IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: **A52/2021**

In the matter between: -

JONAS POGISO NKABINDE **APPELLANT**

And

THE STATE **RESPONDANT**

(1) REPORTABLE: ☒ / NO
(2) OF INTEREST TO OTHER JUDGES: ☒/NO
(3) REVISED.

31 | 08 | 2021
DATE

SIGNATURE

JUDGMENT

NONCEMBU AJ

INTRODUCTION

[1] The following presents a brief exposition of the facts in this matter. On the 6th of April 2017 SJ (the complainant) who was a six-year-old boy at the time, was playing soccer with his younger brother and his friends at the premises of a Rastafarian Church. After they had finished playing SJ and his brother went to a two roomed shack situated inside the church premises to ask for sugar aid. Inside the shack they met the appellant who played with them and read them a paper containing songs. His brother left and SJ remained behind alone with the appellant. The appellant took him to a bedroom inside the shack, where he removed his pants and underwear and had anal intercourse with him. He stopped when SJ told him that it was painful, and asking him to stop. SJ went home where he slept and on waking up he reported the incident to his mother, who in turn reported the matter to the police.

[2] The appellant was arrested and subsequently convicted of rape in contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act,[1] read with the provisions of section 51(1) and Schedule 2 of Part 1 of the Criminal Law Amendment Act[2] on the 29th of September 2020. The regional magistrate sitting at Springs found that there were no substantial and compelling circumstances warranting a deviation from the prescribed minimum sentence on the matter. He accordingly sentenced the appellant to life imprisonment on the 2nd of December 2020. The appellant is now appealing against the said sentence.

[1] Act 32 of 2007.
[2] Act 105 of 1997.

THE GROUNDS OF APPEAL

[3] The notice of appeal lists the following as grounds of appeal on the matter:

1.1 An effective term of life imprisonment is strikingly inappropriate in that it:
- Is out of proportion to the totality of the accepted facts in mitigation;
- In effect disregards the period of time in which the appellant spent in custody awaiting trial.

1.2 The learned presiding magistrate erred in not finding substantial and Compelling substances and thereby deviating from the prescribed minimum sentence of life imprisonment.

1.3 The learned presiding magistrate erred in not imposing a shorter term Of imprisonment, more particularly in view of the following factors:
- The age and personal circumstances of the appellant;
- The rehabilitation element;
- The mitigating factors in the facts found proven;
- The fact that the appellant spent more than 3 years and 6 months in custody awaiting trial.

1.4 The learned presiding magistrate further erred in over-emphasizing the The following factors:
- The seriousness of the offence;
- The interests of society;
- The prevalence of the offence;
- The deterrent effect of the sentence;
- The retributive element of the sentence.

[4] Although the appellant had pleaded not guilty to the charge of rape against him, he made a turn-around during his examination in chief and admitted to sexually penetrating the complainant. The record of proceedings reflects that he was referred to Sterkfontein Hospital in Krugersdorp for psychiatric evaluation in terms of Sections 77, 78 and 79 of the Criminal Procedure Act [3]. A report compiled by two (2) psychiatrists acting independently, dated 4 and 5 June 2019 indicates that the appellant was found to be able to appreciate the wrongfulness of his actions

[3] Act 51 of 1977.

and to act in accordance with such an appreciation at the time of commission of the current offence, and that he was fit to stand trial.[4]

[5] Counsel for the respondent is opposing the appeal, contending that there are no substantial and compelling circumstances justifying a deviation from the prescribed sentence of life imprisonment on the circumstances of this matter. He contends that even though not specifically mentioned, the regional magistrate considered all the personal circumstances of the appellant as well as the facts of the matter and concluded that life imprisonment was an appropriate sentence.

THE APPEAL

[6] The sentencing powers are pre-eminently within the judicial discretion of the trial court; the court of appeal should be careful not to erode such discretion. The court sitting on appeal will interfere if the sentencing court exercised its discretion unreasonably or in circumstances where the sentence is adversely disproportionate. [5]

[7] In *S v Pillay* [6] the court said the following regarding an appeal on sentence:

"as the essential inquiry in an appeal against sentence, however, is not whether the sentence is right or wrong, but whether the Court in imposing it exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence; it must be of such a nature, degree or seriousness that it shows, directly or inferentially, that the court did not exercise its discretion at all or exercised it improperly or unreasonably. Such a misdirection is usually and conveniently termed one that vitiates the Court's decision on sentence. That is obviously the kind of

[4] See Exhibit "AA" dated 6 June 2019, page 179 of the record.
[5] See S v Rabie 1975 (4) SA 855 (A) at 857 D-E; see also S v De Jager and Another 1965 (2) SA 616 (A).
[6] 1977 (4) SA 531 A at 535 E-F.

misdirection predicated in the last quoted *dictum* above: one that "the dictates of justice" clearly entitle the Appeal Court "to consider the sentence afresh."

