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

CASE NO: A 180/2020
DPP REF. NO:SA 61/2020

In the matter between:

T[...] T[...] APPELLANT

and

THE STATE RESPONDENT

JUDGMENT

PHAHLANE, AJ

[1] The appellant was convicted for rape in terms of section 3 of Sexual Offences and Related Matters Act 32 of 2007, read with the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997 ("the Act"), and sentenced to life imprisonment by the Regional court, Benoni, on 05 August 2019.

[2] This section provides that a person who has been convicted of an offence referred to in Part I of Schedule 2 of the Act shall be sentenced to imprisonment for life unless there exist substantial and compelling circumstances justifying a lesser sentence. Part I of Schedule 2 in turn refers to rape as contemplated in s 3 of the Act where, inter alia, the victim is a person under the age of 16 years old.

[3] The trial court ordered that the appellant's particulars be registered in the Sexual Offenders Register and that his name be included in the National Child Protection Register. The appellant was legally represented during the proceedings in the court *a quo* and is now approaching this court for an appeal against conviction and sentence.

[4] It is trite law that a court of appeal will not temper with the trial court's decision regarding a conviction unless it finds that the trial court misdirected itself as regards its findings or the law. With regards to conviction, the appellant stated in his notice of appeal that his guilty plea which he entered on 23 November 2016 was erroneously entered and that the presiding officer ought to have amended the said plea to one of not guilty. To succeed on appeal, the appellant need to convince this court on adequate grounds that the trial court misdirected itself as regards its findings.

[5] In ***S v Hadebe and Others***[1] the Supreme Court of Appeal held that:

"In the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong".

[6] The factual background can briefly be summarised as follows:

On the 23 November 2016, the appellant, through his legal representative, pleaded guilty to the count of rape on the allegation that on 28 July 2016 and at or near Daveyton in the Regional Division of Gauteng, he unlawfully and intentionally committed an act of sexual penetration with the complainant Ms L[...] N[...], an 8-year-old girl by inserting his penis into her vagina, thereby having sexual intercourse with her without her consent. His statement in terms of section 112 (2) of the Criminal Procedure Act 51 of 1977 ("the CPA") was

[1] 1997 (2) SACR 641 (SCA) at 645e-f; See also: S v Pakane and Others 2008 (1) SACR 543

read into the record and handed in as Exhibit "A". The appellant was then convicted as charged on the same day, on the basis of his plea of guilty.

[7] The appellant stated as follows in Exhibit "A":

"...The facts contained in this my plea, are true and correct and within my own personal knowledge unless specifically indicated otherwise.
I know and understand the charge of rape of a minor against me. *I also understand that there is a minimum sentence of life imprisonment which the court will impose upon me....should there be no substantial and compelling circumstance which mitigates against this sentence.*
I am in my sound and sober senses. I freely, voluntarily, no threats, force to arrest, no promises having been employed against me by anyone whom soever to induce this plea, plead guilty to this charge.
On the 28 July 207 6 during the afternoon, I observed the complainant, well known to me as L[…] N[…] sitting outside her house in M adingwane street, Daveyton, waiting for her f ather to come home. I called her to my room which I rent from the complainant's father , which is Located at the same address at M adigwane street. After the complainant entered my room of the foresaid I undressed her, placed her on my bed, removed my trousers and inserted my penis into her vagina and had sexual intercourse with her. I used a condom. I was in all material times aware that the complainant was but 8 years old and could not even had she wanted to have consented to me thus sexually penetrating her. In any event I did not give the complainant any opportunity to consent to my actions described above as I force fully undressed her, put her up on my bed prior to sexually penetration her. I admit the contents of the J 88 and I further admit the injuries depicted thereon were as a result of my actions described above on 28 July 20 7 6 on the complainant. I was at all material times aware that my actions as above were wrong and against the Law..."

