

SOUTH AFRICA / JUDGMENT

Magoloza v S (A228/2021) [2024] ZAWCHC 176 (18 June 2024)

[2024] ZAWCHC 176

COURT

Western Cape High Court, Cape Town

BEFORE

N Mangcu-Lockwood, M I Samela

CASE / FILE NUMBER

A228/2021

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No.:A228/2021

In the matter between:

SIKHUMBUSO MAGOLOZA

Appellant

and

THE STATE

Respondent

JUDGMENT DELIVERED ELECTRONICALLY ON 18 JUNE 2024

MANGCU-LOCKWOOD, J

A.

INTRODUCTION

[1] Regrettably, this Court is called upon, once again, to determine a matter involving the rape of a minor child by a trusted adult person. This is an appeal against the conviction and sentence of the appellant by the Parow Regional Court, where the appellant was found guilty of two counts of rape against the same minor child, and was sentenced to life imprisonment, declared unfit to possess a firearm, and his name was to be included in the national register for sex offenders.

- [2] The appellant was charged with contravening section 3 of the Criminal Law Amendment Act (Sexual Offences and Related Matters) 32 of 2007 (“the Sexual Offences Act”), read with certain provisions of the Criminal Procedure Act and section 51, schedule 2 Part I of the Criminal Law Amendment Act 105 of 1997 (“the CLAA”). It was alleged that during 2016 at Delft in the Western Cape he unlawfully and intentionally committed an act of sexual penetration with the 10-year old complainant by firstly, inserting his penis into her vagina, and secondly inserting his fingers into her vagina on more than one occasion, both whilst she was not of age to give consent. The two counts were taken together for purposes of sentencing by the Magistrate.
- [3] The complainant’s case was that, during December 2016, whilst visiting her grandmother who was in a romantic relationship with the appellant, the appellant raped her on two different occasions. On the first occasion which was on 16 December 2016, he picked her up from the floor where she was sleeping in the same room as her grandmother, placed her on a chair and penetrated her with his penis. Thereafter, he warned her, whilst holding a knife, not to tell anyone otherwise he would kill everyone in the house. On the second occasion, still during December 2016, the appellant placed her on a chair and inserted his fingers inside her

vagina, and again warned her not to tell anyone about the incident whilst again wielding a knife at her.

- [4] It was only during March 2017, whilst the complainant was at school that a problem was detected by adults. The complainant reported at the school’s sick bay, citing difficulty with her flow of urine which was accompanied by a burning sensation and abdominal pain. A teacher was called in, and she in turn reported the matter to the complainant’s father, telephonically. The complainant’s father reported the matter to the mother, who took the complainant to a day hospital. It was there that the complainant reluctantly revealed that a rape had taken place, first to the attendant nurse whilst her mother was outside the consultation room, and later in the presence of her mother when the latter returned to the consultation room. When she revealed to her mother that she had been raped, the complainant stated that it was by the appellant. Tests conducted by the nurse confirmed that the minor had been penetrated. I return to the medical evidence in due course.

B. RELEVANT LAW ON APPEAL

- [5] The law is settled that an appeal court may only interfere with the decision of a trial court if it is established that there was a material misdirection in respect of facts and/or law.[1] In the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong.

- [6] Similarly, an appellate court's power to interfere with sentences imposed by courts below is circumscribed.[2] It can only do so where there has been an irregularity that results in a failure of justice;[3] and the court below misdirected itself to such an extent that its decision on sentence is vitiated.[4] Ultimately, there must be a material misdirection by the trial court.[5]
- [7] In *S v Malgas*[6] it was stated that, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate". This standard has been articulated differently in several cases, including the standard of whether the sentence "creates a sense of shock". Ultimately, the question is whether the court could reasonably have imposed the sentence that it did.[7]
- [8] To reach an appropriate sentence, a court is duty-bound to consider the nature and the seriousness of the offence that the accused has been found guilty of, the personal circumstances of the accused as well as the interests of society - what is often referred to as the triad of considerations.[8] Closely allied to these considerations is the impact of the crime on the victims.
- [9] It goes without saying that each case must be adjudicated on its own facts and that no two cases are the same.[9] It is incumbent upon a court in every case, before it imposes a prescribed sentence, to assess, upon a consideration of all the
- circumstances whether the sentence is proportionate to the particular offence. [10] Punishment imposed by a court should fit the criminal, as well as the crime and be fair to society and blended with the measure of mercy[11].
- [10] A court is also enjoined to take into consideration the main purposes of punishment, namely retribution, deterrence, prevention and rehabilitation. All these must be accorded due weight in any sentence. As the SCA has stated in *S v RO and Another*[12] :

