REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION PRETORIA

CASE NO: A115/2021
DOH: 28 MAY 2024

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

[redacted]
SIGNATURE

21/6/2024
DATE

THOMAS MALESA **APPELLANT**

and

THE STATE **RESPONDENT**

This Judgment was handed down electronically and by circulation to the parties' legal representatives' by way of email and shall be uploaded on caselines. The date for hand down is deemed to be on 21 June 2024.

JUDGMENT

Mali J

[1] Subsequent to pleading the appellant, Mr Thomas Malesa, was sentenced by the Benoni Regional Court, Gauteng (trial court) on one count of rape. He was sentenced to life imprisonment. He now appeals in terms of section 10 of the Judicial Matters Amendment Act 42 of 2013[1] (Automatic right to appeal).

[2] The appellant's conviction and sentence relate to the incident which occurred on 12 March 2017. The appellant who was 44 years at the time of sentencing was friends with the complainant's father. The complainant was 12 years old at the time she was raped by the appellant. The appellant overheard her conversing with a friend that she desired to own a memory card in order to play gospel music. On the day of the incident, he invited her to his room to fetch the memory card. On her arrival he made her to undress and raped her. He was using a condom which came off twice whereafter the appellant had replaced the condom each time with another. He stopped raping the complainant when he was caught by the complainant's uncle. Thereafter the police were called, and he was arrested.

[3] The approach of the trial court in sentencing the appellant was rather unusual. The trial court did not mention and neither referred to the factors presented as substantial and compelling on behalf the appellant. In finding that there are no substantial and compelling circumstances warranting a departure from imposing a lesser sentence it considered the following aggravating factors, that the complainant was a young female (girl) who was 12 years at the time. The complainant was so tiny and frail. The appellant was close to the relative of the complainant. The appellant preyed on the complaint in view of her home circumstances. The appellant lured the

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[1] 10. section 309 of the Criminal Procedure Act, 1977, is hereby amended by the substitution in subsection (1) for paragraph (a) of the following paragraph:
"(a) Subject to section 84 of the Child Justice Act, 2008 (Act No. 75 of 2008), any person convicted of any offence by any lower court (including a person discharged after conviction) may, subject to leave to appeal being granted in terms of section 309B or 309C, appeal against such conviction and against any resultant sentence order to the High Court having jurisdiction: Provided that if that person was sentenced to imprisonment for life by a regional court order under section 51(1) of the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997), he or she may note such an appeal without having to apply for leave in terms of section 309B: Provided further that the provisions of section 302(1)(b) shall apply in respect of a person who duly notes an appeal against a conviction, sentence or order as contemplated in section 302(1)(a)."

complainant to his shack under the pretext that he was going to give her a memory card.

[4] The general approach is to refer to the factors submitted as substantial and compelling circumstances, deal with them and make a determination whether the factors are found to be substantial and compelling or not. The aggravating circumstances are listed separately, and then weighed against the mitigating factors which might be the same as substantial and compelling circumstances in order for the court to arrive at the appropriate sentence.

[5] In the seminal case of *S v Malgas*[2] the following is instructive:

"*Secondly, a court was required to spell out and enter on the record the circumstances which it considered justified a refusal to impose the specified sentence. As was observed in Flannery v Halifax Estate Agencies Ltd by the Court of Appeal, "a requirement to give reasons concentrates the mind, if it is fulfilled the resulting decision is much more likely to be soundly based --- than if it is not". Moreover, those circumstances had to be substantial and compelling. Whatever nuances of meaning may lurk in those words, their central thrust seems obvious. The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny……*"

[6] It is trite law that a court of appeal will not interfere lightly with the trial court's exercise of its discretion.[3] In Du Toit's well-known commentary[4], the learned authors observe that:

'A court of appeal will not, in the absence of material misdirection by the trial court, approach the question 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.'[5]

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[2] 2001 (1) SACR 469 (SCA).
[3] See *S v Romer* 2011 (2) SACR 153 (SCA); *S v Hewitt* 2017 (1) SACR 309 (SCA); and *S v Livanje* 2020 (2) SACR 451 (SCA).
[4] E du Toit (et al), Commentary on the Criminal Procedure Act (Jutastat, RS 66, 2021), at ch30-p42A.
[5] S v Malgas 2001 (1) SACR 469 (SCA); S v Fielies [2014] ZASCA 191 (unreported, SCA case no 851 / 2013, 28 November 2014); S v Mathekga and another 2020 (2) SACR 559 (SCA); and S v Gebengwana and another (unreported, ECG case no CA&R 186 / 2015, 21 September 2016.

