IN THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION (MIDDELBURG LOCAL SEAT)

CASE NO: A30/2022

RC CASE ESH 135/2017

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED

DATE: 28/04/2023

SIGNATURE:

In the matter between:

B[...] L[...] N[...] **APPELLANT**

And

THE STATE **RESPONDENT**

JUDGMENT

LANGA J:

Introduction

[1] This is an appeal against the sentence only. The accused Mr B[...] L[...] N[...] was convicted of rape which was committed under circumstances falling within the purview of section 51 (1) of the Criminal Law Amendment Act 105 of 1997 ("The CLAA"). According to the charge, the provisions of section 51(1) of the CLAA are applicable in this case because the victim was a person under the age of 16 when

she was raped. The appellant was legally represented right through the trial and he denied that he ever had any sexual intercourse with the complainant. After the appellant pleaded not guilty to the two counts, he was eventually found guilty on both counts and sentenced to life imprisonment in respect of both counts after the court *a quo* found that there were no substantial and compelling circumstances justifying a lesser sentence.

Concise Facts

[2] It is common cause that the complainant/victim who was born on 06 August 2002 according to her birth certificate, was 15-years old at the time of the rapes. It is further not disputed that she is also the appellant's biological daughter. She testified that the appellant raped her on two separate occasions. The first she was at home when her mother was away and her father told her he wanted to do something to her. He had sexual intercourse with her and she bled from her vagina. He thereafter threatened to kill her if she told anyone or her mother. The complainant did not tell anyone because she had been threatened.

[3] The second rape she said happened when her father found her doing her washing and her mother was not home. Her father, the appellant then forced himself on her. He caused her to bend down and while in that position he lowered his pants, pulled her panties down and inserted his penis into her vagina without her consent. He was interrupted by people talking outside and left her and went to the bed and pretended to be sleeping. On her arrival her mother found her crying and could not get anything out of her. She went to the appellant and confronted him. She checked him and found that his penis was erect and wet and asked him if he raped the complainant which he denied. The matter was eventually reported to the police and the complainant was given medical attention.

[4] The appellant denied the allegations and even suggested that the mother to the complainant forced her to testify against him. The court *a quo* ultimately, and correctly so, rejected his defence of base denial and convicted him of rape read with the provisions of the section 51 (1) CLAA. The appellant was subsequently sentenced to life imprisonment on the rapes. The appellant now appeals only against the sentence. The appellant is not appealing the convictions which in my view

appear to be based on sound and solid evidence. Consequently, what this court has to deal with is the sentence of life imprisonment imposed in terms of the CLAA.

Grounds of appeal

[5] In this appeal the appellant essentially contended that the court *a quo* erred in imposing a term of life imprisonment. He contended that this sentence is inappropriate and disproportionate to the offence committed and the mitigating factors accepted by court. The appellant contended that the sentence therefore ought to be set aside by this court as the court erred by over emphasising the seriousness of the offence, the interest of society amongst others. It was essentially argued that the court ignored his personal circumstances and legally erred in finding that there were no substantial and compelling circumstances as envisaged in section 51 (3) of the CLAA.

[6] The personal circumstances recorded were that the appellant is 37 years of age, has a minor children aged 17, 7 and 5 and had a good job when he was arrested and was therefore the bread winner.

Analysis

[7] It is trite that as an Appeal Court, this court can only exercise its powers to interfere with the sentence only if it appears that there was an irregularity and that a failure of justice has in fact resulted because of this irregularity (See: Section 304 (2) Criminal Procedure Act 51 of 1977). In *S v Kgosimore* 1999 (2) SACR 238 SCA the following was stated regarding the approach of a Court of appeal on sentence:

> *"It is trite law that sentence is a matter for the discretion of the court burdened with the task of imposing the sentence. Various tests have been formulated as to when a court of appeal may interfere. These include, whether the reasoning of the trial court is vitiated by misdirection or whether the sentence imposed can be said to be startlingly inappropriate or to induce a sense of shock or whether there is a striking disparity between the sentence imposed and the sentence the court of appeal would have imposed. All these formulations, however, are aimed at determining the same thing: viz. whether there was a proper and reasonable exercise of the discretion bestowed upon the court imposing*

sentence. In the ultimate analysis this is the true enquiry. (Cf S v Pieters 1987 (3) SA 717 (A) at 727 G – I). Either the discretion was properly and reasonable exercised or it was not. If it was, a court of appeal has no power to interfere; if it was not, it is free to do so".

