IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case number: **AR18/2022**

In the matter between:

SIBONGISENI FANO GWALA **APPELLANT**

and

THE STATE **RESPONDENT**

Coram: Mossop J and Hadebe AJ

Heard: 22 November 2024

Delivered: 22 November 2024

ORDER

On appeal from: the Regional Court, Inkanyezi (sitting as court of first instance):

1. The appeal against the sentences imposed upon the appellant on 24 June 2021 is dismissed, save to the extent set out in paragraph 2 of this order.

2. The sentence imposed on the appellant is corrected to read as follows:

(a) 'On each of counts 1, 2 and 3, the appellant is sentenced to life imprisonment in terms of the provisions of section 51(1) read with schedule 2, part 1 of Act 105 of 1997;

(b) On count four, the appellant is sentenced to 15 years' imprisonment in terms of the provisions of section 51(2)(a) read with schedule 2, part 2 of Act 105 of 1997; and

(c) In terms of the provisions of section 280(2) of the Criminal Procedure Act 51 of 1977, the sentences imposed on counts 2, 3 and 4 shall run concurrently with the sentence of life imprisonment imposed on count 1.'

JUDGMENT

HADEBE AJ (**MOSSOP J concurring):**

Introduction

[1] This is an appeal against the sentences imposed upon the appellant by the regional magistrate sitting at the regional court of Inkanyezi on 24 June 2021. The appellant was charged with three counts of rape and one count of robbery with aggravating circumstances. He was convicted on all four counts. On counts 1, 2 and 3, he was sentenced to undergo life imprisonment. On count 4, he was sentenced to fifteen years imprisonment with the trial court ordering that the sentences imposed on counts 2, 3 and 4 were to run concurrently with the sentence of life imprisonment imposed on count 1.

[2] In terms of the provisions of s 309(1)*(a)* of the Criminal Procedure Act 51 of 1977 (the CPA), the appellant has an automatic right of appeal to challenge both his conviction and sentence but has elected only to challenge the sentences imposed upon him.

Uncertain meaning of the sentence

[3] I have some difficulty in comprehending the sentences imposed in respect of counts 1, 2 and 3 as recorded in the transcript of proceedings in the trial court. In respect of those counts, it appears that the regional magistrate sentenced the appellant to a single term of life imprisonment. This appears from the regional magistrate's judgment as recorded in the transcript which reads as follows:

‘ON COUNTS 1, 2 AND 3: IN TERMS OF SECTION 51(1) READ WITH SCHEDULE 2, PART 1, OF ACT 105 OF 1997, YOU ARE SENTENCED TO LIFE IMPRISONMENT.’

[4] From this, it appears that a single sentence was imposed in respect of counts 1, 2 and 3. The regional magistrate did not indicate that on each of counts 1, 2 and 3 a sentence of life imprisonment was imposed. However, she did order that the sentences imposed by her on counts 2, 3 and 4 were to run concurrently with the sentence imposed on count 1.

[5] That the regional magistrate intended the sentence to be life imprisonment on each of counts 1, 2 and 3, however, appears certain from an annexure to the charge sheet in which details of the sentence imposed were recorded in manuscript on a pre-printed form, which reads:

‘Count 1: Life imprisonment
In terms of Section 51(1) read with Schedule 2 Part 1 of Act 105 of 1997
Count 2: Life imprisonment
In terms of Section 51(1) read with Schedule 2 Part 1 of Act 105 of 1997
Count 3: Life imprisonment
In terms of Section 51(1) read with Schedule 2 Part 1 of Act 105 of 1997’.

[6] The fact that the regional magistrate directed that the sentences imposed on counts 2, 3 and 4 were to run concurrently with the sentence on count 1 reaffirms the fact that she sentenced the appellant to life imprisonment on counts 2 and 3 as well for it would not be possible, or necessary, to order the sentence on those counts to run concurrently with the sentence on count 1 if there was only one sentence imposed in respect of counts 1 to 3.

[7] The issue was addressed with counsel for the appellant who submitted that, despite what is recorded in the transcript of proceedings, she understood the appellant to have been sentenced to one sentence of life imprisonment on each of counts 1, 2 and 3.

[8] I am, however, satisfied that the sentence imposed on the appellant was life imprisonment on each of counts 1 to 3 and the sentence of the regional magistrate will be corrected, *ex abundanti cautela*, to reflect that. Judicial officers must ensure that sentences imposed clearly and unambiguously reflect their intentions.

