REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: A259/2021

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED: NO
4/7/2022

In the matter between:

SIMOSIHLE MPHABANTSHI Appellant

and

THE STATE Respondent

JUDGMENT

MOKOSE J

[1] The Appellant, who was represented in the court *a quo,* was charged in the Regional Court of Emfuleni sitting at Vereeniging of the counts of compelled rape, rape of an adult person, robbery with aggravating circumstances, two counts of kidnapping, assault with intent to do grievous bodily harm, two counts of pointing a firearm, possession of a firearm and possession of ammunition.

[2] The Appellant pleaded guilty on the charges of possession of a firearm and possession of ammunition only. At the end of proceedings, he was found guilty of attempted compelled rape, rape read with the provisions of Section 51(1) of Act 105 of 1997, two counts of kidnapping and the counts of possession of a firearm and possession of ammunition. He was acquitted on all the other charges.

[3] The Appellant was sentenced as follows:

(i) Count 1 being attempted compelled rape, eight (8) years imprisonment;
(ii) Count 2 being rape read with the provisions of Section 51(1) of Act 105 of 1997, life imprisonment;
(iii) Count 4 and 5 being kidnapping, eight (8) years on each count;
(iv) Count 9 being possession of a firearm, five (5) years imprisonment; and
(v) Count 10 being possession of ammunition, three (3) years imprisonment.

[4] The court ordered that the sentence imposed in count 5 run concurrently with that imposed in count 4. So too was the sentence imposed in count 10 which was ordered to run concurrently with that in count 9.

[5] On an automatic right of appeal in terms of Section 10 of the Judicial Matters Amendment Act 42 of 2013, the Appellant appealed against sentence only.

[6] The charges arise from an incident which occurred on the night of the 2nd December 2016 when the complainant, N[....]1 H[....] S[....] and her boyfriend X[....] N[....]2 were seated outside the house where the complainant lived. They were accosted by an unknown male person who was later identified as the Appellant, armed with a firearm. They were taken to a nearby veld where they were forced to engage in sexual intercourse at gunpoint.

[7] The complainant was later taken by the Appellant to a friend's house where he had sexual intercourse with her twice without her consent. The

Appellant then walked the complainant halfway home. She was found by her boyfriend and family. She assisted the police leading them to the scene of where she had been raped. The Appellant's friend, Themba took the police to where the Appellant resided, whereupon, he (the Appellant) was arrested. The firearm and also ammunition were found in the Appellant's possession.

[8] The record of appeal was found to be wanting in that the evidence of the complainant's sister did not form part of it. It was however agreed by the parties that the appeal should be adjudicated upon as it was directed only against sentence.

[9] The ground of appeal against sentence is premised on the court *a quo's* failure to find substantial and compelling circumstances to deviate from the mandatory sentence of life imprisonment. The Appellant contends that the trial court had misdirected itself in finding that there were no substantial and compelling circumstances to justify a deviation by the Magistrate from imposing a life sentence on the Appellant in respect of Count 2, being the contravention of Section 3 of Act 32 of 2007 (referred to as the "Sexual Offences Act"). Furthermore, the Appellant appeals against the sentences on the ground that they are shockingly inappropriate and induce a sense of shock.

[10] It is trite law that sentence is pre-eminently at the discretion of the trial court. The test which has been enunciated in numerous cases is whether the sentence imposed by the trial court is shockingly inappropriate or was violated by misdirection. The court of appeal may interfere with the sentencing discretion of the court of first instance if such discretion had not been judicially exercised. Marais JA in the matter of *S v Malgas*[1] observed that:

> *"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 a 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 so doing, it assesses sentence as if it were a court of the 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 appropriate court may yet be justified in interfering with the sentence imposed by the court. It may do so only where 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 emphasized that in the lotter situation the appellate court is 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 I so substantial that it attracts epithets of the kind I have mentioned."

[11] When imposing sentence, a court must try to balance the nature and circumstances of the offence, the circumstances of the offender and the impact that the crime had on the community. It must ensure that all the purposes of punishment are furthered. It will take into consideration the established main aims of punishment being deterrence, prevention, reformation and retribution.[2]

[12] This approach was followed by the court in the matter of *S v Rabie*[3] where Holmes JA said:

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[1] [2001] 3 All SA 220 (SCA) para 12
[2] S v Zinn 1969 (2) SA 537 (A)
[3] 1975 (4) SA 855 at 862 G - H

"Punishment should fit the criminal as well as the crime, and be fair to society, and be blended with a measure of mercy according to the circumstances."

[13] A trial court considers for the purposes of sentence, the following:

(i) The seriousness of the case;
(ii) The personal circumstances of the Appellant;
(iii) The interests of society.