"Sentencing is about achieving the right balance or in more high-flown terms, proportionality. The elements at play are the crime, the offender, the interests of society with different nuance, prevention, retribution, reformation and deterrence. Invariably there are overlaps that render the process unscientific, even a proper exercise of the judicial function allows reasonable people to arrive at different conclusions."

C. GROUNDS OF APPEAL

- [11] The appellant's main ground of appeal relates to the medical evidence. First, he complains that the nurse, who testified at the trial, did not submit a detailed report; nor was there forensic evidence in respect of a swab test that was obtained from the appellant.

- [12] The nurse had completed a J88 report on the day that she examined the complainant, which was an exhibit at the trial, and certain observations were recorded therein, but it is correct that no conclusions were recorded in the report. She explained when she gave evidence that this was an error, as she thought she had recorded her conclusions. The J88 report, however, did record the findings of the gynaecological examinations made by the nurse on that day, which she confirmed were true. In the first place, she noted a red, bruised spot on the inner aspect of the complainant's labia minora. Secondly, she noted that the hymen, which is described as annular in configuration, was "too wide open", which was also described as "so wide open that [she] did not need to touch it during examination", and "could see deep inside", which she testified was inconsistent with the complainant's age and maturity range. In addition, there was a missing membrane noted in the hymen.
- [13] The nurse further testified that the complainant was referred with abdominal pains, vaginal discharge and a burning sensation when urinating. She explained that when there is vaginal discharge present, indicating an infection, children have a tendency to scratch themselves because of the itchiness caused by it. Her opinion therefore was that the bruising was a result of the minor scratching herself. Although there was no detailed conclusion noted in the J88, the nurse testified that the findings she noted in the J88 are consistent with vaginal penetration by a blunt object.
- [14] It was suggested to the nurse during cross examination that, if the child scratched herself, she may have also penetrated herself. The nurse disputed this suggestion, stating that the child could not have penetrated herself as deeply as her examination revealed. She also explained the scratching by reference to a time period, stating that the bruising appeared to be fresh and not older than 72 hours. The evidence of the nurse was not disputed during trial.
- [15] Much was made in Court before us regarding the relative freshness of the vaginal bruising and scratching, and it was suggested that this was inconsistent with the complainant's version that she was raped in and during December 2016. It was suggested that the alleged rape could not have occurred as far back as the complainant claimed. Apart from the fact that there was no medical evidence to support this argument, it is important to have regard to the nurse's evidence that the complainant suffered from an infection. There is no medical basis to conclude that the complainant could not have suffered from an infection three months after the rape.
- [16] Furthermore, the fact that the scratching and bruising could have been caused by the complainant, does not mean that a rape was not caused by the appellant. In fact, that theory was disputed by the nurse, who refuted any suggestion that the penetration could have been caused by the complainant given the depth of the penetration.

[17] The issue of the timeline of the rape was also relevant to the reporting of the rape made by the complainant to the nurse and her mother whilst at the day clinic on 17 March 2017. On that occasion the complainant indicated that the appellant had raped her on 10 March 2017, which was approximately a week earlier. However, she had later changed it to state that the rape had occurred on 16 December 2016. The appellant argued that, because of this contradiction, no reliance should be placed on the evidence of the

complainant, who was a single witness.

[18] The complainant, however, was candid about this issue, stating that she had made an error when she first reported the rape to the nurse. The evidence of the complainant's mother supported the complainant's version, and she clarified that the complainant had in fact corrected herself on the same day as the medical examination, and whilst still at the day hospital. She attributed the error to the emotional state of the complainant. Again, none of this evidence was disputed on behalf of the appellant. The error had only been made on the date of reporting the rape to the nurse in March 2017, which was also the same date on which she

corrected itself. This cannot be elevated to a contradiction in the evidence of the complainant. There was otherwise no irregularity in the manner in which the Magistrate considered and applied the law relating to single witness evidence.

