IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY

Case number: **CA&R21/2022**
Date Heard: **01 / 08 / 2022**
Date delivered: **19 / 08 / 2018**

Reportable: NO
Circulate to Judges: NO
Circulate to Regional Magistrates: YES
Circulate to Magistrates: YES

In the appeal of:

EDMUND FARAO **APPELLANT**

and

THE STATE **RESPONDENT**

Before: **Phatshoane DJP and Stanton AJ**

JUDGMENT

STANTON AJ

INTRODUCTION: -

[1] The appellant, Mr Edmund Farao, was arraigned before Magistrate Mbalo in the Regional Court, held at Fraserburg (the trial court), on two counts, namely, rape of a minor and attempted murder. He was legally represented in the trial court and had been advised, prior to commencement of the trial, that he could be sentenced to life imprisonment, if convicted on the charge of rape, absent any substantial and compelling circumstances. On 10 March 2021 he was convicted on both counts. In respect of the count of attempted murder, he was sentenced to 8 years imprisonment and on the count of rape, he was sentenced to life imprisonment in terms of section 51(1) of Criminal Law Amendment Act 105 of 1997 (the CLAA).

[2] In terms of s 309(1)(a) of the Criminal Procedure Act 51 of 1977 (the CPA), as amended by s 10 of the Judicial Matters Amendment Act 42 of 2013, the appellant has an automatic right of appeal to the Full Bench of this Court against his sentence of life imprisonment. On that basis, the appellant noted his leave to appeal against his sentence of life imprisonment to this Court. He does not persist in his appeal against the sentence of 8 years imprisonment imposed in respect of the attempted murder count.

[3] The appellant pleaded not guilty during his trial and made some formal admissions in terms of section 220 of the CPA to the effect that he had a consensual sexual encounter with the complainant, which included contact of the genital organs, but denied any form of penetration. Accordingly, the State bore the *onus* to prove all the elements of the offences beyond a reasonable doubt.

THE BACKGROUND:

[4] It is not necessary to traverse the evidence comprehensively. A bit of a background suffices for present purposes. About 28 September 2018 the 16-year-old Mr J[....], the complainant, accompanied by Ms M L[....] arrived at the appellant's home. Shortly thereafter, the appellant sent Ms L[....] into the neighbourhood to

purchase some drugs. She left the complainant with the appellant. The complainant testified that the appellant then grabbed him, pushed him against the cupboards, threw him on a bed, put the complainant's legs on his shoulders. He penetrated the complainant anally with his penis and had sexual intercourse with him. During the act the complainant cried but the appellant muffled his scream. He also threatened to hurt the complainant should he reveal the acts to his parents. True to this, the complainant did not disclose the ordeal to his parents. Days later, the complainant experienced some discomfort around his anus. He reported the discomfort to his mother which prompted her to probe about the source of the complaint. When she was unable to obtain the answer, she requested the complainant's cousin to assist. Ultimately, the complainant revealed that the appellant raped him. He left school in grade 8 because his peers mocked him about the rape.

[5] The complainant was examined Dr Natasha Blanckenberg. On the J88 handed in evidence by consent, she recorded that the complainant is "slender" in built with a height of 153 cm and weighed 41 kg. The complainant had multiple flat warts clustered around the anus caused by syphilis. The doctor explained that he contracted syphilis as a result of the anal penetration by a person infected with this sexually transmitted disease. The complainant was treated for syphilis. The doctor further explained that syphilis, if untreated, syphilis would cause dementia, madness and damage to the heart and heart valves. She confirmed that the appellant is HIV positive.

[6] When he took the stand, in essence, the appellant denied that he committed the offences with which he was charged. However, when cross-examined and after being confronted with his contradictory evidence, he admitted that he raped the complainant anally, without a condom, and that he was aware of his HIV status when he did so. These concessions were subsequently formally admitted in terms of section 220 of the CPA.

THE GROUNDS OF APPEAL:-

[6] As already alluded to, this appeal lies against the sentence of life imprisonment imposed by the trial court. It was contended for the appellant, in broad

terms, that the trial court misdirected itself in not finding substantial and compelling circumstances which justified a departure from the imposition of life imprisonment.

THE DISCUSSION:

[7] The appellant's conviction attracts a sentence of life imprisonment in that s 51(1) of the CLAA stipulates that a high court or regional court must, if it has convicted a person of rape, when it is committed by a person knowing that he has the acquired immune deficiency syndrome, sentence the person to life imprisonment, unless substantial and compelling circumstances exist which justify the imposition of a lesser sentence.

[8] Sentencing is primarily in the discretion of the trial court. The question to be answered is not whether the sentences were right or wrong, but whether the trial court used its discretion in a reasonable manner. Only when there is an irregularity or where the trial court made a grave error or where the sentence is shocking and inappropriate, will a court of appeal intervene.[1] Where, as here, the trial court imposed the sentence prescribed by the CLAA, the approach on appeal is whether the facts that were considered by the sentencing court are indeed substantial and compelling circumstances. Bosielo JA, in *S v PB*[2], reaffirmed the correct approach by a court on appeal against a minimum sentence, as follows:-

> "…Can the appellate court interfere with such a sentence imposed by the trial court exercising its discretion properly, simply because it is not the sentence which it would have imposed or that it finds shocking? The approach to an appeal on sentence imposed in terms of the Act should, in my view, be different to an approach to other sentences imposed under the ordinary sentencing regime. This, in my view, is so because the minimum sentences to be imposed are ordained by the Act. They cannot be departed from lightly or for flimsy reasons. It follows therefore that a proper enquiry on appeal is whether the facts which were considered by the sentencing court are substantial and compelling, or not."

