



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

CASE NO: AR493/2024

In the matter between:

PHUMLANI NKOSI

APPELLANT

and

THE STATE

RESPONDENT

ORDER

On appeal from: Pinetown Regional Court (sitting as Court of first instance):

1. The appeal in respect of sentence is dismissed.
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JUDGMENT

MIZRACHI AJ (SHAPIRO AJ concurring)

[1] On 1 August 2024, the appellant pleaded guilty to the rape of a minor, female child and was convicted.

[2] The victim of the appellant's rape was six years old at the time.

[3] On 30 August 2024, after hearing argument in mitigation by the appellant's legal representative, the appellant was sentenced to imprisonment for life, being the minimum sentence to be imposed in a case of this nature.

[4] The Court *a quo* found that no determination in terms of section 103(1) of the Firearms Control Act 60 of 2000 was made and the appellant is consequently unfit to possess a firearm. The Court *a quo* further ordered that the appellant's particulars must be included in both the National Register for Sex Offenders in terms of section 50(2)(a) of Act 32 of 2007 and in the National Child Protection Register in terms of section 120(4A) of Act 38 of 2005. These are not, however, subject to the appeal before this Court.

[5] The appeal on sentence comes before this Court as an automatic appeal in terms of section 309(1)(b) of the Criminal Procedure Act.

[6] Although it was not set out in the appellant's heads of argument, counsel for the appellant advised the Court that the appellant sought that the minimum sentence of life imprisonment be reduced to a sentence of 25 years' imprisonment.

[7] The grounds of appeal in respect of the sentence imposed by the Court *a quo* were as follows:

- 7.1. the Court over-emphasized the interests of the complainant as well as the public;
- 7.2. the Court gave insufficient weight to the personal circumstances of the appellant, in particular the following:
 - 7.2.1. the appellant was a first offender;
 - 7.2.2. there was no threat or extraneous violence in the commission of the offence;
 - 7.2.3. the appellant had a stable family background and supported his family;
- 7.3. the circumstances did not allude to the worst type of rape. There have been other cases, worse than the present, where the victims were seriously injured and some even murdered;

- 7.4. the amount of time the appellant spent in custody awaiting trial was not considered in favour of the appellant;
- 7.5. the fact that the appellant committed this offence whilst being under the influence of alcohol was given no consideration when looking at the issue of blameworthiness.

[8] In his plea explanation in terms of section 112(2) of the Criminal Procedure Act the appellant stated that on the day of the offence he was drinking alcohol with the minor child's aunt and uncle. While they were drinking alcohol, the minor child's aunt received a phone call which led to the aunt and the uncle leaving the appellant drinking alcohol alone in the dining room, with the minor child being in a separate room in the house.

[9] The appellant then went to the minor child's room and sent her to the shop to buy cigarettes for himself and chips for herself. After some time had passed and the minor child had not returned, the appellant went to look for the minor child and found her at the shop, at which point he took her back to the house.

[10] Instead of taking the child into the house, he took her to the back of the house where he lowered his pants and sat on a wooden bench and made the minor child sit on his lap with her legs wide open with no underwear on. He then lifted her dress and penetrated her with his penis.

[11] The appellant admitted that at the time of the offence, the minor child was 6 years old and thus not capable in law of consenting to the acts of sexual penetration.

[12] He admitted further that although he was under the influence of alcohol at the time of the offence he was well aware of what was happening around him and what he was doing to the minor child. He further admitted that he acted with direct intention when he raped the minor child and stated that he was extremely remorseful for his actions.

[13] The medico-legal examination of the minor child (recorded on the J88 form,

completed by Dr S Govender) found that the minor child had some genital injuries that were noted. She had erythema (redness) on the posterior fourchette, and erythema on the labia minora. She also had redness on the fossa navicularis. Her hymen had tears at 4, 6 and 7 o'clock positions and was bruised. Dr Govender found that this was consistent with vaginal penetration.

[14] At the time of sentencing, the appellant had been in custody and awaiting trial for a period of approximately one year and nine months, but it should be noted that he had denied the charges against him until the point that he pleaded guilty on 1 August 2024. The witnesses came to Court on three occasions to testify in the intervening period between his arrest and his plea.

[15] At the time of sentencing, the appellant was 37 years old and was a first offender with no criminal record. He has no children of his own, but he stayed with his sisters who have children. He was working as a gardener earning R200.00 per day and supported his sister's children.

[16] The appellant was represented throughout the proceedings in the Court *a quo*, and in mitigation, the following factors were submitted by his legal representative as being substantial and compelling circumstances to depart from the prescribed minimum sentence were:

- 16.1. the appellant was 37 years of age, was unmarried and had no children;
- 16.2. he was unemployed but sought "piece jobs" as a gardener and generated an income of R200.00 per day which he utilized to support his sister's children as he resided in his sister's home with his sister and her children;
- 16.3. although his plea of guilty was at a late stage, he pleaded guilty to the offence and did not put the minor child through the secondary trauma of testifying about the allegations;
- 16.4. the appellant was remorseful and his plea of guilty, however late should be taken as remorse. He deeply regretted his actions and he had taken responsibility for them;
- 16.5. he was a first time offender with no previous convictions;

- 16.6. although his plea of guilty could have come at an earlier stage, the time spent in custody should be taken into account when considering sentencing;
- 16.7. the principle and purposes of sentence being rehabilitation, retribution and prevention should be taken into consideration and given the appellant's age, he was very young and there were therefore prospects of rehabilitation;
- 16.8. the fact that life imprisonment could be imposed would induce a sense of shock in the circumstances of this case and would not be proportionate to this case;
- 16.9. the appellant was under the influence of alcohol. During the commission of the offence he was intoxicated, however, did admit that he was aware of what he was doing, but that the blameworthiness of a person who was intoxicated while he committed an offence was diminished compared to a person in his sound and sober senses.

