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

Case no: AR 264/22

In the matter between:

SANDILE ELLEN SHABALALA **APPELLANT**

vs

THE STATE **RESPONDENT**

This judgment was handed down electronically by circulation to the parties' representatives by email, and release to SAFLII. The date for hand down is deemed to be on 29th May 2023 at 10:00

ORDER

On appeal from the Regional Court, Scottburgh:

The appeal against the sentence of life imprisonment that was imposed on the appellant by the court a quo is dismissed.

JUDGMENT

ME Nkosi J (Chetty J Concurring)

Introduction

[1] This is an appeal by Sandile Ellen Shabalala ('the appellant') against the sentence of life imprisonment that was imposed on him by the District Court for the Region of KwaZulu-Natal held at Scottburgh for the crime of rape of a child under the age of 12 years. The appellant pleaded guilty to the charge of rape of the complainant, and his appeal is against sentence only by virtue of his

automatic right of appeal in terms of s 309 of the Criminal Procedure Act 51 of 1977 ('the CPA') against the sentence of life imprisonment.

The crime

[2] The appellant's conviction and sentence by the court a quo emanated from the allegations made the State that on or about 3 March 2019, and at or near the Nomakhanzana Area in Hibberdene, KwaZulu-Natal, the appellant raped the complainant, 'A', who was a child aged 11 years' old at the time of the commission of the offence.

The Plea

[3] The appellant pleaded guilty to the charge of rape and his legal representative handed a written statement into court in terms of s 112(2) of the CPA, in which the appellant set out the facts which he admitted and on which he pleaded guilty. In essence, he admitted that on 3 March 2019 he was walking along a certain road at the Nomakanzana area when he came across the complainant. He called her to come to him, which she did. He then instructed her to go with him into a dark place where he climbed on top of her and inserted his penis into her vagina. He admitted that his actions were without the consent of the complainant.

[4] After his statement in terms of s 112(2) of the CPA was read into the record by his legal representative, the appellant was questioned by the presiding magistrate to ensure that the statement had been read and interpreted to him. He confirmed that it was, which satisfied the learned magistrate that he admitted all the elements of the offence of rape, and had no valid defence to the charge. He also admitted that the complainant was under the age of 12 years at the time of the commission of the offence and, therefore, was legally incapable of consenting to sexual intercourse. The magistrate found him guilty as charged.

The evidence

[5] Prior to the appellant's conviction, the documentary evidence which the State had against him was admitted by the court a quo by consent of the parties. Such evidence included the appellant's statement in terms of s 112(2) of the CPA (Exhibit 'A'); the Doctor's affidavit in terms of s 212(4) of the CPA and the J88

form completed by him of his medico-legal examination of the complainant (Exhibit 'B'); a certified copy of the complainant's birth certificate (Exhibit 'C'); and the DNA report which linked the appellant to the rape of the complainant (Exhibit 'D').

Grounds of appeal

[6] The appellant's appeal against the sentence of life imprisonment for the crime of rape of the complainant is based primarily on two grounds. The first ground is that the trial court misdirected itself in attaching insufficient weight to the personal circumstances of the appellant which, it was submitted, ought to have been accepted by that court as constituting mitigating factors in favour of the appellant.

[7] In particular, the personal circumstances of the appellant that are said to have been given insufficient weight by the court a quo are, namely: (a) that he was 42 years' old at the time of the commission of the offence; (b) although he has a number of previous convictions, they are not related to the charge of rape which indicates that he is a candidate for rehabilitation; and (c) it was apparent from the J88 form that was admitted as evidence marked Exhibit 'B' that the complainant did not suffer serious injuries from being raped by the appellant.

[8] The second ground of is that the sentence of life imprisonment that was imposed on the appellant by the court a quo is, in the circumstances of this case, harsh and inappropriate to the extent that it induces a sense of shock. It is further submitted that the trial court failed to exercise its discretion properly and judicially, which warrants this court to exercise its powers to interfere with the sentence imposed by the trial court.

The law

[9] It was held by the Supreme Court of Appeal ('SCA') in S v Malgas 2001 (1) SACR 469 SCA at 478 (d) to (e) that:

'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.'

Therefore, in the present case, the question is whether there was any material misdirection by the trial court to justify an interference by this court with the sentence of life imprisonment that was imposed upon the appellant.

[10] In addressing the question posed in the preceding paragraph, one has to adopt as a starting point the provisions of s 51(1) of the Criminal Law Amendment Act 105 of 1997 ('the CLAA'). In essence, that section provides that a regional court or a high court is required to sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to that Act to imprisonment for life, unless such court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence of life imprisonment.

[11] The rape of a person under the age of 16 years is one of the offences referred to in Part I of Schedule 2 to the CLAA.[1] Therefore, in the present case, the fact that the appellant was convicted of the crime of rape of an 11-year-old enjoined the court a quo to impose the sentence of life imprisonment upon the appellant, that is, unless it was satisfied that the personal circumstances of the appellant constituted substantial and compelling circumstances to justify a deviation from such sentence.

[12] In my view, there is nothing in the personal circumstances of the appellant, whether considered individually or cumulatively, which ought to have been regarded by the court a quo as constituting substantial and compelling circumstances justifying a deviation from the minimum sentence of life imprisonment that is prescribed for the rape of a person under the age of 16 years. Aged 42 years at the time of the commission of the offence, the appellant was old enough to be the complainant's father.

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[1] Subsequent to the amendment to Part 1, Schedule 2, by s 15 of Criminal and Related Matters Amendment Act 12 of 2021, which took effect on 5 August 2022, the age is now 18 years.

