IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: AR119/20

In the matter between:

ZAKHELE GUMEDE **APPELLANT**

and

THE STATE **RESPONDENT**

The judgment was transmitted to the parties by electronic mail with the date of handing down of the judgment deemed to be 26 May 2021 at 12:30.

ORDER

On appeal from the Regional Court, Ngwelezane:

The appeal is dismissed.

JUDGMENT

Chetty J (Ploos van Amstel J concurring)

[1] The appellant was charged in the Regional Court, Ngwelezane with one count of rape in which it was alleged that on 23 January 2008 in the Thukwini Reserve, Sokhule, KwaZulu-Natal, the appellant unlawfully had sexual intercourse with the

complainant, to whom I will refer to by her initials ‘MTM’, without her consent and on more than one occasion.

[2] The charge against the appellant was framed in terms of s 51, Schedule 2, Part 1 of the Criminal Law Amendment Act 105 of 1997 (‘the Amendment Act’) and he was alerted to the applicability of life imprisonment in the event of his conviction and the absence of substantial and compelling circumstances. The appellant pleaded not guilty to the charge. He was legally represented at his trial. After considering the evidence before it, and in particular the DNA evidence linking the appellant to the offence, the trial court convicted the appellant as charged.

[3] On 19 September 2018, the appellant was sentenced to life imprisonment as the court a quo found no substantial and compelling circumstances to deviate from the prescribed sentence of life for rape on multiple occasions. The matter comes before this court as an automatic appeal in terms of s 309 of the Criminal Procedure Act 51 of 1977 (‘the Act’).

[4] The facts of the matter are briefly that the complainant, a 32-year-old female with four children, testified that on 23 January 2018 at about 20h00 hours, she was walking home when she was accosted by a male person who grabbed her from behind, wrestling her to the ground. He pulled her into nearby bushes, threatened her with a knife. She was made to lie down, after which he undressed and forcibly had sexual intercourse with her. She had an amount of R200 concealed in her bra, which the assailant took. During the course of the assault, the complainant’s eyes were covered and she was instructed not to look at her attacker.

[5] After the initial sexual assault on the complainant, her assailant again had forcible sexual intercourse with the, after which he drove to an area and instructed her to wash herself. Unable to find an area where she could bath, the assailant then bent her over and penetrated her from behind. Eventually, the assailant led the complainant to a river where he instructed her to wash herself, and in particular the

area around her vagina. She eventually fled from her assailant and managed to seek assistance at a nearby Homestead.

[6] On seeking refuge away from her assailant, she realised that members of the community had already realised that she was missing and had sent out people to look for her. Her brother arrived at the house where she had been waiting, and she reported to him that she had been raped by a person not known to her. She was taken to the police and thereafter to the Ngwelezane Hospital where she was examined by a doctor.

[7] The complainant's brother, Mr PS Mtshali, testified that on the night of the incident, he was performing his duties as a security officer when he received news of his sister's disappearance. After receiving a report as to what had transpired, he proceeded to the spot that she had referred to as the place where she was sexually assaulted. Mr Mtshali noticed that there were prints on the sand in the area, which appeared to have been made by a pair of sandals made from the rubber used in vehicle tyres. These are referred to in IsiZulu as "izimbadada". The prints of the sandals were followed, eventually leading to a homestead where the appellant was found sleeping inside together with another male. After searching the room, Mr Mtshali found a pair of sandals under the bed of the occupant as well as an amount of R200 which was concealed in the sofa. The police were then contacted and the occupant of the house was arrested. The State further led the evidence of a doctor who attended to the complainant and from whom he took a forensic specimen, which was eventually sent for DNA analysis and was returned with a positive match to the appellant. The court a quo was satisfied that the chain of evidence in respect of the obtaining of the DNA sample and the conveyance thereof to the forensic lab were intact.

[8] The appellant testified in his defence and was unable to offer any explanation as to how he could be linked by DNA evidence to the rape of the complainant. He conceded that he wore a pair of sandals as well as long black trousers, which was

consistent with what the complainant described her assailant as having worn. The appellant's version was simply that he was playing snooker at a tavern up until 22h00 on the night in question, after which he retreated to his room where he went to sleep until he was awoken by a person for a pair of sandals in his room.

[9] The court a quo considered the totality of the evidence, concluding, correctly in my view, that the version of the appellant was improbable and ought to be rejected as false. As stated earlier, the State relied on DNA evidence linking the appellant to the crime. In the circumstances, the trial court found that the State had proven its case beyond reasonable doubt. Albeit that there has been no appeal noted against the conviction, I am satisfied that the conviction is in order. Mr Marimuthu, who appeared on behalf of the appellant, conceded that the appellant was properly convicted.

[10] It is accepted by counsel for the appellant that the court a quo was enjoined to impose life imprisonment in the absence of substantial and compelling circumstances. It is well established that in the absence of a misdirection, an appeal court is not at large to interfere with a sentence imposed by the trial court.