[17] The state argued that no substantial and compelling reasons existed to depart from the prescribed minimum sentence and submitted the following aggravating circumstances:

- 17.1. the offence was both serious and prevalent and the Court being a sexual offences Court was inundated with such matters;
- 17.2. the appellant, being a neighbour and a friend to the family, took the first opportunity when the aunt and uncle left the home to violate the child. The appellant, being a close family friend in whose care the child was left, was expected to protect the child, and instead violated her;
- 17.3. the child was extremely young, being only 6 years old at the time of the offence. She should not have been exposed to any sexual conduct, let alone being raped by the appellant;
- 17.4. the sentence should deter the accused and likeminded offenders the accused has provided no substantial and compelling circumstances to depart from the prescribed minimum sentence.

[18] In *Hewitt v S*¹ the Supreme Court of Appeal held:

‘... the appellate court must be satisfied that the trial court committed a misdirection of such a nature, degree and seriousness that shows that it did not exercise its sentencing discretion at all or exercised it improperly or unreasonably when imposing it. So, interference is justified only where there exists a ‘striking’ or ‘startling’ or ‘disturbing’ disparity between the trial court’s sentence and that which the appellate court would have imposed. And in such instances the trial court’s discretion is regarded as having been unreasonably exercised.’

[19] In *S v Malgas*² the Supreme Court of Appeal, in considering the discretion of a sentencing Court to depart from the minimum sentences prescribed under section 51 of the Criminal Law Amendment Act 105 of 1997, held:

‘Courts are required to approach the imposition of sentence conscious that the legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.’³

‘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.’⁴

‘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.’⁵

‘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 cumulatively justify a departure from the standardised response that the legislature has ordained.’⁶

[20] The Court *a quo* referred to *S v Malgas* in its judgment and dealt individually with the mitigating circumstances placed before it and ultimately arrived at the conclusion that no substantial and compelling circumstances existed to depart from

¹ *Hewitt v S* [2016] ZASCA 100; 2017 (1) SACR 309 (SCA) para 8.

² *S v Malgas* 2001 (2) SA 1222 (SCA) (*‘Malgas’*).

³ *Ibid* para 25B.

⁴ *Malgas* para 25C.

⁵ *Malgas* para 25D.

⁶ *Malgas* para 25G.

the minimum sentence.

[21] The appellant was a trusted person to the minor child's family, in whose care they left the minor child, and that the appellant was a person of authority to the minor child and therefore exerted this position of authority to perform this horrific act. While the appellant may argue that no violence was used, the psychological, emotional, and physical trauma which will undoubtedly be endured by the minor child is not to be understated. The trauma which the minor child's family has had to endure is also not to be taken lightly.

[22] The prevalence of rape of minor children in our country and in our province is intolerable and destroy the lives of the most vulnerable members of our society, who require the most protection.

[23] In a report⁷ published by Statistics South Africa (StatsSA), it was stated that 'The effects of child sexual abuse usually include teenage pregnancy, low self-esteem, a feeling of worthlessness, a lack of trust in adults, and an abnormal or distorted view of sex. The effects can be so strong that the child may even become suicidal. Children who have suffered from sexual abuse are at an increased risk of future abuse and may become child abusers themselves.'

[24] The report further found that rape (39.9%) and sexual assault (8.4%) accounted for 48.3% of all crimes committed against children in South Africa under the age of 17 years old, and that during the period considered, being 2015 to 2020, KwaZulu-Natal has consistently held the highest incidence of rape of minor children in South Africa at a rate of over 20% during this period.

[25] I refer to these statistics because the Court *a quo* in its judgment stated: 'The prevalence of sexual offences is very high, not only in this court's jurisdiction but countrywide; our country is facing a crisis of endemic proportion in respect of rape, particularly of young children. The rape statistics induce a sense of shock and disbelief.'

[26] This statement is not only factually correct but is directly in line with the

⁷ Child Series Volume II: Crime against children – Report 92-02-02, published 27 February 2024.

approach adopted in *S v Malgas*, that while the legislature deliberately left some discretion to the Courts to decide whether the circumstances of a particular case justify a departure from the minimum sentence, the legislature intended these sentences to be imposed for the listed crimes.

[27] In my view, the Court *a quo* properly applied and considered the approach set out in *S v Malgas* and it considered fairly all factors placed before it. I therefore find that there was no misdirection or irregularity in the exercise of the Court *a quo*'s discretion in sentencing. There are therefore no grounds on which this Court is entitled to interfere with the sentence which has been imposed. The appeal accordingly must be dismissed.

Order

[28] I accordingly make the following order:

1. The appeal in respect of sentence is dismissed.

MIZRACHI AJ

I agree.

SHAPIRO AJ

Appearances

For the appellant:

P Nkanyiso,
Legal Aid South Africa,
Durban Local Office

For the respondents

K M Shah
Office of the Director of Public
Prosecutions, KwaZulu-Natal

Date of hearing:

4 July 2025

Date of judgment:

24 October 2025