

SOUTH AFRICA / JUDGMENT

Mabuza v S (A30/2024) [2025]

ZAMPMBHC 57 (18 June 2025)

[2025] ZAMPMBHC 57

COURT

Mbombela High Court, Mpumalanga

BEFORE

Vukeya LD, Roelofse J

CASE / FILE NUMBER

A30/2024

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IN THE HIGH COURT OF
SOUTH AFRICA
MPUMALANGA DIVISION,
MBOMBELA (MAIN SEAT)
Case No.: A30/2024
In the application

between:

ABEL
MBUTHO MABUZA
APPELLANT
and
THE
STATE
RESPONDENT

JUDGMENT

VUKEYA J

- [1] The Appellant appeals against the sentence of life imprisonment following a conviction on a charge of contravening the provisions of Section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, Rape, read with the provisions of Section 51(1) and Part I of Schedule 2 of the Criminal Law Amendment Act 105 of 1997.

- [2] Central to this appeal is the enquiry whether a sentence of life imprisonment was indeed an appropriate sentence in the circumstances of the case. The appellant's argument was advanced raising two issues, namely, the Court a quo's failure to deviate from the prescribed minimum sentence of life imprisonment due to its failure to find substantial and compelling circumstances and that, the sentence of life imprisonment was shockingly inappropriate in the circumstances.
- [3] Firstly, the appellant contends that the Court a quo failed to find that his age; his scholastic qualifications; the fact that he is a first offender; that he was raised by his grandmother without a father figure and the time he spent in custody; constituted substantial and compelling circumstances justifying a deviation from the prescribed minimum sentence, if considered cumulatively.
- [4] Secondly, the appellant contends that the Court a quo's failure to consider the above circumstances cumulatively resulted in it incorrectly imposing a sentence of life imprisonment, under-emphasizing his personal circumstances and over-emphasizing the impact of the crime on the victim.
- [5] I pause here to briefly discuss the appellant's application for condonation for the late noting of this appeal.
- [6] The appellant applied for condonation for his failure to prosecute his appeal timeously. The condonation application is not opposed by the respondent. It is supported by an affidavit in which the appellant provides an explanation of the steps he has taken since the date of his sentence to prosecute the appeal. The main reason advanced for the lateness in prosecuting the appeal is attributed to his legal representative who did not proceed with his appeal timeously.
- [7] When the appellant made a follow up regarding his appeal he was afforded a new attorney by Legal Aid South Africa, who then started with the appeal proceedings. Upon due consideration of the reasons advanced in the application, condonation is granted.
- [8] I return to the appeal hereunder.
- [9] The complainant, accompanied by two friends, visited the residence of the Appellant and asked him for money to buy sweets. The Appellant provided the complainant's friends with money to go to the shop and instructed the complainant to remain behind. Thereafter, he picked her up, took her to his room, where he proceeded to rape her by forcefully penetrating her vagina with his penis. Despite the complainant's cries and pleas for him to stop, the Appellant persisted.
- [10] Following the commission of the offence, the Appellant instructed the complainant not to disclose the incident to anyone and gave her R6-00. The complainant confided in her cousin, requesting her to keep the matter confidential. The cousin teased the complainant, which led to the matter becoming public.

[11] Subsequent to the disclosure, the complainant was taken to hospital where she underwent a medical examination. She was admitted for several weeks and received treatment for oedema which was caused by the fact that she could not urinate as it was too painful.

[12] The appellant appeared before the court a quo facing rape charges. He pleaded guilty to the charges and was convicted as charged. A victim impact report was handed up during sentence proceedings and it stated the following:

"I would like to advise the court as to how the crime has affected me or my family. The psychological or emotional trauma suffered as a result of the crime. When I was raped my private part became painful. I told my mother and she took me to the clinic. I was thinking too much and I was crying for no reason. At home I do not play with my friends and I watch TV. I am scared of Abel."

[13] The State also called the victim's mother to testify in aggravation of sentence. The mother stated that the child suffers from recurring nightmares and is unable to sleep at night and is still sleeping with her. The child developed swelling and was admitted to Rob Ferreira Hospital, where she was diagnosed with oedema. According to the doctors, this condition is uncommon in children and is typically caused by physical trauma or extreme fear.