[19] The appellant also takes issue with the fact that there was no forensic evidence linking him to the rape. However, the rape was only reported three months after the incident, and as the State points out, any DNA screening would have been superfluous by March

2017. Similar considerations apply in respect of the appeal ground that no forensic evidence in respect of a swab test obtained from him was used in the trial. Such evidence would not have assisted in the matter so long after the event.

[20] A further ground of appeal relates to the State's failure to call the grandmother of the complainant as a witness. However, as the State points out, the grandmother would not have taken the matter any further because according to the complainant she was sleeping during the rape, and accordingly would not have been a witness to the rape. Further, the complainant testified that her grandmother had passed out after drinking alcohol on that night, and therefore her observational abilities would most probably have been compromised.

[21] However, it is possible that the complainant's grandmother may have assisted regarding the timeline of events, which was in dispute. The appellant's version was that the grandmother of the complainant had left the Western Cape for the Eastern Cape in or during October 2016, never to return. Accordingly, he denied that he could have committed the said rape during December 2016 because he no longer visited the grandmother's residence by then. It was revealed during the trial that the complainant's grandmother did not consider it worthwhile to travel from the Eastern Cape to the Western Cape to give evidence in this

matter because she considered herself too old and was said to be in her eighties at the time of the trial.

- [22] However, even without the grandmother's version, the issue of the timeline was satisfactorily resolved, in my view, through the evidence of not only the complainant, but also her mother and father, all of whom testified that the complainant went to visit her grandmother during the December 2016 holidays and that it was thereafter, in January 2017 that the grandmother was sent back to the Eastern Cape. All three testified that the complainant never returned to her grandmother's residence after the December 2016 holidays. The complainant's father resided in the same yard as his mother (the complainant's grandmother) whilst she resided in the Western Cape, and it was his decision (supported by the grandmother) to return her to the Eastern Cape in January 2017. Furthermore, the complainant's mother testified that, from January 2017 she was responsible for collecting the grandmother's

grant which was paid out in the Western Cape. None of this evidence was challenged.

- [23] Furthermore, the complainant's evidence was that she specifically remembered that the first rape incident occurred on 16 December 2016 because on that day, she was to wear new clothing in line with what she and other children of her age would normally do on that date. However, because of the state she was in following the rape, she found herself unable to put on her new clothes. There was no contradiction in this evidence relating to the date of the rape assault during trial, and the complainant's version was consistent throughout, that she was raped in December

2016. Given all this evidence, the Magistrate was justified in holding that the rape occurred during December 2016.

- [24] The appellant makes much of the fact that the complainant failed to report the matter sooner than she did. However, one has to take into account firstly that at the point of the assault the complainant was threatened with a knife and was told that if she reported the matter, all the occupants of her grandmother's home – her family - would be killed by the appellant. She testified that she was very scared as a result of these threats, which were made on two separate occasions of rape. One must also take into account that she was an impressionable child of 10 years when the rape took place.

- [25] Similar considerations have been mentioned on many occasions by the courts, including in *Bothma v Els*[13], that “child rape is an especially egregious form of personal violation... Because it often takes place behind closed doors and is committed by a person in a position of authority over the child, the result is the silencing of the victim, coupled with difficulty in obtaining eyewitness corroboration”.

- [26] In any event, section 59 of the Sexual Offences Act provides that “in criminal proceedings involving the alleged commission of a sexual offence, the court may not draw an inference only from the length of any delay between the alleged commission of such offence and the

reporting thereof". I also observe that in the circumstances of this case, the delay was not substantial, being only three months. And because the delay was negligible, the complainant's parents were able to provide reliable evidence, especially regarding the timeline of events. There is otherwise nothing in the record which indicates that the quality of the trial was in any way affected by the said delay of three months, and the appellant has pointed to none.

[27] Apart from what has already been mentioned, the appellant's defence during trial was that the complainant must have been influenced by her father to falsely implicate him because the father was unhappy with the relationship between the appellant and the grandmother, who is the mother of the complainant's father. However, the appellant's own evidence in this regard did not sustain this allegation because his evidence was that he had a good relationship with the complainant's father who never expressed any view regarding the appellant's relationship with his mother; and even after his mother left for the Eastern Cape, they

continued to enjoy a good relationship. Furthermore, he only discovered during the trial that the complainant's father did

not approve of his romantic relationship with his mother. It therefore makes no sense why the complainant's father would

fabricate these allegations against him, even on his own version.

