**NOT REPORTABLE**

**IN THE HIGH COURT OF SOUTH AFRICA**
**(EASTERN CAPE DIVISION, GRAHAMSTOWN)**

**CASE NO. CA&R 37/2021**

In the matter between:

**MONGAMELI JOJO** Appellant

and

**THE STATE** Respondent

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**APPEAL JUDGMENT**

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**HARTLE J**

[1] The appellant was convicted in the Regional Court, Port Elizabeth, of three counts of kidnapping, rape in contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007, and robbery with aggravating circumstances. He was sentenced to three years' imprisonment on count one, life imprisonment in respect of count two, and fifteen-years' imprisonment in respect of count three. The sentences imposed in respect of counts one and three were ordered to be served concurrently with the

sentence of life imprisonment.

[2] The sentences in respect of counts two and three had attracted the minimum sentencing provisions as envisaged in section 51 (1) and (2) of the Criminal Law Amendment Act No. 105 of 1997 respectively. On the rape charge the basis for the state's reliance on the relevant section was because the complainant was under the age of 16 years at the time of the offence and on the robbery charge the factual premise for the invocation of the provision was because the appellant had threatened the complainant with a firearm during the ordeal in order to dispossess her of her sneakers and the cash monies in her pocket.

[3] The facts found proven in the trial (which are not under challenge in this appeal) are compelling. The complainant, 14 years at the time, was taking a taxi to her grandmother's. She was in the company of her two younger siblings aged three and five years. It was Good Friday and their mother was going to be involved in church activities on the Easter weekend so they were going to be staying with their grandmother instead. She left her home in "Soweto" in the early afternoon to take a taxi to Daku. She carried with her the taxi fare for the three of them (R20) and an additional sum of R15. The boarded a "jikeleza" (small taxi vehicle) driven by the appellant. She instructed him as would any fare paying passenger where she would like them to be driven to. Another passenger who wanted to go to the Kenako mall got on at Shweme and the appellant justified to her that it was necessary to drop him off first and that she and her siblings would be dropped off "last." But after the mall passenger had alighted, the appellant drove in a different direction towards Ezinyoka (Missionvale). He stopped the vehicle on an off-road far from the main route and demanded that the complainant take out all her money and cell phone. She complied out of fear and because she believed he would shoot her with the firearm he said he had but which she never saw. (He had gestured as if to suggest to her that he had access to a firearm in the

driver's storage compartment to the right of the driver's seat). While the car was still moving and the appellant driving around, evidently aimlessly, he told her to move to the front passenger seat. Whilst sitting there he also instructed her to remove her sneakers and give them to him. She complied and he placed them near his feet. She was crying but this did not deter him from keeping her and her siblings captive in the vehicle. He drove around until it became dark ending up at his friend's home in Veeplaas. They entered there leaving the two younger children behind in the vehicle. He smoked with the friend while the complainant waited in the bedroom on the appellant's instruction. The appellant told the friend that the complainant was his girlfriend, but the latter had had the good sense to check with her if this was true on an occasion when the appellant serendipitously had to go outside to move his taxi to allow another vehicle to pass in the narrow road in front of his house. He gathered from her response that she was under duress so when the appellant went into the bedroom with the complainant, he made up an excuse why they had to leave his home promptly and go elsewhere. Before the appellant was interrupted he had however made clear to the complainant in the bedroom his intention to have sexual intercourse with by her by telling her to undress and by putting on a condom.

[4] From the friend's home he drove them to a tavern. He entered with the complainant, again leaving her younger siblings in the vehicle to buy two bottles of "Reds." Back in the vehicle he made her drink the alcohol against her will.

[5] He then drove them to an unlit place near the Veeplaas graveyard. He instructed her to move her siblings who had been sitting with her in the back of the vehicle since they had stopped at the tavern, to the front passenger seat. They were crying. He threatened that unless she got them to be quiet that he would leave them there at the graveyard. She begged them not to make a noise.

[6] On the backseat of his vehicle, he undressed the complainant since she was not complying fast enough with his request to take off her clothes. He instructed her to sit astride of his genitalia, but this was painful and made her cry. He then caused her to lie on her back and sexually penetrated her in her vagina. He was still wearing the condom she said she had seen him put on earlier at his friend's home.

