IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case no: A243/21

In the matter between:

THEMBELANI SOGONI **Appellant**

and

THE STATE

Coram: Binns-Ward and Savage JJ
Date of hearing: Decided on the papers in terms of s 19(a) of Act 10 of 2013
Date of judgment: 18 July 2022

JUDGMENT

BINNS-WARD and SAVAGE JJ:

[1] The appellant, who was legally represented, was convicted by the regional court, Wynberg, Western Cape on 14 December 2020 of four counts of the rape of a 12-year-old girl in contravention of section 3 of the Criminal Law (Sexual Offences and Relates Matters) Amendment Act 32 of 2007.

[2] The appellant, who was given notice that the minimum sentence of life imprisonment applied in the matter given that the victim was under the age of sixteen years at the time of the commission of the offences, pleaded not guilty to all four counts against him. Following his conviction on all counts, and on the same day that he was convicted, the appellant was sentenced to life imprisonment, all four counts being taken as one for purposes of sentence. In terms of section 103(1) of the Firearms Control Act 60 of 2000 he was declared unfit to possess a firearm. This

appeal, with the leave of the magistrate, is against his both his conviction and sentence.

[3] The evidence of the complainant was that she was raped on four occasions by the appellant between June 2018 and August 2018 in the one-roomed house in which she lived with his family in Kosovo, Philippi. In her evidence the complainant did not waver in her identification of the appellant as the person who had raped her on each of the four occasions. The first incident, in June 2018, occurred while she was asleep in bed next to the appellant's mother. The appellant got into the bed from the foot of the bed, pulled down the complainant's panties and pyjamas down, got on top of her and raped her, cautioning her not to make a noise while his mother slept. After he had raped her the appellant gave the complainant a face towel to clean herself and told her to keep what had occurred between them. The complainant did not report the incident to anyone. The following day, while she was alone at home with the appellant, he inserted his finger into her vagina.

[4] In July 2018, while the complainant was again alone at home with the appellant, he got into his mother's bed and raped her. The complainant reported the incident to a young man who was boarding at the address, one Onke, who in turn told the appellant's older brother, who told the appellant's mother. Her response was that the appellant would not do such a thing.

[5] In August 2018 the complainant was once again alone at home with the appellant when he undressed and raped her. She attempted to kick him away, but he managed to pull her panties down and raped her vaginally. He then told her to lie on her stomach and he proceeded to rape her vaginally and anally. After the complainant reported the incidents to her aunt, the matter was reported to the police and the complainant was medically examined on 11 August 2018. Fresh vaginal injuries sustained within the past 72 hours were identified. In addition, injuries consistent with a history of anal penetration by a blunt object or penis were identified.

[6] The appellant denied raping the complaint. On his version he would leave for work at 05h00. He described his relationship with the complainant as good and stated that there were not opportunities presented for him to be alone with the

complainant. Although in cross-examination he stated that he had previously reprimanded the complainant for arriving home late, on his version the complainant had not taken issue with this. No evidence was advanced that the complainant had any reason to falsely implicate the appellant as the perpetrator. Equally, since he was well known to her, it was not suggested that the complainant may have been mistaken in her identification of the appellant.

[7] The regional magistrate recognised that the complainant was not only a child witness but also a single witness. In spite of the caution with which her evidence was approached, the complainant was found to have been a confident, coherent and logical witness whose evidence could be relied upon, in contrast to the appellant who was found by the trial court to have not make a good impression as a witness. The court noted that the appellant denied raping the complainant and had attempted, without success, to create the impression that the complainant was truant and had not been attending school, when his own mother, with whom both the complainant and the appellant both lived, had no similar concerns. In addition, it was noted that new aspects of his defence were advanced for the first time in his evidence, which had not been put to the state's witnesses. This led the court to reject the appellant's version that he had not repeatedly raped the complainant as not being reasonably possibly true. The magistrate found that the state had discharged the burden which rested on it to prove its case against the appellant beyond reasonable doubt. Consequently, the appellant was found guilty on all counts.

[8] The appeal against conviction proceeds on three grounds: that the state failed to prove its case against the appellant beyond reasonable doubt; that the magistrate failed to apply the necessary caution in respect of the testimony of the complainant as a single witness; and that in rejecting the version of the appellant, the magistrate erred.

[9] We are not persuaded that there is merit in any of these grounds. The complainant was clear and cogent in her identification of the appellant as the person who had raped her on four occasions. There was no support for any suggestion that she had wrongly identified or falsely accused the appellant as the perpetrator of the rapes or that her evidence was untrue or unreliable.

