IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: ***NO***
(2) OF INTEREST TO OTHER JUDGES: ***NO***
(3) REVISED: ***Yes***

Date: ***25th October 2019*** Signature: _____

APPEAL CASE NO: A54/2019

COURT *A QUO* CASE NO: VSH481/11

DPP REF NO: 9/2/5/1-(2019/54)

DATE: 25th October 2019

In the matter between:

MAJOLA: MXOLISI ELIAS Appellant

- and -

THE STATE Respondent

JUDGMENT

Coertse AJ (Adams J concurring):

[1]. This is an appeal by the appellant against his conviction and sentence by Vosloorus Regional Court for the region of Gauteng. On 21 August 2013 the appellant, Mr Mxolisi Elias Majola, was found guilty of the crime of contravening the provisions of Section 3 read with sections 1, 56(1), 57, 58, 59, 60 and 61 of the Criminal Law Amendment Act (Sexual Offences and related matters), Act 32 of 2007 read with the provisions of sections 51 and Schedule 2 of the Criminal Law Amendment Act, Act 105 of 1997, as amended by Act 38 of 2008, and also read with section 261 (1) of Act 51 of 1977 as amended in that appellant raped the complainant, S M, when she was six (6) years old. The trial court warned the appellant at the start of his trial that the court was:

'… bound by the provisions of section 51 of the Criminal Law Amendment Act 105 of 1997, as amended by Act 38 of 2007, to sentence him to life imprisonment should I [the trial court] find him guilty … unless there are compelling and substantial circumstances warranting me [the trial court] to deviate from the prescribed minimum sentence.' [My insertions].

[2]. Appellant clearly and unequivocally indicated that he understood the warning from the trial court. He was sentenced to life imprisonment on the same date as his conviction and therefore has an automatic right of appeal. Appellant had legal representation throughout the trial in the regional court and at the court of appeal. Appellant as well as the Respondent filed Heads of Argument.

[3]. It is common cause that the complainant was raped on 4 November 2011. Appellant denies that he raped her. Appellant is of the view that the learned magistrate erred in finding him guilty of this heinous crime and also is of the view that, in light of the conviction, the trial court materially misdirected itself in respect of sentence. The court of appeal was urged to uphold the appeal against both the conviction and the sentence.

[4]. There are a fair number of other issues that are common cause between the case for the State and the appellant's case. The appellant was apprehended in the street very close to the scene where the alleged rape took place and he was taken to the Police Station where the above charges were laid against him. Shortly before he was apprehended, the witness for the State, Mr L Mokoena,

kicked out at the appellant and also threw a brick at him which struck him. The complainant was raped on the day in question at or near the place where appellant was apprehended.

[5]. The State led the evidence of five witnesses, inclusive of medical evidence as to the injuries the complainant suffered. The conclusion that can be drawn from the injuries is that the six-year old complainant was raped. The mother of the complainant gave evidence. Mr Mokoena encountered the appellant in the street with the complainant and he decided to follow them. Appellant took the complainant into an abandoned shelter, also referred to by Appellant as a vandalized house, and they were followed into this house by Mokoena; Mokoena heard complainant crying. He then saw the appellant in the available light under a table lying on top the complainant. Mokoena shouted at appellant who tried to flee the scene. Mokoena kicked appellant and also threw a brick at him. While appellant was fleeing the scene Mokoena saw that appellant had an erection as his pants were down. Eventually appellant was apprehended in the street and taken to the Police Station.

[6]. Another State witness, Mrs Rebecca Mngomezulu, testified that she also followed the Appellant while carrying the complainant. She saw how appellant took complainant into the vandalized house and she heard complainant crying; later she saw appellant fleeing from that vandalized house. She saw complainant exiting the place and she could hardly walk as she kept falling and she couldn't talk. Mrs Mngomezulu saw that complainant's panties had blood stains and she was bleeding from her vagina.

[7]. The thrust of the appellant's appeal against the conviction is that the trial court erroneously relied on the evidence of a single witness; it is trite that, in terms of section 208 of the Criminal Procedure Act 51 of 1977 as amended, a court of law may convict on the evidence of a single witness provided that the evidence is satisfactory in all material aspects. How is this applied in practice? The classic case is *R v Mokoena* 1932 OPD 79 at p80. This case has been a guide for our courts through the decades since 1932 and has found application in numerous cases over the years. The 1932 case dealt with the criminal

procedure act of that time; section 208 of the CPA is substantially the same. De Villiers JP delivered the judgment and he had this to say:

'Now the uncorroborated evidence of a single competent and credible witness is no doubt declared to be sufficient for a conviction by sec. 284 of Act 31 of 1917, but in my opinion that section should only be relied on where the evidence of the single witness is clear and satisfactory in every material respect. Thus the section ought not to be invoked where, for instance, the witness has an interest or bias adverse to the accused, where he has made a previous inconsistent statement, where he contradicts himself in the witness box, where he has been found guilty of an offence involving dishonesty, where he has not had proper opportunities for observation, etc, etc.'

