

SOUTH AFRICA / JUDGMENT

Tsiba v S (CA 44/2022) [2023] ZANWHC 27 (15 March 2023)

[2023] ZANWHC 27

COURT

North West High Court, Mafikeng

BEFORE

Petersen, Maakane

CASE / FILE NUMBER

CA 44/2022

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Policy

IN THE HIGH COURT OF

SOUTH AFRICA

NORTH WEST DIVISION,

MAHIKENG

CASE NO: CA 44/2022

Reportable: NO

Circulate to Judges:

NO

Circulate to

Magistrates: NO

Circulate to Regional

Magistrates: NO

In the matter between:

IFRIME LUSIZI TSIBA

APPELLANT

and

THE

STATE

RESPONDENT

Coram:

Petersen J, Maakane AJ

Heard: 24 February 2023
Handed
down: 15
March 2023
ORDER
(i)
Condonation for the late noting and prosecution
of the appeal is granted.
(ii)
The appeal against the sentences imposed is
upheld.
(iii)
The sentence imposed by the court a
quo is set aside and is substituted
with the following: “Count
1 (Theft): Five (5) years imprisonment.
Count
2 (contravening section 3 of Act 32 of 2007): Life imprisonment”.
(iv)
In terms of section 103(1) of the Act 60
of 2000, the accused shall remain unfit to possess a firearm.
(v)
In terms of section 50(2) of Act 32 of 2007, the accused particulars
are to be included in the National
Register for Sex Offenders.

JUDGMENT

PETERSEN J

Introduction

[1] The appellant was tried in a trial which commenced on 11 July 2019 in the Regional Court, Klerksdorp on two (2) charges including robbery with aggravating circumstances read with section 1 of the Criminal Procedure Act 51 of 1977 (‘the CPA’) and further read with section 51(2) of the Criminal Law Amendment Act 105 of 1997 (as amended) (Count 1); and 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’) – (count 2). The appellant pleaded not guilty and following a trial on the charges, he was convicted on 22 October 2019 of the competent verdict of theft on count 1 and rape as charged on count 2. On the same date, 22 October 2019, the appellant was sentenced to four (4) years imprisonment on the theft conviction (count 1) and life imprisonment on the rape conviction (count 2).

- [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 set out as follows in the affidavit in support of the application for condonation. He was legally represented by Mr. Neethling from Legal Aid South Africa (LASA) for the duration of the criminal trial in the Regional Court. The Regional Magistrate immediately following sentence informed him of his automatic right of appeal, which had to be prosecuted within fourteen

- (14) days from date of sentence. The appellant duly informed Mr Neethling that he required assistance to note an appeal. However,

as a result of being whisked away to the holding cells, the instructions could not be taken.

- [7] The appellant was taken to Klerksdorp Correctional Centre where he started serving his sentence. He wrote to LASA within fourteen (14) days of sentence being imposed requesting legal assistance on appeal. A paralegal from LASA arrived at Klerksdorp Correctional Centre and caused the appellant to complete forms for legal aid assistance. The appellant was advised that he would be requisitioned to court but that never materialized.

- [8] During November 2019 the appellant was transferred to Rooigrond Correctional Centre where he was to continue serving his sentence. A different paralegal arrived at Rooigrond from the offices of LASA Mafikeng, during February 2020. A new set of forms were complete and the appellant was advised that arrangements would be made for his appeal to be heard in the High Court. Once again, the appellant received no feedback from LASA.
- [9] During June 2021, the appellant was transferred to Kutama Sinthumule Correctional Centre in Limpopo Province to continue serving his sentence there. The appellant continued making enquiries regarding his appeal and through the assistance of a correctional official, Mr John Phillemon during July 2022, the appellant eventually made contact with Mr Gonyane telephonically on 15 September 2022. The appellant instructed Mr Gonyane that he was desirous of only proceeding with an appeal against sentence.
- [10] Whilst the application for condonation is opposed by the respondent on the basis that there are no reasonable prospects of success on appeal, the delay in prosecuting the appeal cannot be attributed to the appellant. The appellant's explanation is accepted and sufficient cause has been shown for condonation to be granted and the main issues in the appeal to be ventilated and considered. Condonation for the late prosecution of the appeal against sentence is accordingly granted.

