

SOUTH AFRICA / JUDGMENT

Dlamini v S (CA 53/2022) [2023] ZANWHC 19 (2 March 2023)

[2023] ZANWHC 19

COURT

North West High Court, Mafikeng

BEFORE

Hendricks, Maakane

CASE / FILE NUMBER

CA 53/2022

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IN

THE NORTH WEST HIGH COURT, MAFIKENG

CASE

NO: CA 53/2022

Reportable:

YES / NO

Circulate

to Judges: YES /

NO

Circulate

to Magistrates: YES /

NO

Circulate

to Regional Magistrates: YES /

NO

In

the matter between:

DLAMINI

RICHARD

Appellant

and

THE

STATE

Respondent

CORAM: HENDRICKS JP et MAAKANE AJ
DATE
OF HEARING
: 20 JANUARY 2023
DATE
OF JUDGMENT
: 02 MARCH 2023
FOR
THE APPELLANT
: MR. MADIBA
FOR
THE RESPONDENT
: ADV. GOLODA

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email. The date and time for hand-down is deemed to be 10h00 on 02 MARCH 2023.

ORDER

Consequently, the following order is made:

- (i) The appeal against sentence is dismissed.
- (ii) The sentence of life imprisonment imposed by the Regional Magistrate is confirmed.

HENDRICKS JP

Introduction

- [1] The appellant stood trial in the Regional Court, Lehurutshe, on a charge of rape in contravention of the provisions of section 3 read with sections 1, 50, 55, 56 (1), 56 (A), 57, 58, 59, 60 and 61 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, as amended. Further read with sections 94, 256 and 261 of the Criminal Procedure Act 51 of 1977, as amended (CPA) and section 51 (1) and Schedule 2 of the Criminal Law Amendment Act 105 of 1997, as amended (CLAA). He was legally represented. He pleaded not guilty to the charge.
- [2] The complainant, as a minor, testified with the assistance of an intermediary through close-circuit television (CCTV) and was cross-examined. So too did the nephew Mr. K [....] D [....], as the first report, testified. The matter was then remanded. When it resumed on the remand date, the appellant with the assistance of his legal representative made admissions in terms of section 220 of the CPA, admitting all the elements of the offence he was charged with. A verdict of "guilty as charged" was returned.

- [3] The appellant was sentenced to a term of life imprisonment. He was also declared unfit to possess a fire-arm and it was ordered that his particulars be entered in the Sexual Offenders Register. His interaction with children are restricted in terms of section 120 (4)
- (2) of the Children's Act 38 of 2005. Furthermore, in terms of section 299A of the Criminal Procedure Act (CPA), the complainant's family and/or the complainant has the right to make representation at the time of his release on parole.
- [4] The appellant becry the sentence of life imprisonment imposed upon him. In terms of section 309(1) of the Criminal Procedure Act 51 of 1977 (the CPA), read with sections 10 and 43(2) of the Judicial Matters Amendment Act 42 of 2013 (JMA Act), once the Regional Court imposed the sentence of life imprisonment, the appellant is entitled to an automatic right of appeal to the Full Bench of the High Court.

Grounds of Appeal

- [5] In terms of the Notice of Appeal, the only ground of appeal is that the trial court "erred in not finding that there were compelling and substantial circumstances to persuade the Honourable Court to deviate from the prescribed sentence of life imprisonment." There is also an application for condonation for the late noting and prosecuting of the appeal, which is unopposed. Starting with this aspect first, a reasonable detailed explanation for the delay in prosecuting this appeal within the prescribed period was proffered by the appellant. It is clear that he was from the onset desirious to appeal the sentence of life imprisonment. Hence, the requisite condonation should be granted.

- [6] The facts that this case are briefly as follows:

According to the evidence of the complainant she visited her uncle, the appellant, on the day of the incident. He then enquired from her whether she was sexually active and she said no. He then said he wanted to have sexual intercourse with her and she refused. He became angry and violent and even spoke to her with a raised voice. He was aggressive. Initially she was still refusing but ultimately she succumbed. He instructed her to undress and ordered her to lie on top of the bed. She complied. He undressed himself. He ordered her to open her thighs and he mounted her. He then had sexual intercourse with her. Because she was a minor aged fourteen

- (14) years and given the circumstances she could not consent. After he had finished, he instructed her to get dressed and to go home and not to tell anybody about what happened.
- [7] She fell pregnant as a result of this sexual encounter. When the pregnancy was visible, and upon being confronted about it, she then related the ordeal that befell her. She did not report the incident earlier as she was scared, because of the threats of the appellant. She was subjected to rigorous cross-examination. Her uncle to whom she made a report, Mr. K [...] D [...], also testified. He confirmed that the appellant is the brother to the complainant's mother. He said that when he saw that the complainant was pregnant, he confronted her and the grandmother about it. The complainant then

informed them about what happened. After the evidence of Mr. K [...] D [...] the matter was remanded.

