidents. This was properly conceded by counsel appearing on behalf of the appellant. Accordingly, such factor has no role to play in the present instance.

⁸ *Mpongoshe v S* (CA24/2019) [2020] ZAECGHC 8 (11 February 2020).

[21] The complainant was 10 years of age, chronologically, when the offences were committed. Extrapolating from her respective chronological and mental ages at the date of trial, being 12 and 7, to which I have referred, she would at the time of the commission of the offence undoubtedly have fallen below the age of 7, mentally and emotionally. The appellant, being her father figure, was in a position of trust, which he abused. He penetrated the complainant, digitally and thereafter with his penis on two separate occasions on consecutive days. Accordingly, notwithstanding an opportunity for reflection, he elected not to alter his conduct.

[22] The rape of young girls by their fathers was described by Bosiello JA in *S v Bailey*⁹ as “scandalous” and “morally repugnant”. It is “a malignant cancer seriously threatening the well-being and proper growth and development of young girls” and it qualifies to be described as “a most serious threat to our social and moral fabric.”

[23] Cameron JA, in dealing with the rape of a minor by her father stated as follows at paragraph [17] in *S v Abrahams*:¹⁰

“Of all the grievous violations of the family bond the case manifests, this is the most complex, since a parent, including a father, is indeed in a position of authority and command over a daughter. But it is a position to be exercised with reverence in the daughter’s best interest, and for her flowering as a human being. For a father to abuse the position to obtain forced sexual access to his daughter’s body, constitutes deflowering in the most grievous and brutal sense.”

[24] Common sense dictates that these comments are of equal application in circumstances involving rape within the family unit perpetrated by an adult filling the role of a parental figure, such as in the present matter. The rape of a minor child is an abhorrent crime. It is for this reason that the legislature has elected to

⁹ [2012] ZASCA 154 at paragraph [13].

¹⁰ 2002 (1) SACR 116 (SCA).

include this type of rape in the category of crimes which attract a life sentence in the absence of substantial and compelling circumstances.¹¹

[25] This is compounded by the fact that not only is the complainant a vulnerable member of society, being a child, who has been deprived of her innocence, but she has an added layer of vulnerability given her cognitive impairment. She was violated in the most egregious manner on two separate occasions, in the sanctity of her own home, by the person that she considered to be her father. He thereafter threatened to kill her, using immense brutality, should she speak out. This breach of their trust relationship by the appellant is reprehensible. Whilst no evidence was led at trial through a social worker or a psychologist as to the psychological consequences of the incidents on the complainant and her long-term prognosis, nor was a victim impact statement compiled, there can be little doubt that the events were traumatic for her and that she will be severely affected thereby.

[26] The appellant showed no sign of remorse, nor was any such remorse contended for by his legal representative at trial. As for his prospect for rehabilitation, no such evidence was advanced. The appellant was 37 years old at the time of the commission of the offence and 40 at the date of trial. He is neither a youthful nor immature offender. The repeated commission of the offence on two consecutive days; his lack of reflection during such time and thereafter, in the three-year period that followed leading up to the conclusion of the trial and prior to sentencing, militate against such a finding. To draw any other conclusion in such circumstances, would amount to a speculative hypothesis in favour of the appellant as cautioned against in *Malgas*.

[27] That the appellant was employed and supported his family from his income, coupled with the fact that he is a first-time offender, does not, in the circumstances of this case constitute substantial and compelling circumstances. Accordingly, no criticism can be levelled against the sentencing court's conclusion in this respect. Regard being had to what I have set out above, and with particular reference to

¹¹ *GK v S* 2013 (2) SACR 505 (WCC).

the facts of this matter viewed collectively with the high levels of violence against woman and children (inclusive of the legitimate expectations and legal interests of the community), which are widely reported on and have been referred to as “a *pandemic of sexual violence against woman and children*” by the Supreme Court of Appeal,¹² life imprisonment is not unjust.

[28] In the result, the following order is issued:

1. The appeal against sentence is dismissed.

**I BANDS
JUDGE OF THE HIGH COURT**

RUSI J:

I agree.

**L RUSI
JUDGE OF THE HIGH COURT**

For the appellant: Mr Giqwa

Instructed by: Legal Aid South Africa
Qonce Office
Cathcart Street
Qonce

For the respondent: Mr Philisane

Instructed by: Office of Director of Public Prosecutions

¹² *Director of Public Prosecutions, Grahamstown v TM* (131/2019) [2020] ZASCA 5 (12 March 2020).

East London

Date heard: 29 November 2023

Judgment delivered: 16 July 2024