



**“IN THE HIGH COURT OF SOUTH AFRICA”
NORTH WEST DIVISION, MAHIKENG**

CASE NO. CA 12/2013

In the matter between:

DICHABA MOHUMI

APPELLANT

and

THE STATE

RESPONDENT

GURA J AND GUTTA J.

CRIMINAL APPEAL

GUTTA J.

A. INTRODUCTION

- [1] The appellant was convicted in the Regional Court held at Lehurutshe, on 02 February 2008 on one count of rape of a female aged [.....] years old, J. S., and sentenced to life imprisonment.

- [2] This appeal is on sentence only.
- [3] The appellant applied for the reinstatement of the appeal and for condonation for the late filing of the amended notice of appeal.
- [4] The application is not opposed and this Court is of the view that the appellant has provided a reasonable explanation for the delay and for reinstatement of the appeal.

B. GROUND OF APPEAL

- [5] The appellant submitted the following:

- “1.1 The sentence of life imprisonment is excessively long and induces a sense of shock;
- 1.2 The court a quo misdirected itself by finding that there were no substantial and compelling circumstances in favor of the appellant warranting departure from prescribed minimum sentence of life;
- 1.3 The court failed to adequately take into account the personal circumstances of the appellant and further erred in not applying mercy upon the appellant; and
- 1.4 This was not the worst category of rape.”

C. THE FACTS

- [6] The complainant, who was [...] years old at the time of the rape, testified that the appellant and one Gaobotse used to visit her aunt at her home and would sleep over. On a certain day, the appellant came

to the complainant's home in the company of Gaobotse. They, together with the complainant and other members of the family, watched television and Gaoboste went to the adjacent house to sleep. Later, the appellant sent the complainant to wake Gaobotse up as he wanted money from him. The appellant followed the complainant to the room in which Gaobotse slept. He grabbed her, undressed her of her undergarment and threatened to kill her if she reported this to her parents or relatives. He pushed her down onto the bed and raped her. She also testified that the appellant raped her on another occasion in the same house.

D. SENTENCE

- [7] It is trite that the imposition of a sentence is a matter for the discretion of the Court tasked with imposing same. A court of appeal will generally only interfere with the sentence imposed by a trial court in circumstances where the reasoning of the trial court is vitiated by misdirection or where the sentence imposed is startlingly inappropriate and induces a sense of shock or where there is a striking disparity between the sentence imposed, which a court of appeal would impose. See *S v Kgosi* 1999 (2) SACR 238 (SCA) at 241G–H, where the Court held that the true enquiry is:

“... whether there was a proper and reasonable exercise of the discretion bestowed upon the court imposing sentence. . . . Either the discretion was properly and reasonably 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.”

See also *S v Coetzee* **2010 (1) SACR 176 (SCA)**; *S v Matlala* **2003 (1) SACR 80 (SCA)**; *S v Shank & Others* **2008 (1) SACR 1 (CC)** at paragraph 72.

- [8] The Court, in sentencing the accused, must consider the triad, which consists of the crime, the offender and the interests of society. See *S v Zinn* **1969 (2) SA 536 (AD)**. Although the trial court generally enjoys a wide and unfettered discretion when imposing a sentence, this discretion is curtailed where minimum sentences apply.
- [9] The appellant was found guilty of rape under section 51(1) of the Criminal Law Amendment Act 105 of 1997 ("the Act"), where the minimum sentence of life imprisonment was applicable. The question arises whether there were substantial and compelling circumstances present to justify a deviation from the minimum sentence.
- [10] According to Navsa JA, the case of *S v Malgas* **2001 (1) SA 1222 (SCA)** is not only a good starting point but the principles stated therein are enduring and uncomplicated when considering whether there are substantial and compelling circumstances. See *Director of Public Prosecutions KwaZulu-Natal v Ngcobo & Others* **2009 (2) SACR 361 (SCA)**.
- [11] The Supreme Court of Appeal ("the SCA") in *S v Malgas supra* at **1235F–1236C, paragraph 25**, in determining the manner in which the question whether substantial and compelling circumstances exist, held that:

"All factors traditionally taken into account in sentencing continues to play a role, none is excluded at the outset from consideration in the sentencing process. The ultimate impact of

all the circumstances relevant to the sentencing must be measured against the composite yardstick substantial and compelling and must be such as cumulatively justify a departure from the standardized response that the legislature has ordained."

And **at 1236C – F, paragraph 25:**

"If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society so that an injustice would be done by imposing that sentence, there is a duty on the accused or the defence to produce evidence in order to convince the court that circumstances exist which justify the imposition of a lesser sentence."

[12] The Court in *S v Malgas supra* **at paragraph 9**, dealt with circumstances that should not be automatically regarded as substantial and compelling circumstances, held that:

"The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances."