[8] When the matter resumed on the remand date, the legal representative of the appellant informed the court that he was instructed to make certain written admissions in terms of the provisions of section 220 of the CPA. It reads as follows:

“In the Regional Court division of North West, held at Lehurutshe, under case number RC50/2019. In the matter between the State vs Richard Dlamini.

I Richard Mampe Dlamini, I am an adult male person aged 51 years, residing at Mokane Village.

I am an accused person in this matter and I know and understand the charge against me, being rape of a minor of 15 years.

I would like to make the following admissions. I admit that I had sexual intercourse with O [...] L [...] D [...], without her

consent. O [...] L [...] D [...] is my niece child who is 15 years old.

I admit that my actions were wrongful and illegal, and my actions were also unlawful, as she is a minor.

I admit that penetration in her vagina took place where my penis was used and ejaculated inside her vagina.

I called her into my bedroom with intention to have sexual intercourse with her.

I also admit that date and venue where the incident took place, it is admitted.”

[9] The State closed its case, so too did the appellant (accused/defence) without presenting any evidence. The appellant was convicted. A pre-sentence report was admitted into evidence. As alluded to earlier, he was sentenced to undergo a term of life imprisonment, which is the prescribed minimum sentence.

[10] It is common cause that the provisions of section 51 of the Criminal Law Amendment Act 105 of 1997 (Act 105 of 1997) are applicable. Section 51 of Act 105 of 1997 provides:

“51. Discretionary minimum sentences for certain serious offences –

(1) Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life.

...

(3)

- (a) If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist 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 thereupon impose such lesser sentence...”

[11] Part I of Schedule 2 of Act 105 of 1997 provides for offences including inter alia:

“Rape as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 –

(a) . . .

(b) where the victim –

(i) is a person under the age of 18 years;

. . .

(iv) is or was in a domestic relationship, as defined in section 1 of the Domestic Violence Act, 1998, with the accused.”[1]

See: *Maila v The State* (429/2022) [2022] ZASCA 3 (23 January 2023).

[12] I will accept that by the pronouncement of “guilty as charge” the Regional Magistrate founded that this case falls squarely within the purview of section 51 (1) read with Part I of Schedule 2 of Act 105 of 1997, although not specifically pronounced.

[13] It is trite that sentencing is pre-eminently a matter of discretion of the trial court. A court exercising appellate jurisdiction cannot, in the absence of a material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it, simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court.

[14] Where, however, a material misdirection by the trial court vitiates its exercise of that discretion, an appellate court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance.

[15] Nevertheless, even in the absence of a material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as 'shocking', 'startling' or 'disturbingly inappropriate'.[2]

[16] The sentence imposed by the Regional Court is one that is prescribed by the Legislature – that of life imprisonment – as it found that the appellant raped the complainant who was under the age of 18 years. When setting out minimum sentencing for certain offences, the Legislature aimed at ensuring a severe, standardised, and consistent response from the courts to the commission of such crimes unless there were, and could be seen to be, truly convincing reasons for a different response.

[17] The Learned Regional Magistrate did take into account the personal circumstances and mitigating feature that were placed on record and which have been laid out in the pre-sentence report, inter alia it was said: “you are 51 years old, you a first offender, you suffer from hypertension, and you have two children that were living off the money you were making at the church”.

[18] The aggravating circumstances were placed on record, when the Regional Magistrate said:

“You took advantage of a very young child. You threatened her to submission. In fact, when the cousin of the child testified, that is where I got the picture of what was going on through this child’s mind all throughout the months when she was pregnant.”

I must actually take it, you pushing it to applaud this cousin of the complainant. I believe his name is K [...] D [...]. Had he not taken the initiative to go into the complainant’s room and talk to her about her feelings, and telling her that it is fine to go through what she is going through. I do not think this child would have told who actually raped her and impregnated her.

Society needs people like K [...] D [...] who will take the initiative to protect the young girls of our country. You took advantage of her and it is very clear that you planned this offence. Like I said earlier on, she is now a child mothering a child.”

[19] Rape remains under-reported nationally, but there may be no rapes more hidden than those committed within families. Sexual violence victims ‘often experience a profound sense of shame, stigma and violation’. These factors are compounded by attempts from family members of the victim or the perpetrator to influence the victims not to file charges or, if charges have been filed, to withdraw the case so that the families can resolve the problem amicably. Often the perpetrator offers to pay the medical costs for the victim’s medical treatment, including psychological treatment, and even maintenance of the family in cases of indigent families.

See: *Maila v The State*, Supra.

