

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

CASE NO: A17/2024

- (1) REPORTABLE: YES/NO
 (2) OF INTEREST TO THE JUDGES: YES/NO
 (3) REVISED: YES/NO

Naude – Odendaal J

SIGNATURE

DATE

19/09/2025

In the matter between:

THEMA MODIBE LAZARUS

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

NAUDE-ODENDAAL J:

- [1] The Appellant was convicted on a charge of Contravention of Section 3 of the Criminal Law Amendment Act (Sexual Offences and Related Matters) 32 of 2007

after he tendered a plea of guilty in terms of Section 112(2) of the Criminal Procedure Act, 51 of 1977.

[2] The Appellant was sentenced to life imprisonment on the 24th of November 2020 by Magistrate Reynolds in the Mankweng Regional Court. The sentence of life imprisonment was imposed after the court a quo found there were no substantial and compelling circumstances justifying deviation from the prescribed minimum sentence of life imprisonment. The Appellant was legally represented during the trial. This appeal is against sentence only.

[3] The settled approach to be adopted by this court is that the sentencing task resorts primarily within the scope of the trial court's discretion, and the court on appeal shall not interfere with a sentence so imposed, save for if it is found that the sentence is ominously inappropriate and or disproportionate to the severity of the offence or that the trial court did not exercise its discretion judiciously. The Appeal court can only interfere with the court a quo's sentence if the presiding officer had committed a material misdirection and when the sentence was imposed can be considered shockingly inappropriate.

[4] In **S v RO and Another 2000 (2) SACR 248 (SCA)** at paragraph 30 that Hener JA stated as follows:-

"sentencing is about achieving the right balance or in more high-flown terms, proportionality. The elements at play are, the crime, the offender, the interest of

society with different nuance, prevention, retribution, rehabilitation, reformation and deterrence. Invariably there are overlaps that render the process more unscientific, even a proper exercise of the judicial function allows reasonable people to arrive in different conclusions."

- [5] It was submitted on behalf of the Appellant that an effective sentence of Life Imprisonment is disproportionate, inappropriate and unjust in the circumstances of the present case. The Appellant submitted that the court a quo erred in finding that there were no substantial and compelling circumstances warranting deviation from the prescribed minimum sentence of life imprisonment.
- [6] The Appellant further submitted that the Magistrate erred by taking into account the time it took for the Appellant to plead guilty and considering that as minimizing the weight of the Appellant's remorse. The court's observation failed to take into account that when the Appellant pleaded guilty it was the first time that the court was able to deal with the matter. It was further submitted that the Magistrate misdirected himself by taking into account the Public Prosecutor's submission on the effect of the offence on the Complainant as against the admitted pre-sentence report. The pre-sentence report states that the complainant was coping and passed grades 6 and 7 after the incident. It is submitted that the omission of this fact from the consideration of factors for the determination of whether there are substantial and compelling circumstances is a material irregularity warranting interference by the appeal court.

- [7] The Appellant further submitted that the court *a quo* failed to consider the reality that although any form of rape is very serious and deplorable, some rapes are committed in a very vicious and despicable manner and therefore deserving of the harshest possible sentence, whilst other are not. The rape committed by the Appellant did not deserve the harshest sentence as was imposed by the court *a quo*.
- [8] The Appellant referred this court to **S v Nkomo 2007 (2) SACR 198 (SCA)** wherein **Lewis JA held at para 21**, that:-
- "That said, I do not believe that this crime should attract the heaviest sentence permitted by our law, life imprisonment. I recognize that it may be difficult to imagine a rape under much worse conditions. But it is possible, and I consider the prospect of rehabilitation and the fact that the Appellant is a first offender must be regarded as substantial and compelling circumstances justifying a lesser sentence. What must be borne in mind as well, is the statement of this court in Abrahams (cited in the passage from Mahomotsa above) that life imprisonment should be imposed only where the case is 'devoid of any substantial factors compelling the conclusion that such a sentence is inappropriate and unjust.'"*
- [9] It was submitted that the Magistrate misdirected himself by not taking into account the fact that the Complainant was sexually active as reflected in the medical report. The Complainant was medically examined a few hours after the incident yet no fresh injuries, bleeding, swelling or inflammation but only scars were observed. The scars and the "STI" were obviously not a result of the rape by the Appellant as the scars

were clearly healing/healed tears suffered prior to the rape and the sexually transmitted infection couldn't have resulted from the rape as the Appellant used a condom. More specifically, the Complainant admitted to previous consensual intercourse as per paragraph 'D10' of Exhibit "C".

[10] It was submitted by the Appellant that the court *a quo* erred in not taking into account the abusive environment under which the Appellant was raised. The pre-sentence report alludes to the Appellant's mother escaping from the family home, leaving the Appellant and his siblings behind as a result of the persistent abuse by the Appellant's father. Although there is no evidence of direct abuse of the Appellant by his father, the pre-sentence report states that the Appellant's "*circle of courage is broken and as a result he easily makes the wrong decision that impacted negatively on his life.*"

[11] In conclusion it was submitted by the Appellant that the court *a quo* erred by not finding that the cumulative weight of the following factors constituted substantial and compelling circumstances that justified deviation from the prescribed minimum sentence of life and the imposition of a lesser sentence:-

11.1 The Appellant was a first offender at the age of 49 years;

11.2 The Appellant's level of education – he couldn't complete Grade 8.

11.3 The Appellant pleaded guilty to the charge and expressed remorse;

11.4 The Appellant did not inflict grievous bodily harm on the Complainant.

11.5 The Appellant's upbringing in an abusive environment made him prone to making mistakes as per the pre-sentence report.