[10] The trial court, while exercising caution in its approach to the evidence of the complainant as a child and a single witness, cannot be faulted for accepting the state's version and rejecting that of the appellant. From a careful consideration of the evidence placed before the trial court, it is clear that the state discharged the burden of proof which rested upon it.

[11] It was telling that both the appellant and his mother attempted to place the blame for the sexual assaults on the young man who was boarding at their address, Onke. Onke had since left the address and his whereabouts were apparently unknown. It was obvious that this was a stratagem adopted to deal with the difficulty for the appellant's case occasioned by the strong objective evidence in support of the complainant's allegations provided by the results of the medical examination. There was, however, no suggestion by either of them that they had reported this to the investigating officer, as might have been expected had Onke made a confession, as claimed by the appellant's mother. The version put up by the appellant and his mother was far-fetched because it necessarily implied a case of misidentification by the complainant. As already noted, such a possibility was unrealistic in the circumstances of the case.

[12] There can, in our mind, be no doubt that "moral certainty" exists as to the guilt of the appellant, in the manner discussed in *S v Mavini*,[1] in the sense that his conviction on the application of the rules of evidence, interpreted within the precepts of the Bill of Rights, was properly attained through a proper application of the rules of the system. It follows for these reasons that the appeal against conviction must fail.

[13] In relation to the issue of sentence, we are not however similarly persuaded. It has become all too prevalent in our courts to rely on minimum sentencing legislation to impose the most severe of sentences, being life imprisonment, without any more than scant regard to whether substantial and compelling circumstances exist which would warrant the imposition of a reduced sentence; or whether the minimum sentence, if imposed, would constitute a disproportionate response to the crime committed, the criminal and the needs of society. As has been made clear in a

[1] [2009] 2 All SA 277 (SCA) at para 26.

number of cases, including *S v De Beer*[2] and *S v Vilakazi*,[3] although the minimum sentencing legislation weighs upon a court's discretion, it does not eviscerate its obligation to safeguard that a just sentence is imposed when the task of the court is to guard in every case against an injustice being committed.

[14] The complainant testified that following the rape she had felt like less of a child and that the appellant had taken her girlhood from her. The court had regard to the physical injury and emotional distress suffered by the complainant in circumstances in which the appellant was known to her. Yet, no effort was made by the state, for reasons which are entirely unclear, to obtain a victim impact assessment report or any other pre-sentencing report in relation to the appellant in order that a proper investigation of all factors relevant to sentencing could be undertaken before sentencing and made available to the trial court for its consideration. Somewhat surprisingly, the court also did not see fit to request that any such pre-sentencing reports be obtained but elected to move straight into sentencing immediately following and on the same day as the appellant was convicted. In proceeding to sentence the appellant in such circumstances, the court was constrained in its task. It lacked the necessary material to have regard to the pertinent issues relevant to the weighty task of sentencing and to consider these issues, with due care and appropriate caution, in order to allow it to arrive at a just sentence.

[15] In considering whether substantial and compelling circumstances existed which may have warranted the imposition of a sentence reduced from the minimum prescribed, the court took note of the fact that the appellant was a first offender, was 33 years old and had been incarcerated since 2018 when he was sentenced on 14 December 2020. The lack of remorse shown by the appellant, his dishonesty in denying the repeated rape of the complainant, the fact that the rapes occurred when she lived in the same home as he did, were all considered to be aggravating factors. These factors, considered in the context of the shocking prevalence of instances of rape in the country, led the trial court to conclude that no substantial and compelling

[2] [2017] ZASCA 183; 2018 (1) SACR 229 (SCA).
[3] 2012 (6) SA 353 (SCA); [2008] ZASCA 87; [2008] 4 All SA 396 (SCA) ; 2009 (1) SACR 552 (SCA)

factors existed which would warrant the imposition of a sentence reduced from the minimum.

[16] Having regard to the judgment of the trial court on sentence one is left concerned that the approach to sentencing appeared to have been a mechanical one in which scant regard was had to all of the factors relevant to sentencing. Where the state seeks the imposition of the most severe of punishments, life imprisonment, a thorough case must be made out to justify the imposition of the most severe sanction. This requires at the least proper preparation to allow a convincing motivation to be advanced that the imposition of such maximum penalty is appropriate and proportionate.

[17] In this matter, the sentencing of the appellant proceeded with undue haste, in a manner which in our view undermined the process of sentencing itself. Having regard to the material before the trial court, we are of the view that it was unjust and disproportionate to impose a sentence of life imprisonment on the appellant.

