IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No. A226/2020

In the matter between

I[…] H[…] M[…] **APPELLANT**

AND

STATE **RESPONDENT**

CORAM: BAM J and MUNZHELELE AJ

Date heard: 9 March 2021

Date delivered: 23 March 2021

JUDGMENT

Munzhelele AJ

Introduction

[1] The appellant, I[…] H[…] M[…] appeared at Benoni Regional Court before Regional Magistrate E.Schute, who found him guilty of raping a 10 years old child in contravention of section 3 of the Criminal Law (Sexual Offences and Related matters) Amendment Act.32 of 2007 read with the provisions of section 51 and schedule 2 of the Criminal Law Amendment Act 105 of 1997. Appellant was sentenced to life imprisonment. He appeals against this sentence only.

Background Facts

[2] The facts appear from the statement in terms of section 112(2) of Criminal Procedure Act 51 of 1977 of the appellant. On the 15th of October 2017 the appellant met the complainant along the road walking alone to the shops at Lindelani. The appellant joined in to walk with the complainant. Appellant was moderately under the influence of alcohol but could still be able to distinguish the right from the wrong. They walked until they were next to his shack. Then appellant invited the complainant to his shack. While complainant still shocked and confused by such invitation from the appellant, he then dragged her inside the shack. While she was inside, appellant raped her.

Issues

[3] Attorney Masete argued on behalf of the appellant that the sentence was shocking and inappropriate. She further argued that the court *a quo* misdirected itself by not finding that there were substantial and compelling circumstances to deviate from life imprisonment sentence. Further that the cumulative effect of appellant's personal circumstances should have been regard as constituting substantial and compelling circumstances.

[4] She further argued that the appellant was not properly informed about the applicability of the minimum sentence as well as the gravity of the sentence which will be imposed when accused is found guilty of raping a child below the age of 16.

[5] She argued that this was not the most severe form of rape on a child because the complainant was not injured or infected by deceases and that she did not suffer any trauma.

[6] Advocate S Mahomed for the respondent argued that the appellant was informed of the applicability of the minimum sentence on the 17 October 2017 as per the record and had a legal representative as a result there was no infringement of the appellant's rights. Further that there were no substantial and compelling circumstances available instead the commission of this offence only

shows aggravated rape in that an unsuspecting child of 10 years old was pounced by an adult person of 33 years old and traumatised until she realised that she should even leave the comfort of her own home and migrated to another province to leave with her paternal relatives.

[7] He argues further that grading rape cases is a nefarious practices that countermands the very essence of the constitution and further infringe the dignity of the victim and is unbefitting of an institution that is the moral compass of the society.

Applicable law

[8] Section 51(1) of the Criminal Law Amendment Act 105 of 1997 1s applicable to this case and it provides that:
'Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part 1 of Schedule 2 to imprisonment for life.'

Part I of Schedule 2 provides that where the offence of rape in contravention of section 3 of the Sexual Offences and Related Matters Amendment Act 32/2007 was committed against the victim who is a person under the age of 16 and the perpetrator is convicted the sentence shall be life imprisonment.

[9] In S *v Malgas* 2001 (1) SACR 469 (SCA) at para8 Marais JA said:
'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. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate Court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. 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'. see S *v Rabie* 1975 (4) SA 855 (A) 857 para D-E.

Discussion

[10] Firstly, It has been argued that the cumulative effects of the appellant's personal circumstances should amount to substantial and compelling circumstances. In S*v Malgas* 2001 (1) SACR 469 (SCA) at C-D Marais JA said that:

'C. Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts.

D. The specified sentences are not to be departed from lightly and for flimsy reasons.

Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded.'

Jn S *v Matyily i* 2011 (1) SACR 40 (SCA) the court referred to the fact that such deviations must be based on convincing reasons.

[11] Personal circumstances of the appellant are that he is 33 years old, with no previous convictions. He is not married but has two children and the children stay with their mother. He maintains the children with the money that he earns from his odd jobs . He had passed grade 10. He has hearing problems. He was in custody awaiting trial for 9 months with no bail.

[12] In *S v Vilakazi* 2009 (1) SACR 552 (SCA) at para 58 Nugent JA said:

In cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment are in themselves largely immaterial to what that period should be, and those seem to be the kind of flimsy grounds that *Sv Malgas case* said should be avoided. But they are nonetheless relevant in another respect. A material consideration is whether the accused can be expected to offend again. While that can never be confidently predicted his or her circumstances might assist in making at least some assessment.