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

[13] The appellant's personal circumstances and mitigating factors are as follows:

13.1 the appellant is a [...] years old man;

13.2 he has one child aged [...] years and five siblings;

13.3 he was self-employed at his parent's cattle kraal.

[14] The factors in aggravation of sentence are the following:

14.1 the complainant was threatened with murder if she reported the incident;

14.2 the complainant was [...] years old;

14.3 the appellant is not a first offender, but has a previous conviction of assault with intent to do grievous bodily harm, committed on 14 August 2003. This offence has an element of violence and is relevant;

14.4 the appellant impregnated the complainant and she gave birth to a child when she was [.....] years old.

[15] Counsel for the appellant, Mr Nkhahle, submitted that the mitigating factors, cumulatively considered, constitute compelling and substantial circumstances to warrant a deviation from the minimum sentence of life imprisonment.

[16] He referred the Court to the Full Bench decision of this Court of ***Abraham Khwane v The State (CAF 14/2014) (19 September 2014)***, where the appellant was convicted of two counts of rape of two adult females

and sentenced to life imprisonment on both counts, and there were several aggravating factors, including that the complainants were stabbed and that one complainant became pregnant and suffered a miscarriage. The Full Bench set aside the sentence and substituted it with 20 years imprisonment on counts 1 and 2, running concurrently.

- [17] He further submitted that in *casu*, the complainant fell pregnant as a result of the rape and the Court *a quo* did not attach any weight to the appellant's responsibility for the child.

- [18] Counsel for the respondent, Ms Maila, submitted that this Court should dismiss the appeal on sentence, when considering that the complainant was 12 years old and impregnated by the appellant and that the complainant is deprived of her childhood.

- [19] In ***Rammoko v Director of Public Prosecutions* 2003 (1) SACR 200 (SCA)** the Court acknowledged that in rape matters there are bound to be differences in degree of seriousness and that the differences should receive recognition when considering an appropriate sentence.

- [20] There is no gradation between ten years imprisonment ordinarily prescribed for rape, and life imprisonment prescribed if any one of eight aggravating features present. This situation poses a real risk of incongruous and disproportionate sentences being imposed. It is incumbent upon the court to assess whether the prescribed sentence is indeed proportionate to the particular offence. See ***S v Vilakazi* 2012 (6) SA 353 (SCA)**.

[21] In *S v Vilakazi supra*, the appellant was convicted in a Regional Court of the rape of his 15 years old stepdaughter and sentenced to life imprisonment. The Court **at 203C–D, paragraph [14]** held that:

“Courts should take care to elicit the necessary information to put them in a position to exercise their sentencing discretion properly. In rape cases, for instance, where a minor is the victim, more information on the mental effect of the rape on the victim should be required, perhaps in the form of calling for a report from a social worker. This was especially so in cases where it was clear that life imprisonment was being considered to be an appropriate sentence. Life imprisonment is the ultimate and most severe sentence that our courts may impose and therefore a sentencing court should be seen to have sufficient information before it to justify imposing that sentence.”

The Court **at 203J–204B, paragraph [16]** held that:

“Rape was a very serious offence, especially when perpetrated against a minor. It deserved severe punishment, but the circumstances under which it took place were relevant in the consideration of an appropriate sentence. There was no doubt that there was a public outcry to stop the scourge of rape. In the circumstances of the present case, however, a sentence of life imprisonment would be disproportionate to the crime. There were therefore substantial and compelling circumstances justifying a lesser sentence than the one imposed.”

[22] In *S v Vilakazi supra*, the Court, **at 374C–375D, paragraphs [55]–[57]** took, *inter alia*, the following circumstances into consideration when it altered the sentence of life imprisonment with a sentence of 15 years:

22.1 that there had been no extraneous violence, or threat, and no physical injury other than that inherent in the offence;

22.2 the appellant minimised the risk of pregnancy and transmission of disease by using a condom;

22.3 there was very little upon which to measure the emotional impact on the complainant. The emotional distress and damage that accompanied rape might be extensive even if it was not manifested overtly. This was all the more so in the case of young girls. Even though the district surgeon had observed no signs of stress, it must be accepted that no woman, least of all a child, would be left unscathed by sexual, and that in *casu* the complainant must indeed have been traumatised. However, the evidence revealed nothing more specific than that.

[23] In an unreported decision of *S v Mokoena* **2013 JDR 0635 (GNP)**, a 10 year old was raped by a 24 years old man. The complainant was on her way to school when the appellant hit her twice with his clenched fist on her face, close to her ear, took her clothes off, let her lie on her school bag and raped her, using a condom. The appellant was sentenced to life imprisonment. The Appeal Court altered the sentence of life imprisonment to 20 years and held that the circumstances of the rape are less aggravating when compared to those in *S v Mahomotsa* **2002 (2) SACR 435 (SCA)**; *S v Nkomo* **2007 (2) SACR 198 (SCA)**; and *S v Vilakazi supra*. In the latter two cases, life imprisonment was imposed for the rapes of girls under the age of 16 years. In both cases, the SCA replaced life imprisonment with sentences of 12 and 16 years imprisonment, respectively.