[8] This court is mindful that a court of appeal is not at liberty to depart from the trial court's findings of fact and credibility, unless they are vitiated by irregularity, or unless an examination of the record reveals that those findings are patently wrong. The following passage by the learned Ponnan JA in *S v Monyane and others* 2008 (1) SACR 543 (SCA) at paragraph [15] is relevant;

> "This court's powers to interfere on appeal with the findings of fact of a trial court are limited. ... In the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong (*S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 645e – f)."

[9] It is accordingly settled law that the powers of a court of appeal to interfere with the findings of a trial court findings are strictly limited. If the appeal court is satisfied that there has been no misdirection on the facts, it ought to accept that the trial court's evaluation of the evidence is correct. A court of appeal will interfere if it is convinced that the evaluation is wrong. *S v Bailey* 2007 (2) SACR 1 (C). It is therefore only in exceptional cases that an appeal court will be entitled to interfere with a trial court's findings. (See also *S v Francis*1991 (1) SACR 198 (A) at 204*b* - *e*; *S v Hadebe and Others*1997 (2) SACR 641 (SCA) at 645*e* - *f*.).

[10] Section 51(1) read with Part 1(a) of Schedule 2 of the CLAA prescribes a minimum sentence of life imprisonment in the circumstances where the victim of rape is a minor, that is a person under the age of 16 years. In terms of section 51(3)(a) a Court may, however, deviate from the imposition of the prescribed minimum sentence if it finds that there are substantial and compelling circumstances justifying imposition of a lesser sentence than that which is prescribed. In that event, the court shall enter those circumstances on the record of the proceedings and thereupon impose such a lesser sentence it deems fit.

[11] The Supreme Court of Appeal in *S v Malgas* 2001(1) SACR 469 (SCA) gave very useful guidance regarding the approach in dealing with the concept of 'substantial and compelling' circumstances. The guidelines enunciated in this judgment can be summarized as follows:

8.1 The point of departure is that the prescribed sentence must ordinarily be imposed;

8.2 The prescribed sentences are not to be departed from lightly and for flimsy reasons;

8.3 It is only if a court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence that a court may depart from the prescribed sentence;

8.4 In deciding whether substantial and compelling circumstances exist, the court is required to look at all the factors traditionally taken into account in determining the appropriate sentence;

8.5 If the court is of the opinion that to impose the prescribed sentence would be disproportionate to the crime, the criminal and the needs of society so that an injustice would be done by imposing that sentence, the court is entitled to impose a lesser sentence;

8.6 The determination whether there are substantial and compelling circumstances is a factual enquiry – (See *S v Kwanape* 2014(1) SACR 405(SCA) at 408);

8.7 Courts are not free to subvert the will of the Legislature by resorting to vague concepts and ill-founded hypothesis that appear to fit the particular sentencing officer's personal notion of fairness;

8.8 Substantial and compelling circumstances need not be exceptional – (See also *S v Sikhipha* 2006 (2) SACR 439 (SCA) para 16).

[12] A court it should therefore consider the totality of the evidence before it, including other relevant factors traditionally taken into account when sentencing. In that process the principles as set out in amongst others in *Malgas* referred to above must be factored in. In this matter the appellant's legal representative presented mainly the appellant's personal circumstances. As stated above, the appellant's legal representative in essence argued that the fact that he is a 37-year-old breadwinner and has minor children constitute substantial and compelling circumstances justifying deviation from the imposition of the prescribed minimum sentence.