Grounds of appeal

- [11] 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

- [12] 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 in respect of the rape charge (count 2), 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

- [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...”

[16] Against the aforesaid background, a vigilant examination of the charge proffered against the appellant, as it appears from the charge sheet and the transcribed record is necessary. The charge reads as follows:

“Charge 2 one of rape, in other words contravening the provisions of section 3 read with various other sections of the Sexual Offences Act 32 of 2007 as well as read with the provisions of section 51(1) of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 as amended in that on or about the 1 April 2018 and at or near Orkney 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 L [...] P [...] D [...] by inserting his penis into or beyond the genital organs of the said complainant without the consent of the said complainant.

The provisions of section 51(1) and Schedule 2 of the Criminal Law Amendment Act is applicable as this said complainant was born on the 18 December in the year 2006.”

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

“COURT: Do you recall that when we conducted a pre-trial conference on 21 May this year you confirmed that your attorney did explain to you the prescribed minimum sentence with regard to count 1 as well as with regard to count 2. Do you still confirm that?

ACCUSED: Yes I recall.”

- [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. The State after reading out the essential elements of the charge of rape which was read with section 51(1) and not section 51(2) concluded by informing the appellant that “The provisions of section 51(1) and Schedule 2 of the Criminal Law Amendment Act is applicable as this said complainant was born on the 18 December in the year 2006”. 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.
- [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.

[22] The appeal against sentence on the technical ground of appeal accordingly 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

[23] The second and third grounds of appeal must be considered by having regard to the judgment on sentence. The judgment on sentence by the Regional Magistrate leaves much to be desired. The brevity thereof can, on a reading of the transcribed record, can only be attributed to the fact that upon sentencing the appellant, the roll for the day would be concluded. This appears clearly from the transcribed record against the date stamp [14:20] in reference to the time of day:

“PROSECUTOR: As the court pleases, Your Worship. That also concludes the court roll.

COURT ADJOURNS. [14:20]”

[24] The totality of the judgment on sentence reads as follows:

“SENTENCE

You have been indeed found guilty of a very serious offence that is with regard to rape. And having taken into account all your personal circumstances. The seriousness of the offence and the interests of society with regard to count 2, which is rape.

I found that there are no substantial and compelling circumstances. Therefore in that count, you are sentence to undergo life imprisonment.

Count 1, you were convicted of theft. That is a competent verdict, not robbery with aggravating circumstances. For that count, you are sentenced to four years' imprisonment.

It is so that in terms of section 280(2) of the Criminal Procedure Act, that the sentence in count 1 will run concurrently with the sentence in count 2.

You are declared unfit to possess a firearm in terms of section 103 of Act 60 of 2000. Lastly it is ordered that your particulars be entered into the National Register of Sex Offenders, in terms of section 50(2) of Act 32 of 2007.”

[25] What precedes the judgment on sentence in respect of the conduct of the legal representative of the appellant, Mr Neethling and the prosecutor, Ms Cordier, is equally disconcerting. The transcribed record reads as follows in this regard:

“MR NEETHLING ADDRESSES THE COURT: Thank you. Your Worship. On count number 2, section 51(1) the court is compelled to look at the provisions of section 51(1) which is life imprisonment. Unless there is substantial and compelling circumstances. Your Worship, I am of the view there are none. So I will leave the sentence in the hands of the court.

PROSECUTOR ADDRESSES THE COURT: As the court pleases, Your Worship. Your Worship, yes I have to agree with Mr Neethling. If one looks at the prescribed minimum sentence on the rape count. Your Worship, it is clear from the accused just said and his behavior, that he does not have any remorse. And secondly there is no substantial and compelling circumstances.