[1] S v Pillay 1977 (4) SA 531 (A) at 535 E-F; S v Pieters 1987 (3) SA 717 (A) at 728 B – C.
[2] 2013 (2) SACR 533 at paragraph [20].

[9] In the matter of *S v Malgas*[3], Marais JA, with regard to the approach to be followed when minimum sentences are considered on appeal, stated as follows:-

> "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."

[10] The appellant advanced the following personal circumstances in mitigation:-

10.1 He was 35 years old at the time of the commission of the offence;

10.2 He was a first offender;

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[3] 2001 (2) SA 1222 (SCA) at paragraph [12].

10.3 He had high prospects of rehabilitation;

10.4 He was self-employed as a hair stylist;

10.5 He was the breadwinner of his family;

10.6 The complainant did not sustain serious physical injuries; and

10.7 The appellant made admissions in terms of section 220 of the CPA, thereby taking responsibility for his actions.

[11] The trial court had regard to the serious nature of the crime which had been committed on a 16-year-old; its high prevalence, which is shocking and causes outrage. It also considered that the appellant committed these offences when he was acutely aware of his HIV status. The more aggravating feature of this case is that the complainant contracted syphilis as a result of the rape. Ms MM Smith, a social worker, compiled a report in terms of s170 of the CPA concerning the ability of the complainant to testify in open court. Apparent from her report is that the complainant was traumatised by the incident. He confided to the social worker that he harboured fear against the appellant. As already stated, the complainant left school as a result of being teased about the rape. The appellant showed no genuine remorse and did not take the court into his confidence until after he had been cross-examined.

[12] Mr P Fourie, for the appellant, conceded that the trial court considered all the mitigating and aggravating circumstances and exercised its discretion judicially. He, however, urged us to deviate from the prescribed minimum sentence on the basis that the appellant is a first offender and the physical injuries were not of a serious nature. In *S v Vilakazi*[4], the Supreme Court of Appeal reaffirmed that the personal circumstances of an offender, in cases of serious crime, will necessarily recede into the background when sentencing is considered. The lack of physical injuries is a factor to be considered along with other relevant factors to conclude whether there are substantial and compelling circumstances. An apparent lack of physical injury to

[4] 2009 (1) SACR 552 (SCA) at paragraph [58].

the complainant, without more, would not suffice.[5] In *S v Matyityi*[6], Ponnan JA, with regard to the appellant's personal circumstances, concluded:-

> "…Instead the trial court emphasised the personal interests of the individual respondent above all else. In doing so it failed to strike the appropriate balance. It thus imposed a sentence that was disproportionate to the crime and the interests of society. In my view there were no substantial and compelling circumstances present that warranted a departure from the prescribed statutory norm. It follows that the contrary conclusion reached by the high court cannot stand. Having regard to all of the circumstances encountered here the minimum sentence is a manifestly fair and just one. To my mind this is precisely the type of matter that the legislature had in mind when it enacted the minimum sentencing legislation."

[13] In *S v Mahomotsa*,[7] Mpati JA, with reference to the severity of an offence, confirmed that:-

> "One must of course guard against the notion that because still more serious cases than the one under consideration are imaginable, it must follow inexorably that something should be kept in reserve for such cases and therefore that the sentence imposed in the case at hand should be correspondingly lighter than the severer sentences that such hypothetical cases would merit. There is always an upper limit in all sentencing jurisdictions, be it death, life or some lengthy term of imprisonment, and there will always be cases which, although differing in their respective degrees of seriousness, nonetheless all call for the maximum penalty imposable. The fact that the crimes under consideration are not all equally horrendous may not matter if the least horrendous of them is horrendous enough to justify the imposition of the maximum penalty."

[14] The trial court, in its detailed judgment on sentence, considered all the

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[5] *Director of Public Prosecutions, Free State* v *Mokati* 2022 (2) SACR 1 (SCA) para 40.
[6] 2011 (1) SACR 40 (SCA) at paragraph [24].
[7] 2002 (1) SACR 435 (SCA) at paragraph [19].

relevant factors which come into play when deciding upon an appropriate sentence - the serious nature of the offence, the interests of the community, the prevalence of violence towards women, children and the elderly and the personal circumstances of the appellant. In my view, not one of these factors was over-emphasised at the expense of another.

[15] The trial court also weighed both the mitigating and the aggravating factors and correctly found that no substantial and compelling circumstances existed to deviate from the prescribed minimum sentence of life imprisonment. In my view, the trial court exercised its discretion in a reasonable manner and the sentence is not shockingly inappropriate. There is accordingly no basis on which this court can interfere with the sentence. In the result, the appeal must fail. I make the following order.

Order:

The appeal against sentence is dismissed.

STANTON, A
ACTING JUDGE

I agree

PHATSHOANE, MV
DEPUTY JUDGE PRESIDENT

On behalf of the Appellant:	**Mr. P. Fourie (Legal Aid SA)**
On behalf of the Respondent:	**Adv. E Krüger (the DPP, Northern Cape)**