[13] Contrary to the appellant's contentions, it is clear from the judgment that in the determination of sentence, the court *a quo* duly considered the personal circumstances of the appellant, including the fact that he is a bread winner and is 37 years of age. The court, however, also correctly took into account the seriousness of the offence, the interest of the society and well as the interest of the victim. *S v Zinn* 1969(2) SA 537. The court *a quo* also considered the fact that the appellant had previous convictions involving violence and was also in custody for breaching his parole.

[14] However, most importantly, the court also took into account the fact that the victim is the appellant's biological daughter who should have been protected by him. The court correctly found the appellant's conduct reprehensible. It needs to be mentioned that children and women must be protected against this type of behaviour. The appellant's conduct is indeed reprehensible and sickening. It is incomprehensible how a father can even conceive of having sexual intercourse with her own daughter. This is *contra naturam* and the worst that can come out a man and father. To suggest that the court over emphasised the fact that the appellant raped his own daughter is an anomaly in itself. There is no doubt that the sternest possible sentence is called for in such circumstances.

[15] In *S v Rabie* 1975 (4) SA 855 (A) at 857 D – E the court stated the following:
"In any appeal against sentence, whether imposed by a magistrate or a Judge, the

court hearing the appeal –

(a) should be guided by the principle that punishment is pre-eminently a matter for the discretion of the trial court and;

(b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been 'judicially and properly exercised'.

The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate".

[16] In *S v Malgas, supra,* the Court stated the following in applying a broadened scope for the interference:

"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 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". It must be emphasized that in the latter situation the appellate court is not at large in the sense in which it is at large in the former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned".

[17] Having due regard to the aforementioned principles, it is clear that the Court of Appeal generally has a limited scope to interfere with the discretion of the trial court. The Court of Appeal is, however, still empowered to interfere with the trial Court's sentence where for example the discretion was not judiciously exercised or in the event the trial court erred in respect of the finding as to whether substantial and compelling circumstances are present. This is so even in the absence of material

misdirection or a failure of the exercise of discretion. See *S v Tafeni* 2016 (2) SACR 720 at 723.

[18] In the light of the above, our view is that the court ***a quo's*** approach to sentencing cannot be criticized. It clearly took into account all the factors relevant to sentencing. Its conclusion that there are no substantial and compelling circumstances in this case is based on solid grounds. Even if cumulatively considered, the weight of the appellant's personal and other mitigating factors does not by any means constitute substantial and compelling circumstances as envisaged by the CLAA. Furthermore, this is a good example of a case in which the personal circumstances of the offender should recede into the background in the case of serious crimes once it becomes clear that the crime is deserving of a substantial period of imprisonment. See *S v Vilakazi* 2009 (1) SACR 552 (SCA). There is no doubt in our mind that in this case a substantial period of imprisonment is justified. The court *a quo* therefore correctly did not find it justifiable to deviate from the imposition of the prescribed sentence of life imprisonment in these circumstances.

Conclusion

[19] We are accordingly satisfied that the sentence imposed *a quo* was correctly arrived at and that there was no irregularity and/or misdirection in the sentencing as contended by the appellant. There are consequently no grounds based on which this court is entitled to interfere with the sentence imposed by the trial court. In the premise the appeal on sentence stands to be dismissed.

Order

[20] In the result the following order is made:

1. The appeal in respect of the sentence is dismissed;

2. The sentence of life imprisonment is hereby confirmed.

MBG LANGA

JUDGE OF THE HIGH COURT

I agree, and it is so ordered.

MANKGE MT

JUDGE OF THE HIGH COURT

Appearances:

For the Appellant: Mr MC Mavasa, Legal Aid South Africa, Mbombela

For the Respondent: Advocate TBE Molefe, DPP's Office, Middelburg.

This judgment was handed down electronically by circulation to the parties' legal representatives by email. at 14h00. The date and time for hand-down is deemed to be 14h00 on 28 April 2023.