[14] The mother further testified that the child only disclosed later that she was unable to urinate due to severe pain. A social worker contacted the mother to come to the hospital and during questioning about the child's nightmares, the mother informed her that the child had been raped. She also confirmed that the child had become withdrawn and isolated herself from others.

[15] The Appellant testified in mitigation of sentence and told the court that he is 37 years old, unmarried and has two children aged 10 and 14, who live with their respective mothers. Prior to his incarceration, he was self-employed as a building contractor, earning between R7,000.00 and R10,000.00 per month. His highest level of education is Standard 7. The Appellant appealed to the court to give him a non-custodial sentence and an opportunity to build a future for his children, so they could have a stable home.

[16] The Appellant's legal representative submitted that the victim is no longer suffering from the effects of the rape. It was also argued that the Appellant is a first-time offender who grew up without a father figure, having been raised by his grandmother and left to navigate life on his own. He contributes R1,500.00 per month towards the upbringing of his children. The legal representative further argued that the court should consider Section 28 of the Constitution, which prioritises the best interests of minor children. He also contended that the Appellant has good prospects for rehabilitation, as he is a first-time offender who made a mistake.

[17] Rape of a child is not merely a crime, it is the destruction of innocence, the silencing of a voice still learning to speak. It is a form of psychological murder, leaving wounds deeper than the physical. In the eyes of the law and in the heart of justice, such acts cry out for a response that affirms the sanctity of childhood and the duty of courts to protect it. In doing so, speak for every child who looks to the law for refuge.

[18] The provisions of section 51(1) of the Criminal Law Amendment Act are applicable in this matter and prescribe the following minimum sentence in a peremptory manner:

“Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person—

(a) if it has convicted [a person] of an offence referred to in Part 1 of Schedule 2 ... to imprisonment for life.”

[19] Section 51(3)(a) of the Criminal Law Amendment Act contains a redeeming provision and determines the following:

“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 [may] must thereupon impose such lesser sentence: Provided that if a regional court imposes such a lesser sentence in respect of an offence referred to Part 1 of Schedule 2, it shall have jurisdiction to impose a term of imprisonment for a period not exceeding 30 years.”

[20] Section 51(3)(aA) of the Criminal Law Amendment Act aids the interpretation of the phrase “substantial and compelling circumstances” by stating which facts shall not constitute “substantial and compelling circumstances”. This provision reads as following:

“When imposing a sentence in respect of the offence of rape the following shall not constitute substantial and compelling

circumstances justifying the imposition of a lesser sentence:

- (i) The complainant's previous sexual history;
- (ii) an apparent lack of physical injury to the complainant;
- (iii) an accused person's cultural or religious beliefs about rape; or
- (iv) any relationship between the accused.”

[21] It is trite that sentencing is pre-eminently a matter for the discretion of the trial court and that an appeal court should only alter a sentence if that discretion has not been judicially and properly exercised, namely where the sentence is vitiated by irregularity, misdirection or is disturbingly inappropriate.[1]

[22] In *S v Malgas*[2] , the following approach was postulated:

“The mental process in which courts engage when considering questions of sentence depends upon the task at hand. Subject of course to any limitations imposed by legislation or binding judicial precedent, a trial court will consider the particular circumstances of the case in the light of the well-known triad of factors relevant to sentence and impose what it considers to be a just and appropriate sentence. 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. Where 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. As it is said, an appellate court is at large. However, even in the absence of 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”. It must be emphasised that in the latter situation the appellate court is not at large in the sense in which it is at large in the

former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned. No such limitation exists in the former situation.”

