

SOUTH AFRICA / JUDGMENT

Olifant v S (A139/2023) [2024] ZAGPJHC 746 (29 July 2024)

[2024] ZAGPJHC 746

COURT

South Gauteng High Court, Johannesburg

BEFORE

Mkhabela, Johnson

CASE / FILE NUMBER

A139/2023

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IN

THE HIGH COURT OF SOUTH AFRICA,

GAUTENG

DIVISION, JOHANNESBURG

CASE

NO: A139/2023

1. REPORTABLE: NO

2. OF INTEREST TO OTHER

JUDGES: NO

3. REVISED.

In

the matter between:

OLIFANT,

DANIEL

Appellant

and

THE

STATE

Respondent

JUDGMENT

MKHABELA AJ:

- [1] This is an appeal in terms of the provisions of Section 309(1)(a) of the Criminal Procedure Act 51 of 1977 (“the CPA”) against the judgment of the Johannesburg Regional Court by the appellant.
- [2] The appellant was convicted of one count of rape and tendered a plea of guilty in terms of Section 112(2) of the CPA. For convenience I will refer to the appellant as the accused.
- [3] The circumstances pertaining to the rape were explained in the plea of guilty and are as follows.
- [4] On or about the 4th of February 2019 at Johannesburg, the accused unlawfully and intentionally committed an act of sexual penetration with the complainant, a 71-year old woman by inserting his penis inside her vagina without her consent.
- [5] The plea explained further that the accused was the gardener at the house where the complainant was a tenant at the time of the rape.
- [6] The rape commenced when the accused knocked at the complainant’s room. This was in the evening of the 4th of February 2019.
- [7] Upon the complainant opening the door, the accused grabbed her and threw her on top of her bed, undressed her by removing her clothing and underwear.
- [8] Once the complainant was undressed, the accused also took off his clothes, including his underwear, and instructed the complainant not to make noise.
- [9] The accused then inserted his penis inside the complainant’s vagina without her consent. After finishing raping her, the complainant requested to go to the toilet and subsequently escaped using a sliding door. The accused then ran away after realising that the complainant had escaped.
- [10] The accused was subsequently arrested in Krugersdorp after a warrant of arrest had been issued against him.
- [11] In his plea of guilty, the accused admitted the medical evidence which supported the occurrence of rape as documented in the J88 form and the medical conclusion reached by Dr Clevich to the effect that the complainant was indeed raped. This conclusion was also supported by the complainant’s labia minora being red and there was also a fresh tear which was consistent with vaginal penetration.
- [12] The plea also contained an apology to the complainant and an assertion that the accused was in his sober senses when he raped the complaint.

- [13] The State accepted the plea of guilty as it was in accordance with the State's case. Similarly, the Court accepted that the accused admitted all the elements of the offence to which he had pleaded guilty.
- [14] The Court then found the accused guilty of rape in contravention of Section 3 of Act 32 of 2007 read with Section 51(1) of 105 of 1997.
- [15] Since the matter involved the prescribed minimum sentence as envisaged by Section 51(1) of Act 105 of 1997, the Court requested a pre-sentence report as well as a victim impact report. The matter was postponed for purpose of sentence and the admission of those two reports mentioned above.
- [16] On the day of sentencing, the State informed the Court about the accused's previous convictions which were as follows:
- 16.1 One count of housebreaking with intent to steal in 1985;
- 16.2 Another count of housebreaking with intent to steal in 1986;
- 16.3 Possession of dependence producing substance which are drugs, this was in 1991;
- 16.4 One count of robbery in 1991;
- 16.5 One count of theft on 18 June 1993;
- 16.6 One count of housebreaking with intent to steal and this was on 18 February 2000;
- 16.7 v However, on 17 August 2002, the accused was released on parole;
- 16.8 One count of theft and possession of firearm which was on 29 September 2005;
- 16.9 One count of robbery which was on 5 December 2007 as well as one count of rape;
- 16.10 One count of rape and this was on 12 October 2021.
- [17] After the State had read all these previous convictions, the Court enquired from the accused as to whether he admits his previous convictions to which the accused answered in the affirmative.
- [18] The State then requested to lead evidence in aggravation of the sentence by calling the complainant to the stand. The State requested that the complainant's evidence be adduced and heard by the Court in camera as envisaged by Section 153 of the CPA.
- [19] The complainant testified that she was 75 years old or about to reach 75 years in the following week.
- [20] The gist of the rest of the complainant's evidence was that the accused was known to her in that the accused was a gardener working for the complainant's landlady.

