

**REPUBLIC OF SOUTH AFRICA**  
**IN THE HIGH COURT OF SOUTH AFRICA**  
**GAUTENG DIVISION, PRETORIA**

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

**CASE NO: A137/2018**

In the matter between:

**MOSIKARE: PINKY JOHN**

**Appellant**

and

**THE STATE**

**Respondent**

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**JUDGMENT**

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**MOKOSE J**

- [1] The appellant was granted leave on petition to appeal against the sentence only of 25 **years** on a charge and conviction of rape of a child of 7 years. The appellant had been represented during the trial proceedings.
- [2] The evidence was that the complainant, K[....] S[....], a girl of 7 years, asked the appellant for R1,50. The appellant then lured her behind the toilets on the promise of the money. He ordered her to kiss him and when she refused, he put his hand over her mouth to prevent her from alerting anyone. He then inserted his fingers into her vagina and told her not to tell anyone about the

incident. When the appellant let her go, the complainant went home and told her mother about the encounter. She was later taken to hospital for a medical examination.

- [3] The appellant appeals against the sentence imposed by the Magistrate on the grounds that the sentence was excessive and inappropriate and that the Magistrate had misdirected himself when imposing the sentence by failing to exercise his discretionary power to impose a lesser sentence in circumstances where the minimum sentence is applicable and thus failed to find substantial and compelling circumstances in sentencing the appellant.
- [4] It is trite law that sentence is pre--eminently at the discretion of the trial court. The court of appeal may interfere with the sentencing discretion of the trial court if such discretion had not been judicially exercised. The test which has been enunciated in numerous cases is whether the sentence imposed by the trial court is shockingly inappropriate or was vitiated by misdirection. The trial court considers for the purposes of sentence, the following:
- (i) The seriousness of the case;
  - (ii) The personal circumstances of the Appellant;
  - (iii) The interests of society.

**S v Zinn 1969 (2) SA 537 (A)**

- [5] The provisions of Section 51(1) of Act 105 read with Schedule 2 of the Criminal Law Amendment Act 51 of 1977 were explained to the Appellant prior to him pleading to the charges. The section states that an offender shall be sentenced to imprisonment as per the minimum sentence unless there are substantial and compelling circumstances to warrant a deviation from the prescribed minimum sentence. The specified sentences are not to be departed from for flimsy reasons and must be respected at all times.

**S v Matyityi 2011 (1) SACR 40 (SCA) at 53 E-F**

- [6] There is no definition of what constitutes substantial and compelling circumstances. The court must consider all the facts of the case *in* determining whether compelling and substantial circumstances exist. The overall guiding principle is that the sentence must befit the crime.
- [7] In mitigation of sentence, the appellant placed on record that he was 47 years old at the time of sentence, was single but had a minor child of 14 years. He further placed on record that he had only completed Grade 3 and was employed as a general labourer earning the sum of R1 200,00 at Vaal Reefs.
- [8] Factors which aggravate sentence can be divided into those relating to the crime, the offender and the interests of society. Factors which aggravate sentence include:
- (i) the seriousness of the crime;
  - (ii) the after-effects of the crime;
  - (iii) the planning or pre-meditation of the crime; and
  - (iv) the problem types of crime.
- [9] Factors which a court would take into consideration in sentencing pertaining to the offender would include:
- (i) previous convictions;
  - (ii) the motive:
  - (iii) the lack of remorse: and
  - (iv) the abuse of trust.
- [10] Factors a court would take into consideration in sentencing relating to society would include:
- (i) vulnerable victims;
  - (ii) attacks on the maintenance of law; and
  - (iii) the prevalence of the crime.

- [11] Whilst the legal representatives of the accused make submissions to the court that all personal circumstances of the appellant be considered, none of those circumstances carry sufficient weight to make a substantial difference to the sentence that is ordained. The age of the offender and the fact that he is a first time offender are often brought to the court's attention as factors to be taken into consideration. Often when the appellant reaches an advanced age which is usually 60 years and older, it may be regarded as a mitigating factor.<sup>1</sup>
- [12] In aggravation of sentence, the court considered the seriousness of the crime as also the fact that the appellant had abused the trust relationship with the complainant.
- [13] To arrive at an equitable sentence this court is enjoined to weigh the personal circumstances of the accused against the aggravating factors, in particular, the interests of the society, the prevalence of the crime, and its nature and seriousness.
- [14] After submissions had been made by the respective legal representatives, the court requested the parties to make further written submissions pertaining to the sentence as it became evident in argument that the sentence by the court a *quo* was not in line with the sentence in terms of the provisions of Section 51(1) of Act 105 read with Part 1 of Schedule 2 of the Criminal law Amendment Act 105 of 1997.
- [15] The appellant's further submissions merely stated what had been stated previously that the court should take into consideration of sentence his personal circumstances that he had 'led a clean life and that he was fairly old' thus constituting compelling and substantial factors justifying a deviation from the prescribed minimum sentence of life imprisonment. The appellant merely furnished the court with similar case law in which the court had deviated from the minimum sentence.
- [16] No further submissions were received from the State Attorney despite the court having requested both counsel for the appellant and counsel for the respondent to make further submissions.

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<sup>1</sup> S v Heller 1971(2) SA 29 (A) at SSC-D

- [17] It is noted that the Regional Magistrate in the court *a quo* was of the view that there were substantial and compelling circumstances in that the appellant had 'led a clean life' and that he was fairly old which he found justified a deviation from the prescribed minimum sentence of life imprisonment. But as stated above, these circumstances need to be weighed with other factors which would aggravate the crime and those which relate to society. The crime committed by the appellant was serious. He abused the trust of the complainant who knew him well and who was a vulnerable victim. All these factors must be taken into account by the court in ascertaining whether they are aggravating and thus to be taken into account in deciding whether to depart from the minimum sentence.
- [18] Given the seriousness of the crime as well as the mitigating and aggravating circumstances which were taken into consideration by the Regional Magistrate in the court *a quo*, I am of the opinion that the Magistrate erred in deviating from the minimum sentence. There were no substantial and compelling circumstances to sentence the Appellant to a lesser sentence than that prescribed by the provisions of Section 51(1) of Act 105 read with Part 1 of Schedule 2 of the Criminal Law Amendment Act 51 of 1977. I am of the view that the Magistrate's sentencing discretion was not properly **exercised**.
- [19] In the premises, the following order is made:
- (i) The appeal against sentence is accordingly dismissed.
  - (ii) The sentence of the court *a quo* is set aside in its entirety and is substituted as follows:
    - (a) The appellant is sentenced to life imprisonment;
    - (b) The appellant is declared unfit to possess a firearm in terms of Section 103 of Act 60 of 2000; and
    - (c) The particulars of the appellant be entered into the National Register of Sexual Offenders in terms of Section 50(2) of Act 32 of 2007.

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MOKOSEJ  
Judge of the High Court  
of South Africa  
Gauteng Division,  
Pretoria

I agree and is so ordered

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THOBANE AJ  
Acting Judge of the High Court  
of South Africa Gauteng Division,  
Pretoria

For the Appellant:  
Adv JL Kgokane instructed by  
Pretoria Justice Centre  
Pretoria

For the State:  
Adv A Roos instructed by  
The Office of the Director of Public Prosecutions

Pretoria

Date of hearing: 21 May 2019

Date of judgement: 16 August 2019