[28] Importantly, it was not disputed that the rape was only discovered as a result of the difficulties experienced by the complainant to urinate. It was furthermore not disputed that the parents were not present when that occurred at the complainant's school. Further, that the complainant was unwilling to reveal the rape to any adult person, until the nurse succeeded in the absence of

the mother. There was accordingly no basis to suggest that the parents, especially the father, fabricated the allegations of rape.

[29] For all these reasons, it is no wonder that the Magistrate found that the State had proved its case beyond reasonable doubt.

D. SENTENCE

[30] The charges against the appellant invoked the provisions of section 51(1) of the CLAA, which provides as follows:

"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 1 of Schedule 2 to imprisonment for life".

[31] In turn, the following offence is included as part of Part 1, Schedule 2:

“Rape as contemplated in section 3 of the Sexual Offences Act where the victim is a person under the age of 16 years”.

[32] In terms of section 51(3)(a) of the CLAA a lesser sentence may be imposed if the Court is satisfied that substantial and compelling

circumstances justify a departure from the prescribed minimum sentence. The Supreme Court of Appeal[14] has cautioned that the “specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded”. With this background in mind, I turn to consider the appeal against the sentence.

[33] The appellant relies on his personal circumstances, which may be summarized as follows: he is now 63 years old, was approximately 57 years old at the time of the rape assault, and 60 years old at the time of sentencing; he suffers from migraines; earned an amount of R4000 at the time of arrest; has a low standard of education and possesses no work skill and therefore his chances of obtaining employment after release are minimal; was residing with his niece and her child in an informal structure at the time of arrest; and has one child whose whereabouts have been unknown to him for approximately 26 years.

[34] Although the age of the appellant is advanced, it is difficult to construe his age as a substantial and compelling circumstance in the context of this case, whether viewed on its own or cumulatively with other personal circumstances raised by him. The case law is clear that one has to make out a case for why age constitutes substantial and compelling circumstances.[15] In the case of *S v JA*, the appellant was approximately 56 years old at the time of the rape offences, and 59 when sentencing procedures commenced, and the age was described by the court as ‘relatively advanced’. However, the sentencing court concluded that the relatively advanced age of the appellant was not a mitigating factor in the context of a prescribed sentence of life imprisonment and in considering whether there were substantial and compelling circumstances justifying a lesser sentence.[16]

[35] If anything, the appellant’s age constitutes an aggravating factor in this case, because the minor child referred to him, even during trial, as ‘Tat’omkhulu’ (grandpa). The minor child trusted him by virtue of his age and his relationship with her grandmother, and one would never expect a person in his position to inflict the type of assault that he did upon the complainant, and repeatedly so. He seized upon the easy access he had to the child by virtue of his romantic relationship with her grandmother. Further, he wielded a knife and threatened her with murder.

[36] Similarly, no case has been made out for why the alleged migraines are substantial and compelling circumstances, and why they could not be seen to within the correctional services facilities. As for the prospect of losing an income, the appellant joins thousands of individuals who are said to be earning an income, but nevertheless commit crimes as

heinous as the one committed by the appellant. The fact that he earned an income cannot possibly constitute a substantial and compelling circumstance, and the loss thereof is instead a consequence of the fact that he is now to be incarcerated. Furthermore, it is by now well-known that our correctional facilities do offer upskilling opportunities for inmates and there is no reason why the appellant cannot avail himself of such an opportunity if he wished to do so, even at his advanced age.