- [21] The complainant informed the Court that she used to assist the accused in the garden. She testified that the rape had severely affected her life. She had become reclusive and has developed hypertension. She had also lost a lot of weight which she was not able to regain.
- [22] The complainant testified that she was giving evidence so that the accused “does not do to other women what he did to me”. She further testified that she had bruises on her neck and legs and that her daughter took pictures of her injuries.
- [23] The complainant confirmed her date of birth being 6 September
1947. The Magistrate then pointed out to the complainant that she was the third woman to be raped by the accused.
- [24] The accused, the Magistrate noted, had been convicted of rape in 2007 and sentenced to 10 years imprisonment and in 2021 was also convicted of rape and sentenced to 15 years imprisonment.
- [25] Upon asked by the Court as to the term of sentence she would want, the complainant responded that a life imprisonment would be appropriate given the fact that the accused was a serial rapist.
- [26] In her cross-examination by the defence it was put to the complainant that he had accepted responsibility and was apologising for what he had done. The complainant responded by saying that she accepts his apology and further that she forgives the appellant.
- [27] The complainant also conceded that she was on good speaking terms with the appellant prior to the rape.
- [28] In response to questions from the Court, the complainant indicated that she was taken directly to the hospital after the rape and had undergone counselling.
- [29] In response to a question from the Court, the complainant accepted that counselling did not help her since she was still affected by the rape incident.
- [30] The complainant indicated further in response to questions by the Court that she had suffered injuries from the neck and that her daughter took photos of her bruises on her neck.
- [31] When the Magistrate pointed out to her that she was the third woman to be raped by the appellant, the complainant responded by saying that she was sorry for the other women who were raped by the appellant.
- [32] The Magistrate remarked that the appellant was convicted of rape in 2007 and sentenced to 10 years imprisonment and was also convicted for rape in 2021 and sentenced to 15 years imprisonment.

- [33] The defence then made submissions in mitigation and relied heavily on the pre-sentence report which detailed the accused's personal circumstances. The appellant did not give evidence in mitigation nor was any witness called to testify on his behalf.
- [34] The pre-sentence report detailed the personal circumstances of the appellant. He was 50 years old at the time of sentence and was born in Jagersfontein in the Free State.
- [35] The appellant was the only child from his mother and the fifth sibling from his father. He was raised by his maternal aunt since his mother was a domestic worker who moved with her employers whenever they relocated.
- [36] From the age of 12 the appellant started committing various crimes. This continued and when the appellant was 19 years old, he committed another offence.
- [37] The appellant has been in and out of prison and according to his uncle he did not get support from his father.
- [38] The appellant told the probation officer that after he was released on parole, he consulted a prophet who told him that he had been bewitched.
- [39] The appellant also mentioned to the probation officer that he had been abused and that was the reason why he was committing the offences that are the subject of his previous conviction.
- [40] It was submitted on behalf of the appellant that there were substantial and compelling circumstances justifying a departure from the prescribed minimum sentence.
- [41] The appellant's legal representative pointed out that the Court should regard the fact that the appellant pleaded guilty as a mitigating factor which should be in the appellant's favour.
- [42] It was submitted that the appellant was remorseful^[1] which is indicated by his decision to plead guilty as well as his apology to the complainant.
- [43] The defence, to the credit of Mr Ncumisa from Legal Aid, conceded that there were aggravating factors in this case such as the age of the complainant, who was 71 years old at the time of the rape. The other aggravating factor that the defence mentioned was the manner in which the rape was committed. What was alluded to here was the injury inflicted by the appellant when he committed the rape in question.
- [44] The defence accordingly accepted that apart from violating the complainant's right to dignity, the appellant also assaulted the complainant. All these aggravating factors were conceded by the defence.
- [45] The defence also highlighted the "string of previous convictions", in particular the ones pertaining to the two rape convictions on which the appellant was convicted and sentenced to 10 and 15 years imprisonment respectively.