[7] In *S v Hewitt*,[6] it is held; *'It is a trite principle of our law that the imposition of sentence is the prerogative of the trial court. An appellate court may not interfere with this discretion merely because it would have imposed a different sentence. In other words, it is not enough to conclude that its own choice of penalty would have been an appropriate penalty. Something more is required; it must conclude that its own choice of penalty is the appropriate penalty and that the penalty chosen by the trial court is not. Thus, the appellate court must be satisfied that the trial court committed a misdirection of such a nature, degree and seriousness that shows 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.'*[7]

[8] The court can only interfere with the sentence where the trial court's exercise of its discretion was patently incorrect. The sentence must otherwise be left undisturbed. The above principles must guide the determination to be made in relation to the appellant's grounds of appeal.

Substantial and compelling circumstances

[9] The appellant was at the age of 44 and is a first offender, he was held in custody for a period of 1 year and 2 months. The fact that the appellant is a first-time offender, cannot be considered in isolation from other factors.

[10] Pertaining to the submission that the appellant spent time in custody awaiting trial, the court was referred to *S v Radebe*[8] where it is held that: "*the test was not whether on its own that period of detention constituted a 'substantial and compelling circumstance', but whether the effective sentence proposed was proportionate to the*

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[6] 2017 (1) SACR 309 (SCA).
[7] Above (6) At paragraph [8]
[8] 2013 (2) SACR 165 (SCA) at 14.

crime or crimes committed: whether the sentence in all circumstances, including the period spent in detention prior to conviction and sentencing, was a just one." When the accused is sentenced to life imprisonment it is impossible to deduct any time period, hence in *S v Radebe* the following is held:

"In my view there should be no rule of thumb in respect of the calculation of the weight to be given to the period spent by an accused awaiting trial. (See also S v Seboko 2009 (2) SACR 573 (NCK) para 22). A mechanical formula to determine the extent to which the proposed sentence should be reduced, by reason of the period of detention prior to conviction, is unhelpful. The circumstances of an individual accused must be assessed in each case in determining the extent to which the sentence proposed should be reduced. (It should be noted that this court left open the question of how to approach the matter in S v Dlamini 2012 (2) SACR 1 (SCA) para 41.)."[9] The appellant ignores the fact that he is the one who violated the bail conditions resulting in him having to await trial in custody. Therefore, the time he spent awaiting trial is not inordinate at all and is due to his own making.

[11] There was no evidence led in mitigation concerning the appellant's age and in particular how the sentence will impact his age negatively. The mere mentioning of an accused's age cannot be regarded as a substantial and compelling circumstance.

[12] The submission that the appellant had pleaded guilty, therefore he has shown remorse cannot be accepted as is. It is trite that for a court to find that an accused person is genuinely remorseful, it needs to have a proper appreciation of what motivated the accused to commit the deed; what had since provoked his change of heart; and whether he does indeed have a true appreciation of the consequences of those actions. The implication of this is that generally where an accused elects not to testify, a finding of remorse cannot be made by the presiding officer.[10] The appellant did not confess to his deeds, he was reported by the complainant. From the facts of this case it can be inferred that the appellant was not remorseful; but rather regretful that he was caught by the complainant's uncle.

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[9] 2013 (2) SACR 165 (SCA) at 13.
[10] S v Matyityi 2011 (1) SACR 40 (SCA).

[13] Another submission is that the appellant made use of condom when he was raping the complainant. Reference was made to ***S v Vilakazi*** 2009(1) SACR 552 (SCA):

"that there had been no extraneous violence, or threat of, and no physical injury other than the inherent in the offence. The appellant had at least minimised the risk of pregnancy and transmission of disease by using a condom."