Therefore the state is of the view in respect of count 2, that life imprisonment will be a suitable sentence. Your Worship, the state does not have any objection or will concur if the court decided to let the sentence in count 1 run concurrently with the sentence in count number 2.

Your Worship, the state is going to request that the accused names be entered into the National Register of Sex Offenders. The accused has already been declared unfit to possess a firearm on previous occasions. The state is going to request the court to find him unfit again. As the court pleases, Your Worship.”

[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.”

[28] Mr Neethling in his address on sentence failed the appellant. It does not behove a legal representative to leave the very important question of sentence and in particular where life imprisonment is applicable, “in the hands of the court.” 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. This conduct goes against the very grain of what was said in *S v Matyityi* 2011 (1) SACR 40 (SCA), that sentencing in matters such as the present must be victim centered. In this matter, sadly no voice was given to the victim 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...’

[29] The recital by the Regional Magistrate, of the triad which has its origins in *S v Zinn* 1969

- (2) SA 537 (A), in the words “And having taken into account all your personal circumstances. The seriousness of the offence and the interests of society with regard to count 2, which is rape. I found that there are no substantial and compelling circumstances”, with due respect constitutes the sum total (essence) of the judgment on sentence. The brevity of the judgment on sentence on its own constitutes a material misdirection. In the words of Malgas, *supra*, it is a material misdirection by the trial court which vitiates its exercise of its sentencing discretion to the extent that this Court, sitting as a court of appeal is entitled to consider the question of sentence afresh.
- [30] The sentence imposed by the Regional Magistrate for the reasons as aforesaid, stands to be set aside and this Court is at large to consider sentence afresh, as hamstrung as this Court may be by the absence of any submissions or evidence on the impact of the rape on the victim.

Background

facts

- [31] 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.
- [32] The appellant was convicted on the following factual basis. On 01 February 2018, the victim, L [...] P [...] D [...], a 12 year old girl at the time, left her home in Kanana, North West, in the company of a friend, M [...] S [...]. The girls wanted to attend a church service of their church, which was to be held in Orkney rather than in Kanana. The girls missed the bus which was going to Orkney and decided to walk to Orkney.
- [33] Neither of the girls knew which road would take them to Orkney but walked in the general direction of Orkney. Whilst walking along a footpath, the victim noticed and alerted M [...] to the fact that they were being followed by a male person, later identified as the appellant, carrying a pink backpack and an iron rod. The girls decided against running away from the appellant. When the appellant caught up with the girls they asked him for directions to Orkney. The appellant assured them that he was going to a scrapyard in Orkney and told them to follow him. The appellant diverted the girls from a footpath they wanted to take to a footpath which led to a veld.
- [34] When they arrived at the veld, the appellant produced a knife which he used to threaten the girls to undress themselves. The victim complied with the appellants instruction but M [...] did not. The appellant undressed himself and raped the victim vaginally. During the rape of the victim, M [...] was praying. M [...] was in possession of the victims cellphone as she was playing games on it. The cellphone at some stage during the incident fell to the ground. When the appellant had finished raping the victim, he dressed himself, took the cellphone which belonged to the victim on the ground and ran away.

[35] The girls managed to get to an industrial site where they reported to a security officer that the victim had been raped. When the colleague of the said security officer arrived, he was informed of the report. The girls left with this security officer in a motor vehicle in search of the perpetrator. In the vicinity of a scrapyard some 6.5km from the scene of the rape, the girls pointed out the appellant. The appellant was apprehended and taken to Orkney Police Station by the

security officer. The cellphone which belonged to the victim was found in possession of the appellant.