[8] The trial court havi ng satisfied itself as regards exhibit A, convicted the appellant, and the matter was remanded to obtain a pre-sentence report and

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(SCA) at para 15

victim impact report. Subsequent thereto on 11 June 2018, the appellant was remanded to be detained at Sterkfontein hospital in order to give effect to section 77 and 78 of the CPA. After the observation period at Sterkfontein hospital, the appellant was found to be fit to stand trial and that at the time of the alleged offence, he was able to appreciate the wrongfulness of his actions and act in accordance with such appreciation. The matter was remanded to 27 July 2018 for sentence and the report from Sterkfontein hospital was obtained on this day. The court was informed on 27 July 2018 that the appellant wished to change his plea. On 5 September 2018 the matter was remanded for judicare counsel to be appointed and for the appellant to amend his plea.

[9] On the 11th of June 2019, advocate Taunyane appeared on behalf of the appellant and the application to change the appellant's plea of guilty to that of not guilty was heard by the trial court. The appellant's statement was read into the record, and once again, he confirmed the correctness of his statement. The grounds for the application were mainly that that he was wrongly influenced by his mother who had negotiated with the family of the complainant to plead guilty so that the charge could be withdrawn against him. He further indicated that he did not commit the alleged offence of rape. It is noted in his affidavit that:

"[3] After I made several appearances in court, my mother informed me that she negotiated with the complainant that if I plead guilty, she will withdraw charges.

[4] Further that at the time I was legally represented by Legal aid lawyer and due to what my mother has told me, I elected to grab that opportunity with the hope that after entering a guilty plea, charges were going to be withdrawn against me.

[5] To my surprise, things did not happen as I hoped.

[6] I further wish to place it on record that for me to enter a guilty plea was as a result of what purported to be negotiations between my mother and the victim's grandmother

[7] I am still in demand that I did not commit the said offence and my plea of not guilty still stand.

[8] It is therefore my request to the honourable court to amend a guilty plea entered by me previously to the one of not guilty in terms of section 113 of Criminal Procedure

Act 57 of 7977 *as the said guilty plea was induced by a promise ie. withdrawal of the case".*

[10] The trial court found that the intention of the appellant to change his plea, was only brought to the court's attention 1 year and 8 months after the appellant was convicted. The following aspects were considered by the trial court regarding the application: (a) for 1 year and 8 months no mention was made that the appellant was influenced or promised that charges will be withdrawn should he plead guilty
(b) only after the appellant was found fit to stand trial was the court informed that the appellant wanted to change his plea (c) the appellant had previously alleged that he was in forced by his legal representative at the time, to plead guilty (d) apart from the fact that the appellant mentioned that he wanted to change his plea, he had also complained that he did not want to return to prison (d) in his statement pertaining to the amendment of his plea, the appellant did not raise any valid defence to the charge nor did he indicate that he had previously incorrectly admitted the allegations against him.

[11] Advocate Mariot on behalf of the respondent argued that the appeal should be dismissed because there are discrepancies pertaining to the reasons why the appellant wanted to change his plea. Relying on the case of ***Attorney -General Transvaal v Botha***[2] where the court referred to ***S v Britz***[3]***,*** counsel submitted that the appellant's explanation is improbable and beyond reasonable doubt false for the following reasons:

11.1 The appellant firstly stated that he wanted to change his first legal representative because he made him to plead guilty, and that is the reason why judicare counsel was appointed.

11.2 When the judicare counsel appeared before court, another reason was given to court in seeking to have an amendment of his plea, in that the appellant stated that he was wrongly influenced by his mother who had

[2] 1993 (2) SACR 587 (A) at 589 E.

negotiated with the family of the complainant, to plead guilty so that the charges could be withdrawn against him. The appellant indicated further that he did not commit the alleged offence of rape.

[12] The court in ***S v Britz*** *supra* stated that:

"The accused wishing to withdraw his plea of guilty must give a reasonable explanation as to why he had pleaded guilty and now wishes to change his plea. A reasonable explanation could be, for example, that the plea was induced by fear, fraud , duress, misunderstanding or mistake. If he fails to give an explanation the court would be entitled to hold him to his plea of guilty. If he does give an explanation, there is no onus on him to convince the court of the truth of his explanation. Even though is explanation be improbable the court is not entitled to refuse the application, unless it is satisfied not only that the explanation is improbable, but that beyond reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he should be allowed to withdraw his plea of guilty."