- [37] As regards his estranged relationship with his child, it was stated that he last saw his child when the child was 10 years old, and that the child should now be 36 years old. Once again, there was no indication of how this constitutes compelling and substantial circumstances. Whilst it is not for this Court to draw an inference that the appellant is not a caring or responsible father, the Court can equally not draw a positive inference in this regard since no information was provided in this regard at all. What we do know is that, in the circumstances of this case, where the appellant was provided with an opportunity to play the role of a responsible, caring 'Tat'omkhulu', he abused that opportunity.
- [38] In my view, the circumstances relied upon by the appellant, even when viewed cumulatively, constitute what the SCA referred to in *S v Malgas*[17] as flimsy and insubstantial grounds which do not justify departure from the prescribed minimum sentence of life imprisonment.
- [39] On the other hand, it was not disputed that the rape incident had a tangible negative effect upon the complainant. Both her parents reported that she has subsequently become socially and emotionally withdrawn, and that her performance at school has deteriorated such that she now has to be enrolled at what they termed a 'special school' where she will receive more care and assistance. The evidence was that this new arrangement was about to place a long-term financial strain on the family.
- [40] Taking into account what was placed before the trial court, I agree with the Magistrate's assessment that no substantial and compelling circumstances were presented by the appellant. Rape remains a shocking, despicable scourge which shames us as a nation. More so the rape of a helpless, minor child by a trusted adult person in her life. All the more need to carefully and dutifully apply the statutory prescripts imposed by the CLAA. The words of the SCA in *DPP, North Gauteng v Thabethe*[18] come to mind:

"Rape of women and young children has become cancerous in our society. It is a crime, which threatens the very foundation of our nascent democracy, which is founded on protection and promotion of the values of human dignity, equality and the advancement of human rights and freedoms. It is such a serious crime that it evokes strong feelings of revulsion and outrage amongst all right thinking and self-respecting members of society. Our courts have an obligation in imposing sentences for such a crime, particularly where it involves young, innocent, defenseless and vulnerable girls, to impose the kind of sentences which reflect the natural outrage and revulsion felt by the law-abiding members of society. A failure to do so would regrettably have the effect of eroding the public confidence in the criminal justice system"

E. ORDER

[41] In the circumstances the appeal against conviction and sentence is dismissed.

N. MANGCU-LOCKWOOD

Judge of the High Court

I agree, and it is so ordered.

M. I. SAMELA

Judge of the High Court

APPEARANCES

For the appellant : Adv N Kunju

Legal Aid South Africa Cape Town Local Office

For the respondent : Adv P A Thaiteng

Director of Public Prosecutions: Western Cape

[1] S v Francis 1991

(1) SACR 198 (A) at 198J-199A.

[2] S v Bogaards [2012] ZACC 23; 2012 BCLR 1261 (CC); 2013

(1) SACR 1 (CC) para 41; R v Dhlumayo and another 1948

(2) SA 677 (A); S v Pieters 1987 (3) SA 717 (A) at 727; See also S v Salzwedel and Others 1999

(2) SACR 586 (SCA) at para 10.

[3] S v Jaipal [2005] ZACC 1; 2005

(4) SA 581 (CC)[2005] ZACC 1; ; 2005

(5) BCLR 423 (CC) at para 39 and R v Solomons 1959

(2) SA 352 (AD) at 366C.

[4] Anderson above n 37 at 495D and Kruger Hiemstra's Criminal Procedure Service Issue 5 (LexisNexis, Cape Town, 2012) (Hiemstra) at 30-49 to 30-50 for a full discussion on misdirection.

[5] See S v Brand 1998

(1) SACR 296 (C) at 303 E-J.

[6] S v Malgas

[2001] ZASCA 30; [2001] 3 All SA 220 (A) (19 March 2001) para 12.

[7] See for example S v Sadler 2000

(1) SACR 331 (SCA) at para 8, and S v Bolus and Another 1966

(4) SA 575 (AD) at 581E-G.

[8] S v Zinn 1969 (2) SA 537 (A) at 540G.

[9] Asmal v S para 7.

[10] S v Vilakazi 2009

(1) SACR 552 (SCA) para 15. Opperman v S [2010] 4 All SA 267 (SCA) at 278 para 30.

[11] S v Rabie 1975

(4) SA 855 (A).

[12] S v RO and Another 2000

(2) SACR 248 (SCA) at paragraph 30. See also Opperman v S.

[13] Bothma v Els 2010

(2) SA 622 (CC) at para 47. See also Maila v S (429/2022) [2023] ZASCA 3 (23 January 2023)

[14] In S v Malgas para 25D.

[15] S v JA 2017

(2) SACR 143 (NCK) paras 41 - 49.

[16] S v JA para 41.

[17] S v Malgas 2001

(1) SACR 469 (SCA). See also S v Cwele & another 2013(1) SACR 478 (SCA) at [29].

[18] DPP, North Gauteng v Thabethe 2011

(2) SACR 567 (SCA) 577 G-l.

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