- [46] Furthermore, the defence also pointed out the fact that the appellant was on parole when he committed the current rape. This factor was identified as an aggravating one.
- [47] The defence also pointed out that the appellant's chances of rehabilitation are minimal given his past conduct or previous convictions.
- [48] However, it was pointed out on behalf of the appellant that he was a father of two children.
- [49] After the submission in mitigation of sentence, the Court observed that the appellant committed rape on 4 February 2019.
- [50] On 19 May 2019 he committed another rape. The Magistrate observed that the appellant committed the rape on 19 May 2019 in the space of three months.
- [51] The Magistrate enquired from the defence as to why would the appellant rape another older person if he was remorseful.
- [52] The legal representative for the State emphasised that the appellant is not a young person and his upbringing could not be the reason as to why he committed the rape in question.
- [53] Furthermore, it was pointed out by the State that the appellant had "many opportunities to rectify his behaviour in order to act in a remorseful way".
- [54] It was pointed out that the appellant took advantages of two elderly ladies, the complainant and her landlady who gave him food and employment after having approached them asking for work and food. Accordingly, there was a trust relationship between the appellant and the complainant, so was it argued on behalf of the State.
- [55] The Court was referred to the case of *S v Chapman*[2] which stated as follows:
- "Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. ... [Women] 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 tranquillity of their homes without the 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 equality, dignity and freedom of all women, and we shall show no mercy to those who seek to invade those rights."*
- [56] The State concluded its oral address by inviting the Court to impose the applicable minimum sentence and submitted that the probation officer's report does not reveal anything that could be interpreted as constituting substantial and compelling circumstances.
- [57] The Magistrates' Court in its judgment referred to the applicability of the minimum sentence regime and the fact that the complainant was an older person as defined in terms of the Older Persons Act[3].

[58] After referring to the established and guiding principles pertaining to sentence the Court referred to the judgment of Majiedt JA in the case of *Mudau v the State*[4] on which the following was stated:

“It is also self-evident that sentence must always be individualised, for punishment must always fit the crime, the criminal and the circumstances of the case. It is equally important to remind ourselves that sentencing should always be considered and passed

dispassionately, objectively and upon a careful consideration of all relevant factors. Public sentiment cannot be ignored, but it can never be permitted to displace the careful judgment and fine balancing that is involved at arriving at an appropriate sentence.

Courts must therefore always strive to arrive at a sentence which is just and fair to both the victim and the perpetrator, has regard to the nature of the crime and takes account of the interests of society. Sentencing involves a very high degree of responsibility

which should be carried out with equanimity, as Corbett JA put it in *S v Rabie*[5]:

‘[a] judicial officer should not approach punishment in a spirit of anger, because, being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interest of society which his task and the objects of punishment demand of him. Nor should he strive after severity; nor, on the other hand, surrender himself to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a humane and compassionate understanding of human frailties and the pressures of society which contribute to criminality.’”

[59] The Magistrate emphasised that it was therefore not only the interests of the appellant that needed to be taken into account, the interests of society also play a role in sentencing, so contended the Magistrate in his judgment.

[60] Consequently, the Magistrate referred to the case of *R v Karg*[6] which stated as follows:

“It is not wrong that the natural indignation of interested persons and of the community at large should receive some recognition in the sentence that courts impose, and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured parties may feel inclined to take the law into their own hands. Naturally righteous anger should not becloud judgment”.

[61] The Magistrate then went into some considerable lengths in detailing the personal circumstances of the appellant, inter alia, that from the age of 12, the appellant lived off crime and lack basic needs. The appellant’s previous convictions were also detailed and taken into account by the Magistrate.

- [62] Having set out the appellant's personal circumstances for purposes of determining the appropriate sentence, the Magistrate then grappled with the question as to whether there were substantial and compelling circumstances that existed in order to deviate from imposing the minimum sentence.
- [63] The Magistrate observed that whether there were substantial and compelling circumstances was a factual question. He noted that the defence's submission that there were substantial and compelling circumstances was based on the appellant's personal circumstances and the submission that he was remorseful.
- [64] The Court then referred to relevant authorities dealing with the imposition of minimum sentences.
- [65] Having detailed the personal circumstances of the appellant, the Court then focused on the interests of society as well as the impact of the rape on the complainant – including the injuries that the complainant suffered pursuant to the assault committed by the appellant.
- [66] In respect of the defence's submission that the appellant was remorseful, the Magistrate disagreed. His reasons were that the appellant was not remorseful since he raped the complainant in this case in February and in May he raped another old woman. Two months later he says he was remorseful after committing the second rape on another old woman. In the Magistrate's view it was more regret than remorse.
- [67] According to the Magistrate, the evidence pointed to a picture of a serial rapist who prey on old women – since the complainant was 71 years old at the time of the rape.
- [68] The Magistrate observed that rape of women and young children had become cancerous in our society. The Court then made reference to the case of *Director of Public Prosecutions v Thabethe* [7] which deals with public confidence in the criminal justice system.
- [69] The Court pointed out that any crime that threatens the well-being of society deserves severe punishment. Furthermore, the Court continued to observe that when it comes to sentencing rapists, it cannot be business as usual and the protection of possible future victims must be taken into account when making a decision on an appropriate sentence.
- [70] Ultimately, the Magistrate came to the conclusion that he was not convinced or persuaded that substantial and compelling circumstances exist to deviate from imposing the prescribed sentence of life imprisonment. Accordingly, the Magistrate sentenced the appellant to life imprisonment.

