REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED: ~~YES~~/NO

21/10/24 [redacted]

DATE SIGNATURE

Case No: A425/2016

In the matter between:

SIGABA MZIKHONA **APPELLANT**

and

THE STATE **RESPONDENT**

APPEAL JUDGMENT

FRANCIS-SUBBIAH J:

[1] This is an appeal against sentence of life imprisonment on a conviction of rape of a minor child imposed on the appellant by the regional court in Foschville. On the 16 March 2016 the appellant pleaded guilty on the charge of rape and housebreaking with intent to steal. Following a sentence of life imprisonment, the appellant acquired an automatic right to appeal his sentence in according with section 309(1)(a) of the criminal procedure act 51 of 1977. This is an appeal on sentence only.

[2] Section 51(1) of the Criminal Law Amendment Act 105 of 1997 provides 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 of Schedule 2, to imprisonment for life".

[3] Part 1 of Schedule 2 of Act 105 of 1997 lists inter alia rape of a child under the age of 16, as one of the offences which attract a mandatory sentence of Life imprisonment. In terms of section 51(3) of Act 105 of 1997, a lesser sentence than the one prescribed may be imposed provided that substantial and compelling circumstances exists which justify the imposition of such a lesser sentence.

[4] The court in those instances must note such substantial and compelling circumstances on the record of the proceedings and impose such lesser sentence as it deems fit. The Magistrate in sentencing requested both a victim impact report and the

pre-sentence report that set out the personal circumstances of the appellant as well as the circumstances of the child victim. She took these personal circumstances into consideration when sentencing.

[5] The personal circumstances of the appellant are that; he was 24 years' old, he was a matric graduate and he had completed a course in Paramedics. He was employed and lost his employment due to his arrests. He had several previous convictions for housebreaking and theft. He pleaded guilty, which is an element of remorse, but the Magistrate did not consider his guilt to be one indicative of remorse because DNA evidence connected him to the crime of rape of the minor child. The probation officer indicated dispassionately in her pre-sentencing report that:

> "The accused indicated that when the child refused to show him the money he then tied her with bandages in her mouth, legs and arms. He indicated that he tied the child victim because she was making noise. The accused indicated that when he did not get the money, he then took out his frustration on the victim by raping her. He indicated that he tried to insert his private part into the victim's private part but it could not get in. He then inserted it into the victim's buttocks. He did verbalize that he was guilty. The accused indicated that he did not know the victim or the victim's mother. After the incident, he never met them to apologize".

[6] The sentencing court acknowledged that the appellant was a young adult male who has the support of his family and that he was clearly intelligent as he went up to grade 12

and further completed the paramedics course to further empower himself. Despite having the opportunities to work, which he threw away, it was unfortunate that he involved himself in the use of drugs. And it seems from there it went downhill for him.

[7] Background to the crime is the appellant had observed that the people of the house had left and that he thought that there was no one inside the house when he broke in. He wanted to get his hands on some money to buy drugs. Then he came upon the 9-year-old child who was alone at home, getting dressed to go to school and he raped her. Since the child was of small build and tiny, he failed to penetrate her vaginally and then penetrated her anally. As a result, the J.88 report indicates that there were injuries at the anal area of the child. The court acknowledged that this was an inhuman deed that was committed on a defenseless child, who posed no threat to the appellant. She did not obstruct him in any manner when he broke into her house and violated her in the sanctity of her home.

[8] The sentencing court further acknowledged the increasing levels of violent crimes in South Africa particularly against women and children who have a right to feel safe especially in their own homes. However, in Foschville; it is clear that the community is permanently living in fear and must always look over their shoulder to protect themselves against criminals. Given the seriousness of rape and high prevalence in communities in South Africa, the legislature has prescribed a minimum sentence.

[9] The court concluded that substantial and compelling circumstances do not exist to warrant a lesser sentence than the prescribed sentence of life imprisonment. When the crime of rape has been perpetrated against a child, its seriousness cannot be underrated. The court having given careful consideration to all the factors that were mentioned, taking into account what was stated in the pre-sentencing and victim impact reports found no substantial and compelling circumstances to deviate from the prescribed sentence in terms of section 51(1) Act 105 of 1997.

[10] It was argued on behalf of the appellant that the injury suffered by the child to her anal area was not serious and therefore this factor collectively taken with the appellant having spent only one year as an awaiting trial prisoner, should therefore be considered in reducing his sentence.

[11] An apparent lack of serious physical injury to the child cannot constitute substantial and compelling circumstances to justify a reduction in the sentence. In ***S v Peletona Abel Lebele*** Case No: CC07/2021, Pretoria Judgment delivered 09 May 2023 (Unreported) the Phahlane, J summarized the issue of physical injury during rape and its impact on sentence as follows:

> "[38] In my view, this submission is misplaced because the Legislature has acknowledged that rape in itself deserves the imposition of the most severe punishment possible, hence the enactment of the provisions of section 51 of the Act. On the other, it has been well documented that "irrespective of the presence

of physical injuries or lack thereof, rape always causes its victims severe harm" [Amanda Spies 'Perpetuating Harm: Sentencing of Rape Offenders Under South African Law' (2016) (2) SALJ 389 at 399.] The victims were stripped off their dignity when they were sexually violated by the accused who perpetrated these acts to satisfy his 'sexual desires'. Having said that, the Legislature also specifically amended the Criminal Law Amendment Act to provide categorically that, the fact that a complainant was not injured during rape cannot be considered as the basis for concluding that compelling or substantial circumstances are present.

