

SOUTH AFRICA / JUDGMENT

C.A.C v S (A14/2022) [2023] ZAMPMBHC 46 (21 August 2023)

[2023] ZAMPMBHC 46**COURT**

Mbombela High Court, Mpumalanga

BEFORE

Greyling-Coetzer, T V Ratshibvumo

CASE / FILE NUMBER

A14/2022

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IN THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MBOMBELA -MAIN SEAT

APPEAL CASE NUMBER: A14/2022

In the matter between:-

C[...] A[...] C[...]

Appellant

versus

STATE

Respondent

JUDGMENT

GREYLING-COETZER AJ

- [1] This matter comes before this court by way of an appeal against the sentence imposed upon the appellant by the Mpumalanga Regional Court held at Mhala on 22 February 2018. The appellant is aggrieved by the sentence of life imprisonment imposed, and thus exercises his right of automatic appeal to this court under Section 309(1)(a), read with Section 309(1)(b) of the Criminal Procedure Act 51 of 1977 (as amended) (CPA).

- [2] The appellant was charged with one count of Contravention of the Provisions of Section 3, read with Sections 1, 56(1), 56A, 57, 58, 59, 60 and 61 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 – Rape (read with the provisions of Section 51(1) and Schedule 2 of the Criminal Law Amendment Act 105 of 1997 as amended).
- [3] The appellant was legally represented during the proceedings and pleaded guilty. He was consequentially convicted on the above proffered charge and sentenced to life imprisonment.
- [4] This appeal has been launched some 5 years post-conviction and sentence for which late filing of the appeal the appellant obtained condonation on 19 January 2022.
- [5] The test on appeal in relation to sentence is whether the court a quo misdirected itself in imposing the sentence or if there is a disparity between the sentence of the court a quo and the sentence which the appeal court would have imposed had it been the trial court that is so marked that it can properly be described as shockingly, startling or disturbingly inappropriate.[1]
- [6] A sentencing court is required to achieve a balance between the crime, the offender and the interest of society.[2] In achieving or accomplishing the judicial counter-balance between the elements, a court should not unduly accentuate one element above the other.[3]
- [7] In *S v Pillay*[4] the Appellate Division held that the word “misdirection” simply means an error committed by the court in determining or applying the facts for assessing the appropriate sentence. As the essential enquiry on appeal against sentence is not whether the sentence was right or wrong, but whether the court that imposed 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. The misdirection must be of such a nature, degree or seriousness that it shows, directly or by inference, that the court did not exercise its discretion judicially(?) or at all, or exercised it improperly or unreasonably. Such a misdirection is usually and conveniently termed one that vitiates the court’s discretion on sentence. The question to be answered by an appeal court is thus, considering the particular facts of a case, is the sentence imposed proportionate to the offence with reference to the nature of the offence, the interest of society and the circumstances of the offender.
- [8] The appellant is the biological father of the complainant. When the offence was committed the complainant was 11 years of age. The complainant was raped in the appellant’s home, which home the complainant and appellant shared with his wife, who was a step-mother to the complainant and two other siblings. As a result of the rape, the complainant fell pregnant. She was 6 months pregnant when she was induced and the pregnancy terminated. Biological testing confirmed the appellant to have been the biological father of the unborn child carried by the complainant.

[9] The appellant challenges the sentence imposed, essentially on the following grounds: life imprisonment is disproportionate to the

offence committed, and therefore induces a sense of shock, the appellant's personal circumstances were not considered, there

are reasonable prospects of rehabilitation, the seriousness of the crime was overemphasized and the sentence is not blended with mercy.

[10] Life imprisonment is the ordained sentence in respect of the offence of rape in the circumstances applicable in this matter. It is

thus unsound to contend as the appellant does that, that in itself induces a sense of shock. Unless substantial and compelling

circumstances are found to exist Life Imprisonment is a suitable sentence for the offence the appellant has been convicted of.

[11] In *S v Malgas*[5] the court provides suggested guidelines in determining whether substantial and compelling circumstances exist to justify the departure from the prescribed minimum sentence. The court stated inter alia that:-

- a) Courts are required to approach the imposition of sentence consciously, that the legislature has ordained life imprisonment as the sentence that should ordinarily and in the absence of weighty justification be imposed for certain crimes.
- b) Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe standardised and consistent response from the courts;
- c) Specific sentences are not to be departed from lightly or for flimsy

reasons.

