THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case No: 131/2019

In the matter between:

THE DIRECTOR OF PUBLIC PROSECUTIONS, GRAHAMSTOWN **APPELLANT**

and

THEMBELANI MANTASHE **RESPONDENT**

Neutral citation: *The Director of Public Prosecutions, Grahamstown v Mantashe* (131/2019) [2020] ZASCA 05 (12 March 2020)

Coram: PONNAN and NICHOLLS JJA and LEDWABA AJA

Heard: 18 February 2020

Delivered: 12 March 2020

Summary: Rape - Sentence - Life Imprisonment – Minimum sentence in terms of Criminal Law Amendment Act 105 of 1997 – misdirection in finding substantial and compelling circumstances present.

ORDER

On appeal from: Eastern Cape Division of the High Court, Grahamstown (Mageza AJ sitting as court of first instance):

1 The appeal is upheld.

2 The sentence of the high court is set aside and replaced with the following:

'The accused is sentenced to life imprisonment.'

JUDGMENT

Nicholls JA (Ponnan JA AND Ledwaba AJA concurring):

[1] The respondent was convicted in the Eastern Cape Division of the High Court, Grahamstown of three counts of rape in terms of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. He was sentenced to an effective 22 years' imprisonment. Pursuant to an application for leave to appeal against the sentence, brought by the State, leave was granted to this Court. The issue for determination is whether the high court was correct in departing from the sentence of life imprisonment prescribed by the Criminal Law Amendment Act 105 of 1997 (the Act).

[2] Because the offence of which the respondent was convicted is the rape of a child under the age of 16, the provisions of s 51(1) of the Act find application. This section provides that a person who has been convicted of an offence referred to in Part I of Schedule 2 of the Act shall be sentenced to imprisonment for life unless there exist substantial and compelling circumstances justifying a lesser sentence. Part I of Schedule 2 in turn refers to rape as contemplated in s 3 of the Criminal Law Amendment Act where, inter alia, the victim is a person under the age of 16 years old.

[3] In this matter, the complainant was nine years old at the relevant time. After the death of her mother, the complainant seems to have been passed from one relative to another until she went to live with her aunt, Ms Ncebakazi Giyo, and her aunt's boyfriend, the accused in the criminal trial and the respondent herein. They resided in a two-roomed house. One of the rooms was a bedroom occupied by the aunt and the respondent. The complainant would generally sleep on a mattress in the other room described as the kitchen.

[4] One evening in April 2017 the respondent and Ms Giyo returned home drunk and went straight to bed. The complainant had prepared her bed in the kitchen and was lying awake. The respondent came out of the bedroom and got under the blankets with the complainant. He proceeded to rape her. The complainant did not tell her aunt as she was afraid of the respondent, who threatened to beat her if she said anything.

[5] The next evening the couple had again been drinking and the complainant was sharing the bed with the couple. She was sleeping at the foot of the bed. When Ms Giyo had fallen asleep, the respondent got out of bed, approached the complainant and repeatedly inserted his fingers into her vagina. On the third occasion, the respondent again inserted his penis into her vagina while she was sleeping on the mattress in the kitchen. The exact date of this is unclear. The charge sheet puts the rapes on three consecutive nights but the testimony of the child suggests that this occurred a few nights later.

[6] Later during the week, the complainant visited another one of her aunts. This aunt observed that the complainant was limping. When she enquired what was wrong, the complainant told her that the respondent had been inserting his fingers into her vagina, as well as his penis. On inspecting the complainant's underwear, the aunt found a strange discharge. The next day the police were informed and the complainant was taken to a doctor for a medical examination. The doctor confirmed that the complainant had been penetrated, adding that she informed him that the 'fingering' had been taking place for

several months. This was consistent with his findings that the hymen had been 'worn out' due to 'friction over a long period of time'.

[7] The respondent's version was a bare denial. He suggested that he had displayed a fatherly attitude to the child, he loved her and assisted her with her homework. This did not find favour with the high court who found the complainant to be an honest and reliable witness of above average intelligence. The respondent was convicted as charged.

[8] In sentencing the respondent, the high court accepted that the prescribed minimum sentence was life imprisonment and if there was to be a departure from the sentence ordained by the legislature, substantial and compelling circumstances warranting a lesser sentence would have to be found to be present. In terms of s 51(3)*(a)* if a court is satisfied that substantial and compelling circumstances are present 'it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence'.

[9] In imposing a lesser sentence, the high court had regard to the role played by alcohol. It found that 'the offence was completely opportunistic and occurred because her aunt would be drunk and seemingly unable to decipher what was going on within the house with the child.' The role of alcohol can hardly be considered as a mitigating factor, let alone a substantial and compelling circumstance when, as here, it was used as cover to facilitate the commission of the offences.

