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

IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG

CASE NUMBER: CA21/2022

In the matter between: -

SIBONELO NGCANI Appellant

and

THE STATE Respondent

***Coram*: Mfenyana J *et* Du Toit AJ**

This judgment was handed down electronically by circulation to the parties' representatives *via* email. The date for hand-down is deemed to be **05 August 2024.**

ORDER

(i) The late filing of the appeal is condoned.

(ii) The appeal against sentence is dismissed.

JUDGMENT

MFENYANA J

[1] In this appeal, the appellant was convicted on 27 January 2021 on a charge of rape (read with the provisions of section 51(2) of the Criminal Law amendment Act (CLAA)[1] On 28 January 2021 he was sentenced to 10 years imprisonment.

[2] He now appeals against his sentence of 10 years imprisonment.

[3] In the notice of appeal, the appellant avers that the court *a quo* misdirected itself in imposing the sentence, having failed to take into account that his personal circumstances taken cumulatively, constitute substantial and compelling circumstances. He further contends that the sentence of 10 years imprisonment is shockingly inappropriate in the circumstances of this case, and out of proportion to the

[1] Act 105 of 1997 as amended.

totality of the accepted facts in mitigation.

[4] Incorporated in the appeal, albeit in a cursory manner, is a request on behalf of the appellant that this court dispenses with the normal rules of court "regarding condonation for late filing of the appeal." No further submissions are made in this regard.

[5] It may be worthwhile to state that this appeal forms part of a special project for the eradication of the backlog of appeal cases. It is our considered view that, for this reason *inter alia*, it would be in the interests of justice that the appellant's late filing of the appeal be condoned. This will in addition, bring finality to the matter.

[6] In the heads of argument filed on behalf of the appellant, it is contended that the sentence of 10 years imprisonment is harsh and evokes a sense of shock. It is further contended that the personal circumstances of the appellant constitute substantial and compelling circumstances which call for the imposition of a lesser sentence than the prescribed minimum sentence of 10 years. The appellant's personal circumstances are that:

(i) The appellant was 26 years at the time he committed the offence.

(ii) He had no previous convictions.

(iii) He was not married and had two children, both of whom are still minors and reside with their mothers.

(iv) He completed grade 11, and was then working as Brickworld, making stock bricks.

(v) At the time of the commission of the offence he was earning a weekly salary of R600.00, part of which he used to contribute to the maintenance of his 1 year old child.

[7] Lastly, the appellant avers that the sentence imposed leaves no room for rehabilitation, as it over- emphasizes the retribution element of sentencing and does not allow for the appellant to be reintegrated back into society.

[8] The appeal is opposed by the respondent on the basis that no misdirection was committed by the court *a quo,* and that the sentence imposed is not disproportionate or shocking

that no reasonable court could have imposed it. For this contention, the respondent relies on the decision of the Constitutional Court (CC) in *S v Bogaards*[2]*.* In that matter the CC reaffirmed that a court of appeal can only interfere with a sentence imposed by a lower court where there has been an irregularity that results in a failure of justice, or the sentence is so disproportionate or shocking that no reasonable court could have imposed it.

[9] The respondent further avers that the sentence imposed by the court *a quo* was properly considered and that from the evidence, there is no suggestion that an irregularity was committed by the trial court.

[10] It was further the respondent's contention that the personal circumstances of the appellant were considered by the court *a quo* and found not constitute substantial and compelling circumstances to justify a departure from the prescribed minimum sentence. In this regard the respondent cited the well-known decision of *S v Malgas (Malgas)*[3] that the prescribed minimum sentences "are to be taken to be ordinarily appropriate when crimes of the prescribed kind are

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2 2013 (1) SACR (CC).
3 2001 (2) SA 1222 (SCA).

committed" when considering whether in a specific case, a departure is justified. In this case, so contends the respondent, the trial court properly exercised its discretion in imposing sentence, taking into account the principles laid down in *Malgas*.

[11] The respondent pointed out the fact that the appellant was regarded as a family friend by the complainant and her family, as he was her brother's friend and known to them. He was therefore expected to protect the complainant, and not harm her, the respondent further contended.

[12] Lastly, the respondent contended that the fact that the appellant continued to place the blame on the complainant and denied that he inserted his finger in the complainant's vagina, is an indication that the appellant has no remorse.

[13] We do not intend restating the trite principles in relation to the powers of the court of appeal with regard to sentencing, save to state that sentencing is pre-eminently within the discretion of the trial court. A court of appeal can only interfere if there is a material misdirection.

