

SOUTH AFRICA / JUDGMENT

E.M.M v S (A190/2024) [2025] ZAGPPHC 344 (24 March 2025) [2025] ZAGPPHC 344

COURT

North Gauteng High Court, Pretoria

BEFORE

Phahlane, MJ Mosopa

CASE / FILE NUMBER

A190/2024

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REPUBLIC OF SOUTH
AFRICA

IN THE HIGH COURT OF
SOUTH AFRICA

GAUTENG DIVISION,
PRETORIA

CASE NO: A190/2024

(1) REPORTABLE:NO

(2) OF INTREST TO

OTHER JUDGES: NO

(3) REVISED: YES/NO

24-03-2025

In the matter between:

E[...] M[...]

M[...]

APPELLANT

And

THE

STATE

RESPONDENT

Delivered: This judgment

was prepared and authored by the Judges whose names are reflected herein and is handed down electronically

by circulation to the

parties/their legal representatives by email and by uploading it to the electronic file of this matter on

Caselines. The date for

hand-down is deemed to be 24 March 2025.

JUDGMENT

PHAHLANE, J

The appellant who was legally represented during trial proceedings was convicted by the regional court, Benoni on one count of rape in contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, read with the provisions of section 51(1) of Act 105 of 1997 ("the CLAA"). He pleaded guilty in terms of section 112(2) of the Criminal Procedure Act 51 of 1977 ("CPA")

and was convicted on the strength of his plea and sentenced to life imprisonment on 23 March 2023.

[1] Section 51(1) of the CLAA provides that a person who has been convicted of an offence referred to in Part I of Schedule 2 of the Act shall be sentenced to imprisonment for life unless there exist substantial and compelling circumstances justifying a lesser

sentence. Part I of Schedule 2 in turn refers to rape as contemplated in s 3 of the Act where, inter alia, the victim is a person under the age of 16 years. The victim in this case was a 14- year-old-girl.

[2] The grounds of appeal as noted in the notice of appeal are as follows:

3.1 "The effective term of life imprisonment is strikingly shocking and inappropriate.

3.2 The court erred in finding that there are no substantial and compelling circumstances where the mitigating factors placed before the court were that:

a) The appellant has pleaded guilty to the offence.

b) The appellant has been in custody awaiting finalization of his matter

- c) The appellant is a first offender.

3.3 The court erred in over-emphasizing the following factors:

- a) The interests of society- and finding that the appellant was a danger to society and needed to be removed permanently
- b) The seriousness of the offence and the deterrent effect of sentencing
- c) The punishment as the element of sentencing and the personal circumstances

of the appellant which if not properly applied or balanced, may end up putting people who are not danger to the society in prison and introduce them to harsh conditions of prison and thereby grooming them into hardened criminals".

- [3] It is a trite principle of our law that the imposition of sentence is pre-eminently within the discretion of the sentencing court. In dealing with the question of sentence, a trial court will consider the particular circumstances of the case in light of the well-known triad factors relevant to sentence and impose what it considers to be a just and appropriate sentence.
- [4] As a court of appeal, this court must determine whether the sentence imposed on the appellant was justified. Accordingly, a court

exercising appellate jurisdiction cannot, in the absence of 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[1]. Put differently, an appeal court is only entitled to interfere with the sentence imposed by the trial court where such a sentence is disturbingly inappropriate or is vitiated by misdirection of a nature which shows that the trial court did not exercise its discretion reasonably.

- [5] The trial court's discretion to impose what it considers to be a just and appropriate sentence is a principle which has always been fundamental in our law of criminal procedure. It is for this reason that the SCA in *Mokela v The State*[2] expressed that "this salutary principle implies that the appeal court does not enjoy carte blanche to interfere with sentence which have been properly imposed by a sentencing court".
- [6] In *S v PB*[3], the SCA moreover formulated an appellate court's approach in an appeal against a sentence imposed in terms of the minimum sentencing

legislation. It did so as follows: "What then is the correct approach by a court on appeal against a sentence imposed in terms of the Act? Can the appellate court interfere with such a sentence imposed by the trial court's exercising its discretion properly, simply because it is not the sentence which it would have imposed or that it finds shocking? The approach to an appeal on sentence imposed in terms of the Act should, in my view, be different to an approach to other sentences imposed under the ordinary sentencing regime. This, in my view, is so because the 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."

[7] It is incumbent upon a court in every case, before it imposes a prescribed sentence, to assess, upon a consideration of all the

circumstances of the particular case, whether the prescribed sentence is indeed proportionate to the particular offence[4]. In order to determine whether the trial court misdirected itself or imposed a sentence that was strikingly disproportionate as averred in paragraph 3.1 of the notice of appeal, it is imperative to examine whether the general purpose of imposing a sentence as pronounced in *S v Rabie*[5], as well as the triad factors applicable to sentencing in *S v Zinn*[6] have been considered.