The appeal

- [71] The appeal before this Court is an automatic appeal as envisaged by Section 309(1)(a) of the CPA in that the appellant did not need to ask for leave to appeal his sentence from the Lower Court.

[72] It is therefore common cause between the parties that the appeal is in respect of sentence only.

[73] In the circumstances, the only issue in this appeal that falls crisply for determination is whether this Court sitting as an Appeal Court is entitled to interfere with the sentence imposed by the Magistrates' Court.

The applicable law

[74] It is trite that in every appeal against sentence, whether imposed by a Magistrate or a Judge, the Court hearing the appeal should be guided by the principle that punishment is pre-eminently a matter for the discretion of the Trial Court. Furthermore, the Court hearing the appeal against sentence should be careful not to erode such discretion. There is also a further principle to the effect that the sentence should only be altered if the discretion has not been judicially and properly exercised. The test under the letter

principle is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate. These principles were enunciated in the case of *S v Rabie*[8].

[75] These principles were repeated and endorsed in the case of *S v Malgas*[9]. I do not need to regurgitate them since they are trite.

Evaluation

[76] In my respectful view there is no room to alter the sentence imposed by the Magistrates' Court since there is no misdirection committed. Moreover, since the sentence of life imprisonment is ordained by the legislature, there is no room to contend that it could be disturbingly inappropriate.

[77] Similarly, there is no justification to quibble with the Magistrates' Court's findings that there are no substantial and compelling circumstances that exist in order to deviate from the prescribed minimum sentence of life imprisonment. The Magistrate is correct in his factual findings that the evidence portrays the appellant as a serial rapist that preys on old women.

[78] Equally correct is the Magistrates' Court's findings that the appellant was not remorseful but regretful for being caught. After all, the evidence against the appellant was so damning that he had no choice but to plead guilty.

[79] It should also be borne in mind that the appellant did not hand himself over to the police but was arrested in Krugersdorp after a warrant of arrest had been issued.

[80] In my view a court should not be inclined to accept an assertion that an accused person is remorseful in circumstances in which such an accused ran away after the commission of the offence in question and only to claim remorse when the evidence is seen to be overwhelming against such an accused person.

[81] To my mind and based on the facts of this case and the fact that the complainant in this case is the third woman to be raped by the appellant, the assertion of remorse is so hollow that a Court should reject it with the contempt that it deserves.

[82] For all these reasons, the appeal is susceptible to fail.

Order

[83] I the result, I make the following order:

1. The appeal is dismissed.

R B MKHABELA

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION

JOHANNESBURG

Electronically submitted therefore unsigned

I concur.

JOHNSON

Delivered: This judgment was prepared and authored by the Acting Judges whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 29 July 2024.

FOR THE APPELLANT: D Maluleke FOR THE STATE: Adv P T Mpekana DATE OF THE HEARING: XXX 2024 DATE OF JUDGMENT: 29 July 2024

[1] The Court was referred to the case of *S v Matyityi* [2010] ZASCA 127 (30 September 2010), which deals with the question of remorse.

[2] *S v Chapman* [1997] ZASCA 45; 1997

(3) SA 341 (SCA) 345C-D.

[3] Act 13 of 2006.

[4] (764/12)

[2013] ZASCA 56 (9 May 2013) para 13.

[5] 1975

(4) SA 855 (A) 866A-C.

[6] 1961(1) SA 231 (A) 236A-B.

[7] [2011] ZASCA 186 (30 September 2011).

[8] Footnote 5 supra.

[9] 2001 SACR 496 (SCA).

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Prepared on 12 October 2026 · Esheria