

SOUTH AFRICA / JUDGMENT

Motale v S (CA 08/2019) [2023]

ZANWHC 28 (15 March 2023)

[2023] ZANWHC 28

COURT

North West High Court, Mafikeng

BEFORE

A H Petersen, R D Hendricks

CASE / FILE NUMBER

CA 08/2019

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Policy

IN THE HIGH COURT OF
SOUTH AFRICA
NORTH WEST DIVISION,
MAHIKENG

CASE NO: CA 08/2019

Reportable: NO

Circulate to Judges: NO

Circulate to Magistrates:

NO

Circulate to Regional
Magistrates: NO

In the matter between:

MAILANE SIDWELL MOTALE
APPELLANT
and
THE
STATE
RESPONDENT

Coram:

Hendricks JP, Petersen J
Enrolled
for hearing: 10
March 2023
Handed

down: 15 March 2023
ORDER
(i)
Condonation for the late noting and prosecution
of the appeal is granted.
(ii)
The appeal against sentence is dismissed.

JUDGMENT

PETERSEN J

Introduction

- [1] The appellant was tried in a trial which commenced on 22 January 2018 in the Regional Court, Klerksdorp on a charge of contravening section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (rape) read with section 51(1) and Schedule 2 of the Criminal Law Amendment Act 105 of 1997 ('the CLAA'). The appellant pleaded not guilty and following a trial on the charge, he was found "guilty as charged" on 27 February 2018 and on even date sentenced to life imprisonment.
- [2] The appellant only appeals against sentence pursuant to the right to an automatic appeal in terms of section 309(1)(a) of the CPA.

Condonation

- [3] The appellant failed to prosecute his appeal timeously and has filed an application for condonation for the late filing of the appeal accompanied by an affidavit in support of the application.
- [4] The authorities on an application for condonation is trite. In *Mulaudzi v Old Mutual Life Assurance company (SA) Limited*,^[1] Ponnann JA re-affirmed the factors to be considered in respect of an application for condonation stated in *Melane v Santam Insurance Co. Ltd*:

"Factors which usually weigh with this court in considering an application for condonation include the degree of non-compliance, the explanation therefor, the importance of the case, a respondent's interest in the finality of the judgment of the court below, the convenience of this court and the avoidance of unnecessary delay in the administration of justice."

- [5] In *Grootboom v National Prosecuting Authority*^[2] the Constitutional Court re-affirmed the trite principle that:

"It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance"

with the rules or court's directions. Of great significance, the explanation must be reasonable enough to excuse the default."

[6] The reasons advanced by the appellant for the lateness in prosecuting the appeal against sentence, is essentially based on his transfer between correctional centres, no response being forthcoming on his applications for legal aid assistance until recently and delays with the transcription of the case record. I do not propose to repeat the full history of the delay in prosecuting the appeal, save to say, that the appellant's explanation is accepted and sufficient cause has been shown for condonation to be granted for the main issues in the appeal to be ventilated and considered. Condonation for the late prosecution of the appeal against sentence should accordingly be granted.

Grounds of appeal

[7] It is apposite to set out the very brief grounds of appeal as set out in the Notice of Appeal:

"AD SENTENCE

1. It will be argued that in this case the charge sheet did not refer to which Part of Schedule 2 of the Criminal Law Amendment Act it finds life imprisonment applicable in terms of the (provisions of section 51(1) Part I of Schedule 2 of Act 105 of 1997) and thus rendered the sentence unfair.
2. It will be argued that the trial court misdirected itself by failure to take into account that the appellant's cumulative personal circumstances are substantial and compelling circumstances justifying a departure from the prescribed minimum sentence of life imprisonment.
3. It will be argued that the trial court misdirected itself by sentencing the appellant to a term of life imprisonment, the sentence is shocking and inappropriately severe when considering the appellant's cumulative facts in mitigation as outlined in the appellant's affidavit and also in the heads of argument."

