IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

CASE NO: CA22/2022

Reportable: **NO**

Circulate to Judges: **NO**

Circulate to Magistrates: **NO**

Circulate to Regional Magistrates: **NO**

In the matter between:-

G[...] D[…] Appellant

and

THE STATE Respondent

Coram: Mfenyana J *et* Ramolefe AJ

Delivered: This judgment was handed down electronically by circulation to the parties' representatives *via* email. The date for hand-down is deemed to be **17 December 2024.**

ORDER

1) The appeal against sentence is dismissed.

JUDGMENT

Mfenyana J

Introduction

[1] This is an appeal against the sentence of life imprisonment imposed upon the appellant on a count of rape. The appellant was convicted by the Regional Court in Taung, on a charge of housebreaking with intent to rape and rape in contravention of section 3 of the Criminal Law (Sexual Offences and related matters) amendment Act 32 of 2007, and rape, read with sections 1, 55, 56(1), 57, 58,59,60 and 61 of Act 32 of 2007, further read with the provisions of section 51 and Schedule 2 of the Criminal Law Amendment Act (as amended)[1] (count 1) and attempted murder (count 2).

[2] He was sentenced to life imprisonment in respect of count 1, and 5 years in respect of count 2. He now appeals against the sentence of life imprisonment imposed in respect of count 1. No appeal lies against the conviction.

[3] At the request of the parties, this matter was decided on the papers, both parties having filed heads of argument.

[4] Although in the heads of argument filed on behalf of the appellant, it is stated that the appellant was convicted following his plea of guilty, the record indicates that the appellant pleaded not guilty to both charges.

---

1 Act 105 of 1997.

He provided a plea explanation in terms of section 115 of the Criminal Procedure Act (CPA)[2].

[5] In terms of section 309(1)(a) of the CPA the appellant has an automatic right of appeal occasioned by his sentence of life imprisonment.

[6] In the notice of appeal, the appellant avers that that the sentence of life imprisonment is shockingly inappropriate as to induce a sense of shock. No other grounds of appeal are advanced.

[7] The appeal is opposed by the respondent who avers that the court *a quo* properly considered the totality of evidence. On that basis the respondent contends that the court *a quo* correctly accepted the evidence of the state witnesses including the findings contained in the J88. The respondent further avers that the trial court properly considered the totality of the evidence before it and committed no misdirection. Thus, there is no basis for this Court to interfere with the factual and credibility findings made by the trial court.

[8] In respect of sentence, the respondent contends that as the trial court, found that there were no substantial and compelling circumstances for it to deviate from the prescribed minimum sentence of life imprisonment, the sentence imposed is not disturbingly inappropriate, or out of proportion to the gravity of the offence committed by the appellant. It is further the respondent's submission that the sentence is not vitiated by a misdirection of such a nature that it can be said that the trial court failed to exercise its discretion reasonably.

[9] At the commencement of the proceedings, the court *a quo* warned the accused that in the event of his conviction in terms of section 51(1)[3] the prescribed minimum sentence of life imprisonment would apply, unless

---

2 Act 51 of 1977 (as amended).
3 Record p4, para 23-26.

there are substantial and compelling circumstances for it to deviate therefrom.

[10] In considering a sentence imposed by a trial court, the powers of the appeal court are circumscribed. The principles applicable in such circumstances are trite and have been stated in various decisions of the Constitutional Court and the Supreme Court of Appeal (SCA).

[11] In *S v Kgosimore*[4] the SCA stated the following with regard to the powers of the appeal court:

> "It is trite 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. … 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."

[12] In *Bogaards v S*[5] the Constitutional Court stated in clear terms that "sentencing is within the discretion of the trial court", and that an appellate court's power can only be exercised "where there is an irregularity that results in a failure of justice".

---

4 1999(2) SACR 238 (SCA).

5 (CCT 120/11) [2012] ZACC 23 2012 (12) BCLR 1261 (CC); 2013 (1) SACR 1 (CC) (28 September 2012).