[7] All the while both her and her siblings were crying aloud. This ultimately caused him to stop. After this he drove the three of them to the Kenako mall and discarded them there, distraught, penniless and without a means of contacting their family. The complainant was also bare foot. A passer-by noticed that they were in trouble and dropped them off near their home. Their ordeal had carried on for about six hours during which time they were extremely traumatized.

[8] The complainant immediately upon their arrival at home reported the incident to her grandmother. The latter laid a complaint with the police. The complainant had recalled where the friend lived and it was he ultimately who facilitated the arrest of the accused, albeit he at first evaded the police when they came looking for the appellant at his house.

[9] The appellant pleaded not guilty to the charges but the court *a quo* correctly made short shrift of his defence that the complainant had been a willing participant in the whole debacle and had had consensual sexual intercourse with him, not at the graveyard, but in the comfort of his own home. It appears that although the complainant had been in a position to escape from her captor and or to alert someone to her plight, she had behaved strategically at all times to protect the two younger children from harm and had remained fearfully under the impression that the appellant was armed. The appellant's friend had at least been astute enough to recognize her fear in the brief exchange with him if only to move

them along from his house.

[10] After his conviction and sentence the appellant availed himself of the automatic right to appeal by virtue of the sentence of life imprisonment imposed upon him in respect of count two.

[11] He challenges the sentence on the basis that the trial court erred in finding that his personal circumstances, viewed cumulatively, did not constitute compelling and substantial circumstances justifying a departure from the prescribed minimum sentences imposed in respect of counts two and three, and in not affording his personal circumstances sufficient weight - in the process over emphasizing the interest of the community and the seriousness of the offences in all the circumstances. In the result, so it was contended, the prescribed minimum sentences are disproportionate and unjust.

[12] The appellant was 34 years of age at the time the sentence was imposed. He was raised by his maternal grandfather but as the court observed he grew up in a warm and loving family where domestic violence was anathema to him. He is single and claimed to have one minor child who was 8 years at the time of sentence, but it transpired that this is not his biological child neither was he the primary caregiver of the boy at the time. The boy, who to the appellant's credit he regards as his own, resides with his own mother. He was employed as a taxi driver earning R800,00 a week. He smokes dagga and consumes alcohol. He is HIV positive but is receiving treatment at the prison clinic. He left school in grade 10 of his own accord. He was in custody for a lengthy period of four years and seven months awaiting trial. He has previous convictions and is not a first offender for rape. The prior offence, albeit committed in his youth in 1999, was observed by the court to still be of relevance for one reason in particular, which is that that incident involved the rape of a six-year-old child which in the

magistrate's view reflected a particular predilection on the appellant's part to prey on innocent young children.

[13] Mr. Charles who appeared on behalf of the appellant suggested that his personal circumstances taken cumulatively ought to have persuaded the trial court to have deviated from the minimum sentence of life imprisonment imposed in respect of the rape conviction, and that it should upon a balance of all the considerations also have ordered all the sentences to be served concurrently. Instead, the trial court imposed an "overly harsh" sentence.

[14] A court's discretion to interfere with the sentence on appeal is limited. In Malgas v S[1] it was held 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 was the trial court and then substitute the sentence arrived by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court."

[15] In S v Ncheche[2] it was reiterated that:

> "a court of appeal even if it is of the opinion that it would have imposed a lighter sentence, is not free to interfere if it is not convinced that the trial court could not have reasonably passed the sentence that it did."

[16] In the present matter Ms. Van Rooyen who appeared on behalf of the state supported the sentence and correctly observed that the trial court had dealt with the issue of sentence thoroughly and carefully and with due regard to the traditional factors and objectives of sentence and the expectation regarding the

[1] 2001 (2) SACR 1222 (SCA) at par [12].
[2] 2005 (2) SACR 386 (W) at par [2].

imposition of the prescribed minimum sentences. She also had extensive regard to a social worker's report. The report included a full exposition of the appellant's personal and socio-economic circumstances. It also dealt with the impact of the offence from the complainant and her family's perspective.