[13] Advocate Kgokane appearing for the appellant argued that the learned Magistrate misdirected himself in finding that the appellant had to provide substantive reasons for the plea of guilty to be changed to that of not guilty. He submitted that the conviction was not in accordance with justice and that the matter should be remitted to the trial court for reconsideration. Although advocate Kgokane submitted that the appellant's conduct was suspicious and raises a serious concern, he argued that the explanation advanced by the appellant that he was influenced by his mother to plead guilty, is a reasonable explanation which should have persuaded the trial court to change the appellant's plea of guilty to that of not guilty in terms of Section 113.

[14] For a presiding officer to record a plea of not guilty in terms of section 113, there must be the basis upon which to record a plea of not guilty. When a guilty

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[3] 1963 (I) SA 394 (T) at 398 H- 3998.

plea was tendered on 23 November 2016, the trial court followed the procedure as required by section 112(2) in order to satisfy itself that the appellant intended to plead guilty, and to safeguard against the possibility that the appellant had a valid defence, and the appellant confirmed the correctness of his statement as read out by his attorney, Ms Bhamjee.

[15] Advocate Mariot correctly argued that the appeal against conviction is void of merits. She submitted that the appeal should be dismissed for failure to give a reasonable explanation as to why the appellant had previously pleaded guilty and later wanted to change his plea.

[16] It is on record that after the appellant was convicted and had terminated the mandate of his counsel Ms Bamjee, he complained about the interpreter who had on a few occasions interpreted for him without any problems and stated that the interpreter does not speak the same Sotho language as his. On the day on which an application was to be made to change his plea, the appellant asked the court to refer him to Sterkfontein hospital and stated that he did not want to go back to Modderbee correctional centre. The reason according to him, was that he was not given food and was on medication. He also refused to take the oath, and his counsel at the time, advocate Thobejane, informed the court that he was struggling to draft an affidavit to proceed with the application to proceed with the appellant's application to change his plea, and that there was no progress in carrying out his mandate because the appellant was not cooperating with him.

[17] Although an accused person may change his or her plea at any time before sentence, in the circumstances of this matter in my view, the timing of the application in terms of section 113 and the reasons advanced, as well as the request by the appellant that he did not want to be committed to a correctional facility, is of grave concern as also submitted by advocate Kgokane that the appellant' s conduct which led to him wanting to change his plea was suspicious and raises a serious concern. It is clear from the appellant's

section 112 statement that he intended to plead guilty, and he was legally represented at the time. He understood the consequences of his plea of guilty and there is nothing in his statement which indicates that there was a material contradiction to what was intended, or a defence or an element of outside influence. Nevertheless, the learned magistrate correctly pointed out the need for a proper basis for the application for changing the plea. It is apparent that only in the face of the looming reality of imprisonment, did the appellant decide to change his plea.

[18] In my view, the appellant failed to give a reasonable explanation calling for the application of section 113 of the CPA. I therefore agree with the trial court's finding that the appellant's affidavit pertaining to the amendment of his plea does not pass the test which calls for the application of section 113 of the CPA.

[19] The appellant also stated in his notice of appeal, as a ground of appeal, that there was no DNA collected from the victim to match his own DNA. This ground in my view cannot stand because the appellant had in his section 112 statement stated that he used a condom and that he admits the contents of the J 88 as well as the injuries which he says, were as a result of his action.

[20] With regards to sentence, this court must also determine whether the sentence imposed on the appellant was justified . It is trite that sentencing remains pre- eminently within the discretion of the sentencing court. In dealing with the court's approach in appeals against sentence, Boshielo JA in ***Mokela v The State***[4] stated that:

"This salutary principle implies that the appeal court does not enjoy carte balance to interfere with sentence which have been properly imposed by a sentencing court".