[13] The appellant has three daughters of his own, the youngest of whom is almost the same age as the complainant. Under normal circumstances, one would expect him to be protective of young girls from being preyed on by sexual predators like himself. Instead, he was the one who forced himself upon an 11-year-old girl causing her physical and psychological harm that is likely to leave her scarred for the rest of her life.

[14] The minimum sentence legislation was purposely promulgated by the legislature to curb the prevalence of certain offences which have become a menace to society. These include offences which are committed against the most vulnerable members of the society, such as children, the elderly and physically disabled persons. The SCA warned in *S v Malgas* (*supra*) para 25 that:

'B. 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.

C. 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.

D. The specified sentences are not to be departed from lightly or for flimsy reasons. Speculative hypothesis 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.'

[15] I now turn to the 'traditional mitigating factors' of the appellant set out above. Regarding his age of 42 years at the time of the commission of the offence, the appellant was by no means an immature young person incapable of appreciating the severity and wrongfulness of his conduct. He is an adult man whose last-born

children are themselves just two years younger than the complainant. In my view, his chronological age cannot operate as a mitigating factor. At best for him, it was a neutral factor.[2] Otherwise, it could have been regarded as an aggravating factor by the trial court because the complainant was almost the same age as his youngest daughter.

[16] Regarding the contention that the appellant pleaded guilty and that this was a factor to be taken into account in mitigation, I am not persuaded by this argument. The fact of the matter is that the appellant was faced with the DNA results which linked him to the commission of the offence. Therefore, he had no other option but to plead guilty, particularly, as the complainant's age rendered her incapable of consenting to sexual intercourse. For this reason, my view is that the appellant's guilty plea can hardly be regarded as a mitigating factor.

[17] This brings me to the last submission that the complainant did not suffer 'serious injury' as a result of the rape and, therefore, this should be regarded as a mitigating factor. In my view, this argument is without any merit, particularly, when one has regard to the fact that the complainant suffered bruising to the region of both eyes, which is indicative of the fact that she must have sustained some level of physical assault. Moreover, in terms of s 51(3)(aA) of the CLAA certain factors, on their own[3], cannot be taken to constitute substantial and compelling circumstances when sentencing for the crime of rape. Section 51(3)(aA) states:

(aA) When imposing a sentence in respect of the offence of rape the following shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence:

(i) …….;

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[2] See *S v Matyityi* 2011 (1) SACR 40 (SCA), para 14.

[3] It is permissible to consider the factors listed in s 51(3)(Aa) of the Criminal Law Amendment Act 105 of 1997 cumulatively, but not individually, to amount to substantial and compelling circumstances. See *S v SMM* 2013 (2) SACR 292 (SCA), para 26, and *Kruger Hiemstra's Criminal Procedure* SI 16 (February 2023) at 28-29.

(ii) an apparent lack of physical injury to the complainant;

……’

[18] While the sentence of life imprisonment may be considered harsh for a first offender for a particular category of offence, that too is not the basis for an appeal court to interfere with the imposition of a sentence by a trial court. This court can interfere if the sentence is vitiated by an irregularity, misdirection or is disturbingly inappropriate.[4]

[19] In the case of the appellant, he has no previous convictions for rape or sexual offences. However, to the extent that it was submitted that he is a candidate for rehabilitation, it bears noting that his criminal record stretches back to 1998 when he was convicted of theft, with subsequent convictions relating to housebreaking in 2002, theft in 2003, theft in 2007 and robbery, which involves an element of violence, in 2014. In respect of the latter, he was sentenced to five years' imprisonment in terms of s 276(1)(i) of the CPA. In 2019 he was sentenced to two years' imprisonment for housebreaking.

[20] Judging by his previous convictions, it is evident that the appellant has not learnt from his most recent bout of incarceration, and has opted for more violent and serious crime. For all intents and purposes, the criminal record of the appellant displays a relatively long history of conflict with the law, which cannot be considered in his favour.

[21] In my view, the court took into account all of the personal circumstances of the appellant, weighed against the impact of the offence on the young complainant, who will have to bear the consequences of his actions throughout her life. This much is also apparent from the complainant's victim impact statement, in which she expresses her grief at being betrayed by the only parent she was reliant on after her rejection by biological mother's husband. The gravity of the offence in these circumstances outweighs the personal circumstances of

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[4] *See S v Bogaard*s 2013 (1) SACR 1 (CC); *S v Ngcobo* 2018 (1) SACR 479 (SCA), para 11; *S v Romer* 2011 (2) SACR 153 (SCA), para 22.

the appellant.[5] I am unable to fault the trial court in any manner as to its approach in arriving at the decision to impose life imprisonment. There is no evidence of any misdirection on its part.

Order

[22] In the circumstances, I recommend that the following order be made:

[23] The appeal against the sentence of the life imprisonment that was imposed on the appellant by the court a quo is dismissed.

ME NKOSI
JUDGE OF THE DURBAN HIGH COURT

I agree,

M CHETTY
JUDGE OF THE DURBAN HIGH COURT

Appearances

For the appellant:	Mr P Marimuthu
Instructed by:	Legal Aid South Africa
	Durban Justice Centre
	emmanuelc@legal-aid.co.za
	PregasenM@legal-aid.co
For the respondent:	Mr Edwards
	Director of Public Prosecutions, Pietermaritzburg
	AlexN.A.Khanyile@npa.gov.za
Date of Hearing:	12 May 2023
Date of Judgment:	29 May 2023

[5] See *Director of Public Prosecutions, Grahamstown v Peli* 2018 (2) SACR 1 (SCA).