[14] The provisions of Section 51(1) of Act 105 read with Part 1 of Schedule 2 of the Criminal Law Amendment Act 51 of 1977 were explained to the Appellant prior to him pleading to the charges. The section states that an offender shall be sentenced to imprisonment as per the minimum sentence unless there are compelling and substantial reasons to deviate from the prescribed minimum sentence. The specified sentences are not to be departed from for flimsy reasons and must be respected at all times.[4]

[15] There is no definition of what constitutes compelling and substantial reasons. The court must consider all the facts of the case in determining whether compelling and substantial circumstances exist. To arrive at an equitable sentence, this court is enjoined to weigh the personal circumstances of the accused against the aggravating factors, in particular, the interests of the society, the prevalence of the crime, and its nature and seriousness.

[16] The Appellant's personal circumstances were placed before the court. They are that the Appellant was thirty (30) years old at the time of the commission of the offence. He was unmarried but had two (2) children who were in his mother's care. He had dropped out of school in Grade 11, was not in formal employment at the time of the commission of the offence and had no previous convictions.

[17] Counsel for the Appellant was of the view that because the Appellant had written a letter of apology to the complainant and her family, he had shown remorse and regret. As such, the court *a quo* should have taken this into account in sentencing the Appellant.

[18] Counsel for the Respondent was of the view that the aggravating circumstances far outweighed the mitigating circumstances. The complainant was twenty-three (23) years at the time of the rape, she was at home, supposedly a safe environment, in the company of her boyfriend when she was forcibly taken under the threat of a firearm.

[19] In the matter of *S v Matyityi*[5] the Court held:

> *"There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus, genuine contrition can only come from an appreciation and acknowledgment of the extent of one's error. Whether the offender is sincerely remorseful and not simply feeling sorry for himself or herself at having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in court, that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of, inter alia, what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions. There is no indication that any of this, all of which was peculiarly within the respondent's*

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[4] S v Matyityi 2011 (1) SACR 40 (SCA) at page 53 E - F
[5] 2011 (1) SACR 40 (SCA) at 47A - D

knowledge, was explored in this case."

[20] I am not convinced that the appellant is remorseful. I say this in light of the Appellant's persistence of his innocence. He persists that he had consensual sexual intercourse with the complainant. His persistence was also confirmed by the social worker who prepared the pre- sentencing report.

[21] With respect to the personal circumstances of the Appellant, the trial Magistrate stated as follows:

> *"Mr Mpabantshi, there are many young men in society who did not have a wonderful relationship with their fathers, who had suffered hardships and deprivation, but they do not prey like monsters on innocent women... your disposition to your fellow human beings, specially towards the defenceless was reflected in the callousness of your actions..."*

[22) Referring to the victims of the Appellant's actions, the trial Court referred to the case of S v *C*[6] where the court held:

> *"Rape is regarded by society as one of the most heinous of crimes, and rightly so. A rapist does not murder his victim. He murders her self-respect and destroys her feeling physically and mental integrity and security. His monstrous deed often haunts his victim and subjects her to mental torment for the rest of her life, a fate often worse than loss of life."*

[23] It is accepted by this Court that the crime the Appellant has been convicted of is an exceptionally serious one. The Appellant had been convicted of rape on more than one occasion. Section 51(3) of Act 105 of 1997 provides that the court may deviate in sentencing and impose a lesser sentence than the prescribed sentence only where there are substantial and compelling circumstances that justify such deviation.

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[6] 1996 (2)SACR 181 (C)

[24] Given the seriousness of the crime as well as the mitigating circumstances and aggravating circumstances which were taken into consideration by the Magistrate in the court *a quo,* I am of the view that the Magistrate did not err in sentencing the Appellant. There were no substantial and compelling reasons to sentence the Appellant to a lesser sentence than that prescribed by the provisions of Section 51(1) of Act 105 read with Part 1 of Schedule 2 of the Criminal Law Amendment Act 51 of 1977, nor is there any evidence of the discretion of the Magistrate having been incorrectly exercised.

[25] Accordingly, the following order is granted:

The appeal against sentence is dismissed.

MOKOSEJ
Judge of the High Court
of South Africa
Gauteng Division, Pretoria

I agree and is so ordered

BARIT AJ
Acting Judge of the High Court
of South Africa
Gauteng Division, Pretoria

For the Appellant:
Miss MMP Masete instructed by
Pretoria Justice Centre

For the State: Adv J Cronje instructed by
The Office of the Director of Public Prosecutions
Pretoria

Date of hearing: 19 May 2022
Date of judgement: 4 July 2022