[14] In sentencing the appellant, the court *a quo* considered that the appellant had been convicted for rape read with the provisions of section 51(2) and Schedule 2 of the CLAA. The court thereafter analysed the evidence of both the complainant and the appellant. The court further considered the effect of the rape on the complainant as well as what it construed to be feelings of regret demonstrated by the appellant; based on its observation of the appellant. The court *a quo* however concluded that despite its observation, the appellant did not demonstrate any remorse. In addition, the court *a quo* considered that the appellant was 'like a family friend to the complainant'. Having done so, the court went into detail in respect of the purposes of punishment and dealt with each one in turn. We do not intend regurgitating them in this judgment.

[15] Regarding the personal circumstances of the appellant, the court *a quo* took into account that the accused was a first offender; that he was 26 years of age, unmarried and had two children who are still minors. Both minor children were living with their mothers. The court further considered that the accused's seven year old child although living with the

mother in the Eastern Cape, was being 'looked after' by the appellant's family. It further considered that the appellant was maintaining his one year old child, from his salary of R600.00 per week as he was employed. In essence, the court a quo considered all the appellant's personal circumstances.

[16] The court *a quo* found that the appellant's personal circumstances balanced with the manner in which the offence was committed and looked at in line with decided cases, shows that his personal circumstances do not amount to substantial and compelling circumstances.

[17] It would be remiss of us, not to record our observations in respect of the gratuitous remarks made by the court *a quo*, as reflected in the record. The following extract from the record of proceedings bears reference[4]:

> "Court: The two of you say deviate. Let say I agree with the two of you I deviate then how many years? ... And the law says 10 years. …
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> Prosecutor: I would deviate in the sense I start looking at around

[4] Record p173, 174, 175, 182.

five to six years Your Worship. …

Court: For a rape me acting you want them to cancel my acting instinct (sic), years for rape? ... You know my worry is that this record lands on the judges table and they start asking what were these people thinking…"

Prosecutor: Your Worship ja, I, maybe more suitable will be around eight years Your Worship. (sic) ….
Court: The state says eight years.

Mr Neethling: Your Worship let us assume it was a full blown rape.
Court: There would not have been deviation. We could not be talking like this now.
Mr Neethling: Yes I hear what the Court is saying, but let us say there was penetration by a penis and the Court is of the view it can deviate and the eight years is it the same as, that is why I am bound by definition. ….. (sic).

Court: I have heard the officers in here in Court when we adjourned and I was about to leave, I heard the, I overheard the interpreter with the Court orderlies all saying it is a sad one and in a way I am not sure if the word appealing to my wisdom to show mercy. I have on the other hand allowed myself as well to be dictated to by both the Defence and the State as to what should be an appropriate sentence and it was at that stage that I have realised that I have lowered my shield and it was like I want to run away from my responsibilities of sentencing the accused person" (sic).

[18] As it appears from the record, these remarks were made by the presiding magistrate, Mr Foso during the address by the parties' legal representatives and during sentencing. It appears that the presiding magistrate was concerned about his acting stint (instinct), presumably at a higher court, and the views of judges if he were to sentence the appellant to five years imprisonment.

[19] These remarks by the presiding magistrate are not only irrelevant to the substantive issues the court was seized with but are also lamentable. They tend to create an impression that all the court was concerned about, was to create a good impression with the judges, and not have his acting stint cancelled. They have no place in the adjudication of matters, before the courts and could, if permitted to continue unabated, taint the entire process of adjudication and the decorum of the courts. This court must express its discontentment at the inappropriate remarks made by the presiding magistrate.

[20] It may well be worthwhile to restate the duties of judicial officers as set forth in the Constitution[5]. It states in relevant parts:

165 Judicial authority

(1) … .

(2) The courts are independent and subject only to the

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5 *Constitution of the Republic of South Africa*, 1996.

Constitution and the law, which they must apply impartially and without fear, favour or prejudice.

(3) … .

(4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts."

[21] What is disconcerting is that in a decision of this division in *Diniso v S*[6] the court reiterated the sentiments of the Constitutional Court (CC) in *Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa intervening),* cautioned:

> "Judicial officers are the gate keepers of all rights entrenched in the Constitution. Judicial officers in the Lower Courts are the coalface of justice. It is therefore imperative that they be seen to be impartial and independent."[7]

(own emphasis)

[22] It bears mentioning that the Code of Judicial Conduct to which all judicial officers should subscribe, dictates that judicial officers should administer justice to all people alike, without fear, favour or prejudice, and in accordance with the Constitution.

(own emphasis)

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6 (CA14/22) [2023] ZANWHC 11 (7 February 2023).

7 *Ibid*; par 15.

[23] This is indeed the core of the Oath of office to which the presiding magistrate is bound. He bears the responsibility to ensure that he does not merely pay lip service, to this founding principle of the existence of all judicial function. Judicial function is not for show.