The offences

[9] From the evidence adduced at the trial, the victims on counts 1 to 3, three young ladies, were returning from school when they were approached by the appellant who pointed a gun at them and forced them to accompany him across a river, where he raped all three of them consecutively. After doing so, he then forced them to wash themselves in the river. It is common cause that the aforesaid victims were under the age of 16 at the time of the incident.

[10] In relation to count 4, the appellant robbed two of his victims at gunpoint. The appellant was, however, well known to one of the victims as he used to buy from her at her shop. The court a quo was satisfied with the evidence led by the state and found the appellant guilty on all counts. The appellant accepts those findings and does not dispute his guilt on any of the four counts.

Personal particulars

[11] During the phase of the trial when sentence was considered, the appellant did not testify in mitigation of the sentences to be imposed upon him but elected, rather, to make submissions through his legal representative. It was submitted on his behalf that he was 30 years of age with no pending charges. He had been in custody since his arrest on 15 January 2019, with his trial commencing on 31 July 2019, on which date he was called upon to plead. By the time that he was sentenced on 24 June 2021 at the conclusion of the trial, he had been in custody for a period of some two and a half years. He had a child aged four years. It was explained that he never knew his father and that his mother had died when he was ten years old. He was unemployed when he was arrested but indicated that he would obtain ‘piece’ jobs plastering houses from time to time and earned R300.00 per room when so employed.

[12] It was submitted on the appellant's behalf that the court should consider his personal circumstances as a whole as constituting substantial and compelling circumstances justifying a deviation from the mandatory minimum sentences.

Aggravating circumstance

[13] The court a quo found that the manner in which the rapes were committed to be aggravating. The victims were under the age of 16, a particularly aggravating factor. In relation to the robbery, the victims were female victims and there was a young child present when it took place. A shot was fired while the victims were lying on the floor.

[14] From the content of the victim impact statements handed in at the trial and which form part of the appeal record, it is evident that all the complainants remain traumatised by their brutal experience. As a consequence, the trial court found that the aggravating factors far outweighed any of the mitigating factors that may have existed in favour of the appellant. It also found that there were no substantial and compelling circumstances justifying the imposition of a lesser sentence other than the prescribed minimum sentence on all the counts.

The grounds of appeal

[15] The grounds of appeal raised by the appellant are the following:

(a) The sentences imposed are harsh and shockingly inappropriate;

(b) There was a compelling justification for deviating from the minimum sentences;

(c) The regional magistrate did not judiciously exercise her sentencing discretion; and

(d) The court a quo did not consider the period spent by the appellant in custody when sentencing the appellant and that, in itself, constituted a substantial and compelling reason for the court to deviate from the minimum sentences.

Submissions by the appellant

[16] Ms Anastasiou-Krause, who appeared for the appellant, argued that the trial court erred in failing to find the existence of substantial and compelling circumstances. Had it

done so, it would have been entitled to impose a sentence other than the prescribed sentence of life imprisonment on each of the three counts of rape. It was also contended that the trial court misdirected itself by not considering the personal circumstances of the appellant and the period that he spent in custody whilst awaiting trial. She referred in this regard to the case of *S v Sangweni*,[1] a judgment of Steyn J.

[17] It was, however, correctly conceded in the appellant's heads of argument that the rape of young children has become a scourge in our society, but it was further submitted that the imposition of sentence should always be blended with an element of mercy. Both the concession and the proposition are correct.

Submissions by the respondent

[18] Mr Naidoo, who appeared for the State, briefly submitted that the judgment on sentence was well balanced and thoroughly considered. The court a quo was bound to impose sentences of life imprisonment in respect of the three counts of rape because the three victims were under the age of sixteen. The sentence of 15 years imprisonment on the robbery charges was also justified. The appellant, moreover, had four previous convictions, three of which involved dishonesty in the form of housebreaking with intent to steal and theft.

[19] It was further submitted that in acting as he did, the appellant took advantage of the victims' vulnerability, and it was consequently submitted that there were no compelling reasons to deviate from the minimum sentences prescribed by law. The period spent by the appellant in custody awaiting trial was not a valid consideration as he was serving a sentence for another matter.

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[1] *S v Sangweni* [2009] ZAKZPHC 60; 2010 (1) SACR 419 (KZP).

The legal principles

[20] It is trite that the imposition of sentence is pre-eminently a matter that falls within the discretion of the trial court, and that a court of appeal will only interfere in certain discrete circumstances. Such circumstances may present themselves if the sentencing court did not exercise its discretion appropriately, or if it exercised it unreasonably, or in circumstances where the sentence imposed is adversely disproportionate to the offender, the crime committed and the legitimate needs of society. Reiterating this principle, Kampepe J stated the following in *Bogaards v S*:[2]

'An appellate court's powers to interfere with sentences imposed by courts below is circumscribed. It can only do so where there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it.'

