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Case: Mzikhona v S *(Appeal)*

By **Phathutshedzo Tshindane** (Candidate Attorney), and **Chantelle Gladwin-Wood** (Partner)

03 December 2024

(A425/2016) [2024] ZAGPPHC 1118 (21 October 2024)

INTRODUCTION

This matter concerns an appeal against a life imprisonment sentence for a rape conviction of a minor child, imposed by the Regional Court. According to section 309(1) (a) of the Criminal Procedure Act 51 of 1977, the Appellant acquired an automatic right to appeal his sentence. Section 51 (1) of the Criminal Law Amendment Act 105 of 1997 states that a Regional Court or High court can sentence a person convicted on a part 1 of schedule 2 crime to imprisonment for life. Part one of schedule 2 of Act 105 of 1997 lists the rape of a child under the age of 16 years as one of the offences which attract a mandatory sentence of life imprisonment.

BACKGROUND

The Appellant stated that when he broke into the house, he was under the impression that no one was in the house, he alleged that he was desperate for money to purchase drugs, he stated that when the child failed to show him where the money was, he resorted to taking out his frustrations on the child and proceeded to tying up her legs, hands and gagging her mouth and then raping her. The J88 report confirmed that there were injuries sustained because of the rape. The Court acknowledged that this was an inhuman deed committed on a defenceless child who posed no threat to the Appellant.

LEGAL QUESTION

Under what circumstances can a life imprisonment sentence be mitigated?

COURT'S INTERPRETATION

The Magistrate in sentencing requested both the victim impact report and the pre-sentence report setting out the personal circumstances of the child victim as well as that of the Appellant, these were taken into consideration when sentencing was awarded.

The court took into consideration that the Appellant was educated, and that he completed a Paramedics course as a form of empowering himself.

The Appellant was employed and lost his job due to the numerous convictions of housebreaking and theft that he pleaded guilty for, this was an element of remorse. The Magistrate didn't consider the remorse as the DNA evidence connected him to the crime of rape of a minor. Counsel for the Appellant argued that the injuries sustained by the child victim were not serious and that was a factor to be considered in reducing the sentence. It was further argued that the Appellant had spent a year awaiting trial, had a child and a serious drug problem.

The court acknowledged the increasing rate of violent crimes in South Africa mostly against defenceless women and children who have a right to feel safe in their own homes. The community is permanently living in fear. The court also stated that when the crime of rape has been perpetrated against a child, the seriousness of the crime can't be taken lightly, there were no compelling circumstances to deviate from the prescribed sentence in terms of section 51(1) Act 105 of 1997.

The prosecution argued that the lack of serious physical injury to the child cannot constitute compelling circumstances to justify the reduction in sentence. In S v Lebele (CC 07/2021) [2023] ZAGPPHC 567 (9 May 2023) the judge summarized the issue of physical injury during rape and its impact on sentence as follows: rape in itself should be treated as a crime with a more severe sentence, he further added that in most rape cases the victims suffer severe harm [Amanda Spies Perpetuating harm: The 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 offender who merely wanted to satisfy his own sexual desires.The legislature also amended the Criminal law Amendment Act 105 of 1997 not to undermine the bodily harm suffered through rape by alleging that as there was no serious injury to the victim, that stands as a ground for compelling or substantial circumstances to reduce the sentence. As stated in S51(3) (a) of the Act the seriousness of an injury becomes irrelevant in the case of rape considering its severity and prevalence in the community.

In the case of Malgas (S v Malgas (117/2000) [2001] ZASCA 30) it was held that the fact that the injuries sustained were not serious was a flimsy reason to mitigate the sentence. In S v Vilakazi 2009 (1) SACR 552 (SCA), the court held that in serious crimes such as rape the offender's personal circumstances take a backseat once it comes to the court's attention that the punishment might be suitable for the crime. The Malgas and Vilakazi judgements are essential as they cautioned against offenders giving their personal circumstances as excuses for reducing a sentence. The court pointed out the Romer case (S v Romer 2011(2) SACR 153) which dealt with circumstances where an appellate court was entitled to interfere with sentences imposed by the court a quo, these grounds are: the sentence might have been disturbingly inappropriate, the sentence was not proportionate to the crime, discretion was exercised unreasonably and in cases where no reasonable court would have imposed it. The court found that none of the above-mentioned grounds existed in the Appellant's sentencing by the court a quo.

CONCLUSION

The judge concluded that all the facts of the case considered it is apparent that the crime of rape has become a serious issue in most of the communities, this is evidenced by the appellant who broke into the house with the intention to steal and he raped a defenceless and innocent child instead. The judge stated that this clearly shows that he is a threat to the community at large and might be a repeat offender in the future. The judge then decided that there were no circumstances justifying a lesser sentence and confirmed the sentence imposed by the court a quo, because of the severity and prevalence of the crime of rape not just in the community but the country as a whole.

Please note: Each matter must be dealt with on a case-case basis, and you should consult an attorney before taking any legal action

VALUE

Rape offenders being awarded a life imprisonment sentence.

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