IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE, HIGH COURT DIVISION)

Case Number: A103 / 2021

Lower Court Case Number: SHF / 64/2017

In the matter between:

ZUKISWA BANGI **APPELLANT**

and

THE STATE **RESPONDENT**

Coram: Fortuin *et* Wille, JJ

Heard: 28th of October 2022

Delivered: 2nd of November 2022

JUDGMENT

THE COURT

Introduction

[1] This is a criminal appeal from the lower court directed solely against the sentence imposed upon the appellant. The appellant was convicted on a single count of the alleged illegal trafficking of the complainant for sexual purposes.[1] The offender was legally represented for the duration of her trial and initially no less than five (5) charges were preferred against the offender.

[2] Ultimately, after her conviction on a single count of human trafficking for sexual purposes, she was sentenced to imprisonment for a period of twelve (12) years. The appellant was correctly notified of the provisions of the minimum sentencing regime prior to the commencement of the trial proceedings.[2] The appellant was (31) years old at the time of the alleged commission of the offence and the complainant was only (15) years old at the time of the offence committed against her by the appellant. This appeal on sentence is before us with leave having been granted by the presiding officer in the lower court.

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[1] A contravention of section 71 (1) of Act 32 of 2007 (the 'Act').
[2] The prescribed minimum sentence that found application was that of life imprisonment.

Overview

[3] The evidence was that when the complainant was fifteen (15) years old her father passed away. The offender became her guardian and the complainant resided with the offender, who is her aunt. The complainant was informed by the offender that she would be sent away to become the wife of a much older man in the form of an 'arranged' marriage.

[4] The evidence exhibited that this in essence was an 'arranged' marriage against the express want of the complainant. Unequivocally, it was demonstrated that the co-habitation of the complainant with her 'husband' was not by consent and against her will and her express wishes. It was as a direct result of this 'arrangement' that the complainant was repeatedly raped, assaulted, and kept captive by her purported husband. Thus, it was the respondent's case that the offender facilitated these offences and was accordingly convicted in accordance with the application of the overarching provisions set out in the Act.

[5] In summary, the grounds of appeal are the following: (a) that the court *a quo* failed to take into account or sufficiently give weight to the fact that the appellant was a first offender; (b) that the appellant's cultural background was a strong mitigating factor in assessing the overall moral blameworthiness of the offence committed; (c) that the offender is not a danger to her community and the retributive effect of the sentence accordingly falls to be somewhat diluted; (d) that the young children of the offender would be disproportionally penalized by the custodial sentence imposed upon the

offender and, (e) that a non-custodial sentence would be more appropriate in the circumstances of this matter.

Consideration

[6] As far as the sentence imposed upon the offender is concerned, she submits that there were indeed more and additional substantial and compelling circumstances sufficient to deviate from the minimum sentencing regime. It is submitted that the court *a quo* misdirected itself by not deviating more substantially from the minimum sentencing regime. The appellant submits that her personal circumstances alone warrant a lesser sentence and that another court may exercise its discretion to impose a sentence upon her tempered with a much greater element of mercy.

[7] It is trite law that in sentencing, the punishment should fit the crime, as well as the offender, be fair to both society and the offender, and be blended with a measure of mercy.[3] In *S v Masda*[4], in referring to the case of *S v Mhlakaza and Another*[5], Saldulker AJA (as he then was), eloquently remarked as follows:

'...A sentencing policy that caters predominantly or exclusively for public opinion is inherently flawed. It remains the court's duty to impose fearlessly an appropriate and fair sentence even if the sentence does not satisfy the public…'

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[3] *S v Rabie* 1975(4) 855 (AD) at 862 G.
[4] 2010 (2) SACR 311 (SCA) at 315.
[5] 1997 (1) SACR 515 (SCA) at 315.

[8] In *S v Rabie*[6], the philosophies and principles applicable in an appeal against sentence were set out by Holmes JA, namely, that in every appeal against sentence, whether imposed by a magistrate or a judge, the court hearing the appeal should be guided by the principle that punishment is pre-eminently a matter for the discretion of the trial court and 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.

[9] In *S v Anderson*[7]**,** in dealing with the applicable legal principles to attempt to guide the court when requested to amend a sentence imposed by a trial court, Rumpff JA, affirmed as follows:

'...These include the following: the sentence will not be altered unless it is held that no reasonable man ought to have imposed such a sentence, or that the sentence is out of all proportion to the gravity or magnitude of the offence, or that the sentence induces a sense of shock or outrage, or that the sentence is grossly excessive or inadequate, or that there was an improper exercise of his discretion by the trial Judge, or that the interest of justice requires it…'

[10] Moreover, as held in *Malgas*[8]**,** a court of appeal is enjoined to consider all other circumstances bearing down on this question, to enable it to properly assess the trial court's finding and to determine the proportionality of the sentences imposed upon the offender.

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6 *S v Rabie* 1975 (4) 855 (AD) at 862 G
7 1964 (3) SA 494 (AD) at 495 D-H.
8 *S v Malgas* 2001 (1) SACR 469 (SCA).

[11] The constitutional court[9], has described an appeal court's discretion to interfere with a sentence only in the following circumstances: (a) when there has been an irregularity that results in a failure of justice or; (b) when the court *a quo* misdirected itself to such an extent that its decision on sentencing is vitiated or, (c) when the sentence is so disproportionate or shocking that no reasonable court could have imposed it.

[12] Further, the record does not reflect any suggestion that the appellant showed any form of genuine remorse at all. Regrettably, she does not exhibit any insight into the seriousness of the crime committed by her. This then goes to the issue of her moral blameworthiness.

