

SOUTH AFRICA / JUDGMENT

L.J.M v S (CA55/2022) [2024]

ZANWHC 310 (31 December 2024)

[2024] ZANWHC 310**COURT**

North West High Court, Mafikeng

BEFORE

Mfenyana, Scholtz

CASE / FILE NUMBER

CA55/2022

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA****NORTH WEST DIVISION,****MAHIKENG****CASE NO: CA55/2022****Reportable: NO****Circulate to Judges: NO****Circulate to Magistrates:**

NO

Circulate to Regional

Magistrates: NO

In the matter between: -

L[...]

J[...] M[...]

Appellant

And

THE

STATE

Respondent

Coram: Mfenyana J et
Scholtz AJ
Delivered: This judgment
was handed down electronically by circulation to the parties'
representatives via email. The date for hand-down is deemed to
be 31 December 2024.
ORDER
1) The
appeal against sentence is dismissed.

JUDGMENT

Mfenyana J

Introduction

- [1] This is an appeal against the sentence of 22 years imposed on the appellant on two counts of rape. The appellant was arraigned before the Regional Court in Mmabatho on two counts of rape in terms of section 51(1) of the Criminal Law Amendment Act (as amended)[1] (count 1) and attempted murder (count 2).
- [2] The appellant was convicted on both counts and sentenced to 22 years imprisonment in respect of each count. Two years of the sentence in count 2 were ordered to run concurrently with the sentence in count 1. The appellant was thus sentenced to 24 years imprisonment.
- [3] In his notice of appeal, the appellant states that the appeal is against both conviction and sentence. In the heads of argument filed on behalf of the appellant, it is apparent that the appeal lies against the conviction of the appellant. It further appears that the appeal against conviction as stipulated in the notice of appeal relates to a different matter heard in the Regional Court in Odi.
- [4] At the request of the parties, this matter was decided on the papers, both parties having filed heads of argument.
- [5] Incorporated in the appeal, is an application for condonation, for the late filing of the appeal. The appellant was sentenced on 30 July 2019. On 26 April 2021 he was granted leave to appeal. He avers that as a sentenced prisoner, he had no way of influencing the timeous filing of the appeal as he had to secure and file the record of proceedings. As such he contends that the delay in filing the appeal was due to no fault on his part.
- [6] The respondent does not oppose the application for condonation. In our view, the appellant has provided a reasonable explanation for the delay in filing the appeal, which cannot be attributed to a lapse on his part. It is our considered view that the interests of justice dictate that the late filing of the appeal be condoned.

- [7] Ms Ntsala submitted that the respondent was not persisting with the application to strike the appeal off the roll, as it was evident that the appellant's heads of argument were delivered prior to issuing of the application.
- [8] The appellant avers that the sentence of forty-two years is shockingly severe that it induces a sense of shock given his personal circumstances that he was 34 years at the time of sentencing, and therefore capable of rehabilitation. He further contends that as a father to a minor child, he was responsible for his minor child and his mother's sustenance, which he funded from his employment as a general labourer, earning a wages of R4 500.00.
- [9] In support of his contentions, the appellant relies on the decision of the Supreme Court of Appeal (SCA) in *S v Sikhipha*[2] for the proposition that the fact he is capable of rehabilitation and that the complainant was not seriously injured amount to substantial and compelling circumstances. In that matter the SCA set aside a sentence of life imprisonment and imposed a sentence of twenty years in its stead.
- [10] The appellant appears to take issue with the fact that the State provided no evidence that the complainant in count 1 was a minor and provided no proof of any injuries or grievous bodily harm in respect of the complainant in count 2.
- [11] In opposing the appeal, the respondent avers that the appellant took advantage of the complainants who held him in a position of trust and looked up to him for protection. In so saying the respondent contends that the appellant's age cannot count in his favour, as he used it as a weapon to take advantage of vulnerable complainants. He also assaulted the complainant in count 2.
- [12] It is further the respondent's contention that the appellant's personal circumstances do not constitute substantial and compelling circumstances for the court to deviate from the prescribed minimum sentence, and that with reference to *S v Matyityi*,[3] "courts are obliged to impose minimum sentences unless there are truly convincing reasons for departing from them". The respondent thus submits that the sentence imposed by the trial court should be set aside and replaced with the prescribed minimum sentence of life imprisonment on each count.
- [13] The respondent submits that there was no reason for the court a quo to deviate from the prescribed minimum sentence as no substantial and compelling circumstances exist for such deviation.
- [14] In sentencing the appellant, the court a quo considered the need to strike a balance between the crime, the offender and the interests of society. In considering the seriousness of the offence, the trial court noted that the complainant in count 1 was a minor child, and a friend to the appellant's sister. The court considered that the appellant pretended to be reprimanding the complainant for being at a tavern when he knew that his intention was to take advantage of her.