11.6 The Complainant was sexually active prior to the rape.

11.7 The Complainant did not suffer lasting emotional trauma. The victim impact report admitted as Exhibit "F" states that she had emotionally healed at the time of sentencing. She had progressed to Grade 8 after the incident without any learning difficulties.

[12] In **S v Pillay 1977 (4) SA 531 (A)** at 535E-F Trollip JA remarked:-

"Now the word "misdirection" in the present context simply means an error committed by the Court in determining or applying the facts for assessing the appropriate sentence. As the essential inquiry in an appeal against sentence, however, is not whether the sentence was 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."

- [13] The Supreme Court of Appeal in **Nkabinde and Others v S [2017] ZASCA 75;2017 (2) SACR 431 (SCA)** at para 51 held that '*sentencing lies in the discretion of the trial court*'.
- [14] It is trite law that a court of appeal will not interfere with an imposed sentence of a lower court unless the discretion of the lower court was not judicially exercised, or if there was a severe irregularity or misdirection by the trial court, or if the sentence was so severe that no reasonable court would impose it, or if the sentence is shockingly inappropriate, or when there is a striking disparity between the sentence passed by the lower court and that which the Court of Appeal would have imposed. See **S v De Jager 1965 (2) SA 616 (A)** and **S v Pieters 1987 (5) SA 717**.
- [15] In **S v Obisi 2005 (2) SACR 350 WLD**, **S v Rabie 1975 (4) SA 855 (A)** at 857 D-E and **S v De Oliveira 1993 (2) SACR 59 A** at 667, it was held that the test on appeal is not whether or not the court sitting on appeal would have imposed another form of punishment, but rather whether the trial court exercised its discretion properly and reasonably when imposing sentence. This court is mindful of the decision in **S v De Jager 1965 (2) SA 616 (A)** at 628 where the discretion of the appeal court was described as not having a general discretion to ameliorate the sentences of trial courts but that it is the trial court that has such discretion.
- [16] In the absence of a material misdirection by the trial court, an appellate court cannot approach the question of sentence as if it were the trial court and then substitute the

trial court's sentence simply because it prefers to. The same would apply to an accused that cannot choose the sentencing regime that he prefers.

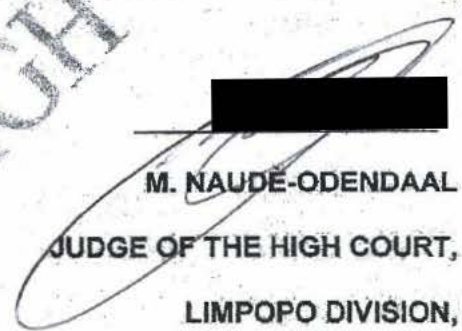
[17] In the present matter, when imposing the sentence of life imprisonment, the trial court had regard to all the mitigating factors placed on record on behalf of the Appellant, as well as the aggravating factors. There is no evidence to show that the Appellant demonstrated remorse at any given time. The Appellant was in a position of trust which he abused. He did not stop even when the Complainant was crying. She was fearful and threatened by the Appellant, she still has nightmares about the Appellant coming to kill her or her aunt. The Magistrate took into account the prevalence of the offence in the region and also the gravity of the crime of rape, especially rape of minor children which inflicts terrible and horrific suffering and outrage on the victim and her family.

[18] In determination of an appropriate sentence in the present matter, the court *a quo* weighed and balanced the mitigating and aggravating factors cumulatively. After considering the factors required to be taken into account in the imposition of sentence, including the Appellant's personal circumstances and the fact that the Appellant was about 34 years older than the victim, he was in a position of trust with the child and threatened her with a knife, the court *a quo* came to the conclusion, and correctly so, that a sentence of life imprisonment will be a suitable sentence.

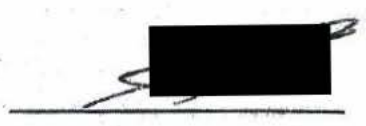
[19] In this court's view, the court *a quo* did not misdirected itself and did not exercise its discretion improperly in sentencing the Appellant to life imprisonment. The appeal against sentence therefore also stands to fail.

[20] Accordingly, this court therefore makes the following order:-

1. The appeal against sentence is dismissed.


M. NAUDE-ODENDAAL
JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION,
POLOKWANE

I AGREE:


A. VAN WYK
ACTING JUDGE
OF THE HIGH COURT,
LIMPOPO DIVISION,
POLOKWANE

APPEARANCES:

HEARD ON: 6 JUNE 2025

JUDGMENT DELIVERED ON: 19 SEPTEMBER 2025

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