[8]. The appellant testified in his own defence and did not lead any other evidence in rebuttal of the case against him. The witness Mokoena was the only eye witness to what occurred inside the vandalized house. He told the court clearly what he could see and what he could not see. Counsel for the appellant argued that the witness Mokoena couldn't see in the dark. Mokoena was emphatic that the rest of the building was dark but not around the table where appellant was laying on top of the complainant. If he wanted to exaggerate what he observed, he could easily have told the court in graphic detail what happened under the table; he did not. After making physical contact with the appellant and while appellant was fleeing the scene, he saw appellant had an erection. This part of the evidence of Mokoena is that of a single witness. The circumstantial evidence presented by the state corroborated the evidence of the witness Mokoena in every single respect.

[9]. The court in *Mokoena* (supra) dealt with the uncorroborated evidence of a single witness pertaining to identity of the accused fleeing a scene at night. In the instant case, the identity of the appellant was established before appellant took the complainant into that vandalized house. He was positively identified after he fled from the house into the street where he was apprehended.

[10]. The trial court evaluated the evidence and came to the conclusion that the case for the state was in essence cogent and satisfactorily in all material respects. The appellant's evidence was rejected. The trial court came to the

conclusion that the guilt of the appellant was proven beyond reasonable doubt and he was found guilty as charged.

[11]. We find that there were at least two eye witnesses who corroborated one another in material respects. Mokoena saw the appellant had an erection. He did not mislead the trial court about what he could or could not see and that has a ring of truth. Applying the guidelines in *Mokoena,* we are of the view that the evidence of Mokoena is satisfactory in all material respects and that it is corroborated by the other state witnesses. Consequently, we find ourselves in agreement with the learned trial magistrate that the guilt of the appellant was proven beyond reasonable doubt.

[12]. As regards sentence, the court of appeal had to consider whether the trial court misdirected itself in sentencing the appellant. The Supreme Court of Appeal (the SCA) in *S v Malgas* 2001 (1) SACR 469 alluded to the test the appeal court has to apply before it can interfere with sentence. The SCA set out the principle thus:

'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.'

[13]. If the trial court materially misdirected itself in respect of sentence then the court of appeal can interfere; if there is no misdirection then it cannot interfere.

[14]. The trial court was then confronted with the prospect of sentencing the appellant to life imprisonment unless satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence. In *Malgas* (supra) the SCA investigated the import and applicability of what would constitute 'substantial and compelling' circumstances when an accused is found guilty of *inter alia* a crime such as in this case.

[15]. The trial court properly considered his personal circumstances as well as his previous convictions. The appellant was 28 years at the time of sentencing, single, no children and that he is not a sophisticated person in that he only went

to school until standard 2. Counsel for the appellant also disclosed that he has three previous convictions. Counsel for the State disclosed appellant has convictions of indecent assault and assault with the intent to cause grievous bodily harm and attempted rape which are acts of a sexual nature. Counsel for the appellant disclosed the particulars of his previous convictions as follows:

'The appellant has (3) three previous convictions, two of which are related to this offence; he is therefore not a first offender.'

[16]. The trial court found no substantial and compelling circumstances to deviate from the minimum sentence. We are of the view that these previous convictions relating to sexual crimes should be seen as aggravating circumstances. We found that the trial court did not misdirect itself in respect of sentencing the appellant. In light of this finding, the court of appeal cannot interfere with the sentence of the trial court.

[17]. At the start of the trial, appellant was warned of the possibility of a life sentence being imposed in the event of him being found guilty of the crime he was charged with. This possibility then arose. The circumstances and the facts of the case are such that renders it necessary to impose the maximum sentence '… unless substantial and compelling circumstances justify a lesser sentence'. (*Malgas* at para 38). The trial court had to consider whether there exist any compelling and substantial circumstances, which would have justified a deviation from the minimum sentence of direct imprisonment for life. The SCA in *Malgas* set out guidelines in respect of what would constitute these circumstances. An p 29 the SCA held that:

'Section 51 has limited but not eliminated the courts' discretion in imposing sentence in respect of offences referred to in Part 1 of Schedule 2 (or imprisonment for other specified periods for offences listed in other parts of Schedule 2). … 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. … The specified sentences are not to be departed from lightly and for flimsy reasons.'

[18]. Counsel for the appellant submitted in his Heads of Argument that the appellant is not a first offender. As regards the sentence, we are satisfied that the appellant did not advance any compelling and substantial circumstances warranting the trial court to deviate from passing the minimum sentence. The trial court found that the aggravating circumstances far outweigh the mitigating factors. We agree. The appellant's previous convictions pertaining to crimes of a sexual nature weigh heavily against him. This, in our judgment, is aggravating in the extreme and the aggravating circumstances truly outweigh the mitigating factors. Taking all of these factors into account, we cannot but conclude that the trial court did not misdirect itself in connection with the imposition of a life sentence on the appellant. Consequently, the appellant's appeal against his sentence should also be dismissed.

[19]. It follows that the appeal against both conviction and sentence must fail.

Order

Accordingly, the following order is made:-

1. The appeal by the appellant, Mxolisi Elias Majola, against his conviction be and is hereby dismissed.

2. The appellant's appeal against his sentence be and is hereby dismissed.

C J COERTSE
Acting Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg

I agree,

L R ADAMS
Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg

HEARD ON:	8th October 2019
JUDGMENT DATE:	24th October 2019
FOR THE APPELLANT:	Adv Leoto
INSTRUCTED BY:	Johannesburg Justice Centre
FOR THE RESPONDENT:	Adv Peck
INSTRUCTED BY:	The Office of the Director of Public Prosecutions, Gauteng Local Division, Johannesburg