The test on appeal against sentence

[8] For the sake of completeness, I repeat the test on appeal against sentence verbatim as I have in several appeals, similar to the present appeal, which have come before me in Full Bench appeals in this Division. It is trite that a court of appeal will not lightly interfere with the sentencing discretion of a trial court. In the context of the mandated sentence of life imprisonment which was imposed, this Court will only be entitled to interfere if there is a material misdirection on the part of the trial court, if the sentence is shockingly inappropriate or disproportionate to the crime, the offender and interests of society. The position is succinctly set out in *S v Malgas*[3] as follows:

"[12] 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.”

(my emphasis)

The technical ground of appeal – failure to refer to Part I of Schedule 2 of the CLAA in the charge

- [9] In case number CA 44/2022, *State v Ifrime Lusizi Tsiba*, a criminal appeal recently heard by myself and Maakane AJ, on 24 February 2023, with judgment handed down, on 15 March 2023, the very same ground of appeal in respect of the failure to refer to Part I of Schedule 2 of the CLAA was raised. It would be prudent to repeat what is said in the Tsiba matter in respect of this ground of appeal:

“[13] It is prudent to deal with the technical ground of appeal raised by the appellant. The high watermark of the appeal on this ground is that the charge proffered against the appellant does not make reference to the applicable Part of Schedule 2 of the CLAA. The issue taken by the appellant with the charge is that it does not stipulate that Part I of Schedule 2 of the CLAA is applicable.

- [14] To fully appreciate the appellant’s attack against the sentence of life imprisonment under this ground of appeal, it would be prudent to have regard to the provisions of section 51(1), 51(2) and the Schedules and Parts relevant thereto. Sections 51 of the CLAA provides as follows:

“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.

- (2) Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in-
- (a) Part II of Schedule 2, in the case of -
- (i) a first offender, to imprisonment for a period not less than 15 years;
- (ii) a second offender of any such offence, to imprisonment for a period not less than 20 years; and
- (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years;
- (b) Part III of Schedule 2, in the case of-
- (i) a first offender, to imprisonment for a period not less than 10 years;
- (ii) a second offender of any such offence, to imprisonment for a period not less than 15 years; and
- (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 20 years; and
- (c) Part IV of Schedule 2, in the case of-
- (i) a first offender, to imprisonment for a period not less than 5 years;
- (ii) a second offender of any such offence, to imprisonment for a period not less than 7 years; and
- (iii) a third or subsequent offender of any such, offence, to imprisonment for a period not less than 10 years:

Provided that the maximum term of imprisonment that a regional court may impose in terms of this subsection shall not exceed the minimum term of imprisonment that it must impose in terms of this subsection by more than five years.

(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: 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.”

(my underlining)

- [15] The relevant and applicable Parts of Schedule 2 in respect of a charge of rape, for purposes of this appeal, referred to in sections 51(1) and 51(2), provide as follows:

“Part 1 of Schedule 2 provides:

...

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 16 years;

Part 3 of Schedule 2 provides:

Rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively in circumstances other than those referred to in Part I...”

(my emphasis)”

[10] A vigilant examination of the charge proffered against the appellant, as it appears from the charge sheet and the transcribed record reflects the following:

“RAPE

THAT the accused is guilty of the crime of contravening the provisions of section 3 read with sections 1, 2, 50, 56(1), 56A, 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. Further read the provisions of section 51(1) and Schedule 2 of the Criminal Law Amendment Act 105 of 1997 as amended.

Further read with section 120 of the Children’s Act, 38 of 2005.

IN THAT that on or about the 6.1.2017 and at or near Ext [...] Kanana in the Regional Division of North West, the said accused did unlawfully and intentionally commit an act of sexual penetration with the complainant to wit T [...] H [...] (13) by penetrating her vaginally with his penis without the consent of the said complainant.”

[11] The following appears from the transcribed record after the charges were put to the appellant:

“COURT: Before you sit down do you confirm that the provisions of section 51(1) of the Criminal Law Amendment Act, Act 105 of 1997 were indeed explained to the accused?

MR STEYN: I do confirm Your Worship.”