[24] Section 51(3)(aA)(ii) of the Act provides that an apparent lack of physical injury to a complainant shall not be regarded as substantial and compelling circumstances justifying a lesser sentence than the prescribed minimum.

[25] In the case of *S v SMM* 2013 (2) SACR 292 (SCA) at paragraph [17], the appellant, a 47 years old man, was convicted of the rape of his 13 years old niece and sentenced to life imprisonment. As regards the sentence, the SCA at 297f–298d, paragraph [14], remarked that:

“Our country was facing a crisis of epidemic proportions in respect of rape, particularly of young children. The rape statistics induced a sense of shock and disbelief. The concomitant violence in many rape incidents engendered resentment, anger and outrage. Although government had introduced various programmes to stem the tide, the sexual abuse of particularly women and children continued unabated. There was consequently increasing pressure on the courts to impose harsher sentences primarily, as far as the public was concerned, to exact retribution and to deter further criminal conduct. It was trite that retribution was but one of the objectives of sentencing and that in certain cases it played a more prominent role than the other sentencing objectives. One could not however only sentence to satisfy public demand for revenge: the other sentencing objectives, including rehabilitation, could never be discarded altogether in order to attain a balanced and effective sentence.”

[26] The Court in *S v SMM supra* at 302b–g, paragraph [26], held further that:

“A literal interpretation of section 51(3)(aA)(ii) of the Act would render it unconstitutional, since it would require Judges to ignore factors relevant to sentencing crimes of rape, which could lead to the imposition of unjust sentences. The proper interpretation of the provision however did not preclude a court sentencing for

rape to take into consideration that a rape victim had not suffered serious or permanent physical injuries, in order to arrive at a just and proportionate sentence. It was settled law that such factors needed to be considered cumulatively, and not individually."

The Court found that a sentence of 15 years imprisonment would meet the objectives of sentencing and would fit the crime, the criminal and the needs of society. See also *S v Maswanganyi* **2014 (1) SACR 622 (GP)**, where the Court referred to *S v SMM supra*, and held that the lack of physical injury will, however, still be relevant and taken into account when the existence of substantial and compelling circumstances is considered.

- [27] In a case arising from this Division of *Baatega v S* **(CA 22/2009) (28 June 2013)**, a sentence of life imprisonment for the rape of a minor aged 11 years, was set aside and substituted with 20 years imprisonment. The Court held that:

"This is not one of the worst cases of rape where the complainant was repeatedly raped by the appellant and where violence was inflicted on the complainant that could cause her a serious harm. This is not a case where life imprisonment was an appropriate sentence as there are different considerations that need to be applied before a minimum sentence could be imposed."

- [28] The complainant in *casu* sustained no serious injuries other than the rape, and although the complainant suffered trauma as a result of the rape, there is no evidence that any permanent psychological harm had been suffered. A further consideration is that the appellant showed remorse, according to the probation officer's report. The Court *a quo* also failed to

consider whether the appellant, a [.....] years old man, may be rehabilitated.

[29] The abovementioned factors, taken together with the appellant's personal circumstances, viewed cumulatively, constitute substantial and compelling circumstances and accordingly justify a departure from the minimum sentence of life imprisonment. The sentence of life imprisonment is shockingly severe and excessive, having regard to the aforesaid facts. The Court can accordingly interfere and impose an appropriate sentence that will fit the offender, the crime and society.

[30] Taking in consideration the seriousness of the crime and its prevalence, the personal circumstances of the appellant, the aggravating circumstances, the interests of society in protecting young girls, the elements of deterrence and retribution, I am of the view that a long term of imprisonment is justified in the circumstances.

E. ORDER

[31] Accordingly, I grant the following order:

- a) The appeal on sentence is upheld.
- b) The sentence of life imprisonment is set aside and substituted with the following:

"The Accused is sentenced to 20 years imprisonment."

- c) The sentence is antedated to 02 February 2009.

N. GUTTA
JUDGE OF THE HIGH COURT

I agree

SAMKELO GURA
JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF HEARING	: 17 OCTOBER 2014
DATE OF JUDGMENT	: 06 NOVEMBER 2014
COUNSEL FOR APPELLANT	: ADV R.J. NKHAHLE
COUNSEL FOR RESPONDENT	: ADV MAILA
ATTORNEYS FOR APPELLANT	: MAFIKENG JUSTICE CENTRE
ATTORNEYS FOR RESPONDENT	: THE DIRECTOR OF PUBLIC PROSECUTIONS