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

Case no: **AR95/2020**

In the matter between:

K[...] T[...] K[...]

APPELLANT

and

THE STATE

RESPONDENT

Coram: Mossop and Harrison JJ

Heard: 2 May 2025

Delivered: 9 May 2025

ORDER

On appeal from: Ngwelezana Regional Court (sitting as the court of first instance):

The appeal against sentence is dismissed

JUDGMENT

MOSSOP J (HARRISON J concurring):

[1] This appeal is directed only at the sentence imposed upon the appellant. He appeared before the Ngwelezana Regional Court on 30 July 2019 on a charge of rape. It was alleged by the State that over the period from March to August 2018, he had inserted his penis into a girl aged 14 years and had sexual intercourse with her. What the charge sheet did not reveal was that the victim was the appellant's biological child. The appellant pleaded guilty to the charge and in short order was sentenced by the regional magistrate to life imprisonment. Given the sentence imposed upon him, he enjoys an automatic right of appeal in terms of the provisions of s 309(1)(a) of the Criminal Procedure Act 51 of 1977 (the Act).

[2] It is important to observe at the outset that an appeal court has very limited grounds upon which it may interfere with a sentence imposed by the sentencing court. The sentencing court has a discretion in determining the appropriate sentence, based upon the facts that it finds to have been proven. In *S v Bogaards*,¹ this was acknowledged by the Constitutional Court, which went on to observe that:

‘... sentencing is within the discretion of the trial court. An appellate court’s power to interfere with sentences imposed by courts below is circumscribed. It can only do so where there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it.’ (Footnotes omitted.)

[3] For an appellate court to interfere with a sentence, there must ordinarily be a material misdirection by the sentencing court. Absent any such misdirection, an appellate court may not approach the issue of sentence:

‘... as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate Court is of course entitled to consider the question of sentence afresh ...’²

[4] However, the Supreme Court of Appeal in *Malgas* went on to state that:

¹ *S v Bogaards* [2012] ZACC 23; 2013 (1) SACR 1 (CC) para 41.

² *S v Malgas* 2001 (1) SACR 469 (SCA) para 12 (*Malgas*) para 12.

‘... even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate Court would have imposed had it been the trial court is so marked that it can properly be described as “shocking”, “startling” or “disturbingly inappropriate”.’³

[5] Before being called upon to plead, the court a quo advised the appellant of the provisions of s 51(1) of the Criminal Law Amendment Act 105 of 1997 (the CLAA), which require that a minimum sentence of life imprisonment be imposed in respect of an offence mentioned in part 1 of schedule 2 to the CLAA. The appellant indicated that he understood this. At the time when the offence was committed, rape of a person under the age of 16 was an offence mentioned in part 1 of schedule 2 to the CLAA.⁴

[6] In pleading, the appellant was represented by a legal representative who prepared a written plea in terms of the provisions of s 112(2) of the Act and who proceeded to read it into the record. In that plea, the appellant admitted that he was the biological father of the complainant and that he had intercourse with her on two occasions.

[7] After the handing in of the appellant’s plea, the State also handed in, with the consent of the defence, a J88 document recording the findings of a medical practitioner who examined the complainant. The examining doctor recorded that he had been informed by the complainant that she had been raped on two occasions, once in March 2018 and once in August 2018. As a consequence of the rape in March 2018, she fell pregnant but declined to follow the appellant’s demand that she abort the child because, so she reasoned, the birth of the child would be proof of the fact that she had been raped by her own father. According to the submissions made by the public prosecutor during the sentencing phase of the trial, both the complainant and her child were now, tragically, living in an orphanage.

³ Ibid.

⁴ After the amendment by the Criminal and Related Matters Amendment Act 12 of 2021, the age was amended to 18 years.

[8] Counsel for the appellant advanced two principal arguments in his heads of argument. The first was that the appellant had admitted his guilt and pleaded guilty and thus did not waste time or money requiring the State to establish his guilt, the inference being that he should therefore qualify for a lesser sentence than the prescribed minimum sentence. That argument holds very little attraction to me. The appellant had no choice but to plead guilty because the State would have been able to establish the fact that he was the father of the complainant's child without any difficulty. Deoxyribonucleic acid (DNA) testing permits paternity to be established with almost absolute certainty. Once that had been established, the appellant would inevitably have had no defence to the allegation of rape. He could not consequently have relied upon consent, considering that he admitted that he had intercourse with his own daughter. He was compelled to plead guilty in the circumstances.