[12] In Tsiba the following is said at paragraphs [18] and [19]:

“[18] The only provision providing for a sentence of life imprisonment in the CLAA, is section 51(1) of the CLAA. Section 51(2) of the CLAA at the time the appellant was sentenced, provided for discretionary minimum sentences starting at ten (10) years imprisonment for rape with maximum terms not exceeding five (5) years in addition to the minimum sentence applicable, which maximum terms apply only to the Regional Court.

[19] The relevance of the Parts of Schedule 2 of the CLAA is to identify the jurisdictional fact which would bring the specified offence within the ambit of section 51(1) or 51(2) of the CLAA. In the present appeal the jurisdictional fact which the State relied on to bring the matter within the ambit of section 51(1) of the CLAA, and thereby trigger a sentence of life imprisonment, must be determined from a vigilant examination of the charge put to the appellant...”

[13] The State in the charge placed the age of the victim, which was 13 years at the time of the rape, in brackets. The only relevance of bringing this to the attention of the appellant is that the rape of a child under the age of sixteen (16) years as provided for in Part I of Schedule 2, at that time, triggered a sentence of life imprisonment. No similar sentence would be triggered within the ambit

of section 51(2) of the CLAA and any other Part of Schedule 2.

[14] The following is said at paragraphs [20] and [21] of Tsiba, which applies equally to the present appeal:

“[20] The appellant relies on the unreported judgment of this Court, Mokhuane v S (CA 05/2018) ZANWHC 53 (18 September 2020) at paragraphs

[18] to [20] as the sole basis for the technical ground of appeal, to argue that the sentence of life imprisonment could not have been imposed. Paragraphs [18] to [20] of Mokhuane reads as follows:

“[18] The facts in the MT and other cases are distinguished from the facts of the present case at hand. It is not sufficient to merely state that Section 51 and Schedule 2 of the Minimum Sentence Act is applicable, without specifically mentioning which sub-section of Section 51 and which

Part of Schedule 2 finds application.

See: S v Mashinini 2012 SACR 604 SCA.

S v Ndlovu 2017

(1) BLCR 1286 CC.

[19] I am of the view that a misdirection was committed by not informing the appellant with sufficient particularity which sub-section

of Section 51 of the Criminal Law Amendment Act finds application. So too with regard to which Part of Schedule 2 is applicable. It is not sufficient to merely state that Section 51 read with Schedule 2 is applicable. To add to this, the charge sheet annexure specifies that sub-section (2) [s51(2)] is applicable.

Without rectifying the annexure to the charge sheet, the prosecutor merely refers to the section and not the particular subsection as well as Schedule 2 without specifying which Part of Schedule 2 finds application. To leave the charge sheet as is (referring to section 51 (2)) and only refer to section 51 is indeed confusing. Not only should the prosecutor have amended the charge sheet to read Section 51 (1) but also to refer to the relevant Part of Schedule 2. The learned Regional Magistrate should also have amended the charge sheet

accordingly, seeing that reference was made to nine (9) sexual intercourse encounters.

[20] I am on the view that the omission of the specific section and the specific Part of Schedule is fatal and it amounts thereto that the appellant did not receive a fair trial...”

[21] On the same basis that Hendricks DJP (as he then was) distinguished the facts of Mokhuane from that of the cases alluded to at paragraph

[18] of Mokhuane, the facts of the present appeal are distinguishable from Mokhuane. In Mokhuane the charge only made reference to section 51 and Schedule 2 of the CLAA. In the present appeal, the charge makes specific reference to section 51(1) of the CLAA. The only sentence which can be imposed in terms of section 51(1) of the CLAA is life imprisonment, subject to proof of a jurisdictional fact, as provided for only in Part I of Schedule 2 and no other Parts of Schedule 2. The State in the present appeal, went one step further in the charge proffered against the appellant, which did not happen in Mokhuane, by making it clear that section 51(1) of the CLAA was applicable in that the child was born on 18 December 2006. There can be no doubt that this is in reference to the jurisdictional fact in Part I of Schedule 2, that the child was under the age of sixteen

(16) years.”

[15] As held in Tsiba, the appeal against sentence on the technical ground of appeal stands to be dismissed.