[8] The personal circumstances of the appellant are contained in the report by the probation officer which was admitted by consent and marked as exhibit "H" in the trial proceedings [7]. Pertinent to the current proceedings are the following circumstances, which are also contained in the heads of argument by counsel for the appellant:

> The appellant was 37 years old at the time of sentence; he only met his mother when he was 12 years old; he grew without his father, whom he only met in his adult life; he was abused physically as a child; he was raised by his maternal grandmother who passed on when the appellant was about 2 years old after which he remained in the care of his maternal aunt with whom he shares a good relationship; he 'apparently' has four minor children for whom he could not provide an address to the social worker, he does not support the said children and nobody in his family knows about their existence; he dropped out of school when he was doing grade 10 because he was bullied; he is unemployed and used to do odd jobs to buy groceries before his arrest; he liked practicing the Rastafarian Rituals although he did not subscribe to the Rastafarian Religion; he used to smoke dagga before his arrest but he was not under influence of any substance at the time of commission of the current offence; he can be childish and enjoys playing with children; he has one previous conviction of compelled sexual assault and two previous convictions of sexual assault, which were committed on the 30 December 2018 and 28 July 2010 respectively [8]; he has committed other sexual offences involving children which were never reported to the police as the matters were resolved between the families concerned; he is reported to have tendencies of raping young boys; and he spent more than three (3) and a half years in custody whilst awaiting trial on this matter.

[9] The issue for determination before this court is whether the regional magistrate erred in finding that there were no substantial and compelling circumstances

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[7] Page 185 of the proceedings.

[8] See Exhibit "G", page 181 of the trial record.

justifying a deviation from the prescribed minimum sentence and in not imposing a lesser sentence than life imprisonment on the circumstances of the matter.

THE LAW AND ITS APPLICATION

[10] The legislature did not prescribe a closed list of what constitutes substantial and compelling circumstances. This in my view was done deliberately so as to ensure that judicial discretion in this regard is not completely eroded. The Supreme Court of Appeal in *S v Malgas* [9] made it quite clear that the minimum sentence provisions have limited, but not eliminated the discretion of the court.[10]The term 'substantial and compelling circumstances' has been described as being so elastic that it can accommodate even traditional mitigating circumstances and it involves a value judgment on the part of the sentencing court.[11]

[11] Counsel for the appellant argued that the regional magistrate erred in not taking into account the personal circumstances of the appellant which include the mitigating factors that he spent over 3 years in custody whilst awaiting trial; he has a cognitive disorder which was beyond the probation officer's area of expertise (acts childishly and likes to play with children); he made a turn-around during the trial and admitted to his guilt, which he repeated to the probation officer, thus showing that his moral fibre was not completely wiped out. Further, counsel argued that the regional magistrate overemphasized the seriousness of the offence and as such did not exercise his sentencing discretion properly.

[12] In exercising its appeal function in this regard, the appeal court is not only limited to those factors that were considered by the trial court on the question of the

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[9] 2001 (1) SACR 469 (SCA).
[10] Se also S v Dodo 2001 (2) SACR 594 CC.
[11] S v PB 2013 (2) SACR 533 (SCA) at para [21].

existence or not of substantial and compelling circumstances. In *S v GK*[12] Rogers J emphasized that on appeal, the court may take into account and examine not only those factors considered by the trial court, but all the circumstances bearing on the question, in order to determine the correctness of the trial court's finding *re* the absence or presence of substantial and compelling circumstances.

[13] It is indeed patent from the probation officer's report that the appellant had a very difficult childhood. He encountered emotional neglect and had no stable caregiving at a young age as he moved from one place to another. One can also glean from the record that there were some questions regarding his mental state, hence he was referred for mental evaluation which were later cleared per report referred to in paragraph 4 above. Counsel for the appellant contends that his personal circumstances were under-emphasized and that the court failed to apply the element of mercy in sentencing him.

