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

CASE NO. CA&R 153/2021

S. MAGODA **Appellant**

and

THE STATE **Respondent**

JUDGMENT

NQUMSE AJ:

Introduction

[1] The appellant was convicted in the Regional Court of East London of two counts of rape in terms of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (SORMA) and one count of Sexual Assault in terms of the section 5 of the SORMA. On 9 December 2020 he was sentenced to life imprisonment for each of the rape counts and 5 years imprisonment for the count of sexual assault.

[2] The first rape count and the count of Sexual Assault were committed on a 12 year old girl SK, and the second rape count was perpetrated on a 5 year old girl UK. Because the victims were both under the age of 16 years, the provisions of section 51(1) of the Criminal Law Amendment Act 105 (CLAA) finds 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 life imprisonment unless there exist

substantial and compelling circumstances justifying a lesser sentence. Part I of Schedule 2 in terms refers to rape as contemplated in section 3 of the CLAA where *inter alia*, the victim is under the age of 16 years old.

Facts

[3] The background facts are briefly that the appellant who is married to the mother of the two victims referred to above as SK and UK, lived together in a one room shack in the informal settlements of East London. From time to time the mother of the two girls would leave them alone to sleep with the appellant in the same bed whilst she pays overnight visits in a nearby township.

[4] It appears that the two girls had been subjected to a continuous sexual abuse by the appellant largely due to their mother's absence, though at times the sexual abuse according to the victims, would happen even when she was present. The specific incidents that led to the conviction of the appellant were presented in the testimony of the victims as follows.

[5] During January 2018 to 24 March 2018 the appellant sexually abused SK who was 10 years old at the time by penetrating her per vaginum. SK testified that on 24 March 2018 following a string of similar abuse, the appellant with whom she was sleeping with, together with her younger sister UK, undressed her pantie and ordered her to hold and play with his penis. Thereafter penetrated her vaginally on three occasions during the same night. Due to the unbearable pain she was enduring, she cried thereby attracted the attention of the neighbours'/community members who came to their rescue and who at the same time summonsed their mother and the police to whom they reported these incident. After they reported the rape to the members of the community they were taken by the police to hospital for examination and thereafter were removed from their parents to live at a place of safety.

[6] The child, UK who was 5 years old at the time of the incident confirmed what had happened to her sibling on the night of the 24 March 2018. She also said it was not the first time for her to witness what was done to her sister by the appellant.

[7] She further testified that at the night in question the appellant undressed her, placed her on top of him and inserted his penis into her vagina. Further, the appellant had done this to her previously but did not report it to her mother owing to threats that were made by the appellant, that if she were to report him, he would kill her.

[8] The medical evidence that was introduced through a forensic nurse confirmed that both victims had been sexually molested and rape cannot be excluded.

[9] The appellant confirmed in his evidence that both children belong to his wife and that he played a role of a father in their lives. He denied the allegations against him and surprised as to why the children with whom he conducted good relations would falsely implicate him.

[10] It is on the bases of the facts above that the court rejected the appellant's version and found him guilty on all the three counts.

Grounds of Appeal

[11] The grounds of appeal as they appears in the notice of appeal which form the bases of the argument on sentence and further substantiated is in the heads of argument can be summarised as follows:

11.1. the trial court failed to properly consider the personal circumstances of the appellant which accumulatively constitute substantial and compelling circumstances which warrant a deviation from the prescribed minimum sentence.

11.2. the trial court erred by not heeding the relevant authorities that support the imposition of a lesser sentence and as result of such failure the sentence imposed on the appellant is grossly disproportion to the crime;

11.3. the trial court erred by not taking into account the fact that there was no form of violence or physical assault and consequential injuries suffered by the complainants.

11.4. the court erred in not taking into account the period of two years which the appellant spent awaiting trial.

11.5. the trial court erred in failing to consider the youthfulness of the complainant(s) who were very young with a chance to overcome their ordered.

11.6. the trial court failed to take into account the possible rehabilitation of the appellant since he was a first offender in respect of sexual offences and the court erred in failing to order that the sentences should run concurrently.

Discussion

[12] The law is settled on when an appellate court may interfere with the sentence imposed by a lower court. In *S v Rabie*[1] Holmes JA enunciated the principle as follows:

*" in every appeal against sentence, whether imposed by a Magistrate or a Judge, the court hearing the appea*l –

(a) Should be guided by the principle that punishment is "pre-eminently a matter for the discretion of the trial court"; and

(b) Should be careful not to erode such discretion; hence the further principle that the sentence should only be altered if the discretion has not been judicially and properly exercised. The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate."

[13] In *S v Malgas*[2], Marais JA, dealing with the same principle under the minimum sentence legislation stated thus:

"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

[1] 1975 (4) SA 855 (A) at 857 D - F
[2] 200 (1) SACR 469 (SCA) at paragraph 12

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".