The second and third grounds of appeal – the failure to deviate from the mandated sentence of life imprisonment on count 2

[16] In imposing sentence, the Regional Magistrate had regard to the oft-quoted triad of the personal circumstances of the appellant, the offence and the interest of society. He introduced his judgment on sentence with a sad, but abiding reality in our country, that:

“...Rape in this country especially rape of women and children has reached a pandemic proportion. Women and children can no longer walk freely without being assaulted in this, in the manner. In this case the raping of the complainant a young girl by you who is old enough to be your daughter is very gruesome, heartless and cruel. She was a friend of your own daughter. In this regard I wish to refer to Kearns v S 2009 (2) SACR 684 where Jeppe (sic Jajbhay J) had this to say or had passed his remark:

‘A rapist not only violates the victim’s privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim. A victim degrades the very soul of the helpless female. The physical scar may heal up, but the mental scar will always remain. When a woman is ravished, what is inflicted is not merely physical injury but the deep sense of some deathless shame. It is violation with violence of the private person of a woman. This constitutes an outrage by all means By the very nature of the offence it is an obnoxious act of the highest order.”

- [17] The Regional Magistrate went to consider the personal circumstances of the appellant. These included the fact that he was 53 years old, married with two children aged 15 years and 10 years old, was a winch operator at a mine and that he was not a first offender, with a violent character. He went on to find that the appellant was not a primary caregiver as his wife took care of the children. No prospects of reformation were found. No substantial and compelling circumstances were found to exist to deviate from the mandated sentence of life imprisonment.
- [18] The sentence judgment of the Regional Magistrate is particularly brief in a similar fashion to that in Tsiba. I find myself having to engage in an act of supererogation in respect of the same Regional Magistrate. I am constrained to repeat what was said in Tsiba regarding the importance of sentence proceedings as a whole. The following is said at paragraphs [26] and [27] of Tsiba:

“[26] The author Hiemstra in the publication, Suid-Afrikaanse Strafproses (first edition) at page 407, loosely translated, made the following observation regarding sentence, which is apt for the present appeal, both in respect of the conduct of the appellant’s legal representative and the prosecutor and the Regional Magistrate:

“The utmost attention is given to the question of guilt or innocence; no faculty, time nor vigour is saved in the process and an intricate system of evidential rules has been developed in the process. However, once the accused has been convicted, sentencing usually follows within minutes. Counsel for the accused points out various circumstances and counsel for the state says nothing.”

- [27] In the fifth edition of Suid-Afrikaanse Strafproses at page 650 by Kriegler, the following is said (loosely translated):

“Importance of sentencing process - The imposition of sentence is usually the most difficult phase of a criminal case. Unfortunately it is the one subject that jurists are least taught - and consequently know least of. Although it is the most important phase for the accused it is often disposed of so-so. It requires at least the same attention as consideration of the merits; and because it usually requires insight and knowledge which the jurist does not have, the wise sentencing officer will not hesitate to, in appropriate circumstances, avail himself of expert evidence.”

[19] I find myself in a similar position of engaging in an act of supererogation in respect of the conduct of the legal representative, Mr Steyn, who appeared on private instruction of the appellant in the trial court and that of the prosecutor, Ms Grassman in respect of their terse addresses on sentence. Mr Steyn in his address on sentence failed the appellant. It does not behove a legal representative to address a court on sentence with the kind of brevity in this matter, to himself cast doubt on his clients personal circumstances as constituting substantial and compelling circumstances. The prosecutor similarly failed in her duty to the victim. The Regional Magistrate was simply given no insight into the impact of the rape on the victim. All the prosecutor did was repeat what was accepted facts, that the victim was 13 years old and that she was raped being a virgin and this deed being perpetrated by the appellant on his daughter's friend. As I said in Tsiba:

“[28] ...This conduct goes against the very grain of what was said in Malgas supra that sentencing in matters such as the present must be victim centred and in circumstances where, sadly no voice was given to the victim in this matter as a result of the absence of any evidence or address by the prosecutor on this important issue:

‘[16] An enlightened and just penal policy requires consideration of a broad range of sentencing options from which an appropriate option can be selected that best fits the unique circumstances of the case before court. To that should be added, it also needs to be victim-centred...