[36] The victim was taken to Tshepong Crisis Centre where she was examined by Dr Seakgwa. On general examination, the victim's clothing was noted as being blood stained. She was nervous and crying. There is no record of the victim having reached the stage of having a menstrual cycle. The gynaecological examination of the victim revealed that the hymen was torn, fresh tears were observed centrally on the hymen, her vagina was bleeding, the perineum was torn and the cervix could not be visualised as the victim was kicking and crying.

The personal circumstances of the appellant

[37] The appellant has several previous convictions, including convictions for theft on 30 January 2006 where he was sentenced to a fine of R300.00 or 100 days imprisonment, which was wholly suspended for a period of four years, on condition that he not be convicted of theft or attempted theft during the period of suspension; housebreaking with intent to steal and theft on 30 January 2008 where he was sentenced to three (3) years imprisonment; housebreaking with intent to steal and theft on 02 June 2008 where he was sentenced to five (5) years imprisonment, of which two (2) years imprisonment was ordered to run concurrently with the sentence imposed on 30 January 2008; housebreaking with intent to steal and theft on 22 August 2008 where

he was sentenced to a fine of R2000-00 or two (2) years imprisonment with a further three (3) years imprisonment suspended for five (5) years on condition that he not be convicted of an offence involving dishonesty during the period of suspension; and two

(2) counts of theft on 08 September 2017, where he was sentenced to eighteen (18) months imprisonment.

[38] The appellant testified in mitigation of sentence. He testified that he was born on 28 February

1988. He would have been 31 years old at the time he was sentenced. He was single with one child aged five (5) years. His child lives with her mother in Mahikeng. He was permanently employed at a soap factory in Craneville at the time of his arrest, where he earned R2500-00 per month. He was the only breadwinner at home and supported his mother who was a pensioner and his brother who was unemployed. He has no formal education as he never attended school. He verbalized no remorse for his actions and maintained that he did not

commit the offences he was convicted of.

- [39] In submissions in the heads of argument of Mr Gonyane for the appellant, albeit in respect of the appeal against sentence for the reasons this Court has dealt with above and which sentence has been set aside, the submissions still apply. The said submissions in addressing the question of substantial and compelling circumstances to deviate from the mandated sentence of life imprisonment are essentially his age, being 31 years old at the time, that he did not attend school, has one child aged 5 years old and that he was a breadwinner at home, cumulatively considered constitute substantial and compelling circumstances. To this, it is submitted that the victim who was 12 years old at the time, was not caused any grievous bodily harm.
- [40] 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.
- [41] This Court is hamstrung as the prosecutor provided no evidence on the impact of the crimes on the victim. This must be deprecated in the strongest terms. This Court is left to consider the question of sentence in respect of the victim with regard to the circumstances surrounding the crimes and the effect of the rape shortly after the incident as is evident from the medical report (J88).
- [42] The twelve (12) year old victim was raped in a veld as she was on her way to attend a church service in the town of Orkney, some distance from where she lived in Kanana. She along with her friend reposed their trust in the appellant when he assured them that he was heading in the same direction they were. They had a right to walk peacefully on the streets heading to church. She along with her friend were threatened with a knife before she was raped. The vaginal injuries sustained by the victim are indicative of force used, resulting her hymen being torn and more telling her perineum being torn. There is no downplaying these injuries and the effect on the victim, who was crying and kicking when she was examined. 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”

[43] In DPP, North Gauteng v Thabethe 2011 (2) SACR 567 (SCA) 577 G-I, the Supreme Court of Appeal said the following in respect of the rape of women and children more than a decade ago, with the scourge not having dissipated to date:

“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”.

[44] In Mashigo and another v The State (20108/2014) [2015] ZASCA 65 (14 May 2015), albeit in the context of a rape matter, but equally apt to the present matter, Bosielo JA remarked at par [31]:

‘It is sad and a bad reflection on our society that 21 years into our nascent democracy underpinned by a Bill of Rights, which places a premium on the right to equality (s 9) and the right to human dignity (s 10), we are still grappling with what has now morphed into a scourge to our nation...Needless to state that courts across the country are dealing with instances of...abuse of women and children on a daily basis. Our media in general is replete with gruesome stories of ...women and child abuse on a daily basis.”

