



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Appeal Case No: A204/2024

Lower Court Case Number: PSOC71/2023

In the matter between:

RANDALL BOOYSEN

Appellant

and

THE STATE

Respondent

Date of Hearing: 7 February 2025

Date of Judgment: 26 February 2025

JUDGMENT

PARKER AJ

Introduction

[1] The appellant stood arraigned in the Plettenberg Bay Regional Court on a charge of contravention of Section 3 of the Sexual Offences Act, Act 32 of 2007, where he was convicted for rape. He was legally represented at all material times and pleaded guilty in

terms of section 112(2) of the Criminal Procedure Act, No. 51 of 1977. ("the Act") on 12th March 2024 he was sentenced to life imprisonment.

[2] The appellant noted an appeal against the sentence imposed in terms of section 309 (1)(a) of the Act, in terms of which he has an automatic right of appeal

Background

[3] On the day of the incident, he was consuming alcohol at a pub called Zanzibar. Whilst walking home the minor child approached appellant and asked him for a five rand. The appellant promised that he would give him one hundred rand in exchange for his assistance. Whilst walking he stumbled and knocked the minor child over, resulting in the minor child's fall. Thereafter the minor child claims that the appellant instructed him to lie down on his stomach and pull his pants down, which according to the minor child he did out of fear. The minor child suffered multiple penetrations. He was raped in his anus, and after the minor child told him that he, the appellant is hurting him, he stopped and proceeded to place his penis into the minor child's mouth, where he ejaculated.

[4] DNA evidence in another case connected the appellant to this rape. When the Appellant was apprehended for the current crime, he was on parole in that case. This will be dealt with more fully below.

Sentence

[5] It was argued that the court *a quo* over emphasized the seriousness of the crime and the interests of the community. More specifically, that the appellant be considered

for a counselling program in order for him to deal with an undisclosed traumatic experience he had suffered.

[6] The factors that were taken into account about the appellant was that he was 39 years of age at the time he was sentenced, employed, unmarried and has an adult daughter. He was in custody for the period of 11 months, however this is so because he has committed this offence whilst he was out on parole which was yet to expire.

[7] When considering what constitutes an appropriate sentence, regard ought to be had to the well-known triad of sentencing,¹ the offender (the personal circumstances of the accused), the interests of society, and the seriousness of the offence. A sentence must be tailored (individualised), and each matter must be dealt with on its own particular facts, tempered with mercy, and punishment must ultimately fit the true gravity of the offence. The interests of society are never well served by too harsh or too lenient a sentence necessitating a balance to be struck.²

Discussion

[8] The perusal of the transcript of proceedings revealed that the appellant's personal circumstances were considered by the learned Magistrate when dealing with the issue of substantial and compelling circumstances, and found no circumstances warranting a deviation from the prescribed minimum sentence.

¹ S v Zinn 1969(2) SA 537 (A) at 540 G

² Samuels v S 2011 SACR 9 (262/03) [2010 ZASCA 113]; 2011 SACR 9 (SCA) (22 September 2010) para 9

[9] The appellant's counsel conceded that imprisonment is indeed justified. However, it argued for a lesser sentence than the period of direct imprisonment imposed as it was not commensurate with the appellant's alleged traumatic experience which necessitates counseling. Furthermore, the appellant relied on two cases that of *S v MN*³ and *S v Moswathupa*.⁴ In the former case the court considered the rehabilitation of the appellant. In the former matter, the facts were distinct from the current case. No weapon was used and the victim suffered no physical injury. The victim impact report in the present matter indicates complainant experienced considerable trauma. The Supreme Court of Appeal in the Moswathupa case held that the prevalence of the sentence may warrant a sentence that will serve as a deterrent to others, but it cannot justify a sentence which will destroy the wrongdoer. In the current appeal the appellant was a repeat offender and the DNA linked him to the current matter. Had the appellant not been convicted on the other matter, and the DNA sampling matched him to this offence, the complainant would not have seen the wheels of justice being realized.