- [23] Whether it is necessary to engage in an enquiry into the seriousness of the offense seems misplaced. Nevertheless, this Court is mindful that “a sentence must reflect the seriousness of the offence and must resonate with the natural indignation of society, while always maintaining a balanced approach[3].”
- [24] The Magistrate in the court a quo appropriately considered the gravity of the offence, the degree of the offender’s culpability, and the consequences that flowed from it. The impact on the victim was duly acknowledged, not only through the evidence of the mother but also by way of the J88 medical report. The report documented four healing tears as reflected on the schematic diagram, including redness and tears around the entrance to the vagina including at the back part of the hymen. Additionally, it was noted that the child experienced such pain in her genital area that urinating became difficult.
- [25] The Victim Impact Report, which was handed up by consent, presents a deeply distressing account of the complainant’s condition following the rape. The most severe after-effects include:
- (a) Persistent anxiety, fear, and a sleeping disorder;
 - (b) A profound loss of trust in others, particularly men.

[26] There can be no serious dispute that the rape of young girls has become a pervasive and insidious crisis, akin to a malignant cancer, threatening the physical, emotional, and psychological development of young children. To describe it merely as a serious offence is to understate its devastating effect on both individual victims and society at large.

[27] The Appellant contended that the hearsay evidence tendered by the victim's mother during the sentencing proceedings, specifically relating to the impact of the offence on the victim, ought not to have been admitted. In this regard, reliance is placed on the principles set out in *Kapa v S*[4], which outline the circumstances under which hearsay evidence may be permitted by a court.

27.1 The Nature of the Proceedings

In the present matter, the Appellant had already been convicted at the time the evidence in question was led. The evidence was introduced during the sentencing phase, and the defence was afforded the opportunity to cross-examine the mother of the victim. Accordingly, the procedural context supported the admission of such evidence.

27.2 The Nature of the Evidence

The evidence pertained to the emotional and physical impact of the offence on the child victim. At the time the offence was committed, the victim was six years old and ten years old when the trial commenced. Given the age of the victim and the sensitivity of the matter, her mother was best positioned to provide insight into the ongoing effects the crime had on the child.

27.3 The Purpose for Which the Evidence Was Adduced

In determining an appropriate sentence, the court is required to consider the interests of society alongside those of the Appellant. Understanding the impact of the offence on the victim is vital in presenting a complete and balanced view before the court imposes sentence.

27.4 The Probative Value of the Evidence

The mother's testimony served to corroborate the victim's own account, including details such as the child isolating herself, experiencing pain, and struggling to urinate. The trial court accepted her evidence on the basis of her credibility and the reliability of her observations.

27.5 Potential Prejudice to the Appellant

At the stage when the evidence was introduced, the Appellant had already been convicted. The matter before the court was limited to the determination of an appropriate sentence. It is further noteworthy that, in terms of Section 51(3) of the Criminal Law Amendment Act, an apparent lack of physical injury to the complainant is not a determinative factor in deciding whether life imprisonment is justified. As such, the admission of the mother's evidence did not occasion any prejudice to the Appellant.

- [28] In light of the above considerations, the admission of the hearsay evidence was appropriate and in accordance with established legal principles.
- [29] In stark contrast, the appellant has demonstrated no remorse. He was convicted and did not appeal against his conviction. Yet, he continues to deny any wrongdoing and has not taken responsibility for his actions, thus his request for a non-custodial sentence in the court a quo and the appeal against his sentence in this court.
- [30] Having considered the arguments advanced on behalf of the appellant and weighed them against the cumulative impact on the complainant, this Court is satisfied that the offence was of such a serious nature that it was not overemphasised, as claimed. Accordingly, the seriousness of the offence does not constitute a substantial and compelling circumstance justifying a deviation from the prescribed sentence.
- [31] This court when considering “substantial and compelling circumstances in order to deviate from the prescribed minimum sentence should apply the principles as set out in *S v Malgas* (supra):

‘Whatever nuances of meaning may lurk in those words, their central thrust seems obvious. The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances. Nor were marginal differences in the personal circumstances or degrees of participation of co-offenders which, but for the provisions, might have justified differentiating between them. But for the rest I can see no warrant for deducing that the Legislature intended a court to exclude from consideration, ante omnia as it were, any or all of the many factors traditionally and rightly taken into account by courts when sentencing offenders.’

