

REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: A195/2024

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

DATE: 20/03/2025

SIGNATURE

In the matter between:

V[...] I[...] S[...]

Appellant

and

THE STATE

Respondent

JUDGMENT

DOMINGO, AJ (with MILLAR, J)

Introduction

- [1] This is an appeal against the sentence imposed upon the appellant on a charge of two counts of rape and sexual assault in the Pretoria Regional Court on the 11 June 2024.
- [2] The appellant pleaded not guilty to the charges of rape and sexual assault and the matter proceeded to trial.

- [3] On the evidence before the court *a quo*, the court *a quo* found the appellant guilty on the charges levelled against him. On the 14 August 2023 the appellant was convicted of two counts of rape, read with section 52 and Part I of Schedule 2 of the Criminal Amendment Act 105 of 1997, and sexual assault in the Pretoria Regional Court.
- [4] On 11 June 2024 the appellant was sentenced to life imprisonment on each count of rape and five years imprisonment for the sexual assault.
- [5] In terms of the provisions of section 309(1)(a) of the Criminal Procedure Act as amended by the provisions of section 10 of the Judicial Matters Amendment Act, Act 42 of 2023 the appellant is entitled to an automatic right of appeal once the court *a quo* has imposed a sentence of life imprisonment.
- [6] This appeal is only in respect of sentence.

Summary of facts

- [7] The appellant was convicted of two counts of rape and one of sexual assault. The complainant testified that the appellant was her stepfather, and he resided with them in the same house. The offences took place at night when the complainant's mother was working and slept over at work. The appellant would come into the complainant's room and move her little brother from the bed and proceed to have sexual intercourse with her without her consent. At the time of these offences the complainant was aged 11 to 13 years old. She wrote down the encounters she had with the appellant in her diary, which was later discovered by her mother who read through the contents. The complainant's mother confronted her about her written diary entries detailing her encounters with the appellant. Charges were brought against the appellant, and he was arrested.

Substantial and compelling circumstances

- [8] The appeal against the sentence is brought on the basis that the court *a quo* misdirected itself in finding that there are no substantial and compelling

circumstances to deviate from life imprisonment and further that the imposed sentence is shockingly inappropriate and induces a sense of shock.

[9] It is trite law that sentencing falls within the discretion of a trial court, and that the Court of Appeal's right to interfere with a sentence is limited to instances where the court *a quo* materially misdirects itself or commits a serious irregularity in evaluating all the relevant factors with regard to sentence. In *S v Rabie*¹ in regard to appeals against sentence it was held:

- "1. In every appeal against sentence, whether imposed by a magistrate or a Judge, the court hearing the appeal –
 - (a) should be guided by the principle that punishment is "pre-eminently a matter for the discretion of the trial Court;" and
 - (b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been "judicially and properly exercised."
2. The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate."

[10] Sentencing is about achieving the right balance between the crime, the offender and the interest of the community.² It is about arriving at a judicious counterbalance between these three elements when determining the sentence, in order to ensure that one element is not unduly accentuated at the expense of and to the exclusion of others.³

[11] In the present matter the appellant, broadly contends that the sentencing court erred in finding that the cumulative effect of the below mentioned factors did not constitute substantial and compelling circumstances:

11.1 The appellant is a first-time offender.

11.2 The appellant was taking care of the complainant and her family.

¹ 1975 (4) SA 855 (A) at para 857D-E.

² *S v Zinn* 1969 (2) SA 537 (A) SCA at 540G-H.

³ *S v Banda* 1991 (2) SA 352 (BG) at 355A.

- 11.3 That the offence in question did not fall within the worst category of offences where a victim is severely assaulted and suffers serious injuries whereby serious medical attention is required or the victim had to undergo an operation to mend the damages.
- 11.4 The complainant was not assaulted/and or did not suffer serious physical injuries during the commission of the offence. There is no evidence that she was infected with any sexually transmitted disease.
- 11.5 It is submitted that in the matter of *S v Nkomo*⁴ it was found that there is hardly a person whom it can be said that there is no prospect of rehabilitation.
- 11.6 The length of the period the appellant spent in custody awaiting the finalisation of the trial. He was arrested on 1 January 2019 and was held in custody until sentencing on 11 June 2024. In total the time spent in custody prior to the finalisation of the trial was approximately 5 years and 4 months.
- 12 In the present matter, life imprisonment is the prescribed minimum sentence for the rape of a person more than once and for the rape of a person under the age of 16 years. Section 51(1) of the Criminal Law Amendment Act, Act 105 of 1997 is peremptory, and gives no discretion to a court to deviate therefrom in the absence of substantial and compelling circumstances indicating that a lesser sentence is justified.⁵
- 13 In *S v Malagas*⁶ the court provided the following guidelines in determining whether substantial and compelling circumstances exist to justify the departure from the prescribed sentence:
- 13.1 Courts are required to approach the imposition of sentence conscious that the legislature has ordained life imprisonment as the sentence that should ordinarily and in the absence of weighty justification be imposed for certain crimes.

⁴ 2007 (2) SACR 198 (SCA).

⁵ See section 51(3) of the Criminal Law Amendment Act, Act 105 of 1997.

⁶ 2001 (1) SACR 469 at para 25.

13.2 Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts.

13.3 The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded.

13.4 The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick (“substantial and compelling”) and must be such as would cumulatively justify a departure from the standardised response that the legislature ordained.

14 The appellant being a first offender and taking care of the complainant and her family as well as the appellant’s personal circumstances, as set out in the pre-sentence report which forms part of the record reveal nothing substantial and compelling that would justify a departure from the sentence imposed.

