



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

Case No.: CA & R 155/2024

Reportable YES/NO

In the matter between:

LULAMILE STUNGA

APPELLANT

versus

THE STATE

RESPONDENT

JUDGMENT ON APPEAL

Cengani-Mbakaza AJ

[1] Pursuant to a plea of guilty and a conviction on a charge of rape in contravention of s 3 read with ss 1, 55, 56(1), 57, 58, 59 and 60 of the Criminal Law Sexual Offences and Related Matters Amendment Act 32 of 2007 and further read with the provisions of s 51(1) of the Criminal Law Amendment Act 105 of 1997 (CLAA), the Regional Court sitting in Somerset East sentenced the appellant to life imprisonment. Aggrieved by the sentence, the appellant exercised his automatic right of appeal in terms of the provisions of s 309 of the Criminal Procedure Act 51 of

1977 to appeal against the sentence of imprisonment for life. The state opposes the appeal.

[2] The notice of appeal lists the following as the grounds of appeal:

2.1 The effective term of life imprisonment is strikingly inappropriate in that it is out of proportion to the totality of the accepted facts in mitigation.

2.2 The court erred by not deviating from the prescribed minimum sentence of life imprisonment.

[3] On 23 September 2023, the complainant, an 11-year-old girl, was at home with the appellant. The appellant was seated in the dining room while the complainant was lying on her bed. The appellant approached the complainant and initiated a conversation with her. He then instructed her to take off her panties and the complainant complied. He inserted his penis into the complainant's vagina. While still engaged in sexual intercourse with the complainant, the appellant's girlfriend entered the house. The appellant jumped from the bed. His girlfriend noticed that he had unzipped his pair of trousers. She confronted the appellant who failed to respond.

[4] Following the appellant's arrest, the complainant was examined by Doctor Moshidi who documented the following that she weighed 28.9 kilograms, was visibly emotional during examination, had a minor discharge from the vagina, had a bruised labia minora, a ragged hymen and a large vaginal opening.

[5] In mitigation of sentence, the appellant did not lead any evidence. The appellant's legal representative informed the court from the bar that the appellant was born on 3 December 1971, has four children who are living with their mothers, he completed grade 11 and had been employed as a general farm worker, earning R1 600 per month. The appellant admitted his previous conviction of assault with intent to do grievous bodily harm in respect of which he was sentenced to a suspended term of 9 months' imprisonment on 17 October 2024.

[6] It is well-established that sentencing is a matter primarily for the trial court's discretion and the appeal court should be cautious not to encroach on this discretion. An appeal court will only interfere in the sentencing court's discretion if it is exercised unreasonably or in circumstances where it is strikingly inappropriate.

[7] Notably, in *S v Pillay*, the court stated the following regarding an appeal on sentence:

“As the essential inquiry in an appeal against sentence, however, is not whether the sentence is right or wrong, but whether the Court in imposing it exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence; it must be of such a nature, degree or seriousness that it shows, directly or inferentially, that the court did not exercise its discretion at all or exercised it improperly or unreasonably. Such a misdirection is usually and conveniently termed one that vitiates the Court's decision on sentence. That is obviously the kind of misdirection predicated in the last quoted dictum above: one that the “dictates of justice” clearly entitle the Appeal Court “to consider the sentence afresh.”

[8] The issue for determination before this court is whether the Regional Court erred in finding that no substantial and compelling circumstances existed. In *S v GK*, Rogers J (as he then was) stated that on appeal, the court may take into account and examine not only those factors considered by the trial court, but all the circumstances bearing on the question, in order to determine the correctness of the trial court's findings regarding the absence or otherwise of substantial and compelling circumstances.

[9] The Supreme Court of Appeal (SCA) in *S v Malgas* (Malgas) had indicated that the prescribed sentences are the starting point when imposing a minimum sentence and should not be departed from for flimsy reasons. The SCA emphasised that courts are obligated to implement the prescribed minimum sentences notwithstanding any personal doubts or concerns regarding the efficacy of the policy underlying the legislation. Furthermore, speculative hypotheses favourable to the

offender as well as undue sympathy are to be excluded. The principles encapsulated in *Malgas* were followed in *S v Matyityi* and a long line of cases.

[10] The legislature's strict adherence to the provisions of the CLAA is evident in the wording of section 51(3)(a) of the CLAA. This provision dictates that "if any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the one prescribed, the court shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence".[emphasis added].

[11] Despite the fact that substantial and compelling circumstances are not explicitly defined, for circumstances to qualify as substantial and compelling, the courts have established that they need not be exceptional, in the sense of being rarely encountered or seldom. Their scope is not limited to those which diminish the moral guilt of the offender. In instances where a court is convinced that, after consideration of all factors, an injustice would occur if the minimum sentence is imposed, then it can categorise such factor(s) as constituting substantial and compelling circumstance(s) .

[12] Sexual violation against children evokes communities' indignation and often prompts them to resort to self-help. There are multitude of cases that describe rape as a degrading, humiliating and brutal invasion of a person's most intimate private space. Our Constitution guarantees that no one may be subjected to violence in any form. It also upholds the paramountcy of the best interests of the minor children. In *De Reuck v DPP WLD* Epstein AJ stated,

"The fact that the Constitution regards a child's best interests as of paramount importance must be emphasised. It is the single most important factor to be considered when balancing or weighing competing rights and interests concerning children. All competing rights must defer to the rights of children unless unjustifiable. Whilst children have a right to inter alia, protection from maltreatment, neglect, abuse or degradation, there is a reciprocal duty to afford them such protection. Such a duty falls not only on law enforcement

agencies but also on right thinking people, and ultimately the court, which is the upper guardian of all children.”

[13] The parties referred to the aggravating factors in this matter. As fortified by Matyityi , the state obtained a victim impact statement through the complainant’s mother. Ms NM testified that eight months after the incident, the complainant still experienced nocturnal crying and would occasionally bursts into tears for no apparent reason. The complainant’s emotional state during clinical examination further underscores her mother’s testimony regarding the psychological impact of the rape incident as well as physical trauma which has already been noted in paragraph 4 above.

[14] The incident was perpetrated by someone in a position of trust, being close to the complainant and in her place of safety. This introduced a clear element of trust. Although the appellant could have potentially concealed the crime, he was caught in the act. Given these circumstances, his guilty plea is a neutral factor, reasonably inferred to be motivated by the overwhelming evidence rather than genuine remorse.

[15] Upon examination of all the evidence, the Regional Court duly considered the appellant’s personal circumstances in relation to the legitimate interests of the community. The appellant’s conduct, including his previous conviction involving an element of violence, indicates a lack of prospects of rehabilitation. Therefore, the cumulative effect of the appellant’s personal circumstances, weighed against the aggravating factors, does not constitute substantial and compelling circumstances justifying a departure from the prescribed sentence of life imprisonment. Instead, they constitute flimsy reasons, which are excluded in terms of Malgas.

[16] In the result, the appeal against sentence is dismissed.

N CENGANI-MBAKAZA
ACTING JUDGE OF THE HIGH COURT

I agree

G H BLOEM

JUDGE OF THE HIGH COURT

APPEARANCES:

For the state : Adv. S Hendricks
DPP, Makhanda

For the accused : Adv. D P Geldenhuys
Legal Aid-SA, Makhanda

Date heard : 16 April 2025

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