[45] The interests of society must be afforded due consideration. The role of society should not however be elevated or over-emphasized in this process of proportionality. When the interests of society are considered it is not what society demands that should determine the sentence, but what the informed reasonable member of that community believes to be a sentence that would be just. (S v Mhlakaza and Another 1997

(1) SACR 515 (SCA) at 518). A sentence would accordingly, not necessarily represent what the majority in the community demands, but what serves the public interest and not the wrath of primitive society. (S v Makwanyane [1995] ZACC 3; 1995

(2) SACR 1 (CC) at paragraph [87]- [89]). In respect of society at large it is recognised, as was stated in R v Karg 1961

(1) SA 231 (A) at 236, that:

“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”.

[46] The remarks in Matyityi supra in relation to minimum sentences are apposite:

‘Despite certain limited successes there has been no real let-up in the crime pandemic that engulfs our country. The situation continues to be alarming. It follows that, to borrow from Malgas, it still is ‘no longer business as usual’. And yet one notices all too frequently a willingness on the part of sentencing courts to deviate from the minimum sentences prescribed by the legislature for the flimsiest of reasons - reasons, as here, that do not survive scrutiny. As Malgas makes plain courts have a duty, despite any personal doubts about the efficacy of the policy or personal aversion to it, to implement those sentences. Our courts derive their power from the Constitution and like other arms of state owe their fealty to it. Our constitutional order can hardly survive if courts fail to properly patrol the boundaries of their own power by showing due deference to the legitimate domains of power of the other arms of state. Here parliament has spoken. It has ordained minimum sentences for certain specified offences. Courts are obliged to impose those sentences unless there are truly convincing reasons for departing from them. Courts are not free to subvert the will of the legislature by resort to vague, ill-defined concepts such as ‘relative youthfulness’ or other equally vague and ill-founded hypotheses that appear to fit the particular sentencing officer’s personal notion of fairness. Predictable outcomes, not outcomes based on the whim of an individual judicial officer, is foundational to the rule of law which lies at the heart of our constitutional order.’

(my emphasis)

[47] In *Maila v S* (429/2022)

[2023] ZASCA 3 (23 January 2023), a very recent decision of the Supreme Court of Appeal, Mocumie JA dealt very decisively with the approach to rapes of this kind against the ever increasing tide of sexual offences. It is apposite to quote extensively from the judgment in the context of the present appeal:

“[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)[28] 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.”

[48] As indicated above there are no substantial and compelling circumstances in the personal circumstances of the offender. Having regard to the nature of the offence and the circumstances relevant thereto and the interest of society, nothing stands out as substantial and compelling to deviate from the mandated sentence.

[49] The appellant has numerous previous convictions for offences of theft. The sentence imposed must demonstrate a balance with the facts of the present matter. That direct imprisonment is merited is beyond dispute. The term of imprisonment must demonstrate the seriousness of the appellant’s recalcitrant conduct.

[50] The appellant accordingly stands to be sentenced to life imprisonment on the rape conviction (count 2) and five (5) years imprisonment on the theft conviction (count 1). The ancillary orders in respect of his fitness to possess a firearm and including his name in the National Register for Sex Offenders should follow accordingly.

Order

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

(iii) The sentence imposed by the court a quo is set aside and is substituted with the following:

(v) In terms of section 50(2) of Act 32 of 2007, the accused particulars are to be included in the National Register for Sex Offenders.

A H PETERSEN

JUDGE OF THE HIGH COURT

I agree

S S MAAKANE

ACTING JUDGE OF THE HIGH COURT

For appellant: Mr T G Gonyane

Instructed by: Legal Aid South Africa

Mahikeng Justice Centre

For respondent: Adv K E Mampo

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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Prepared on 11 October 2026 · Esheria