[21] Notwithstanding that there may not be an obvious material misdirection, an appellate court may be entitled to interfere with a sentence imposed by a trial court if the disparity between the 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 properly be described as 'shocking', 'startling' or 'disturbingly inappropriate.'[3]

Analysis

[22] Having considered the grounds of appeal and the proceedings in the trial court, I am not able to discern any misdirection by the regional magistrate. I also do not consider the sentences imposed to be harsh or 'shockingly inappropriate', as the appellant submits. What I find shocking is the sense of entitlement of the appellant who believed that he could force himself on three young schoolgirls against their will. The appellant displayed no concern for his victims, nor did he exhibit any respect for their right to their bodily integrity or their human dignity. Rape is an act of sexual violence that cannot be tolerated, nor can it be allowed to be normalised. No man should believe that

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[2] *S v Bogaards* [2012] ZACC 23; 2013 (1) SACR 1 (CC) para 41.
[3] *S v Malgas* 2001 (1) SACR 469 (SCA) para 12.

he is justified in violating a woman and all men must know that, if they do, the harshest possible consequences await them.

[23] In my view, the trial court correctly concluded that there were no substantial and compelling circumstances justifying a lesser sentence than life imprisonment on the three rape counts and the sentence of 15 years imprisonment on count 4. The Supreme Court of Appeal has repeatedly made it quite clear that the prescribed minimum sentences are not to be departed from lightly and for flimsy reasons. These are the ordained sentences to be imposed for the specified offences, unless there are substantial and compelling circumstances justifying such a departure.[4] The regional magistrate, correctly in my view, found that there were no such circumstances present in this matter.

[24] I can, furthermore, discern no improper use of the regional magistrate's sentencing discretion. She fully appreciated the heinous nature of the appellant's offences but did not lose sight of his personal circumstances as she came to her decision on the appropriate sentences.

[25] Regarding the period spent in custody whilst awaiting trial, the Supreme Court of Appeal held in *Radebe and another v S*[5] that the period spent awaiting trial cannot, on its own, constitute substantial and compelling circumstances justifying a departure from the prescribed minimum sentence. Lewis JA observed that:

'The period in detention pre-sentencing is but one of the factors that should be taken into account in determining whether the effective period of imprisonment to be imposed is justified: whether it is proportionate to the crime committed'.

[26] The argument advanced on behalf of the appellant that this period of prior detention amounts to substantial and compelling grounds entitling him to a lesser

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[4] Ibid para 9.
[5] *Radebe and another v S* [2013] ZASCA 31; 2013 (2) SACR 165 (SCA) para14.

sentence than the prescribed minimum sentences that he received is both audacious and wrong. The crimes of which the appellant was rightly convicted are so disgraceful and repugnant that they can only justify the minimum sentences that were properly imposed upon him.

[27] The trial court therefore did not err when it found that there were no substantial and compelling circumstances justifying a deviation from the prescribed minimum sentence nor do the sentences that were imposed upon the appellant leave me with a profound sense of shock or seem to me to be disturbingly inappropriate.

Order

[28] The appeal must accordingly fail. The sentences imposed on counts 1, 2 and 3 need to be clarified, as previously discussed. To avoid any future uncertainty, it is probably wise to set out the corrected sentence in full. I would accordingly propose the following order:

1. The appeal against the sentences imposed upon the appellant on 24 June 2021 is dismissed, save to the extent set out in paragraph 2 of this order.

2. The sentence imposed on the appellant is corrected to read as follows:

(a) 'On each of counts 1, 2 and 3, the appellant is sentenced to life imprisonment in terms of the provisions of section 51(1) read with part 1 of schedule 2 of Act 105 of 1997;

(b) On count four, the appellant is sentenced to 15 years' imprisonment in terms of the provisions of section 51(2)*(a)* read with part 2 of schedule 2 of Act 105 of 1997; and

(c) In terms of the provisions of section 280(2) of the Criminal Procedure Act 51 of 1977, the sentences imposed on counts 2, 3 and 4 shall run concurrently with the sentence of life imprisonment imposed on count 1.'

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HADEBE AJ

I agree and it is so ordered:

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MOSSOP J

APPEARANCES

Counsel for the appellant	:	Ms Anastasiou-Krause
Instructed by	:	Legal Aid South Africa Pietermaritzburg
Counsel for the respondent	:	Mr D Naidoo
Instructed by		Directorate of Public Prosecutions Durban