


22/9/2017

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

CASE NO: A183/2016

(1)	REPORTABLE: YES / <del>NO</del> ✓
(2)	OF INTEREST TO OTHER JUDGES: YES / <del>NO</del> ✓
(3)	REVISED.
 22/9/2017	

In the matter between

MACDONALD KAGISHO MODISANI

Appellant

and

THE STATE

Respondent

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**JUDGMENT**

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**SARDIWALLA AJ****Introduction**

[1] The Appellant was accused of one count of rape of a minor before the Schweitzer-Regional Court. During the proceedings the Appellant was legally represented and he pleaded guilty and was convicted of rape of a minor. The Appellant is seeking to appeal the sentence imposed in terms of Section 51(1) of the Criminal Law Amendment Act 105 of 1997.

**Background**

[2] The Appellant's case is that the trial court erred in not finding substantial and compelling factors present in order to deviate from the prescribed minimum sentence. In particular the Appellant argues that the trial court failed to take the following into consideration:

1. He was 22 years old at the time of the conviction
2. He is a first offender with no previous convictions
3. He was not married and has no dependants
4. He attended school up to grade 10
5. At the time of his arrest he was employed and earning a salary of R2300 per month
6. It appears from the record that he maintains various members of his family who are unemployed.

[3] The Appellant argues that taking into account his age; the fact that he is a first time offender and pleaded guilty which signifies remorse he is capable of being

rehabilitated and an excessively long incarceration period shall deny him that opportunity.

[4] The Appellant relies on jurisprudence around Section 51(1) of the Criminal Law Amendment Act to argue that in comparable cases courts had declined to give the minimum sentence and had found substantial and compelling substances. He submits that the mitigating factors cumulatively provide reasons to deviate from the minimum sentence

### **Respondent's case**

[5] The Respondent argues that when an accused rapes a child the departure point in arriving at a just sentence is life imprisonment. Courts can only deviate from this when faced with substantial and compelling circumstances. The Respondent further notes that the circumstances pointed out by the Appellant were already dealt with by the Regional Magistrate.

[6] The Respondent further argues that this Court has limited powers to interfere with the decision of the trial court and it has to be convinced that the trial court misdirected itself or erred in one or other material aspect. The Respondent alleges that the Appellant has failed to do this and has resorted to a comparative analysis of other cases.

### **Issues**

[7] The main issue before this Court is whether or not it should interfere with the decision of the trial court to impose the minimum sentence as required in the Criminal Law Amendment Act.

### **Determination**

[8] Section 51(1) of the Criminal law Amendment Act states that:

*"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 Schedule 2 to imprisonment for life."*

One of the offences under Part I Schedule 2 is rape as contemplated by the Criminal Law (Sexual Offences and Related Matters) Amendments Act, 2007 when the victim is a person under 16 years of age. It is common cause that the Appellant was convicted of this offence.

[9] Further Section 51(3) states that:

*"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 other than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and impose such lesser sentence. "*

The Appellant argues that the trial court misdirected itself and failed to find that there were substantial and compelling circumstances.

[10] The Supreme Court of Appeal in *S v Balfour*<sup>1</sup> held that:

*"Of course, the imposition of sentence is a matter falling pre-eminently within the judicial discretion of a trial court and this court, on appeal, cannot interfere merely because it would have imposed a different sentence. It can only do so if the sentence is shockingly inappropriate or if the trial court substantially misdirected itself either on the facts or by placing undue emphasis on certain issues and underplaying others"*<sup>2</sup>

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<sup>1</sup> 2009 (1) SACR 399 (SCA) at para 9

<sup>2</sup> This Principle is underscored by a number of other cases including: *S v Pieters* 1987 (3) SA 717 (A); *S v Roberts* 2000 (2) SACR 522 (SCA); and *S v Sadler* 2001 (1) SACR 331 (SCA).

This Court is bound by this precedent and shall not interfere with the decision of a trial court unless it is apparent that the sentence is shockingly inappropriate or the trial court substantially misdirected itself when coming to a decision.

[11] As alluded to above the respondent has relied on a long line of cases where substantial and compelling circumstances were found in the rape of a child, these include: *S v McMillan* 2003 (1) SACR 27; *S v Roiberg* 2015 JDR 0740 (ECG); *S v Ngwenya* 2014 JDR 1620 (GP); and *S v Calvin* 2014 JDR 2020 (SCA). In each of these cases the accused was convicted of raping a child and the courts found substantial and compelling circumstances present to deviate from the mandatory minimum sentence.

[12] While the comparative case law is interesting the Appellant is required to place before this court evidence that the trial court misdirected itself on the facts or by placing undue emphasis on certain issues and underplaying others. The Appellant has failed to indicate using the record that the manner in which the Regional Magistrate considered the evidence of substantial and compelling circumstances was a misdirection or unduly placed emphasis on certain issues. In fact very little mention is made of the Regional Magistrate's finding but reliance is placed on a comparative analysis of cases.

[13] In coming to a decision the trial court considered the circumstances advanced by the Appellant and found them not to be substantial and compelling, this is within that Court's discretion. I am guided by Ackerman J in *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* when he states that:

*"A court of appeal is not entitled to set aside the decision of a lower court granting or refusing a postponement in the exercise of its discretion merely because the court of appeal would itself, on the facts of the matter before the lower court, have come to a different conclusion; it may interfere only when it appears that the lower court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it*

*had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.”<sup>3</sup>*

[14] As a court of appeal our powers limited both in terms of interference of: a sentence imposed and the exercise of discretion. Unfortunately, the Appellant has not adduced any evidence to convince this Court that the trial court misdirected itself, imposed a shockingly inappropriate sentence or did not exercise its discretion judicially.

### **Order**

In the result the following order is made:

1. The appeal against sentence is dismissed.



**C M SARDIWALLA A J  
JUDGE OF THE HIGH  
COURT OF SOUTH  
AFIRCA, GAUTENG  
DIVISION, PRETORIA**

I agree



**N MALI, J  
JUDGE OF THE HIGH  
COURT SOUTH  
AFRICA, GAUTENG  
DIVISION, PRETORIA**

<sup>3</sup> (CCT10/99) [1999] ZACC 17; 2000 (2) SA 1; 2000 (1) BCLR 39 at 11.