[10] It is a well-known fact that the trial court has the preeminent authority to determine an appropriate sentence.⁵ The appellant in this appeal request the court to consider an element of mercy, arguing that the current sentence stands to be set aside and be replaced with a lesser sentence. In the absence of compelling and exceptional grounds to do so, a lesser sentence will send out a wrong message to society at large who already live in an environment in which they may find themselves vulnerable to victimization.

³ 2011 (1) SACR 286 (ECG)

⁴ 2012 (1) SACR 259 (SCA)

⁵ *S v Gule* 2019 JDR 0173 (ECB) para [8]. Also see *Thwala v S* (A175/2023) [2024] ZA GPPHC 224 (29 January 2024). See also *Fielies v S* [2015] JOL 33715 (SCA)

[11] A Court of Appeal will interfere where it can be inferred that the trial court acted irrationally and illegally resulting in a significant disparity in the imposed sentence. In such cases, the court will alter the sentence.⁶

[12] The applicable principles on sentencing were dealt with in *S v Malgas*,⁷ affirmed in *S v Dodo*,⁸

'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'.

[13] A Court of Appeal will not easily interfere with a sentence just because it would not have imposed the same sentence *R v S*.⁹

[14] Insofar as minimum sentences are concerned, a court no longer imposes any term it deems appropriate for the particular crime as parliament had enacted the minimum sentencing legislation.¹⁰ Courts are therefore bound to impose the prescribed minimum sentences unless there are genuinely compelling and convincing justification for deviation.

⁶ *S v Anderson* 1961(A) See *Kekana v S* [2013] JOL 30320 (SCA). Also see *Gabriel v S* [2010] 2 All SA 212 (SCA). See also *Bliss Brands (Pty) Limited v Advertising Regulatory Board NPC and others* 2023 (10) BCLR 1153 (CC)

⁷ *S v Malgas* 2001(2) SA 1222 (SCA) para 25

⁸ *S v Dodo* 2001 (3) 282 (CC) para 40.

⁹ 1958 (3) SA 102 at 104 A

¹⁰ *S v Matyityi* (695/09) ZASCA 127 (30 September 2010) para 11

[15] In weighing the interests of the community, the personal circumstances of the accused, the nature of the crime, the vulnerability of the complainant, the statistics for rape shows us that high number of rape offences must be considered. Therefore, it is imperative to impose sentences that safeguard children and women against the heinous acts and atrocities of sexual offences as stated in *S v Blaauw*.¹¹ The statistics shows that rape is a cancer in our society which necessitates decisive action from the legislature as well as our courts.¹² Given the nature of the rape (multiple penetrations), the sentence does not induce a sense of shock. The minor child was only 11 years of age and the victim impact report shows that force was used and that the experience was traumatising. The appellant was only arrested on this charge because the DNA results became available linking him to the offence.

[16] When determining an appropriate sentence, it is essential to recognise that imposing a sentence that is excessively lenient conveys a misleading message to citizens who are victims of crime and who contend with its widespread prevalence in their communities. In evaluating all these circumstances, a suitable sentence of life imprisonment is deemed appropriate, given the vulnerability of the child who was looking for five rand. The argument raised with regard to the pre-existing trauma was not

¹¹ 2001 (2) SASV 255(C).

¹² A report released by Statistics South Africa titled *Child Series Volume II: Crime Against Children* shows that rape cases for children increased by 6,3 percentage points between 2015/16 and 2019/20, whilst both common assault and assault with grievous bodily harm (GBH) decreased by 2,1 and 3,5 percentage points respectively. Moreover, sexual assault cases for children increased by 1,4 percentage points. Crimes against children is a grave concern, as it significantly affects the mental, physical, and emotional health of children. Healing from the trauma of abuse can be a prolonged process spanning several years. Ensuring children are safeguarded against any type of violence is a fundamental right secured by the Convention on the Rights of the Child. In South Africa (SA), there are high rates of reported violent offenses, encompassing murder, rape, aggravated assault, robbery, property crime, and vehicle hijacking. Among these, rape emerged as the most frequently reported crime to law enforcement for children aged 17 and below between 2015/16 and 2019/20, followed by common assault and assault resulting in GBH. See <https://www.statssa.gov.za/?p=17023> Accessed on 19 February 2025