[8] It appears from the reading of the record that the trial court took into consideration the principles laid down in both *Robie* and *Zinn* as it indicated that "all these factors need to be balanced and accorded appropriate weight for the court to come to an appropriate sentence", thus giving effect to the principle that the sentence to be imposed should fit the crime; the criminal, and it must be fair to society. It also appears from the reading of the record that the trial court further considered the evidence presented in the J88 medico-legal examination report; the victim impact report; and the pre-sentence report compiled on behalf of the appellant so as to make a value judgment in order to come to a suitable sentence.

[9] It is common cause that the appellant and the complainant had a father-daughter relationship because the appellant was in a love relationship with the mother of the complaint and were staying together in the same house. The background facts and circumstances of this case can be gleaned from both the victim impact report and pre-sentence report. The victim impact report revealed the following:

- (a) The appellant's relationship with the mother of the complainant started when the complainant was 12 years old. The complainant indicated that she did not trust the appellant because of the way he looked at her and described the ordeal as painful and stated that she is "feeling very dirty".
- (b) There was an incident when the mother of the complainant and the other children were not at home and the complainant and the appellant were alone at home - the appellant remarked that, although she was a grown-up girl, her mother did not give her the respect and treatment she deserves because she did not buy her a cell phone or better clothes. The appellant then told her that if she agrees to have sex with him, he will cater for such needs. He promised the complainant that if she agreed to have sex with him, he would cater for such needs. The complainant felt offended and angered by the utterances and informed her mother when she returned home.

- (c) On the day of the incident, the complainant's mother and the other children went to church and the appellant was not home. He returned around 23:00 drunk and the complainant had to open the door for him and went to sit in the sofa. The appellant entered the house and went to sit on the sofa where the complainant was sitting. He started touching her all over her body, and as she attempted to scream, he threatened to kill her, throttled her and pulled her to his bedroom. He pulled her dress up and the complainant screamed. He then showed her a knife and threatened to kill her if she continued to scream, and he then raped her.
- (d) It is noted that the complainant experienced anxiety attacks because she was always scared that the appellant might come back to harm her. Her personality changed because following the incident, she isolated herself from her siblings and had to be offered counselling which unfortunately did not help because there were no changes.
- (e) It is noted that the complainant will likely suffer long-term effect in terms of trust and hatred towards male figures which might affect her own future relationships.
- (f) The complainant was doing grade 9 at the time of the incident and her performance at school was also severely affected because she could not concentrate.
- (g) It is further noted that the rape incident also had a severe impact on the family of the complainant as her mother blamed herself for having a relationship with the appellant. The family had to relocate to another place, away from the crime scene and was affected socially and financially.
- [9] The pre-sentence report revealed the following:
 - (a) "The appellant was very drunk on the day of the incident, and when he is intoxicated, he develops a perverse behavior. Further that alcohol turned out to be the main cause of the offence that he has been convicted of.
 - (b) He was coming from the pub and found the complainant standing outside the house crying. The complainant informed him that her mother went out with her siblings, and she remained alone in the house. He informed the complainant to come and sit in the couch with him and he comforted her and informed her to stop crying., and he does not recall what transpired because he was very drunk".
- [10] It was submitted on behalf of the appellant at paragraph 17.3 of his heads of argument that the trial court erred in not considering that the J88 medical report admitted as exhibit B reflected that there was no history or physical injuries noted. It was further submitted that the trial court misdirected itself in ignoring that the appellant was intoxicated and without justification, holding that his degree of intoxication was negated by his previous sexual behavior towards the complainant.
- [11] The respondent opposed the appeal and argued that the sentence imposed is fair and appropriate under the circumstances. Relying on the decision in *Bothma v Els* and *Others*[7], Mr Maritz argued that the appellant indicated his sexual interest in the

complainant and abused his position of trust and authority over the complainant and abused the family setup and the vulnerability of the complainant. He further argued that the appellant was sexually interested in the complainant before the rape, and had threatened to kill the complainant with a knife should she continue to scream.

11.1 He submitted that the trial court did not misdirect itself because it took into consideration all the relevant factors when sentencing the appellant and further considered that the appellant was intoxicated when he committed the offence but was of the view that the intoxication could not be regarded as a substantial and compelling circumstance. He submitted that the trial court did not err in this regard or misdirect itself or commit an irregularity. It was further submitted that the sentence imposed is not disproportionate or shocking because an evaluation of all the relevant factors regarding sentence was considered.

[12] In my view, the submissions made on behalf of the appellant are misplaced. With regards to the argument that no physical injuries were noted in the J88, it is indisputable that the J88 revealed specifically that the complainant sustained multiple injuries on her vulva, and that her hymen was ragged with several fresh tears. Even if that were not the case and the complainant did not sustain injuries, the provisions of section 51(3)(aA)(ii) of the CLAA expressly provide that the apparent lack of physical injury to the complainant shall not constitute substantial and compelling circumstance justifying the imposition of a lesser sentence.

12.1 With regards to the submission that the trial court misdirected itself in ignoring that the appellant was intoxicated, there is no merit in this submission because the issue of intoxication was raised for the first time when the appellant was interviewed by the probation officer. His guilty plea in terms of section 112(2) of the CPA is silent in this regard, and it would be wrong to suggest that the trial court ignored this aspect.