[14] As a point of departure, the appellant was not supposed to rape the complainant at all. It does not matter whether the complainant was a much older woman. The appellant did not place evidence before the trial court that he had sexual transmitted diseases and the fact that the complainant would have gotten pregnant is not supported by any scientific evidence. He did not testify to the fertility or not of the complainant. Taking into account the evidence in totality his use of condom in the process of violating a child young enough to be his own, cannot by any means be considered as heroic and is irrelevant.

[15] Another factor is that the complainant did not suffer severe injuries, and this had been conceded by the prosecution in the trial court, that the injuries sustained by the victim were 'not so severe'. The trial court made no reference to this factor. The trial court did not take into account that the hymen was still intact, and that complainant did not suffer any other external injuries to her body except those to her private part. The trial court further did not consider that no threats of violence were made against the complainant.

[16] The act of rape just on its own is brutal. Various courts have expressed disdain about rape and found that the offense of rape is serious and prevalent in the jurisdictional areas of the court, and it is *"... a humiliating, degrading and brutal invasion of the privacy, dignity and the person of the victim...' and is... an appalling and utterly outrageous crime which violates a woman's body (which) is sacrosanct"*[11]

[11] S v M 2007 (2) SACR 60 (WW) 73 C-D.

[17] In *Mudau v S*[12] it was held "*It is necessary to re-iterate a few self-evident realities. First, rape is undeniably a degrading, humiliating and brutal invasion of a person's most intimate, private space. The very act itself, even absent any accompanying violent assault inflicted by the perpetrator, is a violent and traumatic infringement of a person's fundamental right to be free from all forms of violence and not to be treated in a cruel, inhumane or degrading way.'*

[18] Another ground of appeal raised on behalf of the appellant is that that the sentence is not proportionate, as the first offender he would have been sentenced to 10 years imprisonment. This is said in total disregard of the legal provisions that the rape of minor children attracts a minimum sentence of life imprisonment unless substantial and compelling circumstances are found to be present.[13]

[19] In S v Malgas[14] the Court intimated as follows:

"The Courts are required to approach the imposition of sentence conscious that the legislature has ordained life imprisonment as the sentence that should ordinarily in the absence of a weighty justification be imposed for listed crimes in the specific circumstances. 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 standardized and consistent approach from the courts. These sentences are not to be departed from lightly and for flimsy reasons."

[20] In S v Matyityi[15] the court held that:

"*There was all too frequently a willingness to on the part of the courts to deviate from the sentences prescribed by the Legislature for the flimsiest of reasons. Court had a duty, despite any personal doubts about the efficacy of the policy, or aversions to it, to implement those sentences,*

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[12] 2013 (2) SACR 292 (SCA) at para 17.
[13] Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.
[14] 2001 (1) SACR 469 (SCA)
[15] 2011 (1) SACR 40 (SCA) at para 41(g),

Parliament had ordained minimum sentences for certain specified offences, and they were to be imposed unless there were truly convincing reasons for departing from them, Court were not free to subvert the will of the Legislature by resort to vague, ill-defined concepts such a relative youthfulness or other equally and ill-founded hypotheses that appeared to fit the sentencing officer's notion of fairness."

[21] Gender Based Violence against women and children, the vulnerable society in this country is a serious scourge. This society gets raped and or sometimes killed with impunity. The courts do their best in imposing the ultimate sentence, that of life imprisonment, still some perpetrators of these hideous crimes like the appellant are not deterred. There is no other way except to impose sentence according to what is prescribed in the legislation.

[22] In the present case, amongst others, the appellant's age militates against finding substantial and compelling circumstances. This takes into account the very young age of the complainant and further that the appellant was expected to be trustworthy and assume the role of a protector to the complainant, because of his close proximity to the family. He lured her to his room under false pretexts, having studied her home financial limitations.

[23] It is apparent that the aggravating circumstances far outweighs the mitigating factors. The trial court's approach is not so material, thus the court was correct not to make a deviation from the prescribed minimum sentences.

[24] In conclusion, this court does not find any material misdirection by the trial court. There is no reason to interfere with its exercise of discretion. In the result the following order is granted:

ORDER

1. The appeal is dismissed.

[redacted]

N P MALI

JUDGE OF THE HIGH COURT

I agree

[redacted]

BALOYI-MERE

ACTING JUDGE OF THE HIGH COURT

APPEARANCES

For the appellant:	Adv L A van Wyk LillianV@legal-aid.co.za
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