disclosed to the court *a quo* and therefore it cannot be addressed fully. We may make assumptions regarding the causes of the alleged trauma, however, without any evidence tendered for the trauma, it is of no consequence, suffice to send a caution to the Department of Correctional Services to consider his constitutional right to health.¹³ The appellant should be afforded the necessary health care by affording him the necessary counseling and therapy while he is incarcerated.

[17] The learned Magistrate raised the concern that the appellant is a risk and a danger to the community given that he “*committed this offence once, he then committed it again while he was under parole*”. We are concerned that he may reoffend the dignity and privacy of other prisoners if this right to health is not acknowledged. In an effort to alleviate the trauma that the victim has experienced, the court may order therapy, as was done in the case of *S v SN*.¹⁴ The court mandated counselling for a two-year period, with a monthly progress report to the court. It is not however our view that a monthly progress report be made available to us. On the other hand, given the minor child's trauma the prosecution is urged to consider counselling for the minor child on an ongoing basis.

[18] In *Carmichele v The Minister of Safety and Security*,¹⁵ the Constitutional Court overturned the court *a quo*'s decision, concluding that the state could be held culpable for damages. This case involved a woman who was attacked by a man with a pick handle.

¹³ Section 27 (1) (a) and (2)

¹⁴ [2022] ZAECHC 35

¹⁵ *Carmichele v The Minister of Safety and Security* (CCT 48/00) [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC); 2002 (1) SACR 79 (CC) (16 August 2001)

The accused had been released from jail after being arrested for attempted murder and rape.

*"She claimed members of the South African Police Service and the public prosecutor at Knysna had negligently failed to comply with a legal duty they owed to her to take steps to prevent harm being caused to her"*¹⁶.

[19] In the above matter, the Constitutional Court also made reference to Section 179(4) of the Constitution of the Republic of South Africa. The matter was referred back to the High Court for it to continue with the trial.

[20] In applying the Carmichele case to the current appeal we are acutely aware and we are concerned of other matters where accused who are on parole reoffend.

[21] Greater attention and care must be had when parole boards consider parole. This current matter is one of those circumstances where if ever parole is considered, the modus operandi employed by the Appellant, his previous conviction of rape and the lifelong trauma that the victim will be saddled with, cannot be glossed over lightly. The Registrar of this court must furnish a copy of this judgment to the Department of Correctional Services (hereafter referred to as "DCS"), and the National Council of Correctional Services (hereafter referred to as "NCCS"). The NCCS is a statutory body that advises the South African Minister of Justice and Correctional Services on Correctional System Policy and Sentencing. In this regard the provisions of paragraphs 15, 17, 20 and 21 of this judgment is drawn to the attention of DCS and NCCS.

¹⁶ Ibid para [2]

[22] In the result there is no alarming, startling or disturbing disparity between the sentence that the court imposed and that which an appeal court would impose and therefore interference is not justified.

[23] In the result, the following order is proposed:

1. The appeal is dismissed.
2. The imposed sentence is confirmed.
3. The Registrar of this court must furnish a copy of this judgment to the Department of Correctional Services and the National Council for Correctional Services and of the provisions of paragraphs 15, 17, 20 and 21 of this judgment.


PARKER, AJ
Acting Judge of the High Court

I agree, and it is so ordered.


ERASMUS, J
Judge of the High Court

Appearances

Appellant's Legal Representative:

Adv Ntombifuthi Kunju

Legal Aid: Cape Town

Counsel for the Respondent:

Adv M Engelbrecht

Office of the DPP: W Cape