[17] Indeed, the magistrate was mindful of the fact that a departure from the prescribed minimum sentence should not be justified for flimsy reasons and was careful not to gloss over the appellant's unique circumstances. I agree with the submission of Ms. Van Rooyen that the magistrate's pedantic approach in considering whether compelling and substantial circumstances existed is absent of any misdirection.

[18] Indeed, far from it, the trial court painstakingly took all the appellant's circumstances into account as well as the fact that he is not a first offender. She did not overemphasize his previous conviction for rape but concluded on the basis of the facts found proven that he poses a serious threat to the safety of innocent children for whom he ostensibly has little respect. This much is borne out not only in how he treated the complainant, a patron of his taxi service in her own right who was entitled to expect a professional, courteous, and safe service, but also in how he raped and denigrated her in front of her siblings and touted her as his girlfriend to his friend in whose house he was committed to having sexual intercourse in their private home space.

[19] The trial court also took into account the lengthy time that the appellant spent in prison awaiting finalization of his trial but correctly attributed these delays to him and his legal team. Although any unreasonable delay in the finalisation of a trial should not lightly be countenanced the magistrate cannot be faulted in concluding that this factor did not qualify as a substantial and compelling circumstance, especially in the light of her decision to impose a

sentence of life imprisonment in respect of the rape conviction.

[20] The factors that might possibly have mitigated for the appellant do indeed, as the trial court found, pale into insignificance when his personal circumstances are weighed against the trauma suffered by the complainant and her family, the young girl's humiliation, and the psychological impact that the offence had on her.

[21] Further aggravating features exist in the fact that the appellant abused his position as a public driver and breached the complainant's and her family's trust in him as a service provider. He took advantage of her age and vulnerability. He totally disregarded the safety of the two younger children (ironically it was exactly for their protection that the young complainant had both the insight and fortitude to let the incident play out strategically so that they would not be harmed or left abandoned with the appellant). He deprived her, as if he were a hungry petty thief, of the few rands that she had in her possession and by taking the shoes off her feet. He conjured up the fear in her that he might kill her with a firearm he purportedly had at his ready disposal. He was oblivious to the trauma he was subjecting the children to and ignored their pleas and cries and screams for hours while the ordeal continued. He took the complainant to his friend's house with deliberate premeditation and remained disposed to have sexual intercourse with her by keeping the condom on even if it meant doing so later on in the vehicle in the presence of the children at a graveyard. He left the younger children in the vehicle unattended and at risk on two occasions. He took the complainant (who was a non-drinker) to a tavern whereafter he forced her to drink alcohol in an attempt to make her drunk and even more pliable to his machinations, this constituting a further act of clear premeditation. Notwithstanding multiple opportunities to desist from this course of entirely unacceptable conduct, he drove to a graveyard. The selection of the spot was designed to prevent detection of

what he intended to do to her there. It was dark and, as the trial court noted, a cemetery is a terrifying place for children, especially at night. He raped her in full view of her siblings. Not even the complainant's or her siblings' earlier cries deterred him from executing his well-formed plan. His behaviour was goal directed to satisfy his own carnal desires with a helpless child regardless of the impact that this would have on her and her siblings. Once he was done with her, he left her and her siblings in the street, crying, frightened and without money, to fend for themselves. The complainant and siblings became even more vulnerable having been left alone in the dark without adult protection.

[22] The trial court correctly found that the appellant had shown no remorse. Instead, he chose to subject the complainant to secondary victimization and attempted to have her portrayed in court as a liar and a girl of loose morals who had cavorted with him and initiated the sexual intercourse herself. One of the objects of sentencing is rehabilitation which, ultimately, is linked to remorse. The trial court correctly found that the chances of the appellant being rehabilitated are minimal as he persisted with his innocence, displaying an obvious lack of insight in the process.

[23] It was held in S v Swart[3] that:

> "each of the elements of punishment is not required to be accorded equal weight, but instead proper weight must be accorded to each according to the circumstances. Serious crimes will usually require that retribution and deterrence should come to the fore and that the rehabilitation of the offender will consequently play a relatively smaller role."