[39] Put differently, lack of physical injury does not justify a deviation from the prescribed minimum sentence, and cannot be regarded as a mitigating factor for purposes of reducing the prescribed sentence. Section 51(3)(a) of the Act specifically provides that when imposing a sentence in respect of the offence of rape, "an apparent lack of physical injury to the complainant shall not constitute substantial and compelling circumstances" justifying the imposition of a lesser sentence."

[12] The child suffered an injury, whether it was serious or not is irrelevant. The appellant indicated to the probation officer that he tied up the child's legs together. This is a probable reason, having her legs tied together, is why he was unable to vaginally penetrate the child and instead penetrated her anally. It cannot be disputed that Rape remains a serious injury inflicted on a child in the absent of additional injuries. In these circumstances the child was not only raped but suffered an injury around her anal area, had her legs tied, her hands tied, and her mouth was gagged.

[13] The J88 evidence was not disputed, and the seriousness or veracity of the injuries were not raised by the appellant during the trial. This factor in the circumstances can play no role in reducing the prescribed sentence. It is not in dispute that the child suffered an injury and life sentence was imposed due to the requirement of the minimum sentence and not due to the injury. It was expressed in *Malgas*, that reliance on there being no serious injuries is a flimsy reason to reduce a sentence.

[14] On the question of the Appellant having spent a year as an awaiting trial prisoner, the State submits that his is one of the most expedient matters to have been finalized. It was held in ***S v Vilakazi*** 2009 (1) SACR 552 (SCA) at paragraph 58, that in cases of serious crime, the personal circumstances of the offender by themselves will necessarily recede into the background once it becomes clear that the crime is deserving of a substantial period of imprisonment and stated as follows:

> "It becomes clear that the crime is deserving of a substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be and those seem to me to be the kind of flimsy grounds that *Malgas* said should be avoided. But they are nonetheless relevant in another respect. A material consideration is whether the accused can be expected to offend again."

[15] On a similar analogy the questions whether the accused has one child, has a drug addiction and awaited trial for a year becomes immaterial to what the period should be. These are kinds of flimsy grounds that ***Malgas*** and ***Vilikazi*** caution against. There are rehabilitation and skills development programs that are designed to support and assist an inmate during incarceration for his drug addiction. It is within the appellant's decision to rehabilitate himself if he so chooses during his term of imprisonment.

[16] It is trite that an appeal court will interfere with the sentence of the court *a quo* under the circumstances that justify a deviation from its sentencing power. The SCA held in ***S v Romer*** 2011 (2) SACR 153 (SCA) at para 22 that:

> "It has been held in a long line of cases that the imposition of sentence is pre-eminently within the discretion of the trial court. The appellate court will be entitled to interfere with the sentence imposed by the trial court only if one or more of the recognised grounds justifying interference on appeal has been shown to exist. Only then will the appellate court be justified in interfering. These grounds are that the sentence is '(a) disturbingly inappropriate; (b) so totally out of proportion to the magnitude of the offence; (c) sufficiently disparate; (d) vitiated by misdirections showing that the trial court exercised its discretion unreasonably; and (e) is otherwise such that no reasonable court would have imposed it'. See S v Giannoulis 1975 (4) SA 867 (A) at 873G-H.; S v Kibido 1998 (2) SACR 213 (SCA at 216 g-j.; S v Salzwedel & others 1999 (2) SACR 586 (SCA) para 10."

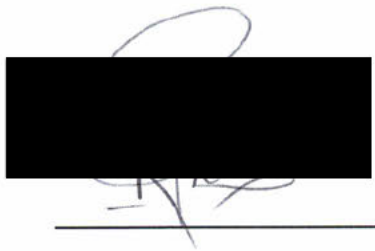
[17] None of the five grounds enunciated in ***Romer*** point to a misdirection by the court *a quo*. Further, as required by the principles established in ***S v Zinn*** 1969 (2) SA 537 (A), the court *a quo* correctly balanced all the factors before arriving at its conclusion, and undertook an appropriate balancing of the appellant's personal circumstances against the serious nature of the crime of rape on a minor child, its increasing prevalence in communities and in the interest of society, the need to hold perpetrators of rape appropriately accountable. The *modus operandi* of the appellant is to break into houses to steal. In the present matter he raped a child after breaking in and therefore represents a threat to the community and society at large, as it is highly likely that he will re-offend.

[18] I find that there are no circumstances justifying a lesser sentence. There are no irregularities that resulted in the failure of justice and the sentencing court did not misdirect itself. The statutory minimum sentence imposed is correct and it is confirmed.

[19] In the result the following order is made:

(a) The Appeal is dismissed.

(b) The sentence imposed by the court a quo on the appellant is hereby confirmed.



R. FRANCIS-SUBBIAH

JUDGE OF THE HIGH COURT,

PRETORIA

I agree,

N. A. ENGELBRECHT

ACTING JUDGE OF THE HIGH COURT,

PRETORIA

APPEARANCES:

COUNSEL FOR THE APPELLANT:		ADV. L. A. VAN WYK
INSTRUCTED BY	:	LEGAL AID SOUTH AFRICA, PRETORIA
COUNSEL FOR THE RESPONDENT:		ADV. D. MOLOKOMME
INSTRUCTED BY	:	DPP, PRETORIA

HEARD ON	:	10 OCTOBER 2024
JUDGMENT DELIVERED ON	:	21 OCTOBER 2024

This judgment has been delivered by uploading it to the court online digital data base of the Gauteng Division, Pretoria and by e-mail to the attorneys of record of the parties. The deemed date and time for the delivery is **21 October 2024.**