[9] The second submission advanced in the appellant's heads of argument related to alleged misdirections committed by the regional magistrate. Two were identified. The first was that the regional magistrate had misdirected himself in imposing a sentence of life imprisonment and the second was that the regional magistrate did not consider the prospects of the appellant being rehabilitated when sentencing him.

[10] As regards the first alleged misdirection, the argument advanced was that a sentence of life imprisonment should be reserved 'for the most serious manifestation of rape'. The facts of this matter, so the argument went, did not identify it as falling into that category. The appellant's heads of argument referred to three Supreme Court of Appeal cases, namely *S v Mahomotsa*,⁵ *S v Swart*⁶ and *S v Vilakazi*.⁷

[11] It is so that reference is made in each of those matters to the concept of a scale upon which the seriousness of a rape should be considered. Some rapes may conceivably be capable of being more severe or brutal than others. But there is one distinguishing feature between those three matters and the facts of this matter: the

⁵ *S v Mahomotsa* 2002 (2) SACR 435 (SCA).

⁶ *S v Swart* 2004 (2) SACR 370 (SCA).

⁷ *S v Vilakazi* [2008] ZASCA 87; 2009 (1) SACR 552 (SCA).

victims in those three cases were not related by blood to the rapist. That is the essential point of differentiation from the facts of this appeal.

[12] In the view that I take, rape is always serious. In *S v Chapman*,⁸ the Supreme Court of Appeal found that rape constituted a:

‘... humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, to privacy and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilisation.’

[13] The rape of a child is even more appalling. In *Maila v The State*,⁹ the Supreme Court of Appeal stated the following:

‘Taking into account *Jansen, Malgas, Matyityi, Vilakazi* and a plethora of judgments which follow thereafter as well as regional and international protocols which bind South Africa to respond effectively to gender-based violence, courts should not shy away from imposing the ultimate sentence in appropriate circumstances, such as in this case. With the onslaught of rape on children, destroying their lives forever, it cannot be ‘business as usual’. Courts should, through consistent sentencing of offenders who commit gender-based violence against women and children, not retreat when duty calls to impose appropriate sentences, including prescribed minimum sentences. Reasons such as lack of physical injury, the inability of the perpetrator to control his sexual urges, the complainant (a child) was spared some of the horrors associated with oral rape, which amount to the acceptance of the real rape myth, the accused was drunk and fell asleep after the rape, the complainant accepted gifts (in this case, sweets) are an affront to what the victims of gender-based violence, in particular rape, endure short and long term. And perpetuate the abuse of women and children by courts. When the Legislature has dealt some of the misogynistic myths a blow, courts should not be seen to resuscitate them by deviating from the prescribed sentences based on personal preferences of what is substantial and compelling and what is not. This will curb, if not ultimately eradicate, gender-based violence against

⁸ *S v Chapman* 1997 (3) SA 341 (SCA) at 344J-345A.

⁹ *Maila v The State* [2023] ZASCA 3 para 59 (*Maila*).

women and children and promote what Thomas Stoddard calls 'culture shifting change'.

[14] Those words are powerful and illuminating. In my view, it is equally true that the seriousness of the rape in this matter is compounded, and exacerbated, by the fact that the appellant is the biological father of the complainant.

[15] A father's duty is to protect his daughter, not to prey upon her. He is absolutely not entitled to view her as an easy means of satisfying his sexual urges. The idea of this being the case is simply abhorrent to any right-thinking member of the community. Ordinarily, a daughter's first hero in life is her father. There can be no doubt that this is not the case in this instance. The appellant betrayed the very essence of what it means to be a father, namely someone who is loving, comforting and supportive of the life that he has helped to bring into the world.

[16] The fact that the familial relationship between the appellant and the complainant has not enjoyed any attention in the appellant's heads of argument is also disturbing to me. It has been ignored entirely. Nothing is said, either, about the fact that the appellant made his daughter pregnant after the first act of rape. The appellant must have been aware that his daughter was pregnant. Notwithstanding that knowledge, he admittedly had further relations with her against her will after she fell pregnant.