12.2 In any event, it was never his case when he pleaded guilty - or his defence that intoxication was the cause or that it led to the actions that he took when he raped the complainant. The trial court can therefore not be faulted in this regard.

12.3 Mr Maritz correctly submitted that the trial court took into consideration that the appellant was under the influence of alcohol at the time of the commission of the offence and indicated that this aspect could not be regarded as a substantial and compelling circumstance.

[13] In light of the above, I cannot find any misdirection in the trial court's reasoning when it held that - had it not been for the appellant's previous attention to the complainant and indication that he wanted her to have sexual intercourse with him in return for favours-then the court would have noted the level of intoxication as being substantial and compelling.

[14] The offence of rape for which the appellant was convicted and sentenced for, falls under the purview of section 51(1) and Part I of Schedule 2 of the CLAA, and carries a prescribed sentence of life imprisonment. To avoid this sentence, the appellant had to satisfy the trial court that substantial and compelling circumstances existed which justify the imposition of

a lesser sentence than the prescribed minimum sentence. In my view, the trial court took into account all the personal circumstances of the appellant cumulatively and did not find any substantial and compelling circumstances or justification to deviate from imposing the prescribed minimum sentence.

- [15] As far as the grounds of appeal noted in paragraph 3.2 is concerned, those aspects were taken into consideration by the trial court. Having done that, the trial court was mindful of the warning in *S v Malgas*[8] that the court should not deviate from imposing the prescribed minimum sentence for flimsy reasons. With that in mind, it is important to heed to the purpose for which legislature was enacted when it prescribed sentences for specific offences which falls under section 51(1) for which the appellant has been convicted and sentenced for.
- [16] With regards to the grounds of appeal noted in paragraph 3.3, I already indicated that the trial court took into consideration the principles laid down in both *Rabie* and *Zinn*. Having considered the reasons for sentence and taking into account the contents of the victim impact report as noted above, I am of the view that the trial court did not misdirect itself. It is also my considered view that the trial court carefully balanced all the factors before it in order to ensure that one element is not unduly accentuated at the expense of, and to the exclusion of the others. In the circumstance, I find that the trial court did not over-emphasize any of the factors raised under this ground.
- [17] In considering the evidence presented in the victim impact report, the trial court stated that the appellant was in loco parentis and stood in as the father of the complainant who was in position of trust and authority over the complainant and was as such supposed to protect her. The trial court further held, and correctly so, that the appellant was "grooming" the complainant when he told her that he would buy her clothes and a cell phone in exchange for sexual favours. It is in this context that a balanced

consideration of the interests of society and of the offence of rape committed by the appellant was made.

- [18] In expressing that the onslaught of rape on children destroys their lives forever and that it cannot be 'business as usual', as stated in *Malgas*, the SCA in *Maila v The State*[9] quoted with approval, the case of *S v Jansen*,[10] where the court stated the following:

"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 civilized 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".

- [19] It appears from the reading of the record that when the trial court took into account the personal circumstances of the appellant, it also took into account the time spent by the appellant in custody awaiting trial. The SCA in *OPP v Gcwala*, [11] held that: "the period in detention pre-sentencing is but one of the factors that should be taken into account in determining whether the effective period of imprisonment to be imposed is justified and whether it is proportionate to the crimes committed. The test is not whether on its own that period of detention constitutes a substantial and compelling circumstance, but whether the effective sentence proposed is proportionate to the crimes and whether the sentence in all the circumstances, including the period spent in detention prior to conviction and sentence is a just one". (see also: *S v Radebe* 2013 (2) SACR 165 (SCA) at para 14.)
- [20] Having regard to the cumulative circumstances of this case, I agree with the trial court's decision that the pre-sentence detention of the appellant did not justify a departure', from the imposition of the prescribed sentence. Accordingly, the trial court cannot be faulted in imposing the prescribed sentence of life imprisonment.
- [21] Having given proper and due consideration to all the circumstances, we are of the view that the trial court considered all the factors when imposing the sentence appealed against. This court cannot fault the decision of the sentencing court, nor can it be said that the sentence imposed is shocking or unjust. Accordingly, we cannot find any misdirection in the trial court's finding.

In the circumstances, the following order is made:

1. The appeal against sentence is dismissed.

PD. PHAHLANE

JUDGE OF THE HIGH COURT

I agree,

MJ MOSOPA J

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Heard on: 21 January 2025

Date of Judgment: 24 March 2025

- [1] S v Malgas 200 I SACR 496 at para 12 (SCA).
- [2] 2012 (I) SACR 431(SCA) para 9,
- [3] 2013
- (2) SACR 533 (SCA) at para [20].
- [4] Vilakazi v S 2012 (6) SA 353 (SCA) at para 15.
- [5] 1975(4)SA855(A).
- [6] 1969
- (2) SA 537 (AD).
- [7] 20 IO (2) SA 622 (CC).
- [8] 2001(I) SACR 469 (SCA).
- [9] (429/2022)
- (2023) ZASCA 3 (23 January 2023)
- [10] S v Jansen 1999 (2) SACR 368 (C) at 378G-379B.
- [11] OPP v Gcwa/a (295/13) [2014] ZASCA 44 (31 March 2014).

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