[13] *Jn* S*v Matyityi* 2011 (1) SACR 40 (SCA) at para 14 Ponnam said:

'Turning to the respondent's age: .....Thus, whilst someone under the age of I 8 years is to be regarded as naturally immature, the same does not hold true for an adult. In my view a person of 20 years or more must show by acceptable evidence that he was immature to such an extent that his immaturity can operate as a mitigating factor. At the age of 27 the respondent could hardly be described as a callow youth.'

[14] Considering the case of Malgas, Vilakazi and Matyityi above it is clear that the fact that one is 37 years , with two children, doing odd jobs as a first offender are regarded as flimsy reasons. We also regard the cumulative effects of the appellant's personal circumstances as not substantial and compelling circumstances that warrants a deviation from the minimum sentence imposed by the trail court. The trial court has correctly found that there were no substantial and compelling circumstances. Undue sympathy for the offender should be excluded. We have not found any misdirection regarding the sentence imposed to the appellant.

[15] Secondly, it has been argued that the life imprisonment sentence was shockingly inappropriate. We find that this sentence is not shocking taking into consideration that this type of offence attracts the sentence of life imprisonment if

the offender is found guilty in terms of section 51(1) of the Criminal Law Amendment Act 105 of 1997 read with Part I of Schedule 2 as stated above.
In this regard the trial court did not misdirect itself when imposing the life imprisonment because it is enacted by the parliament as it is. For the court to deviate there should have been found substantial and compelling circumstances . In *S v Malgas* 2001 (1) SACR 469 (SCA) at para 7-8 Marais JA

'The very fact that this amending legislation has been enacted indicates that Parliament was not content with that (continuers commission of schedule 2 offences) and that it was no longer to be 'business as usual' when sentencing for the commission of the specified crimes.
[8] In what respects was it no longer to be business as usual? First, a court was not to be given a clean slate on which to inscribe whatever sentence it thought fit. Instead , it was required to approach that question conscious of the fact that the legislature has ordained life imprisonment or the particular prescribed period of imprisonment as the sentence which should *ordinarily* be imposed for the commission of the listed crimes in the specified circumstances. In short, the Legislature aimed at ensuring a severe, standardised, and consistent response from the courts to the commission of such crimes.'

[16] So, therefore, having found no substantial and compelling circumstances existing which justifies the imposition of a lesser sentence, it wiII no longer be business as usual the sentence prescribed shall be imposed. The sentence imposed is not shockingly inappropriate. The trail court did not misdirect herself in this regard.

[17] Thirdly, Section 51 (3)(a) provides that where a person is to be sentenced for rape, the fact that there are no apparent physical injury to the complainant shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence. Therefore there can never be a rape which is regarded as not the most severe form of rape on a child because the complainant was not injured or infected by deceases and that she did not suffer any trauma. In *S v Chapman* 1997 (3) SA 341 (SCA) @ 345 C-D Mohamed CJ said:

'Rape is regarded as a serious offence: "constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim."

"Women have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come to work and to enjoy the peace and tranquility of their homes without fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives"

"The courts are under a duty to send a clear message to the accused, to other potential rapists and to the community: We are determined to protect the equality, dignity and freedom of all women, and we shall show no mercy to those who seek to invade those rights."

[18] The appellant has been sentenced for life imprisonment as per the prescribed legislation which he was informed of as per the annexure "A" on the 17th October 2017 by Regional Magistrate Mrs Sathekge. Therefore the argument that the trial court did not appraise the appellant of the provisions of section 51 (1) of Act 105 /1997 is not correct as such the trial court did not misdirect herself in this regard.

[19] Lastly, the issue of being in custody pending the finalisation of the trial is of importance because the accused 's case should be finalised without delay. In the is case the accused knew that he did not have a defence to the offence committed as such he should have pleaded guilty from the onset. He was arrested on the 15 October 2017 and was brought to court on the 17 October 2017. He pleaded guilty on the 31 April 2018. This was a self-made delay. Therefore, the time spent in custody cannot be regarded as substantial and compelling circumstance. The trail court did not misdirect herself even on this issue.

[20] Therefore, the following order is made.

1. The appeal against sentence is dismissed.

M. Munzhelele.
Acting Judge of the High Court
Pretoria

I agree and it is ordered.

A. J Bam
Judge of the high court
Pretoria

Appearances:

For the applicants	:M.M.P Masete
Instructed by	:Pretoria Justice Centre
For the respondents	:S. Mohamed
Instructed by	:Director of Public Prosecution. Pretoria
Heard on the	:17 March 2021
Delivered on	:23 March 2021