- [15] With regard to the complainant in count 2, the trial court found that the appellant's actions were planned. He pretended to walk her home and led her to his house where he raped her.
- [16] With reference to *S v Malgas*[4] the court dealt with the approach to be adopted where a minimum sentence is prescribed. Notably, the court reiterated that section 51 has limited but not eliminated the court's discretion in imposing sentence, and that the prescribed sentences are not to be departed from lightly and for flimsy reasons.
- [17] In the specific circumstances of the present case, the trial court found that the appellant planned the offences in respect of both counts. The complainant in count 1 was saved by the intervention of the appellant's cousin. The court, however, pointed out that the appellant did not keep the complainant in count 1 overnight, owing to the appearance of his cousin who rescued the complainant.
- [18] In the case of the complainant in count 2, the court considered that the appellant did not kidnap her, but lured her to his house and locked her in. She was held against her will. The appellant strangled her and threatened to pour hot water over her. He abused his position of trust.
- [19] With regard to previous convictions, the court found that they did not relate to sexual offences. They occurred between 2004 and 2008, and the appellant had not been convicted of any offence thereafter. This, together with the fact that the appellant had been diagnosed with HIV, and his 'tender age' constitute substantial and compelling circumstances to deviate from the prescribed minimum of life imprisonment. In imposing the sentences of 22 years imprisonment for each count, the court opined that the sentence would have a retributive effect on the complainants and serve as a deterrent to the appellant.
- [20] Dealing with the concurrence of the sentences, the court considered that the offences were committed on 27 August 2017 and 26 November 2017 respectively and were not related. The court ordered that two years of the sentence in count 2 should run concurrently with the sentence in count 1, effectively sentencing the appellant to 42 years imprisonment.
- [21] When it comes to sentencing it is an established principle that sentencing is pre-eminently within the discretion of the trial court. A court of appeal will not lightly interfere with the trial court's exercise of its discretion. In *S v Bogaards*[5], the Constitutional Court held that a court of appeal can only interfere with the sentence imposed by a trial court "where there has been an irregularity that results in the failure of justice" or the trial court "misdirected itself to such an extent that its decision on sentence is vitiated", or "is so disproportionate or shocking that no reasonable court could have imposed it." [6] Its powers are circumscribed.
- [22] In *S v Kgosi*[7] the SCA, dealing with the question when a court of appeal may interfere with the decision of a sentencing court observed that such

consideration should determine whether there was a proper and reasonable exercise of the discretion bestowed upon the court imposing sentence. ... Either the discretion was properly and reasonably exercised or it was not. If it was, a Court of appeal has no power to interfere; if it was not, it is free to do so.”

[23] It follows from the above that in order to determine whether or not a trial court failed to bring its sentencing discretion to bear in the circumstances of a specific matter, and whether the sentence so imposed is shockingly out of kilter with the gravity of the offence, the court should consider the triad of factors pronounced in *S v Zinn*[8].

[24] As observed in *S v Vilakazi*[9] it requires no restating that the crime of rape is ‘an invasion of the most private and intimate zone of the victim and strikes at the core of her personhood and dignity’. The scourge carries on unabated, regardless.

[25] In *Director of Public Prosecutions, KwaZulu-Natal Pietermaritzburg v Ndlovu*[10] the Supreme Court of Appeal (SCA) pointed out that:

“Rape is an utterly despicable, selfish, deplorable, heinous and horrendous crime. It gains nothing for the perpetrator, save perhaps fleeting gratification, but inflicts lasting emotional trauma and, often, physical scars on the victim.” Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, ... and to enjoy the peace and tranquility of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives.”