[10] This Court in *S v S,*[1] where the accused was in the habit of getting drunk at night and then having intercourse with his 17 year old daughter, held that his drinking problem was a factor to be considered, but was hardly a mitigating factor. The Court, while recognising the need to have a compassionate understanding for human frailty, said that this did not extend to instances 'where the selfish exploit or corrupt the weak, since

[1] *S v S* 1995 (1) SACR 267 (A) at 272B.

deterrence of others of like mind is more often than not the best weapon of the law, though still a poor one, to safeguard potential future victims.'[2]

[11] The high court took into consideration that the respondent, at 31 years old, was a first offender who had left school in standard eight. He did odd jobs commensurate with his lack of superior skills and was thus a contributing member of society. All these factors the court found to be 'meaningful' in light of the many young men who have previous convictions and the many young men who are unemployed. Despite embarking on an analysis of the proportionality of the crime and finding that the rapes were not the worst kind of rapes, the court failed to pertinently list the substantial and compelling circumstances as it was enjoined to do by s 51(3) of the Act. Instead, it relied on circumstances that were ordinary mitigating factors, if indeed they could even be described as such. This Court in *Malgas v S*[3] specifically cautioned against considering '[s]peculative hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders', which factors were not intended to qualify as substantial and compelling circumstances.

[12] The only mention of substantial and compelling circumstances is to be found in the final paragraph of the judgment and it is not clear which of the mitigating circumstances the high court considered to be substantial and compelling. In failing to spell out and enter into the record the substantial and compelling circumstances relied upon to warrant a lesser sentence than that prescribed by statute, the high court misdirected itself. For that reason alone, this Court is at large to consider the sentence afresh. Apart from this, no circumstances were identified that could truly be considered to be substantial and compelling circumstances within the meaning of the expression. We are enjoined by *Malgas* not to depart from the statutory injunction to impose life imprisonment in respect of certain categories of offences for flimsy reasons that do not withstand scrutiny.[4]

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[2] As above at 273E-F.
[3] *Malgas v S* 2001 (2) SA 1222 (SCA); 2001 (1) SACR 469 (SCA).
[4] *Malgas* paras 7-9.

[13] The high court found in the respondent's favour that there was no gratuitous violence although threats were made to the child not to disclose the rapes. Presumably, because there was no physical injury to the child, other than the rapes, this was held to be a mitigating factor. Lack of physical injury as constituting a substantial and compelling circumstance when imposing a sentence on a conviction of rape is specifically excluded in terms of s 51(3)*(a*A*)* of the Act. This is precisely because rape itself is an act of violence and has such devastating long-term *sequelae*.

[14] There can be no greater crime, in my view, than to deprive a child of her innocence, especially a vulnerable child such as the complainant here. This heinous act was not perpetrated by a stranger, but by a person who said he considered the child to be his own daughter. For a child to be violated in the sanctity of the only place she can call home is a most egregious breach of trust. Can she ever feel safe again? Unsurprisingly, the psychologist's report diagnosed the child with post-traumatic stress. Apart from the fears, the nightmares, the diminished social and scholastic functioning exhibited at the time the report was compiled, there will be long term psychological consequences. It is stated that these will have a negative impact on her psychological growth and psychosexual development into adulthood – no amount of counselling can counteract this. In short, this young girl's life has been irreversibly damaged.

[15] The reality is that South Africa has five times the global average in violence against women.[5] There is mounting evidence that these disproportionally high levels of violence against women and children, has immeasurable and far-reaching effects on the health of our nation, and its economy.[6] Despite severe underreporting, there are 51 cases of child sexual victimisation per day.[7] UNICEF research has found that over a third (35.4%) of young people have been the victim of sexual violence at some point in their lives. What cannot be denied is that our country is facing a pandemic of sexual violence against

[5] N Sibanda-Moyo et al 'Violence Against Women in South Africa: A Country in Crisis' (2017) at 8.
[6] BMJ Global Health C Hsiao et al ''Violence against children in South Africa: the cost of inaction to the society and the economy''(2017)
[7] South African Police Services. Crime statistics April 2013 - March 2014

women and children. Courts cannot ignore this fact. In these circumstances the only appropriate sentence is that which has been ordained by statute.

[16] The following order is made:

1 The appeal is upheld.

2 The sentence of the high court is set aside and replaced with the following:

‘The accused is sentenced to life imprisonment.’

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CH NICHOLLS

JUDGE OF APPEAL

APPEARANCES:

For appellant:	S Mgenge
Instructed by:	The Director of Public Prosecutions, Grahamstown
	The Director of Public Prosecutions, Bloemfontein
For respondent:	M T Solani
Instructed by:	Legal Aid South Africa, Grahamstown
	Bloemfontein Justice Centre, Bloemfontein