[18] One has only to glance through the list of sentences imposed in broadly comparable cases in *Juta's Sentencing Reports* to recognise that the ultimate sentence of life imprisonment was grossly inappropriate in the circumstances of the current case. The information before the magistrate was too scant for her to be able to discharge the court's sentencing function judicially, but the indications upon the limited material that was available was that a sentence of somewhere between 10- and 15-years' imprisonment would have fallen within the appropriate range. This court is, however, under the same disability as the trial court in determining where in the aforementioned range it would be appropriate to fix the sentence that should be imposed on the appellant.

[19] Pre-sentencing reports would have allowed for all factors relevant to sentencing to have been placed before the trial court and enabled the court to engage in a careful consideration of these factors. Included would have been the lasting impact of the crimes on the complainant, of which there is little to be gleaned from on the record, as well as the appellant's propensity for rehabilitation given that he was a first offender. In the absence of such information, and without a careful

investigation of all relevant factors and circumstances, the decision to find no substantial and compelling circumstances and to impose the most severe of the minimum sentences on the appellant in our view cannot be sustained. For these reasons, the appeal against the sentence imposed on the appellant must succeed.

[20] Having regard to the limited material placed before the trial court pertinent to sentencing, the interests of justice require that the matter should remitted to the trial court for a sentence to be imposed on the appellant afresh in the light of this judgment. Such sentence should be imposed only after consideration by the court of expert witness reports on victim-impact and the amenability of the appellant to rehabilitation and safe reintegration into society. In computing the determinate sentence it imposes, the trial court must take into account, and make full allowance for, the period that the appellant already will have served under the sentence of life imprisonment that this court hereby sets aside; cf. *Director of Public Prosecutions, Gauteng v Pistorius* (2015)[4] and *Director of Public Prosecutions, Gauteng v Pistorius* (2017).[5] In this regard, the appellant is entitled to be credited with the period in imprisonment served by him between 14 December 2020 and the date upon which sentence is imposed afresh.

[21] It is also necessary to say something about the manner in which in which the trial was conducted by the magistrate.

[22] There was an unfortunate tendency by the presiding officer to curtail questioning by the defence attorney. We do not think that it was sufficiently serious to affect the fairness of the trial in the current case, but it is important that any judicial officer should not allow their interventions to inhibit the full and effective ventilation of the issues in the matter. For similar reasons we consider that the magistrate was wrong not to hear what the appellant's mother wished to add at the end of her evidence. The standard of the examining of the witnesses, whether in chief or in cross-examination, was not impressive on either side and in such a situation a witness might be justified in wanting to draw to the court's attention an aspect that

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[4] [2015] ZASCA 204; [2016] 1 All SA 346 (SCA); 2016 (2) SA 317 (SCA); 2016 (1) SACR 431 (SCA) at para 56.

[5] [2017] ZASCA 158; 2018 (1) SACR 115 (SCA); [2018] 1 All SA 336 (SCA) at para 25.

may not have been canvassed with him or her. In our view, the magistrate should have recognised that possibility and treated the witness more sensitively.

[23] The other matter we need to raise is the keeping of the record. Any judicial officer presiding over a trial is duty bound to ensure that a record of proceedings is kept in a manner that will give a coherent reflection of the evidence should the matter go on appeal. There were some shortcomings in that respect in the current matter. At some stage a witness was asked to illustrate the layout of the single-roomed structure in which the complainant testified she had been assaulted. A sketch was made, and evidence adduced in relation to its contents. The sketch was not admitted as an exhibit, however, and this court was consequently handicapped in its ability to fully appreciate the evidence given in relation to it. Similarly, there was more than one occasion during the trial on which a witness would indicate distances with reference to the spatial characteristics of the court room or points within it and the court omitted to record such distances in objective terms. The omissions left this court clueless on appeal as to the precise import of the indications made by those witnesses.

[24] An order is made in the following terms:

1. The appeal against conviction is dismissed.

2. The appeal against sentence succeeds.

3. The sentence of life imprisonment imposed on the appellant by the trial court is set aside.

4. The matter is remitted to the trial court for sentence to be imposed on the appellant afresh in the light of this judgment and after consideration by the court of expert witness reports on victim-impact and the amenability of the appellant to rehabilitation and safe reintegration into society.

A.G. BINNS-WARD

Judge of the High Court

KM SAVAGE
Judge of the High Court

Appearances:

For appellant:	Adv N Kunju Legal Aid, Cape Town
For State:	Adv M J September Director of Public Prosecutions, Cape Town