15 The aggravating factors in this case far overshadow any mitigating factors presented by the appellant’s circumstances. The appellant was a father figure to the complainant. He was in a position of authority and command over the complainant. The complainant was left in his care by her mother, and he calculatingly sexually abused her and raped her more than once when her mother was at work. He threatened her with death if she told on him and threatened that if she did report him, he would kill her mother. The complainant was only 11 to 13 years old at the time she was exposed to the appellant’s deviant sexual behaviour.

16 The appellant has not shown any remorse and has not acknowledged the seriousness of his offences. He has persisted in his denial of the commission of the rapes and sexual assault therefore in my view the prospects of rehabilitation are substantially diminished.

- 17 It is evident from the record of the proceedings that the complainant was extremely emotional during her testimony, and it can also be gleaned from the Victim Impact Report that the complainant suffered emotional and psychological trauma because of the rapes.
- 18 The crimes for which the appellant was convicted and sentenced are of an extremely serious and egregious nature. It was argued on behalf of the appellant that the absence of physical injury and the absence of evidence of any sexually transmitted disease(s) should be factors to be included in “substantial and compelling circumstances.” Section 51(3)(a)(A) of the Criminal Law Amendment Act 105 of 1997 clearly precludes reliance on precisely such absence of injury as substantial and compelling circumstances.⁷ The Act clearly states that when imposing a sentence in respect of the offence of rape an apparent lack of physical injury to the complainant shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence.
- 19 Furthermore, in *Marx v S*⁸ it was stated:
- “[T]he phenomenon of domestic predation...requires like any other crime special understanding, appropriate to its distinct characteristics. The domestic or familial predator’s means are not violent...he exploits the opportunities that intimate engagement offers, and the physical spaces the home affords, to pry upon his victim. He uses the ties that bind him to her -often both emotional and material -to secure both compliance and concealment. When the victim is less than half his age...and subject to his influence and authority as an elder, these factors operate with acute force...her peculiar susceptibility to abuse and exploitation must be appreciated.”
- 20 It is submitted by the appellant that the period of approximately 5 years and 4 months, which he spent in custody prior to the finalisation of the trial should have been factored into his sentence as a substantial and compelling

⁷ See *Khumalo v S* (A146/2022) [2024] ZAGPPHC323 (2 April 2024) at para 43.

⁸ [2005] 4 All SA 267.

circumstance. This is advanced by the appellant using the case of *S v Rabe*⁹ where it was held that there is no rule of thumb for accounting for time spent awaiting trial and that the circumstances of an individual accused must be assessed in each case in determining the extent to which the sentence proposed should be reduced.

- 21 It is further advanced by the appellant that in *S v Solomon and Others*¹⁰ the following was held regarding the *Radebe*¹¹ case:

“I do not read *Radebe* as holding that pre-sentencing detention can never on its own be a substantial and compelling circumstance justifying departure from a prescribed minimum sentence.”

- 22 The appellant submits that the delay in the finalisation of the trial was not due to his doing, but due to the slow pace of the investigation, time it took to get the matter on the roll of the court and the COVID-19 pandemic.

- 23 The COVID-19 pandemic in my view is a neutral factor in the delay of the finalisation of the trial as the entire world was affected by the COVID-19 pandemic and its resultant consequences.

- 24 From the record there is no evidence that either the appellant or the respondent caused the delay in the finalisation of the trial. The record does reflect that the appellant underwent a psychiatric evaluation which may also have contributed to a delay, however, this delay did not unreasonably prejudice the appellant as there were no complaints forthcoming from him.

- 25 In the case of *Radebe*¹² the court stated:

“[I]n determining whether...substantial and compelling circumstances warrant a lesser sentence than that prescribed..., the test is not whether on its own that period of detention constitutes a substantial and compelling circumstance, but whether the effective sentence proposed is proportionate to the crime or crimes

⁹ 2013 (2) SACR 165 (SCA) at para 13.

¹⁰ 2021 (1) SACR 533 (WCC) at para 25.

¹¹ *Supra* note 9 above.

¹² *Supra* note 9 above at 13 and 14.

committed: whether the sentence in all the circumstances, including the period spent in detention prior to conviction, is a just one.”

- 26 In so far as the court *a quo* did not consider the factor of the pre-sentencing period in detention, or did consider the factor but did not regard it as substantial and compelling, the court *a quo* did not misdirect itself.
- 27 It may be viewed by some as unfortunate that the appellant spent an inordinate amount of time in custody pending the finalisation of the trial. However, having considered the matter, I am of the view that a sentence of life imprisonment is proportionate to the crime committed and the sentence is a just one.
- 28 Given the serious nature of the offences and the aggravating circumstances under which the offences were committed the sentence of two counts life imprisonment for rape and 5 years imprisonment for sexual assault is just and cannot be said to be disturbingly inappropriate.
- 29 Having considered the evidence adduced during the trial and the court *a quo*’s judgment in relation to whether the appellant ought to be convicted on the charges, there is nothing on the record that would justify a departure from the prescribed minimum sentence of life imprisonment.
- 30 In the absence of any irregularity or misdirection of the court *a quo*, I am satisfied that the appeal against sentence stands to be dismissed.

Order

- 31 In the result, I propose that the following order is made:

31.1.1.1 The appeal against the sentences in counts 1, 2 and 3 is dismissed.

W DOMINGO
ACTING JUDGE OF THE HIGH COURT
PRETORIA

**A MILLAR
JUDGE OF THE HIGH COURT
PRETORIA**

I agree and it is so ordered.

Date of hearing: 18 March 2025

Date of judgment: 20 March 2025

FOR THE APPELLANT:

MISS MMP MASETE
PRETORIA JUSTICE CENTRE,
instructed by legal aid board

FOR THE RESPONDENT:

ADVOCATE K GERMISHUIS,
instructed by the Director of Public
Prosecution