[14] However, it is also trite that an appellate court can interfere with a sentence even where there has been no misdirection but the sentence is disproportionate to the crime (see *Sadler 2000 (1) SACR 331 (SCA) at 334d – 335g*).

[15] The minimum sentences prescribed by the CLAA have been ordained to be sentences that must ordinarily be imposed unless the court acting in terms of section 51 (3) of the CLAA finds substantial and compelling circumstances which justify a departure from imposing the prescribed sentence.[3]

[16] Before us, counsel for the appellant submitted that he has nothing further to add to his heads of argument. Similarly counsel for the state submitted that he stands by the submissions made in his heads of argument. It is therefore necessary to assess whether the trial court misdirected itself in finding that there were no substantial and compelling circumstances that warrant a lesser sentence than that prescribed.

[17] In *Malgas*[4] the court set out how a court should conduct an enquiry as to the presence or otherwise of substantial and compelling circumstances as follows:

"[18] Here lies the rub. Somewhere between these two extremes the intention of the legislature is located and must be found. The absence of any pertinent guidance from the legislature by way of definition or otherwise as to what circumstances should rank as substantial and compelling or what should not, does not make the task any easier. That it has refrained from giving such guidance as was done in Minnesota from whence the concept "substantial and compelling circumstances" was derived is significant. It signals that it has deliberately and advisedly left it to the courts to decide in the final analysis whether the circumstances of any particular case call for a departure from the prescribed sentence. In doing so, they are required to regard the prescribed

[3] S v Malgas fn2
[4] Ibid paragraph 18

sentence as being generally appropriate for crimes of the kind specified and enjoined not to depart from them unless they are satisfied that there is weighty justification for doing so. A departure must be justified by reference to circumstances which may be seen to be substantial and compelling as contrasted with circumstances of little significance or of debatable validity or which reflect a purely personal preference unlikely to be shared by many".

[18] I now turn to consider the personal circumstances of the appellant which were submitted in the trial court through his legal representative that the appellant was 46 years old, married to the mother of the two victims. He went to school up to standard 6. At the time of his arrest he was gainfully employed earning an amount of R3600 per month. He has no previous convictions.

[19] In aggravation the prosecution presented the victim impact statements in respect of both the victims. Both children during their interview opted to express their feelings and the impact the ordeal has had on them by a sketch of drawings. The child SK, further wrote the following "*before the incident I liked nice food like meat, banana, liked paying ball with other children. Like watching television at home together with my mother. We would be happy and loved. After the incident I am a child who likes crying. I do not trust men. A child who is always sad, who likes to isolate herself and be alone and not play with other children. I always think about what happened to me which was done to me by Sapholwakhe and I would feel like crying, scream and cry. Thinking that I was also victimised by my mother from Nakendi*" (*sic*)

[20] The second child UK drew a sun and wrote next to it in Isixhosa "*Ilanga*" she also drew a person with tears on her face and wrote next to the picture of the crying person "*I am still crying and I am angry*". Contrary to any doubt one may have on the impact the incident has had on the victims, their drawings and statements is undeniable evidence that they are emotionally scared as a result of the rape.

[21] It appears clearly from the record that the learned magistrate was alive to the factors he should take into account before imposing the sentence. The learned magistrate expressed himself pointedly that he took into account the marital status of the appellant who is a first offender and who has been in custody awaiting trial since

his arrest. On the other hand he took into account the aggravating circumstances which include the seriousness of the offence which was perpetrated by someone who was in a position of trust.

[22] He also took into account the age of the victims and the impact of the crime on them. In keeping with the triad as propounded in *S v Zinn*[5], he took into account the interest of society. In expanding on this element, he expressed himself in the following manner "*There is no doubt that the members of our society expect protection from our courts, especially protection of children*".

[23] Following his value judgment the learned magistrate found that the appellant did not succeed in showing substantial and compelling circumstances that would warrant him to deviate from the prescribed minimum sentence and thus imposed imprisonment for life in respect of each of the two counts of rape.

[24] In *S v Jansen*[6] rape was said to be "*an appalling and perverse abuse of male power"*. *The court went on to say "[i]t is sadly to be expected that the young complainant in this case already burdened by a most unfortunate background and who had, notwithstanding these misfortunes, performed reasonably well at school, will now suffer added psychological trauma which resulted in a marked change of attitude and of school performance. The community is entitled to demand that those who perform such perverse act of terror be adequately punished and that the punishment reflect the societal censure. It is utterly terrifying that we live in a society whose children cannot play in the streets in any safety: where children are unable to grow up in the kind of climate which they should be able to demand in any decent society, namely in freedom and without fear. In short, our children must be able to develop their lives in an atmosphere which behoves any society which aspires to be an open and democratic one based on freedom, dignity, and equality, the very touchstone of our Constitution"*

[25] Since the lament in the judgment cited above and many other similar comments made in various judgments that followed thereafter, the situation of abuse of young children has not changed but instead it is a debilitating situation with no end in sight.

