IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG
HEARD AT DURBAN

CASE NO.AR271/2019

In the matter between:

VELENKOSINI THILE MYENI **APPELLANT**

and

THE STATE **RESPONDENT**

ORDER

The appeal against sentence is dismissed, the sentence of the court *a quo* is confirmed.

JUDGMENT

Henriques J (Pillay D J concurring)

Introduction

[1] This is an appeal against the sentence of life imprisonment imposed by the

Empangeni Regional Magistrate on 23 January 2019. The matter serves before us by way of an automatic right of appeal.

[2] The appellant was convicted of rape in contravention of section 3 read with sections 1, 56(1), 57, 58, 59, 60 and 61 of the Sexual Offences and Related Matters Amendment Act 32 of 2007, read with the provisions of section 51 and schedule 2 of the Criminal Law Amendment Act 105 of 1997 (the Act). It is common cause that on conviction the appellant faced a sentence of life imprisonment arising from the rape of a child of three years Andiswa Mthethwa.

[3] The appellant was legally represented when he was convicted pursuant to a guilty plea. The court *a quo*, after considering the probation officer's report and the recommendations of the correctional supervision officer, found that there were no substantial and compelling circumstances warranting a deviation from the prescribed minimum sentence.

[4] In his submissions Mr *Mkhumbuzi*, who appeared for the appellant, submitted that whilst he accepted that the rape was repulsive and the interests of the community demanded a severe sentence be imposed, there were a number of factors, the cumulative effect of which constituted substantial and compelling circumstances warranting the imposition of a lesser sentence than life imprisonment.

[5] These factors were the following, namely, that the appellant was 31 years old at the time of the commission of the offence with a Grade 11 standard of education. He was maintained and supported by his parents and had no pending cases against him. As he had no previous convictions, he was a good candidate for rehabilitation. The appellant had tendered a guilty plea. Consequently, he accepted responsibility for his actions without wasting the court's time. Nor did he subject the complainant to the added trauma of having to testify in a courtroom.

[6] The appellant had expressed remorse for his conduct and was intent on personally apologising to the complainant and her family. His family had shown support in that they had approached the complainant's family to show support and sympathy as a consequence of the appellant's conduct. The appellant, at the time of

the offence, was under the influence of alcohol and there were allegations that he suffered from a mental disorder.

[7] In consequence of the above factors he submitted that the court *a quo* misdirected itself in over-emphasising the seriousness of the offence, and did not strike a balance with regard to all the factors one was required to consider when sentencing a convicted person. He indicated that this court was entitled to intervene as the sentence imposed was disproportionate, having regard to the personal circumstances of the appellant, the interests of society and the gravity of the offence.

[8] On the other hand, Mr *Shah* who appeared for the respondent submitted that the court *a quo* correctly sentenced the appellant. Whilst acknowledging that this is not one of those cases which qualifies as 'one of the worst rapes possible' the sentence imposed was nonetheless justified; there is no reason to interfere on appeal.

Analysis

[9] The powers of the court on appeal to interfere with sentence are well known and are limited. An appeal court will only interfere with a sentence if a sentence is vitiated by an irregularity, misdirection or is startlingly, shockingly, or disturbingly inappropriate. This court recognises that the question of sentence remains pre-eminently a matter for the discretion of the trial court and only interferes with the exercise of such discretion under limited circumstances.

[10] In *S v Malgas* 2001 (1) SACR 469 (SCA) at 478D-G, Marais JA said the following,

'A court exercising appellate jurisdiction cannot, 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. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate Court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance... However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence

imposed by the trial court. It may do so when the disparity between sentence of the trial court and the sentence which the appellate Court would have imposed had it been the trial court is so marked that it can be properly be described as "shocking", "startling" or "disturbingly inappropriate."

[11] It is trite that the minimum sentences are the starting point when imposing a sentence. They must not be departed from for flimsy reasons. When imposing sentence, the court considers the triad identified in *Zinn*[1] as well as the victim. *Malgas* empowers a court to deviate from the prescribed minimum sentence under two circumstances, namely where substantial and compelling circumstances are found to exist in terms of section 51(3) of the Act and where to impose a prescribed minimum sentence would be unjust in that it would be disproportionate having regard to the crime, the criminal and the needs of society. When a trial court considers this, account must be taken of the fact that such a crime has been singled out for severe punishment in the form of the prescribed minimum sentences.

[12] The aggravating features of the matter were that the complainant, a child of three years, was raped by a relative of hers. She was physically injured as a consequence of the rape. Her injuries according to the J88 were extensive. Having regard to the grandmother's victim impact statement, the effects of this incident will be with the complainant for the remainder of her life.

[13] Having regard to the personal circumstances of the appellant, these are not out of the ordinary. It is true that the State proved no prior convictions and he apologised to the family of the complainant. However, one has to determine whether his plea of guilty is truly indicative of remorse or whether the circumstances of the offence were such that he had no alternative but to plead guilty. He was "caught in the act".[2]

[14] The facts to which the appellant pleaded guilty were the following: He indicated that whilst he was undressed and on top of the complainant and after he had inserted

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2 *S v Matyityi* 2011 (1) SACR 40 (SCA).

his penis inside her vagina and whilst trying to fully insert it, he was assaulted, lost consciousness and woke up in hospital. The evidence presented in the court *a quo* was to the effect that the appellant was observed raping the complainant and was assaulted by community members. In light of these circumstances and literally being 'caught in the act', the plea of guilty and having no prior proven convictions are neutral factors.