The issue before us is not whether the sentence imposed is excessive, but rather whether there has been a material misdirection.[1] Rape is a most serious and vile crime. (See: *S v Chapman* 1997 (2) SACR 3 (SCA)). The appellant was a first offender, 28 years of age, unmarried, without children and having attained only grade 2 at school. At the time of being sentenced, he had already been in custody for little more than eight months. Bail was refused to the appellant.

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1 See *Hewitt v S* [2016] ZASCA 100; 2017 (1) SACR 309 (SCA) para 8:

'It is a trite principle of our law that the imposition of sentence is the prerogative of the trial court. An appellate court may not interfere with this discretion merely because it would have imposed a different sentence. In other words, it is not enough to conclude that its own choice of penalty would have been *an* appropriate penalty. Something more is required; it must conclude that its own choice of penalty is the appropriate penalty and that the penalty chosen by the trial court is not. Thus, the appellate court must be satisfied that the trial court committed a misdirection of such a nature, degree and seriousness that shows that it did not exercise its sentencing discretion at all or exercised it improperly or unreasonably when imposing it. So, interference is justified only where there exists a "striking" or "startling" or "disturbing" disparity between the trial court's sentence and that which the appellate court would have imposed. And in such instances the trial court's discretion is regarded as having been unreasonably exercised.'

[11] In *S v Rabie* 1975 (4) SA 855 (A) at 857 Holmes JA stated the principle thus:

'1. In every appeal against sentence, whether imposed by a magistrate or a Judge, the court hearing the appeal –

(a) should be guided by the principle that punishment is "pre-eminently a matter for the discretion of the trial court";
and
(b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been "judicially and properly exercised".
2. The test under *(b)* is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate.'

[12] In considering the applicability of life imprisonment as a result of the rape of the complainant on three occasions, the court also took into account that the appellant had attempted to avoid detection by instructing the complainant to wash herself. It was perhaps the quick reaction of community members as well as the appellant's brother in tracing the prints made by a pair of sandals worn by the assailant, that led him to the house of the appellant, resulting in his eventual apprehension. It was contended on behalf of the appellant that this was not the most serious of rapes and that the complainant did not sustain any serious physical injury. As the court a quo pointed out with reference to s 51(3)(aA)(ii) of the Amendment Act, when imposing a sentence in respect of the offence of rape, an apparent lack of physical injury to the complainant shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence. The legislation is clear that the absence of accompanying violence or resultant physical injuries to the complainant do not constitute a basis alone to deviate from the prescribed penalty. Equally, the fact that the complainant was 32 years old cannot be a factor that operates in favour of the appellant. Rape leaves profound physical as well as emotional scarring. *De Beer v S* [2017] ZASCA 183; 2018 (1) SACR 229 (SCA).

[13] As the appellant was sentenced in terms of s 51(1) of the Act, it is important to keep the objectives of the Act described by Marais JA in *S v Malgas* 2001 (2) SA 1222 (SCA) as a measure aimed at responding to:

'an alarming burgeoning in the commission of crimes of the kind specified resulting in the government, the police, prosecutors and the courts constantly being exhorted to use their best efforts to stem the tide of criminality which threatened and continues to threaten to engulf society.'

[14] I am in agreement with the court a quo that our courts are obliged to send a strong message that crimes such as rape deserve the strongest of sentences, in this case, life imprisonment prescribed by the legislator. It has been held that whether or not substantial and compelling circumstances exists is not a discretionary issue but rather a value judgment which judgment a court of appeal is obliged to bring to bear on the facts presented in the court *a quo*. There is nothing to indicate that the appellant was remorseful for his actions, although Mr Marimuthu submitted that this may perhaps be found in his decision only to appeal against sentence and not conviction. I am not persuaded by this submission, as even counsel conceded that the conviction could not be faulted. Neither am I persuaded by the submission that his actions were "opportunistic". He preyed on an unsuspecting adult woman returning home after work. When the complainant saw him standing near a light pole, she took evasive action and changed the direction of her route. That did not deter the appellant who followed her, wrestled her to the ground and strangled her to the extent that she was unable to scream. In addition, the appellant also threatened her with a knife.

[15] As a court of appeal, even if we consider cumulatively all of the factors traditionally taken into account in respect of sentencing, we are still unable to conclude that within that milieu there exist substantial and compelling circumstances. As pointed out in *Director of Public Prosecutions, Grahamstown v T M* [2020] ZASCA 5 para 15:

'The reality is that South Africa has five times the global average in violence against women. 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. Despite severe underreporting, there are 51 cases of child sexual victimisation per day. UNICEF research has found that 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.'

[16] I do not consider the sentence of life imprisonment to be disproportionate to the offence, and I am unable to find any misdirection in the sentence imposed by the trial court. On that basis, there is no ground to interfere with the sentence imposed.

[17] In the circumstances, I propose the following order:

The appeal is dismissed.

M R CHETTY

Appearances:

For appellant:	Mr P Marimuthu
Instructed by:	Legal Aid South Africa Durban
For respondent	Mr Ngcobo
Instructed by:	Director of Public Prosecutions Durban
Heard on	21 May 2021
Judgement delivered	26 May 2021