IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: AR286/2020

In the matter between:

MBONENI MOMBIKA **APPELLANT**

and

THE STATE **RESPONDENT**

ORDER

On appeal from: Ixopo Magistrates' Court (sitting as court of first instance):

The appeal on sentence is dismissed.

JUDGMENT

Delivered on 8 October 2021

Maharaj AJ (Jappie JP concurring):

[1] The appellant, Mboneni Nombika was found guilty of rape, in the regional court sitting at Ixopo, in contravention of section 3 of the Criminal Law (Sexual Offences and Related matters) Amendment Act 32 of 2007 of a fifteen year old

female child.

[2] He was convicted on 16 October 2019 and was sentenced to life imprisonment on the same date.

[3] The matter serves before this court pursuant to the provision of section 309(1)(a) of the Criminal Procedure Act 51 of 1977 (hereinafter referred to as ('the Act'), which provides as follows:

'If a person was sentenced to imprisonment for life by a regional court under section 51(1) of the Criminal Law Amendment Act, 1997 (Act no 105 of 1997), he or she may note such an appeal without having to apply for leave in terms of section 309B.'

[4] The appeal lies only against the sentenced imposed by the court a quo.

[5] The factual matrix in summary is that the complainant who was fifteen years of age was raped by the appellant on the 26 November 2017.

[6] She was on her way, during the morning, for dancing lessons when she was accosted by the appellant and penetrated from behind.

[7] She suffered injuries to her vagina comprising abrasions to the right and left side of the labia minora and labia majora respectively. There was also active bleeding as recorded on the pro-forma J88 which was handed in as exhibit 'A'.

[8] The complainant sustained an injury to her arm as a result of being stabbed by the appellant. She was also forced to perform fellatio on the appellant.

[9] In the absence of a misdirection on the part of the trial court, a court of appeal will only interfere with the sentence imposed if it is satisfied that the

sentence induces a sense of shock or where it finds that a striking disparity exits between the sentence that the appeal court would have imposed in the circumstances.[1]

[10] In determing an appropriate sentence the court should be mindful of the foundational sentencing principles that the punishment should fit the criminal, the crime as well as be fair to society and be blended with a measure of mercy. [2]

[11] A court must also consider the main purposes of punishment which are deterrent, preventative, reformative and retributive.[3]

[12] In the exercise of its sentencing discretion a court must try to achieve a judicious balance between all the relevant factors in order to ensure that one element is not unduly accentuated at the expense of and to the exclusion of others.[4]

[13] The constitutional court in[5] held as follows at paragraph [41]:

'ordinarily sentencing is within the discretion of the trial court. An appellates court's power to interfere with sentences imposed by the courts bellow in circumscribed. It can only do so where there has been an irregularity, which results in a failure of justice, the court below misdirected itself to such an extent that its decision on sentence is vitiated or the sentence is so disproportionate or shocking that no reasonable court could have imposed it.'

[14] The Supreme Court of Appeal in[6] held the following:

'The approach to an appeal on sentence imposed in terms of the Act should in my view, be

[1] See S v Masala 1968 (3) SA 212 (A) at 214 H.
[2] See S v Rabie 1975 (4) SA 855 (A) at 862 G-H.
[3] See R v Swanepoel 1945 AD at 455.
[4] See S v Banda and others 1991 (1) SA 352 (BG).
[5] S v Bogaards 2013 (1) SACR 1 (CC)
[6] S v PB 2013 (2) SACR 533 (SCA) at 539 F-G.

different to an approach to other sentences imposed under the ordinary sentencing regime. This in my view, is so because minimum sentences to be imposed are ordained by the Act. They cannot be departed from lightly or for flimsy reasons. It follows therefore that a proper enquiry on appeal is whether the facts which were considered by the sentencing court are substantial and compelling or not.'

[15] I am alive to the fact that a wrongdoer must not be visited with punishment to the point of being broken and while justice must be done mercy not a sledgehammer must be its concomitant.

[16] The appellant was sentenced pursuant to the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997, (hereinafter referred to as minimum sentences).

[17] Section 51(3)(a) of the minimum sentences provides as follows:

'If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exists which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must hereupon impose such lesser sentence.'

[18] The appellant in this matter did not show any remorse in this matter. He took advantage of a young child and treated her with disdain and contempt.

[19] In[7] the court held at paragraph [13] as follows:

'In order for the remorse to be valid consideration the penitence must be sincere and the accused must fully take the court into his confidence. Until and unless that happens the genuiness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of inter-alia, what motivated the accused to commit the deed, what has since provoked his change of heart

[7] S v Matyityi 2011 (1) SACR 40 (SCA)

and whether he or she does indeed have a true appreciation of the consequences of those actions.'

[20] The Constitution of the Republic of South Africa provides in section 12(1)(a) for everyone to free from all forms of violence.

[21] Rape is no doubt a serious and prevalent offence that draws *ire* from the community at large. In this matter, the appellant displayed a wanton disregard for the sanctity of the bodily integrity of the child, her privacy and dignity. In my view these factors far outweigh the paucity of his personal circumstances proffered by his counsel.

[21] The learned regional magistrate, in my view, was correct in finding that his personal circumstances did not amount to substantial and compelling circumstances within the meaning of the expression as contemplated in section 51(3)(a) of the minimum sentences.

[22] In my view, I do not believe that a sentence of life imprisonment is out of kilter in these types of matters.

[23] In passing, I might add as part of the ancillary orders in these type of matters the provisions of section 299A of the Act, peremptory as it is, enjoins the court to bring to the attention of the complainant her right to make representations and to be present at parole board meetings.

[24] Accordingly, I propose the following order:
The appeal on sentence is dismissed.

MAHARAJ AJ

JAPPIE JP

DATE OF HEARING: 8 October 2021

DATE OF JUDGMENT: 8 October 2021

FOR THE APPELLANT: Mr B Mbatha

FOR THE RESPONDENT: Mr E X Sindani