- [32] As was stated in *Malgas* (supra) the court was not given a clean slate on which to inscribe whatever sentence it thought fit. It was required to approach that question conscious of the fact that the Legislature has ordained life imprisonment as the sentence which should ordinarily be imposed for the commission of rape of a minor.
- [33] A court can only deviate from the prescribed minimum sentence if after considering all the circumstances of the case, it is satisfied that they render the prescribed minimum sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence.[5]

- [34] As was stated in the case of *Ludidi v S*[6], proportionality is central to whether a sentence is cruel, inhumane or degrading, which was confirmed by the Constitutional Court in *S v Dodo*[7]. It is not just proportionality between the mandatory sentence legislated upon, and the sentence which the offence merits, that would lead to an infringement of the right not to be deprived of freedom arbitrarily without just cause in terms of s 12(1)(a) of the Constitution, but rather whether it is grossly disproportionate.
- [35] Pre-sentencing detention is concerned with the prejudice the Appellant suffers by virtue of the delay from the time he is arrested until the time he is sentenced. In the real world, there will always be a delay, no matter how efficient the criminal justice system is. Nevertheless, where the court is concerned with a determinate sentence, one can assess the accused's prejudice by contrasting the actual position with a hypothetical scenario in which there was no delay between arrest and sentencing. In the hypothetical scenario, the accused would have started his sentence on the date he was arrested, and would thus have been released sooner[8].
- [36] The aforementioned scenario is not applicable to the present case. Where life imprisonment is imposed, it is clear that the Appellant will not be released in the foreseeable future.
- [37] The Appellant further contends that the absence of a father figure during his upbringing should be taken into account in mitigation of sentence. It is acknowledged that a substantial number of children in South Africa are raised without the presence of their biological fathers in the household. According to the State of South Africa's Fathers 2024 report, only 35.6% of children resided with their biological fathers in 2023, indicating that approximately 64.4%—or 12.7 million out of an estimated 19.7 million children under the age of 18—did not.
- [38] However, it cannot be reasonably asserted that the mere absence of a father figure inevitably leads to criminal behaviour. Individuals are not solely defined by the circumstances of their upbringing, but rather by the choices they make throughout their lives. Consequently, this factor does not amount to an exceptional circumstance that would justify deviation from the prescribed minimum sentence.
- [39] The Magistrate adequately took into consideration the aims of punishment and especially the prospects of rehabilitation as requested by the Appellant but came to the conclusion that with crimes as serious as this when it comes to the aims of punishment the aim to rehabilitate an accused recedes into the background and the other aims of punishment becomes of greater importance namely deterrence, prevention and retribution.
- [40] The Appellant was sentenced to life imprisonment for raping a six year old girl, while the court a quo considered the aforesaid provisions of the Act, the Appellant's personal circumstances, the nature and seriousness of the offence, the interests of society. The court a quo found that the nature of the crime outweighed the Appellant's circumstances and therefore that no substantial and compelling circumstances existed to deviate from the minimum sentence. We are unwilling to interfere with the court a quo's sentencing

discretion as we are of the view that there has been no misdirection.

[41] In the premises, I propose that the following order be made:

- (a) The application for condonation is granted;
- (b) The appeal against sentence is dismissed;

Vukeya LD

Judge of the High Court

Roelofse J

Acting Judge of the High Court

Appearing for the Appellant: M.V KEKANA LEGAL AID MBOMBELA

Appearing for the State: Advocate. S ZINDELA

Office of the Director of Public Prosecutions

Date of hearing: ON PAPER

Date of Judgment: 18 JUNE 2025

[1] S v Holder 1979

(2) SA 70 (A) at 75A

[2] 2001

(2) SA 1222 (SCA) at paragraph 12

[3] D v The State (89/16) [2016] ZASCA 123 (22 September 2016) at para 14.

[4] Kapa v S 2023 (4) BCLR 370 (CC)

[5] Malgas v S 2001

(2) SA 1222 (SCA) at para 25.

[6] Ludidi & Others v S (056/2024; 983/2022) (2024) ZASCA 162

[7] S v Dodo [2001] ZACC 16; 2001 (3) SA 382 CC; 2001 (5) BCLR 423 (CC) paras 37-39.

[8] S v Solomon & Others (CC23/2028) (2020) ZAWCHC 118

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