[14] It is trite that in sentencing an offender a court has to take into account the triad as referred to in *S v Zinn*[13] which requires that a balance is maintained between competing interest; these being the personal circumstances of the offender, the seriousness of the offence committed and the interests of society. On the seriousness of the offence of rape, the following views expressed by the Supreme Court of appeal in the case of *S v MM*[14]are apposite:

> "...rape is undeniably a degrading, humiliating and brutal invasion of a person's most intimate, private space. The very act itself, even absent any accompanying violent assault inflicted by the perpetrator, is a violent and traumatic infringement of a person's

[12] 2013 (2) SACR 505 (WCC).
[13] 1969 (2) SA 537 at 540 G.
[14] 2013 (2) SACR 292 SCA para 17.

fundamental right to be free from all forms of violence and not to be treated in a cruel, inhumane or degrading way."

[15] This is even more so when the victim is a child, and hence the legislature elevated such offences to fall under schedule 2 of part one of the minimum sentence provisions which carry the penalty of life imprisonment. Although the complainant did not sustain any lasting physical injuries from the experience of being raped, the probation officer indicates in her report that he would have to leave with the emotional scars for the rest of his life. These can be very dangerous in that although physical scars may heal over time, emotional scars never really go away and may be triggered by some event and manifest themselves much later in one's life. The probation officer also notes in the report that because the rape of a boy is taboo in his community, the complainant is now forced to live with lies at such an early age in order to protect himself and his family. There is no telling what harm this might do to him later on in life.

[16] The rape, especially that of young children, is seen in a very serious light and has sadly become quite prevalent in our society. Mathopo AJ[15] had the following to say in this regard:

"This scourge [of violence against women and children] has reached alarming proportions in our country. Joint efforts by the courts, society and law enforcement agencies are required to curb this pandemic. This Court would be failing in its duty if it does not send out a clear and unequivocal pronouncement that the South African Judiciary is committed to developing and implementing sound and robust legal values of equality, human dignity and safety and security. One such way in which we can do this is to dispose of the misguided and misinformed view that rape is a crime purely about sex."

[17] Sexual violation against children evokes communities' indignation and often prompts them to resort to self-help to keep their children safe.[16] In the present

[15] *Tshabalala v S; Ntuli v S* (CCT323/18; CCT69/19) [2019] ZACC 48; 2020 (3) BCLR 307 (CC); 2020 (2) SACR 38 (CC); 2020 (5) SA 1 (CC) (11 December 2019).

[16] *AL v S* (A201/2019) [2020] ZAFSHC 88 (9 April 2020

matter this is manifest from the probation officer's report which indicates that the community does not want the appellant back in their community as they fear for the safety of their children. The report also indicates that the appellant has committed various other sexual violations against children, which were resolved between the family members without being reported to the police. This touches on the very core of the interests of society, which in this case concerns the protection of young children. Of cause one must be cautious of the fact that the object of sentencing is not to satisfy public opinion, but to serve the public interest.[17] In this instance this court, as the upper guardian of all children, is more concerned about their interests and their protection above everything else.

[18] Section 28 of the Constitution provides that the best interests of a child are of paramount importance in any matter that involves a child.[18] 'This is the single most important factor to be considered when balancing or weighing competing rights and interests concerning children. All competing rights must defer to the rights of children unless unjustifiable. Whilst children have a right to, inter alia, protection from maltreatment, neglect, abuse or degradation, there is a reciprocal duty to afford them such protection. Such duty falls not only on law enforcement agencies but also on right thinking people and, ultimately the court, which is the upper guardian of all children.'[19]

[19] The above dicta put the position of dealing with competing interests, and the paramountcy principle in dealing with matters involving children quite succinctly. No doubt the appellant had quite a difficult childhood, but that cannot detract from the fact that as an adult, one makes choices and has to live with the choices they make. The following are the current circumstances that this court has to take into account in determining whether or not the discretion of the trial court was exercised

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[17] S v Mhlakaza and Another 1997 (1) SACR 515 (SCA).

[18] Constitution of the Republic of South Africa, 2006.

[19] See *De Reuck v DPP WLD* 2003 (1) SACR 448 (WLD), referred to in *AL v S* (A201/2019) [2020] ZAFSHC 88 (9 April 2020).

judiciously. The appellant was 37 years old at the time of sentence, and therefore not one who could be referred to as a callow youth.[20]

[20] His counsel submitted that he has cognitive disorders and therefore should have been regarded as operating at the cognitive level of a child. There is no evidence however, medical or otherwise, to support this submission. On the contrary, the probation officer at page 8 of her report opines that the appellant's criminal behaviour was not mainly influenced by cognitive disorders. Referring to relevant literature in this regard, she explains that the predominant feature of cognitive disorders is the impairment of cognitive abilities such as memory, attention, perception and thinking. Features which were not displayed by the appellant during his interview with the probation officer, or when he was being evaluated by the two psychiatrist who acted independently of each other, or in court during his trial.