---

[5] S v Zinn 1969 (2) SA 537 (A) and S v Rabbie 1975 (4) SA 855 (A)
[6] 1999 (2) SACR 368 (C) at 378 a – 379a

Not only are young children at risk and a prey when they are playing in the streets or outside their homes. Sadly, they are made to suffer the worst forms of violence including sexual violence at the hands of people who are not only close or mere relatives to them, but from those who are entrusted with the responsibility of parenthood and who are supposed to protect them.

[26] In this matter the appellant fulfilled that role of being a parent albeit a stepfather. What makes his conduct even more reprehensible is the repeated times he sexually abused his victims. His denial of guilt in the face of overwhelming evidence against him, subjecting the children to a secondary abuse of having to testify and relive their experience is indicative of someone who does not take responsibility for his actions and therefore shows no remorse. Counsel for the appellant sought to suggest that owing to the absence of physical injuries this is not the most form of rape, I disagree. That the rape happened over a period of time and repeatedly; The invisible scars that are demonstrated in the drawings of the victim impact statements and the explanations accompanying such drawings all point to one conclusion, that the hurt that is not visible to the naked eye and the anger that is harbored by the children indicates the seriousness of the violation of their human dignity. In *S v C*[7] it was stated that: "*A rapist does not murder his victim. He murders herself respect and destroys her feeling of physical and mental integrity and security. His monstrous deed often haunts his victims and subjects her to mental torment for the rest of her life, a fate worse than loss of life*"

[27] In *N v T*[8] rape was described as a horrifying crime and a cruel and selfish act in which the aggressor treats with utter contempt the dignity and feelings of the victim. In *S v Chapman*[9] The court said it is a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim.

[28] It is my view that it is in circumstances of this type of crime that the expression in *S v Swart*[10] is apposite where the court said "*in our law retribution and deterrence are proper purposes of punishment and they must be accorded due weight in any sentence that is imposed. Each of the elements of punishment does not require to be*

[7] 1996 (2) SACR 181 at 186
[8] 1994 (1) SA 862 (C) at 864 g
[9] 1997 (2) SACR 3 (SCA); 1997 (3) SA 341 at 345A – B [1997] 3 ALL SA 277 (SCA)
[10] 2004 (2) SACR 370 (SCA) at 378B - C

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".

[29] I now turn to deal with the failure of the learned magistrate to order the sentences to run concurrently.

[30] A good starting point is the provisions of section 280 (1) of the Criminal Procedure Act[11] which provides:

> *"when a person is at any trial convicted of two or more offences or when a person under sentence or undergoing sentence is convicted of another offence, the court may sentence him to such several punishments for such offences or, as the case may be, to the punishment for such other offence, as the court is competent to impose"*

[31] In terms of section 39 (2) (a) (1) of the Correctional Services Act[12] provides:

> *"`Subject to the provisions of paragraph (b), a person who receives more than one sentence of incarceration or receives additional sentences while serving a term of incarceration, must serve each such sentence, the one after the expiration, setting aside or remission of the other, in such order as the National Commissioner may determine, unless the court specifically directs otherwise, or unless the court directs that such sentences shall run concurrently but –*
>
> *(i) Any determinate sentence of incarceration to be served by any person runs concurrently with a life sentence or with sentence of incarceration to be served by such person in consequence of being declared a dangerous criminal;*

[11] Act 57 of 1977
[12] Act 111 of 1998

(ii) *One or more life sentences and one or more sentences to be served in consequence of a person being declared a dangerous criminal also run concurrently.*

[32] It therefore follows that any determinate sentence of incarceration in addition to life imprisonment is subsumed by the latter. Accordingly, the sentence in Count 2 and Count 3 are automatically subsumed by the sentence of life imprisonment imposed in Count *1.*

(see generally S v Nkosi and others 2003 (1) SACR 91 para 7-9)

[33] In the result I find no misdirection in the sentences imposed by the learned magistrate nor do I falter him in not ordering the sentences to run concurrently. Accordingly the appeal must fail.

Order

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

The appeal is dismissed and the conviction and sentences imposed are confirmed.

_____

M.V. NQUMSE

ACTING JUDGE OF THE HIGH COURT

I agree.

_____

M.J. LOWE

JUDGE OF THE HIGH COURT

APPEARANCES

Counsel for the appellant	:	Adv. Sojada instructed by the Legal Aid Board, Grahamstown.
Counsel for the respondent	:	Adv Soga, instructed by the Director of Public Prosecution, Grahamstown.
Date of hearing	:	23 February 2022
Date of delivery of judgment	:	23 February 2022