[17] Sexual relations between immediate family members is unacceptable in our society because it infringes upon our societal and community values. Scientifically, incest is outlawed because it heightens the risk of genetic disorders and birth defects in children born from such relationships.

[18] The Supreme Court of Appeal has addressed the issue of incestuous rape which, unfortunately, is not an unknown occurrence in our law. In *D v S*,¹⁰ a father raped his 16 year old daughter multiple times and was sentenced to life

¹⁰ *D v S* [2016] ZASCA 123; [2016] JOL 36667 (SCA).

imprisonment. The Supreme Court of Appeal made the following remarks concerning the crime of incestuous rape:¹¹

‘Rape committed by close male relatives against victims related to them is prevalent. See, for an example, cases such as *S v Sikhipha*; *S v Abrahams*; and *S v PB*. Courts are under a duty to punish such that this new tendency is contained. It is despicable behaviour that fathers totally turn their backs on what is their natural duty to ensure the safety of their daughters, and themselves pose a danger towards their own vulnerable children.’ (Citations omitted.)

[19] In *S v Abrahams*,¹² referred to in the abovementioned extract, Cameron JA stated that:

‘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 a daughter's best interests, and for her flowering as a human being. For a father to abuse that position to obtain forced sexual access to his daughter's body constitutes a deflowering in the most grievous and brutal sense.’

[20] Cameron JA went on to state the following in *Abrahams*:¹³

‘Third and lastly, the fact that family rape generally also involves incest (I exclude foster and step-parents, and rapists further removed in family lineage from their victims) grievously complicates its damaging effects. At common law incest is still a crime. Deep social and religious inhibitions surround it and stigma attends it. What is grievous about incestuous rape is that it exploits and perverts the very bonds of love and trust that the family relation is meant to nurture.’ (Footnote omitted.)

I agree with these words.

¹¹ Ibid para 15.

¹² *S v Abrahams* 2002 (1) SACR 116 (SCA) (*Abrahams*) para 17.

¹³ Ibid para 23.

[21] I cannot in the circumstances agree with the argument that the offence for which the appellant was convicted of is anything but serious. The appellant's conduct was disgraceful and shameful and entirely deserving of the minimum sentence prescribed by law.

[22] The possibility of the rehabilitation of a convicted person is always a factor that a court should consider when faced with the difficult task of imposing a sentence upon him or her. That having been acknowledged, it is difficult to contemplate how a person whose moral compass is so defective that it permits him to sexually exploit his own flesh and blood could ever be rehabilitated. In sentencing the appellant, the regional magistrate correctly found that there were no substantial and compelling circumstances entitling the court to impose a sentence other than the prescribed minimum sentence. Simply put, the offence the appellant was convicted of is so appalling that the question of his possible rehabilitation must inevitably 'play a relatively smaller role'.¹⁴ The regional magistrate accordingly committed no misdirection when discounting the rehabilitation of the appellant.

[23] There is accordingly no evidence that the regional magistrate misdirected himself in sentencing the appellant as he did. The sentence that he imposed does not raise in me a feeling of disquiet or compel me to the view that it is inappropriate or disproportionate to the offence that the appellant committed. In *Maila*, Mocumie JA stated the following:

'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 disproportionate to the serious offence that the appellant

¹⁴ *S v Swart* 2004 (2) SACR 370 (SCA) para 12.

committed on a 9-year-old child, his niece. The sentence is, thus, justified in the circumstances.’¹⁵

Those words apply equally to the facts of this case.

[24] I would accordingly propose the following order:

The appeal against sentence is dismissed.

MOSSOP J

I agree:

HARRISON J

APPEARANCES

Counsel for the appellant:

Mr P Marimuthu

Instructed by:

Legal Aid South Africa
Durban Local Office
Ground Floor
The Marine Building
22 Dorothy Nyembe Street
Durban

Counsel for the respondent:

Mr B N Mbokazi

Instructed by:

Director of Public Prosecutions
Durban

¹⁵ *Maila v The State* [2023] ZASCA 3 para 60.