[13] It follows from the above that in order to determine whether or not a trial court failed to bring its sentencing discretion to bear in the circumstances of a specific matter, and whether the sentence so imposed is shockingly out of kilter with the gravity of the offence, the court should consider the triad of factors pronounced in *S v Zinn*[6]. These comprise the nature of the offence and the seriousness thereof, the personal circumstances of the accused, and the interests of society. Even at appeal stage it is also imperative that the court bears in mind the main purposes of punishment, being deterrence, prevention reformation and retribution.[7]

[14] It is common cause that the appellant was convicted and sentenced for rape perpetuated against a 61-year-old woman. The facts of the matter according to the complainant are that the appellant, who is related to her, broke into her house and kicked the bedroom door where she was sleeping. He had a small axe and a knife. He tore the complainant's clothes with the knife he was carrying. He thereafter inserted his fingers and later his penis into her vagina. At first the complainant could not identify who it was, and only realized that it was the appellant when he pushed her outside. When the appellant tried to pull out his penis, the complainant grabbed it and shook it, which apparently infuriated the appellant that he hacked the complainant with the axe (tomahawk) on both hands and breaking her left hand and striking her on the head. She also lost her teeth in the process. The appellant thereafter tried to flee and the complainant grabbed him, causing him to fall down. It is at stage that the complainant screamed for help and called her brother. The appellant was arrested and the complainant taken to hospital where she was treated for the injuries she sustained.

[15] The appellant proffered no explanation for his actions. His version is that he was so drunk that he does not remember any of the details

---

6 1969 (2) SA 537 (A).

7 See in this regard: *S v Rabie* 1975 (4) SA 855 (A).

provided by the complainant, including breaking into the complainant's house and raping her. The complainant however denies that the appellant was drunk. All that the complainant remembers is giving his mother a cellphone when the police were on their way to arrest him. He also does not remember hacking the complainant.

[16] As Jones J noted in *S v Mqikela*[8], "there are features that aggravate this crime to the point that, (in our opinion), it properly belongs among the most serious category of rape cases." The complainant in the present case detailed how the appellant forced himself into her. She gave a grueling account of the scuffle that ensued between herself and the appellant, who was known to her, as they are related. From the moment the appellant tampered with the door and kicked it open, tearing her clothes with a knife, raping her, hacking her with an axe, until she managed to break free from him. All this, in our view, makes the crimes committed by the appellant all the more repulsive.

[17] In *S v Vilakazi*[9] the court held that the crime of rape is 'an invasion of the most private and intimate zone of the victim, and strikes at the core of her personhood and dignity'. The fact that the complainant was found naked by his brother and members of the community, is indicative of the extent to which her dignity was violated by the appellant.

[18] In *Director of Public Prosecutions, KwaZulu-Natal Pietermaritzburg v Ndlovu*[10] the Supreme Court of Appeal (SCA) pointed out that:

> "Rape is an utterly despicable, selfish, deplorable, heinous and horrendous crime. It gains nothing for the perpetrator, save perhaps fleeting gratification, but inflicts lasting emotional trauma and, often, physical scars on the victim." Women in this

8 2010(2) SACR 589.
9 [2008] 4 All SA 396 (SCA); 2009(1) SACR 552(SCA).
10 (881/2021) [2024] ZASCA 23 (14 March 2024)

country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, … and to enjoy the peace and tranquility of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives."

[19] The cumulative effect and the unanimous findings in all these authorities is that rape is a deplorable crime. It cannot therefore avail the appellant to aver that the sentence of life imprisonment imposed by the trial court induces a sense of shock. The question is whether in imposing the such sentence, the trial committed a misdirection of such a nature that it can be said that a failure of justice has occurred. In our view, not.

[20] Moreover, the horrific manner in which the appellant exerted himself on the complainant, throughout the ordeal, which carried on unabated for some time, all the while the appellant unrelenting in his attack on the complainant. When the complainant managed to avoid further sexual violation from the appellant, she was physically attacked by the appellant, causing her several injuries to various parts of her body including her face, head, and hands. Her life was under threat.