In South Africa victim empowerment is based on restorative justice. Restorative justice seeks to emphasise that a crime is more than the breaking of the law or offending against the state – it is an injury or wrong done to another person. The Service Charter for Victims of Crime in South Africa seeks to accommodate victims more effectively in the criminal justice system. As in any true participatory democracy its underlying philosophy is to give meaningful content to the rights of all citizens, particularly victims of sexual abuse, by reaffirming one of our founding democratic values namely human dignity. It enables us as well to vindicate our collective sense of humanity and humanness. The Charter seeks to give to victims the right to participate in and proffer information during the sentencing phase. The victim is thus afforded a more prominent role in the sentencing process by providing the court with a description of the physical and psychological harm suffered, as also the social and economic effect that the crime had and in future is likely to have. By giving the victim a voice the court will have an opportunity to truly recognise the wrong done to

the individual victim...’

[20] Notwithstanding the brevity of the judgment on sentence and the fact that the prosecutor provided no insight into the impact of the rape on the victim, I am of the view that the appeal against the sentence of life imprisonment should fail. I would, however, to appreciate the justification for life imprisonment expound on the facts of the matter and relevant case law to demonstrate that our Courts will show no mercy to those who seek to rape women and children, in a climate where such rapes are not dissipating but are on the increase.

Background

facts

- [21] In considering an appropriate sentence regard must be had to the facts in mitigation and aggravation of sentence against the facts which underscore the conviction of the appellant. To that end, the facts which underscore the conviction are briefly as follows. The appellant at trial provided a plea explanation that he engaged in consensual sexual intercourse with the victim, whom he thought was 17 years old. On 06 January 2016, the victim, a 13 year old girl at the time, accompanied her friend Retabile (the appellant's daughter) to the appellant's residence, as Retabile wanted to pay a visit to the appellant, with whom she was not living. On arrival at the appellant's residence, the girls were requested by the appellant to cook porridge (pap). Retabile was sent to the shop, whilst the victim remained behind with the appellant. In the absence of Retabile, the appellant took the victim to a bedroom where he forced himself on her and raped her vaginally without her consent. After raping her, he offered her an amount of R10.00. The victim left and reported the rape to her father.
- [22] T [...] 1 H [...], the father of the victim testified that he knew the appellant. The H [...] family not only lived next to the appellant for a very long time, but the appellant was a co-worker of Mr H [...]. Mr H [...] paid regular visits to the appellant from the time the appellant started living in Kanana. The appellant thus knew the victim from a very tender age and in fact knew her very well.
- [23] The appellant, save for his version of consensual sexual intercourse, was linked by DNA as a result of a vestibulum swab obtained from the victim when she was examined by a doctor, which matched DNA from a buccal sample obtained from the appellant.
- [24] The victim was examined at Tshepong Crisis Centre by a doctor. The gynaecological examination of the victim revealed tearing of the posterior fourchette with increased friability, the fossa navicularis was torn, the hymen was swollen and bruised, with fresh tears observed at clock position nine o' clock. The doctor concluded that the victim presented with clear signs of rape premised on the tears and that the hymen was totally traumatised, swollen and bruised, with tears.
- [25] In submissions in the heads of argument of Mr Gonyane for the appellant, addresses the question of substantial and compelling circumstances to deviate from the mandated sentence of life imprisonment as follows. That the appellant, being 53 years old at the time;

blessed with two minor children aged 15 and 10 years; having spent 13 months in custody; being gainfully employed at Tau Lekoa Mines which ensured he could support his family; and that the victim who was 13 years old at the time was not caused any grievous bodily harm, should be considered as cumulatively constituting substantial and compelling circumstances.