[21] The appellant was warned of the provisions of section 51(1) of the Criminal

[4] 2012 (1) SACR 431 (SCA) at para 9

Law Amendment Act 105 of 1997. The offence for which he was convicted and sentenced for, carries a term of life imprisonment. To avoid this sentence, the appellant had to satisfy the trial court that substantial and compelling circumstances existed which justify the imposition of a lesser sentence than the prescribed minimum sentence of life imprisonment. The trial court did not find such circumstances.

[22] It was submitted that the trial court ought to have deviated from imposing the prescribed minimum sentence and considered the time spent by the appellant in custody awaiting finalization of his matter. Further that the court should have considered the appellant's age as he was 25 years old at the time of the commission of the offence. Advocate Kgokane stated in his heads of argument that the fact that the appellant pleaded guilty to the offence and saved the complainant from prolonged anguish and trauma of having to relive the ordeal by facing the appellant and testifying in court, meant that the appellant was acknowledging his guilt. He submitted that this indicates that the appellant is a proper candidate for rehabilitation. He further submitted that the court should take into consideration the fact that the complainant did not suffer serious physical injuries during the rape.

[23] It is the court's duty to consider all relevant factors in determining whether substantial and compelling circumstances are present. It is important for a sentencing court to properly evaluate and balance all the factors against the benchmark set by the legislature. There was no evidence placed before the trial court to justify the imposition of a lesser sentence than the prescribed minimum sentence of life imprisonment on the count of rape of the complainant who was 8 years old at the commission of the offence. The trial court considered all the personal circumstances of the appellant placed before court when it imposed sentence on the appellant. Having done that, the court was also mindful of the 'triad' factors pertaining to sentences as enunciated in ***S v Zinn***[5] namely: 'the crime, the offender and the interests of society.

[5] 1969 (2) SA 537 (A)

Furthermore, the court was mindful of the warning given in ***S v Malgas***[6] that the court should not deviate from imposing the prescribed sentence for flimsy reasons. As stated above, the appellant was convicted of the offence which falls under the purview of section 51(1) of Act 105 of 1997. With that in mind, it is important to heed to the purpose for which legislature was enacted, when it prescribed sentences for specific offences which falls under section 51(1) for which the appellant has been convicted and sentenced for. This section makes it clear that the prescribed sentence for a rape of a person under the age of 16 years is life imprisonment. The trial court held that no substantial and compelling circumstances exist, justifying a deviation from the prescribed minimum sentence.

[24] The fact that appellant pleaded guilty, cannot be interpreted as a sign that the appellant is a candidate for rehabilitation while there is nothing to support and substantiate this notion. By changing his plea and denying raping the complainant, in my view, shows that the appellant did not want to take responsibility for his action. The contention that the complainant did not suffer serious injuries cannot be supported. Section 51 (3) (a A) (ii) of Act 105 of 1997 makes it clear that lack of physical injury to the complainant shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence.

[25] The Supreme Court of Appeal in the case of ***The Director of Public Prosecutions, Grahamstown v Mantashe***[7] stated that:

"The reality is that South Africa has five times the global average in violence against women.[8] *There is mounting evidence that these disproportionally high levels of violence against women and children, has immeasurable and far-reaching effects on the health of our nation, and its economy.*[9] *Despite severe underreporting , there are 51 cases of child sexual victimisation per day. UNICEF research has found that*

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[6] 2001 (1) SACR 469 (SCA)
[7] (131/2019) [2020] ZASCA 05 (12 March 2020) at para 15
[8] N Sibanda-Moyo et al 'Violence Against Women in South Africa: A Country in Crisis' (2017) at 8
[9] BMJ Global Health C Hsiao et al 'Violence against children in South Africa: the cost of

over a third (35.4 %) of young people have been the victim of sexual violence at some point in their lives. What cannot be denied is that our country is facing a pandemic of sexual violence against women and children . Courts cannot ignore this fact. In these circumstances the only appropriate sentence is that which has been ordained by statute". (own emphasis)