- d) Speculative hypothesis favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficiency of the policy underlying the legislation and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded;
- e) All factors traditionally taken into account in sentencing continue to play a role;
- f) None is excluded at the outset from consideration in the sentencing process; the ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick 'substantial and compelling' and must be such as would cumulatively justify a departure from the standardised response that this legislature has ordained.

[12] The court a quo in sentencing the appellant had both viva voce evidence, a victim impact report and pre-sentence report at its disposal.

[13] The personal circumstances which served before the court a quo are that the appellant was a first offender, 36 years of age, married with three minor children. He resided with his wife and children. He was employed as a domestic worker, earning a steady income, and was in good health. He is illiterate but enjoys a high standing within the community. The appellant consumes alcohol.

[14] In *S v Vilakazi*[6] the court held that:-

“In cases of serious crimes, the personal circumstances of the offender, by themselves, will necessarily recede into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment the question of whether the accused is married or single, whether he has two children or three, whether he is employed are in themselves largely immaterial to what that period should be and those seem to me to be what the kind of ‘flimsy’ grounds that Malgas said should be avoided.”

[15] The court a quo considered the appellant’s personal circumstances and found that the seriousness of the crime and interest of society outweigh them, thus the personal circumstances of the appellant did not, cumulatively considered, establish substantial and compelling reason to deviate from the ordained sentence of Life imprisonment. The court a quo exercised its judicial discretion correctly and in line with valid and established governing principles of sentencing. The appellant’s

contention in this respect has no merit.

[16] Similarly, the contention that the court a quo erred in not considering and heeding to the possibility of rehabilitation of the appellant, is without merit. From the record of the proceedings there is no basis upon which such a contention could be founded. The pre-sentence report demonstrates the opposite, where it is stated that although the appellant was a first offender, he does not accept responsibility the offence.

[17] Although the appellant pleaded guilty, it is evident that he failed to account for his actions and persisted in shifting the blame, thereby fortifying the finding by the court a quo that he lacked any remorse.

[18] The court a quo did not material misdirected itself in the assessment of what an appropriate sentence would be. It aptly balanced the circumstances and seriousness of the offence, the needs of society and the personal circumstances of the appellant. In the present matter there is no substantial and compelling reason to deviate from the prescribed minimum sentence of life imprisonment.

[19] The sexual offence committed by the appellant is one which can be categorised as one of the most serious type of sexual offences. The appellant being the biological father of the complainant abused his parental authority to satisfy his own sexual desire at the expense of his daughter’s entitlement to human dignity, privacy and personhood. In doing so, causing her to be removed from her home, placed in a Children’s Home, inflicting physical pain to her body, caused her to endure the agony of having to terminate the pregnancy. The emotional trauma inflicted upon a child of that tender age being abused by a person who

was to teach her, protect her and care of her is hard hearted. The offence committed by the appellant is adequately described in the matter of S v Jansen[7] as one of a perverse use of male power.

[20] Consequentially the appeal must fail and the following order is :-

1 The appeal against sentence is dismissed.

D GREYLING-COETZER

ACTING JUDGE OF THE HIGH COURT

I agree and it is ordered

T V RATSHIBVUMO

JUDGE OF THE HIGH COURT

FOR APPELLANT: Mr Mafadza Legal Aid South Africa E-mail: phathutshedzom1@legal-aid.co.za

FOR RESPONDENT: Adv. AN Nkosi Director of Public Prosecutions, Mbombela E-mail: antnkosi@npa.gov.za

JUDGMENT

RESERVED: 02 June 2023

JUDGMENT

DELIVERED: 21 August 2023

[1] S v Van de Venter 2011 (1) SACR 238 (SCA) at par [14]

[2] S v Zinn 1969 (2) SA 537 (A) at 540G-H

[3] S v Banda and Others 1991 (2) SA 352 (BG) at 355A

[4] 1977

(4) SA 531 (A) at 535E-F

[5] 2001 (1) SACR 469 (SCA)

[6] 2009

(1) SACR 552 (SCA) at 574D

[7] 1999(2) SACR 368 CPD

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