[24] Against the aforegoing, it is incumbent on this court to consider the impact of the remarks made by the presiding magistrate against the specific facts of this case. A further reading of the record indicates that in spite of these unfortunate remarks, in sentencing the appellant, the presiding officer, nonetheless proceeded to examine all the relevant factors of the matter, including the triad of factors set out in *Zinn*. There is no indication *ex facie* the record that the remarks played any role in the sentence imposed as the court *a quo* evidently proceeded to consider the applicable legal principles in the specific circumstances of this case, regardless.

[25] The principles which are applicable when a court of appeal considers a sentence imposed by a trial court have been stated in a number of decisions of the Supreme Court of Appeal as well as the Constitutional Court.

[26] In *S v Barnard*[8] it was stated as follows:

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8 (469/2002) [2003] ZASCA 63; 2004 (1) SACR 191 (SCA) (30 May 2003) at para 9.

"The issue is therefore whether the trial Court exercised its discretion properly and judicially in imposing a sentence of 5 years' direct imprisonment. It is trite that sentence is a matter best left to the discretion of the sentencing Court. A court sitting on appeal on sentence should always guard against eroding the trial Court's discretion in this regard and should interfere only where the discretion was not exercised judicially and properly. A misdirection that would justify interference by an appeal Court should not be trivial but should be of such a nature, degree or seriousness that it shows that the Court did not exercise its discretion at all or exercised it improperly or unreasonably."

[27] In S *v Kgosimore*[9], Scott JA said the following with regard to an appeal court's powers to interfere with sentence:

> "It is trite law that sentence is a matter for the discretion of the court burdened with the task of imposing the sentence. Various tests have been formulated as to when a Court of appeal may interfere. These include whether the reasoning of the trial court is vitiated by misdirection or whether the sentence imposed can be said to be startlingly inappropriate or to induce a sense of shock or whether there is a striking disparity between the sentence imposed and the sentence the Court of appeal would have imposed. All these formulations, however, are aimed at determining the same thing: viz whether there was a proper and reasonable exercise of the discretion bestowed upon the court imposing sentence. In the ultimate analysis this is the true inquiry. … . Either the discretion was properly and reasonably exercised or it was not. If it was, a Court of appeal has no power to interfere; if it was not, it is free to do so."

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9 1999 (2) SACR 238 (SCA) at para 10.

[28] Of relevance is that the appellant had been convicted of an offence for which a minimum sentence of 10 years is prescribed. The suggestion that because the appellant inserted his finger and not his penis into the complainant's vagina, cannot be viewed as a mitigating factor. This view is absurd. The insertion of a finger by the appellant into the complainant's vagina is what constitutes rape, no less than the insertion of his penis. It cannot in the same vein, count as a factor which indicates that the rape is not a 'bad rape' as suggested by the state. The concept of a "full-blown" rape is a fallacy and finds no application in our law. It also does not play any role in advancing the personal circumstances of the appellant.

[29] This mischaracterisation of the offence is also what led to the belief that a deviation from the prescribed minimum sentence was warranted. It appears that the appellants' contentions are borne out of the trivialising of the offence on the basis that the appellant inserted his finger in the complainant's vagina. As counsel for the appellant correctly pointed out, the definition of rape encompasses using a finger. "*By definition it is still rape, … It does not change*", he submitted.

[30] In *S v Kekana*[10] the SCA stated that:

> "When considering an appropriate sentence, the lodestar remains the enduring triad — the crime, the offender and the interest of society, as enunciated in S v Zinn 1969 (2) SA 537 (A) at 540G. In S v Rabie 1975 (4) SA 855 (A) at 862A – B the main purposes of punishment were reiterated as being deterrence, prevention, reformation and retribution"

[31] This is what the trial court considered in imposing sentence, as is apparent from the record. The averment by the appellant that the sentence imposed is disproportionate overlooks these aspects.

[32] Sight must also not be lost that the prescribed minimum sentences were ordained by the legislature on the basis that they are suitable whenever offences of the specified nature are committed. In *Malgas*[11] the court cautioned that these prescribed minimum sentences should not be departed from for flimsy reasons. To our mind, the reasons advanced by the appellant fall into that category. They do not evince a sense of an appreciation of the seriousness of the offence

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10 2019 (1) SACR 1 (SCA).
11 *Ibid,* fn 3.

committed, for which a prescribed minimum sentence of 10 years was considered appropriate by the legislature.

[33] When viewed holistically in light of the prevailing circumstances of this case, which include the nature of the offence and the interests of society, there can be nothing in the personal circumstances of the appellant that could be regarded as constituting substantial and compelling circumstances. There is thus no reason to interfere with the sentence imposed by the court *a quo*.

ORDER

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

(i) The late filing of the appeal is condoned.

(ii) The appeal against sentence is dismissed.

S MFENYANA

JUDGE OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG

I agree.

S DU TOIT

ACTING JUDGE OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG

APPEARANCES

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Date reserved:	21 June 2024
Date of judgment:	05 August 2024