[26] In considering the appropriate sentence to impose, the trial court considered the time spent by the appellant in custody awaiting finalisation of his matter. In my view, the period spent in custody pending finalization of a trial cannot on its own be regarded as constituting substantial and compelling circumstance. In addressing the issue of time spent in prison while awaiting trial, Lewis JA in *S v* ***Radebe***[10] stated that

"There should be no rule of thumb in respect of the calculation of the weight to be given to the period spent by an accused awaiting trial ... A mechanical formula to determine the extent to which the proposed sentence should be reduced, by reason of the period of detention prior to conviction, is unhelpful. The circumstances of an individual accused must be assessed in each case in determining the extent to which the sentence proposed should be reduced ...'
The period in detention pre-sentencing is but one of the factors that should be taken into account in determining whether the effective period of imprisonment to be imposed is justified: whether it is proportionate to the crime committed. Such an approach would take into account the conditions affecting the accused in detention and the reason for a prolonged period of detention. And accordingly, in determining *...* whether substantial and compelling circumstances warrant a lesser sentence than that prescribed by the Criminal Law Amendment Act 7 05 of *7997, ...* the test is not whether on its own that period of detention constitutes a substantial or compelling circumstance, but whether the effective sentence proposed is proportionate to the crime or crimes committed: whether the sentence in all the circumstances, including the period spent in detention prior to conviction and sentencing , is a just

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inaction to the society and the economy' (201 7).
[10] 2013 (2) SACR 165 (SCA) at para 16 (See also: S v Sehoko 2009 (2) SACR 573 (NCK) at para 22.

one".

[27] With regards to the submission that the appellant was 25 years old at the time of the commission of the offence, and that he did not have a father figure to guide him, the Supreme Court of Appeal in ***S v Matyityi***[11] held that neither youthfulness nor the accused's background and circumstance constitute substantial and compelling circumstances. This court stated that the courts are duty-bound to implement the sentences prescribed in terms of the Act and that ill-defined concepts such as relative youthfulness or other equally vague and ill- founded hypotheses that appear to fit the sentencing officer's personal notion of fairness' ought to be avoided.[12]

[28] I am of the view that the sentence imposed by the trial court cannot be regarded as shockingly inappropriate. The trial court considered the relevant principles pertaining to the imposition of a sentence. I have carefully considered the circumstances of this case and the submissions of the appellant's counsel and the respondent, and i can find no misdirection in the trial court's finding that there are no substantial and compelling circumstances justifying a deviation from the prescribed minimum sentence of life imprisonment.

[29] In ***S v Ro and Another***[13] the majority of the Supreme Court of Appeal held that:

"To elevate the personal circumstances of the accused above that of society in general and the victims in particular would not serve the well-established aims of sentencing, including deterrence and retribution".

[30] Having given proper and due consideration to all the circumstances, we are of the view that the trial court did not misdirect itself in convicting the

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[11] S v Matyityi 2011(1) SACR 40 (SCA) at para 23.
[12] See also S v Vilakazi 2009(1) SACR 552 (SCA).
[13] 2010 (2) SACR 248 (SCA)

appellant. Consequently, we agree with the trial court's finding that the appellant's plea of guilty and the conviction should stand. Furthermore, this court cannot fault the decision of the sentencing court nor can it be said that the sentence imposed was shocking or unjust. We are of the view that the trial court did not misdirect itself in imposing the prescribed sentence of life imprisonment, bearing in mind that the legislature has ordained life imprisonment as the sentence that should ordinarily and in the absence of weighty justification, be imposed for the offence committed by the appellant.

[31] In the circumstances, the following order is made:

The appeal against conviction and sentence is dismissed.

PD PHAHLANE
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree,

MJ TEFFO
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

For the Applicant	: ADV. JL KGOKANE
Instructed by	: PRETORIA JUSTICE CENTRE STEYN TOWERS, PRETORIUS STREET PRETORIA
For the Respondent	: ADV. MARIOT
Instructed by	: DIRECTOR OF PUBLICATIONS PRETORIA
Date of Hearing	: 18 February 2021
Date of Judgment	: 27 May 2021