[21] In *S v Matyityi*[11] the SCA borrowing from *Malgas*[12] cautioned that it still is 'no longer business as usual' when courts are called upon to deal with the crime pandemic that engulfs our country. The SCA noted that there is often a willingness on the part of sentencing courts to deviate from the prescribed minimum sentences for the flimsiest of reasons. The court went further to state that courts have a duty to implement those sentences despite any personal doubts or aversion about the efficacy of the policy. In the circumstances of the present case the Legislature has ordained a sentence of life imprisonment where *inter alia*, the rape. The fact that the rape was committed against an older

11 2011(1) SACR 40 (SCA).
12 2001(1) SACR 469 (SCA).

person as contemplated in the Older Persons Act[13] constitutes an aggravating circumstance for sentencing purposes.

[22] On every interpretation, the appellant's conduct is inexcusable and cannot be condoned. In our opinion there can be no misdirection attributable to the court *a quo* in this regard.

[23] Belatedly, in the heads of argument, it is argued on behalf of the appellant that the trial court did not forewarn him that life imprisonment may be imposed. This appears to be an afterthought. It is also not borne out by the notice of appeal or the record. Curiously, the appellant concedes that the "court *a quo* did warn the appellant of the applicable sentencing regime, but that the warning did not assist the appellant who had already stated that he did not understand the warning. The following extract from the record is instructive:

> *Court: Ja, right now the law says that I must if I, I find, find you guilty or convict you I must sentence you to life imprisonment.*
> *… Ja, 51(1). You see now unless you or there are circumstances that will cause me substantial and compelling circumstances that can cause or force this court to deviate from life and give you another sentence.*
> *Accused: I hear.*
> *Court: Thank you now we start with Count 1 how do you plead to it?*
> *Accused: Not guilty Your Worship.*
> *Accused pleads not guilty*
> *Court: Yes, count, Count 2 how do you plead to Count 2:*
> *Accused: No.*
> *Court: How do you plead that guilty or not guilty?*
> *Accused: I do not stand in the way of the court or to be against the law if Your Worship sees that I am guilty then I the court may*

[13] Act 13 of 2006.

convict me Your Worship because I, I am not learned, I do not know anything about law.

Court: Okay Mr Diraditsile you have a legal representative Mrs De Klerk who is going to assist you throughout the proceedings free of charge as you have indicated. Now at stage what I want to establish from you is on this allegations do you guilty or you plead not guilty simple as that.

Accused: Not guilty Your Worship.

Accused pleads not guilty.

…

Mrs De Klerk: As the court pleases, Your Worship. I confirm that the plea is according to my instructions Your Worship. Your Worship I also received the instructions to draft a plea explanation in terms of section 115 of the Criminal Procedure Act 51 of 1977 as amended. With the court permission I would like to read it in for the record.

Court: Yes, please read that into record.

…

[24] The appellant's plea explanation was read into the record. The essence of it was that the appellant does not remember the incident as he had been drinking and had a blackout. When he woke up, he was at the police station under arrest

[25] It is also worth reiterating that throughout the proceedings, the appellant was legally represented. This, notwithstanding, the court *a quo* in addition, enquired from the appellant. There can thus be no merit to the appellant's averments that the trial court failed to warn him of the consequences of being convicted of the offence with which he was charged.

Order

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

1. The appeal against sentence is dismissed.

_____

S MFENYANA
JUDGE OF THE HIGH COURT
NORTH WEST DIVISION, MAHIKENG

I agree.

_____

K D RAMOLEFE
ACTING JUDGE OF THE HIGH COURT
NORTH WEST DIVISION, MAHIKENG

APPEARANCES

For the appellant	:	O Madiba
Instructed by	:	Legal Aid South Africa
Tel	:	018 381 5096
Email	:	OrapelengM@legal-aid.co.za
For the respondent	:	I H Makhuvha
Instructed by	:	DPP, Mmabatho
Tel	:	018 381 9084
Email	:	hmakhuvha@npa.gov.za

Date reserved	:	19 June 2024
Date of judgment	:	17 December 2024