[15] As regards his alleged mental disorder, the record of the proceedings in the court *a quo* indicates this was raised prior to the commencement of the proceedings. The accused had been referred to Fort Napier for assessment. Two reports filed indicated that he was fit to stand trial. In addition, his legal representative did not have any difficulties consulting with him and obtaining instructions.

[16] Not only the reports of the correctional officers but also the evidence of the appellant's mother, Thobile Nyawo, and Miss Promise Mkholo, the probation officer, show that the appellant had been prescribed medication but it is not known the exact duration for which he was taking medication. In addition, his mother was unclear as to the date of his diagnosis and indicated that he was not compliant. The court *a quo* considered this but found '... It however remains unclear as to what kind of mental illness is this and the impact it may have had in his social skills. According to the doctors that examined the accused, the psychiatric specialist, they found him to be fit to stand trial with no diagnosis of a mental illness.' This excerpt from the judgment and sentence indicates that the court *a quo* was alive to this issue.

[17] In addition, in relation to the appellant's allegation that he consumed alcohol, this is also touched on in the report of the probation officer and it also appears that they have conflicting reports as to whether or not he was still consuming alcohol. The court was of the view that 'Use of alcohol cannot as well be used as an excuse for irresponsible behaviour.'

[18] No irregularity has been complained of nor any found in relation to the judgment of the court *a quo*. In respect of the submission that there has been a misdirection, in my view, no misdirection is evident from the judgment on sentence.

[19] I turn now to the consideration of whether the sentence imposed is disturbingly inappropriate and can be said to be so excessive so as to induce a sense of shock.

[20] In my view the court *a quo* correctly approached the matter as one in which the minimum prescribed sentence was that of life imprisonment. Having regard to the record of proceedings in respect of sentence, in its assessment of a suitable sentence, the court *a quo* had regard to the triad of *Zinn* and also considered both aggravating and mitigating factors when imposing the sentence. In addition, the court also carefully considered whether or not substantial and compelling circumstances existed and whether to impose the prescribed minimum sentence would be disproportionate and thus unjust. In addition, the court *a quo* also considered the personal circumstances of the accused, the fact that he pleaded guilty and was a first offender, but took into account the circumstances under which the rape occurred as well as the fact that the complainant sustained physical injuries. It also had the benefit of a victim impact statement by the complainant's grandmother.

[21] A further consideration which the court was alive to was the appellant's indication that he was under the influence of alcohol at the time he committed the rape and also the allegations concerning a possible mental disorder. Despite this however, the court came to the conclusion that the most appropriate sentence in the circumstances was that of the prescribed minimum sentence.

[22] Having regard to the facts taken into account by the court *a quo*, I am satisfied that the court *a quo* was correct in finding that there were no substantial and compelling circumstances permitting a deviation from the prescribed minimum sentence.

[23] In addition, the court also considered whether or not the prescribed minimum sentence was unjust and/or disproportionate. In as much as the sentence imposed

may be severe, it does not translate into a sentence which induces a sense of shock or is disproportionate. Such sentence in my view addresses the concerns of the legislature when enacting the prescribed minimum sentencing legislation and also properly considers the purposes of sentencing. Any sentence with a shorter term of imprisonment in my view would have amounted to emphasising the personal circumstances of the appellant and undermining the seriousness of the crime, the interests of the community, as well as the impact on the victim.

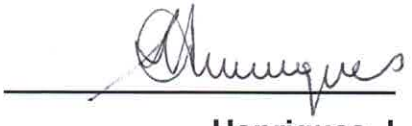
[24} I am fortified in this view when I consider the decision in *S v Vilakazi* 2009 (1) SACR 552 (SCA) at paragraph 58 in which Nugent JA held the following,

'In cases of serious crime the personal circumstances of the offender by themselves will necessarily recede into the background. Once it becomes clear that the crime deserves a substantial period of imprisonment, the question whether he has two children or three, or whether he is in employment by themselves are largely immaterial to what the period should be, and those seems to me to be kind of flimsy grounds that *Malgas* said should be avoided.'

[25] Consequently, in my view, the court *a quo* properly considered the facts before it when coming to an appropriate sentence. It was correct in finding no substantial and compelling circumstances to exist and the imposition of the prescribed minimum sentence was not disproportionate and unjust. Consequently, I find no reason to warrant interference with the sentence by this court on appeal.

[26] In the result the order I propose is the following:

The appeal against sentence is dismissed and the sentence of the court *a quo* is confirmed.



Henriques J

I agree.

D. Pillay J

CASE INFORMATION

APPEARANCES

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Date of Argument	:	06 July 2020
Date of Judgment	:	06 July 2020

NB. With the consent of the parties this matter was dealt with on the papers.