[20] As alluded to earlier, in its judgement, the trial court took into account the pre-sentence report and noted! “However, there is no evidence before me that says, she is emotionally unstable, or she is struggling through this process. The only evidence that I have about her emotions, was when she was pregnant and she made a report.” It need to be emphasized that the absence of psychological assessment does not mean that the rape was not traumatic for the complainant. As was pointed out in the *Maila* case, supra,

“It must be noted that even without a psychological assessment, from reported cases of rape based on literature and evidence of experts in court, rape has a devastating impact on anyone, let alone a child. Although the complainant seemed to be coping better at school, individuals are impacted differently. The experts have noted certain features common in all rape cases: post-traumatic stress disorder (PTSD), including flashbacks, nightmares, severe anxiety, and uncontrollable thoughts. Depression, including prolonged sadness, feelings of hopelessness, unexplained crying, weight loss or gain, loss of energy or interest in activities previously enjoyed. Suicidal thoughts or attempts. Dissociation, including not being able to focus on work or on schoolwork, as well as not feeling present in everyday situations.”[3]

- [21] Rape is a violation of the dignity of a person and as such is in itself a serious offence, which leaves emotional scars. In the present case, a child has been fathered by the appellant. This, the learned Regional Magistrate correctly took into account and remarked: “The victim is a minor child, and she did not expect to be a mother at this stage. However, when looking at her interest, I am appalled to say that, as a child she is now mothering a child herself.”
- [22] The trial court had regard to the basic triad of sentencing and also warned itself to balance the various interests.[4] It took into account the appellant’s personal circumstances. He was a first offender. He was gainfully employed, and all other factors is contained in the pre-sentence report. The trial court also took into account the aggravating circumstances. The appellant was the complainant’s maternal uncle and in a position of trust. He was supposed to protect and love the complainant and not abuse her. All these factors, in the view of the Regional Court, were not compelling and substantial enough to justify a lesser sentence.
- [23] Having considered the reasons for sentence, taking into account the now well documented and known psychological impact of victims of rape, especially children, the Regional Magistrate did not commit any misdirection in imposing the prescribed sentence. Counsel could not point to any. Had the trial court found otherwise, it would have been to deviate for no sound reasons.[5]
- [24] The appellant infringed the right to dignity and the right to bodily and psychological integrity of the complainant, which any democratic society (such as South Africa) which espouses these rights, including gender equality, should not countenance for the future of its children, their safety and physical and mental health. In *S v Jansen*, [6] the court stated it thus:

‘Rape of a child is an appalling and perverse abuse of male power. It strikes a blow at the very core of our claim to be a civilised society. . . . The community is entitled to demand that those who perform such perverse acts of terror be adequately punished and that the punishment reflect the societal censure. It is utterly terrifying that we live in a society where children cannot play in the streets in any safety; where children are unable to grow up in the kind of climate which they should be able to demand in any decent society, namely in freedom and without fear. In short, our children must be able to develop their lives in an atmosphere which behoves any society which aspires to be an open and democratic one based on freedom, dignity and equality,

the very touchstones of our Constitution.’

[25] The message must be clear and consistent that this onslaught will not be countenanced in any democratic society which prides itself with values of respect for the dignity and life of others, especially the most vulnerable in society: children. For these reasons, this Court is not at liberty to replace the sentence that the trial court imposed. For an uncle, who is the position of trust just as a father, to rape his own niece is unconscionable and deserves no other censure than that imposed by the trial court: life imprisonment. The sentence is not disproportionate to the serious offence that the appellant

committed on a fourteen (14) year old young child, his niece. The sentence is, thus, justified in the circumstances.

See: *Maila v The State*, *supra*.

Order

[26] Consequently, the following order is made:

R D HENDRICKS

JUDGE PRESIDENT OF THE HIGH COURT OF SOUTH AFRICA,

NORTH WEST DIVISION, MAHIKENG

I agree

S S MAAKANE

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA,

[1] In terms of the Domestic Violence Act 116 of 1998, ‘domestic relationship’ means ‘a relationship between a complainant and a respondent in any of the following ways: . . . (d) they are family members related by consanguinity, affinity or adoption; . . . (f) they share or recently shared the same residence’.

[2] *S v Malgas* 2001 (1) SACR 469 (SCA) para 12.

[3] See news24 article, <https://www.news24.com/health24/news/public-health/rape-within-families-remains-under-reported-20150821-2>.

[4] The basic triad: the seriousness of the offence, the offender’s personal circumstances and the interests of society, and, lately, a fourth element distinct from the three: the interests of the victim of the offence.

[5] *S v Matyityi*

[2010] ZASCA 127; 2011 (1) SACR 40 (SCA); [2010] 2 All SA 424 (SCA).

[6] *S v Jansen* 1999 (2) SACR 368 (C) at 378G-379B.

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