[13] By contrast, the complainant was traumatized by the events that unfolded since the loss of her father. She was essentially denied the opportunity to flourish and enjoy her childhood and complete her career at school. This traumatic event has influenced her life irreparably. The psychological harm suffered to her person is simply too horrendous to begin to understand. In addition, the court *a quo* highlighted the position of trust between the complainant and the appellant. The threat of violence against the complainant can also not be ignored and is a significant aggravating factor. The sentence imposed upon the appellant must accordingly in some measure, also reflect a censure to this sort of conduct and behavior. Further, we are unable to unearth any misdirection or irregularity on the part of the court *a quo* when it imposed its sentence upon the offender in this matter.

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[9] *S v Boggards* 2013 (1) SACR (CC) at [4].

[14] Put in another way the personal circumstances contended for on behalf of the appellant are by themselves, in no manner overwhelmingly substantial or compelling. They simply are the following: (a) that she is a first offender; (b) that she is now (44) years old and, (c) that she is the primary caregiver of two dependents.[10]

[15] The appellant, in this case, was the primary caregiver of minor children when she was sentenced. It is trite that a sentencing court should consider the effect that incarceration would have on an offender's minor children. In this regard see *S v M* (*Centre for Child Law as Amicus Curiae*)[11]. The Constitutional Court, through Sachs, J, emphasized the factors to be considered in these circumstances as follows:

'...Thus, it is not the sentencing of the primary caregiver in and of itself that threatens to violate the interests of the children. It is the imposition of the sentence without paying appropriate attention to the need to have a special regard for the children's interests that threatens to do so. The purpose of emphasising the duty of the sentencing court to acknowledge the interests of the children, then, is not to permit errant parents unreasonably to avoid appropriate punishment. Rather, it is to protect innocent children as much as is reasonably possible in the circumstances from avoidable harm...'[12]

[16] The most important enquiry is to ascertain whether the convicted person is the primary caregiver. Further, whether the children would be adequately cared for if their caregiver was incarcerated. In this matter, the facts differ from those in *S v M* as in this case, the court *a quo* found that the children were in the care of the appellant's sister and

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[10] Her children are now in the care of her sister and her husband who is also a breadwinner.
[11] 2008 (3) SA 232 (CC).
[12] *S v M*, *supra* at para 35.

her husband, who was also their breadwinner. We can therefore find no misdirection by the court *a quo* in this regard. It is undoubtedly so that innocent children need to be protected as much as reasonably possible when handing down a custodial sentence to their primary caregiver. However, in this case, a non-custodial sentence would not be a good example to set in connection with a person who has been convicted of human trafficking of a minor for sexual exploitation.

[17] We say this because allowing the appellant to return home to her minor children after being convicted of human trafficking of a minor girl for sexual exploitation would possibly in itself be detrimental to their upbringing. Accordingly, we can find no misdirection in the reasoning adopted by the court of the first instance in this connection and thus a custodial sentence will not adversely compromise the best interests of the appellant's children.

[18] As far as time already served by the appellant at the time of sentencing is concerned, we are of the view that the sentencing court correctly considered this factor when it imposed the sentence on the appellant. In addition, on behalf of the appellant, it was submitted that she was still at a youthful age at the time of her sentencing. We do not agree. She was a married woman and a mother. Further, at the time of the commission of the offence, she was already thirty-one (31) years old.

[19] It was further submitted, on behalf of the appellant, that this was not a typical case of trafficking coupled with an exchange for financial gain and that this crime is therefore less blameworthy. We find this submission uncompelling. The relationship between the

appellant and the complainant coupled with the relationship between the complainant's father and the appellant all bear emphasis and are, in our view, aggravating features rather than mitigating factors.

[20] One of the issues raised in the notice of appeal was whether or not the offender's 'cultural factors' can serve to mitigate her sentence. Put in another way, in the circumstances of this case, is it appropriate to give recognition to differing cultural issues when assessing the appropriate sentence to be imposed upon the offender? This, as a sentencing standard, is one of the primary enquiries.

[21] A cultural practice that constitutes criminal conduct in our law does not *per se* mitigate the perpetrator's conduct for sentencing purposes. It must be so that cultural differences do not excuse or mitigate criminal conduct. To hold otherwise would undermine the equality of all individuals before and under the law, a crucial constitutional value. This is of particular significance in the context of gender-based violence. All women are entitled to the same level of protection from their abusers.

[22] An obvious concern is a potential conflict between viewing the law holistically or individually. In our view, the focus should really be on the following: (a) how an offender's disadvantages in life may have contributed to the offending: (b) the risk posed by the offender to the community and, (c) the offender's ability or inability to comply with the sentence imposed. It follows that appropriate reductions in sentence should be given to those offenders who impress upon the courts a proper sense of how their background has affected their offending. However, this can never be a means to an end.

[23] Having anxiously considered the facts pertaining to the present case, we hold the view that this is not an instance in which restorative justice provides for a just and appropriate sentence which would serve to heal the damage done to the complainant and thereby render a benefit to society by the non-custodial rehabilitation of the offender. Restorative justice no doubt has inherent advantages as a viable alternative sentencing option, provided however that it is applied only in appropriate cases. In our view, the trafficking of a minor for sexual purposes is not one of those cases and it would be an inappropriate sentencing option.

[24] Accordingly, in all the circumstances, the following order is proposed, namely:

> *'That the appeal in connection with the sentence imposed upon the appellant is dismissed and both the conviction and sentence imposed upon the appellant are hereby confirmed'*

WILLE, J

I agree and, it is so ordered:

FORTUIN, J