[26] The appellant’s contention, therefore, that the complainants were not seriously injured makes light of the seriousness with which the courts have regarded the crime of rape and the intention of the Legislature in declaring the minimum sentences in those circumstances.

[27] In the present case, the trial court considered that the appellant was relatively young at 34. It further considered that he was HIV+ and had no relevant previous convictions. Having considered the totality of evidence before it, the court characterized these factors as substantial and compelling. It is for these reasons that it deviated from the prescribed minimum sentence of life imprisonment.

[28] In *S Pillay*[11] the court for “circumstances to qualify as substantial and compelling, they need not be exceptional in the sense that they are seldom encountered or rare”. If the ‘court is convinced after considering all factors that an injustice would be done if the minimum sentence is imposed, then it can characterize those factors as constituting substantial and compelling circumstances and deviate from imposing the prescribed minimum sentence.’

[29] It is clear from the reading of the record that the trial court was acutely aware of the application of the prescribed minimum sentence of life imprisonment for both counts. It nonetheless considered the totality of the evidence and saw its way clear to deviate from the minimum sentences prescribed in respect of both counts. Consequently, it imposed a lesser sentence of 22 years for each count. There can therefore be no merit to the appellant’s

contention that the sentence imposed is shockingly inappropriate. Similarly, the respondent's contention that the court a quo should have sentenced imposed life imprisonment cannot be sustained.

[30] The court a quo correctly in our view, pointed out that the offences committed by the appellant were not related in time and place, and were committed

against two different individuals. It is for this reason that the court a quo ordered that 2 years of the sentence in count 2 should run concurrently with the sentence in count 1.

[31] With regard to concurrence of sentences, section 280 of the Criminal Procedure Act provides:

“(1) When a person is at any trial convicted of two or more offences or when a person under sentence or undergoing sentence is convicted of another offence, the court may sentence him to such several punishments for such offences or, as the case may be, to the punishment for such other offence, as the court is competent to impose.

(2) Such punishments, when consisting of imprisonment, shall commence the one after the expiration, setting aside or remission of the other, in such order as the court may direct, unless the court directs that such sentences of imprisonment shall run concurrently.”

[32] It follows from this provision that the court has a discretion to exercise whether sentences should run consecutively or concurrently. The determining factor whether or not sentences should run concurrently is whether there is a link between the offences as forming part of the same transaction.

[33] In *Mokela v S*[12], Bosielo JA (with Mthiyane and Maya JJA concurring) considered the link between the offences in terms of locality, time, protagonists and

common intent. It is common cause in the facts of the present case that, apart from the fact that both offences were committed by the appellant, there is no link between the offences.

[34] The court a quo was alive to this fact. It is apparent from the record that the court a quo carefully considered that the offences were disparate in relation to time and place. They did not form part of the same chain of events.

[35] It is our view that the trial court did not commit any misdirection of the nature described by the appellant as to vitiate its decision on sentence. There is therefore no merit to the appellant's contentions. The appeal falls to be dismissed.

Order

[36] In the result the following order is made:

1. The appeal against sentence is dismissed.

S MFENYANA

JUDGE OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG

I agree

HJ SCHOLTZ

ACTING JUDGE OF THE HIGH COURT

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Date reserved

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22 March 2024

Date of judgment :

31 December 2024

[1] Act 105 of 1997.

[2] 2006(2) SACR 439 (SCA).

[3] (695/09)

[2010] ZASCA 127.

[4] 2001(1) SACR 469 (SCA).

[5] 2013(1) SACR 1 (CC).

[6] Para 41.

[7] 1999(2) SACR 238 (SCA).

[8] 1969

(2) SA 537 (A).

[9]

[2008] ZASCA 87; [2008] 4 All SA 396 (SCA); 2009(1) SACR 552(SCA).

[10] (881/2021)

[2024] ZASCA 23 (14 March 2024)

[11] (CCD48/17)

[2018] ZAKZDHC 11; 2018 (2) SACR 192 (KZD (7 May 2018).

[12] 2012(1) SACR 431 (SCA).

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