- [26] I re-iterate that nothing in the personal circumstances of the appellant stands out as substantial and compelling either individually or cumulatively to merit deviation from the mandated sentence of life imprisonment. The absence of any grievous bodily harm similarly cannot weigh in favour of the appellant as being substantial and compelling.
- [27] The fact that the prosecutor provided no evidence on the impact of the crime on the victim must be deprecated in the strongest terms. That aside, the sentiments expressed in *S v Chapman* 1997 (2) SACR (SCA) at 5A-D are apposite:

“Rape is a serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, to privacy and the integrity of every person are basic to the echoes of the Constitution and to any defensible civilization. Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquility of their homes without fear, the apprehension and the insecurity, which constantly diminishes the quality, and enjoyment of their lives. The courts are under a duty to send a clear message to the accused, to other potential rapists and to the community: We are determined to protect the quality, dignity and freedom of all women, and we shall show no mercy to those who seek to invade those rights”

- [28] These sentiments and those expressed in a plethora of cases over decades since the enactment of the CLAA, are succinctly captured in the recent judgment of *Maila v S* (429/2022) [2023] ZASCA 3 (23 January 2023), from which I quote extensively:

“[1] 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.

Ad Sentence

[40] I now turn to the question of sentence. The trial court imposed the prescribed minimum sentence of life imprisonment. It is common cause that the provisions of s 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. . .’

[41] 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.’

[51] 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.

[53] The trial court noted the following as aggravating circumstances: the appellant was the complainant’s maternal uncle and in a position of trust – who is ‘supposed to protect and love’ the complainant and not abuse her. The trial court did not note specifically that the appellant took advantage of the presumably long absence of the mother and grandmother

(as alluded to earlier on) to abuse the complainant. A factor ordinarily present in rapes committed within families or by those close to the families to commit these violent crimes, knowing well that the victims are left on their own at particular times of the day or on certain days.

[57] Rape of women and children is rampant in South Africa. It has reached alarming proportions despite the heavy sentences which courts impose. South Africa has one of the highest rape statistics in the world, even higher than some countries at war. The country's annual police crime statistics confirms this: in 2019/2020, there were 42 289 rapes reported as well as 7 749 sexual assaults. This translates into about 115 rapes per day.

[58] 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*, 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.'

[59] Taking into account *Jansen*, *Malgas*, *Matyityi*, *Vilakazi* and a plethora of judgments which follow thereafter as well as regional and international protocols which bind South Africa to respond effectively to gender-based violence, courts should not

shy away from imposing the ultimate sentence in appropriate circumstances, such as in this case. With the onslaught of rape on

children, destroying their lives forever, it cannot be 'business as usual'. Courts should, through consistent sentencing of offenders who commit gender-based violence against women and children, not retreat when duty calls to impose appropriate sentences, including prescribed minimum sentences. Reasons such as lack of physical injury, the inability of the perpetrator to control his sexual urges, the complainant (a child) was spared some of the horrors associated with oral rape, which amount to the acceptance of the real rape myth, the accused was drunk and fell asleep after the rape, the complainant accepted gifts (in this case, sweets) are an affront to what the victims of gender-based violence, in particular rape, endure short and long term. And perpetuate the abuse of women and children by courts. When the Legislature has dealt some of the misogynistic myths a blow, courts should not be seen to resuscitate them by deviating from

the prescribed sentences based on personal preferences of what is substantial and compelling and what is not. This will curb, if not ultimately eradicate, gender-based violence against women and children and promote what Thomas Stoddard calls ‘culture shifting change’.

[60] 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 9-year-old child, his niece. The sentence is, thus, justified in the circumstances.”

[29] The appeal against sentence accordingly stands to be dismissed.

Order

[30] In the result, the following order is made:

(ii) The appeal against sentence is dismissed.

A H PETERSEN

JUDGE OF THE HIGH COURT

I agree

R D HENDRICKS

JUDGE PRESIDENT OF THE HIGH COURT

For appellant: Mr T G Gonyane

Instructed by: Legal Aid South Africa

Mahikeng Justice Centre

For respondent: Adv W Mahlangu

Instructed by: The Director of Public Prosecutions, Mahikeng

[1] [2017] ZASCA 88; [2017] 3 All SA 520 (SCA); 2017 (6) SA 90 (SCA); 1962 (4) SA 531 (A) at 532 C - E

[2] [2013] ZACC 37; 2014 (2) SA 68 (CC) at paragraph 23

[3] 2001

(2) SA 1222 (SCA)

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