[24] The trial court correctly reflected on the prevalence of the offence of rape and the time and money spent by the state on awareness campaigns in a bid to

[3] 2004 (1) SACR 423 (SCA) at 429 h – i.

raise awareness about the scourge of rape in our country, the appellant having been sentenced during the conduct of the annual "16 Days of Activism for No Violence against Women and Children Campaign" in 2020. (These campaigns, as well meaning as they are, seem to fall on deaf ears and regrettably miss the mark of curbing the incidence of rape). In S v Chapman[4] the Supreme Court of Appeal urged courts, by the sentences imposed for rape:

> "to send a clear message to the accused, to other potential rapists and to the community: We are determined to protect the equality, dignity and freedom of all women, and we shall show no mercy to those who seek to invade those rights."[5]

[25] In S v De Beer[6] the court noted that:

> "Rape is a topic that abounds with myths and misconceptions. It is a serious social problem about which, fortunately, we are at last becoming concerned. The increasing attention given to it has raised our national consciousness about what is always and foremost an aggressive act. It is a violation that is invasive and dehumanising. The consequences for the rape victim are severe and permanent. For many rape victims the process of investigation and prosecution is almost as traumatic as the rape itself."

[26] The trial court also had due regard to the impact of the offence on the complainant. Although she did not sustain any physical harm as a result of the rape, it is clear from the social worker's report that the incident had a profound negative effect on her as well as on her siblings, who witnessed the horrific act and must have had a sense of impending doom that their arrival at their grandmother's was a slim prospect, their sister was under threat, and they were left alone in the vehicle in the dark and at strange places. It is poignant in my view that the grandmother related in her testimony that the younger children are

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[4] 1997 (3) SA 341 (SCA).
[5] par [4].
[6] SB De Beer v S (121/04) unreported judgement of the SCA delivered on 12 November 2004, at par 18.

now terrified whenever they see a red vehicle passing (such as the one driven by the appellant) and instantly associate it with the incident. They remark upon seeing such a vehicle that "there is the car that strangled (the complainant)." (Sic)

[27] In S v Radebe[7] the court remarked upon the devastating impact of the experience of rape by a victim at its receiving end as follows:

> "Rape…is not just the invasion of a right not to be physically harmed. It significantly diminishes a large number of the fundamental bundle of rights which the Bill of Rights either expressly or implicitly secures for each individual. Rape constitutes a gross violation of a person's physical integrity and psyche. It is likely to leave indelible emotional and psychological scars with sequalae that can dramatically impact on the enjoyment of the qualities of life."

[28] The impact does not rest with the victim alone but also has vast consequences for society, families, and communities in its wake. In this instance the impact was not only felt by the complainant and her siblings who had first-hand experience of the ordeal itself but extended to her parents as well. the complainant's mother indicated in her victim impact statement that she was at the time of sentencing accompanying the children to school and waiting for them to finish because she does not trust anyone any longer. She was also taking several tablets at night to cope with the trauma of what had happened. The child's father believed that he had failed the complainant and felt powerless because he cannot make his daughter feel better. The family had to move from their home because of threats received concerning the prosecution of the appellant. The complainant who until the incident was performing brilliantly at school and presented as a model child with no behavioural problems failed grade 11 and dropped out. She also started drinking alcohol and spending more time with her friends. Another fallen star who will likely succumb to dysfunctionality and unfortunately will act out from that broken psyche. These are precisely the kind of ripple adverse effects

[7] 2019 (2) SACR 81 (GP) at 389 e- g.

that emerge from one selfish act of rape.

[29] In this instance the trial court correctly and fairly concluded in my view that this case of rape was serious enough to warrant the imposition of life imprisonment. I have no qualms with that deduction and find no basis for this court to interfere with that sentences imposed. The other sentences imposed are in my view also just and entirely appropriate in all the circumstances.

[30] In result I issue the following order:

1. The appeal is dismissed.

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**B HARTLE**
**JUDGE OF THE HIGH COURT**

**I agree,**

**L RUSI**

**ACTING JUDGE OF THE HIGH COURT**

DATE OF HEARING: 1 September 2021

DATE OF JUDGMENT: 4 November 2021*

*Judgment delivered electronically on this date by email to the parties.

*APPEARANCES:*

*For the appellant: Mr. H Charles of Grahamstown Justice Centre, Grahamstown*

*For the respondent: Ms. M Van Rooyen of the Office of the Deputy Director, Grahamstown.*