[21] What is common cause however, is that the appellant has previous convictions of sexual offences involving children for which he was sentenced to a term of imprisonment (2x 5 year sentences which were ordered to run concurrently). This sentence however did not deter him from committing further offences of a similar nature, nor did it have the rehabilitative effect one would have expected it to have on him. The unchallenged evidence of the probation officer shows that he has an inclination towards sexual tendencies against children. His aunt, with whom he is reported to have a good relationship, reported to the probation officer that she once caught the appellant trying to remove her daughter's underwear and she merely reprimanded him.

[22] I must commend the probation officer who compiled the report in the present matter. She did not just do a cut and paste job just to present a report to the court.

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[20] *S v Matyityi* 2011 (1) SACR 292 SCA.

She delved extensively into the relevant literature to try and understand and to explain to the court the condition of the appellant. Referring to some of the said literature, she states in her evaluation that the appellant shows certain personality traits and behavior patterns of people who molest children. The report also indicates that according to his family, the appellant's sexual offending tendencies were observed from a much younger age, at which stage he was merely reprimanded, and now his sexual offending behavior has developed gradually.

[23] From the above it is crystal clear that the appellant poses a serious danger to society, in particular, the children who are clearly the target group of his sexual offending tendencies. The appellant is not a youthful offender whose actions can be attributed to youthfulness; it can therefore not be argued that he is an ideal candidate for rehabilitation. His repetitive offending behaviour, even after having been sentenced by a court of law also renders him not an ideal candidate for rehabilitation. In addition to this, the probation officer stated in her report that even though he admitted to committing the offence in question, he kept on referring to himself in the third person when narrating the events of the incident, which shows that he is not taking full responsibility for his actions. This is usually a starting point for any effective rehabilitation of an individual. The argument therefore that the regional magistrate did not take into account the rehabilitative purpose of punishment when sentencing the appellant cannot be sustained.

[24] Taking into account all that has been stated above, I find that the seriousness of the offence committed and the interests of society, specifically the interests of children and their protection, far outweigh the personal circumstances of the appellant in this matter. In my view this is one matter where prevention and deterrence as purposes of punishment should be the key elements to be prioritized in sentencing an offender. The appellant clearly needs to be deterred and

prevented from committed further offences of a sexual nature against children, and the only way that this can be done is by removing him from society.

[25] The principle of emphasizing some elements of punishment whist under-emphasizing others was approved by the Supreme Court of Appeal in *S v Mhlakaza* [21] where it said that given the current levels of violence and serious crimes in this country, it seems proper that in sentencing such crimes the emphasis should be on retribution and deterrence, and that retribution might even be decisive. I therefore cannot find that the regional magistrate misdirected himself in under-emphasizing the element of rehabilitation in sentencing the appellant on the circumstances of this case.

[26] On the overall circumstances of this case, I cannot find that the regional magistrate did not exercise his discretion properly in considering the appropriate sentence in this matter. I cannot find that he erred or misdirected himself when he found that there were no substantial and compelling circumstances justifying a deviation from the prescribed sentence of life imprisonment. Counsel for the appellant argued that the regional magistrate did not take into account the period that the appellant spent in custody awaiting trial, and consider that as part of substantial and compelling circumstances justifying a deviation from the prescribed minimum sentence. I do not agree with this argument. The time spent in custody awaiting trial is but one of the factors to be taken into consideration, together with the other factors, in determining whether or not the prescribed sentence is a just sentence on the circumstances of the particular matter.

[27] On the circumstances of this matter as outlined in the preceding paragraphs, including the time spent in custody, I am satisfied that life imprisonment is a just

[21] 1997 (1) SACR 515 (SCA)

sentence as it is proportionate to the seriousness of the offence committed, the interest of society as well as the personal circumstance of the appellant. I find therefore that the sentence imposed is in accordance with the dictates of justice. This court therefore has no basis upon which to interfere with the sentence imposed by the trial court. In the premise the following order is made:

ORDER

The appeal against sentence is dismissed.

NONCEMBU AJ

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

I agree, it is so ordered.

MAKHOBA J

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Date of hearing: 28 July 2021.

Delivered: This Judgment was prepared and authored by the Judge whose name is reflected above, and is handed down electronically by circulation to the parties' legal representatives by email and uploading same to the electronic file of this matter on Caselines. The date for hand-down is deemed to be: 31 August 2021.

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