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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

**CASE NO: A91/2014
JPV 2004/6303**

(1)	<u>REPORTABLE: YES / NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
.....
DATE	SIGNATURE

In the matter between:

ELLIOT ZAYO

Appellant

and

THE STATE

Respondent

J U D G M E N T

TSOKA, J:

[1] The appellant, Mr Elliot Zayo (“Mr Zayo”) was charged and convicted by the Regional Court at Protea, Soweto with rape of a 14 year old female.

[2] In terms of s 51 of Act 105 of 1997 (“the Act”) the conviction attracts minimum sentence of life imprisonment unless there exists substantial and compelling circumstances warranting departure from imposing the minimum sentence.

[3] As the Regional Court at the time was not competent to impose the prescribed minimum sentence of life imprisonment, Mr Zayo was referred to this Court for sentencing in terms of s 51(1) of the Act.

[4] This Court (Mophosho AJ) having been satisfied that the proceedings in the Regional Court were in accordance with justice, confirmed the conviction and sentenced Mr Zayo to life imprisonment as there were no substantial and compelling circumstances entitling the court to impose any lesser sentence.

[5] On 14 June 2013 Mr Zayo was granted leave to appeal against both the conviction and sentence. This is the appeal before us.

[6] The appeal is, in the main, directed against the trial court’s finding that the evidence of the complainant was satisfactory in all material respects and thus proves the guilt of Mr Zayo beyond reasonable doubt.

The Conviction

[7] According to the complainant, Mr Zayo had sexual intercourse with her for the first time in 2001 as his sangoma had advised him that the assault charges he was facing would be withdrawn against him. The sexual intercourse was without her consent. It occurred when she had just come out of a bath when Mr Zayo, who is her aunt's lover, pushed her to the bed and raped her. At that time, the other children who stayed with them in the one room home separated by a curtain, were ordered by Mr Zayo to go and play outside. The complainant's aunt, who lives with Mr Zayo as husband and wife, was at work at the time.

[8] On her aunt's return from work, the complainant reported the rape to her aunt. Instead of the aunt confronting Mr Zayo, the aunt did not believe that the complainant had been raped by Mr Zayo but instead beat her up.

[9] The sexual assault continued throughout 2001 ultimately resulting in the complainant falling pregnant towards the end of the same year. When she discovered that she was pregnant, she again reported the pregnancy to her aunt who this time instructed her to abort the foetus which she did. The complainant was told by her aunt that '*this*', meaning the rapes and possibly the abortion, must not be talked about. This led the complainant to lead a

miserable and unhappy life as her aunt kept swearing and referring to her as a '*bitch and prostitute*'. The aunt threatened to kill her for sleeping with Mr Zayo whom she regarded as her husband.

[10] As the swearing and abuse by her aunt continued, the complainant decided to end it all by committing suicide. One morning when she was about to commit suicide she met one N..... to whom she related her story. It was N..... who suggested that the complainant report Mr Zayo to the police.

[11] Dr Ophiong, the medical practitioner who examined the complainant in January 2002, testified that the complainant reported to him that she was raped on many occasions by Mr Zayo. Indeed on examination he came to the conclusion that the complainant was medically raped resulting in the complainant acquiring a transmitted infection.

[12] N..... corroborated the version of the complainant. She confirmed that, that morning while taking her child to crèche, she saw the complainant sitting on the pavement crying. She became concerned and asked the complainant the reason why she was crying. It was then that the complainant told her that she was abused by her father who slept with her. The complainant did not tell her that she reported the abuse to the aunt. This was so as according to the complainant the aunt was '*kwaai*', meaning very strict. The complainant further pointed out to N..... that she did not report the abuse to her teachers as they in turn would report it to her aunt who will undoubtedly assault and swear at her. The complainant was so desperate

that she wanted to commit suicide by jumping in front of a moving train, so said N..... She was also informed by the complainant that '*when days are dark friends are few*' hence she had no shoulder to cry on. Being a parent and concern about the situation, N..... accompanied the complainant to the complainant's school where she reported to the principal what the complainant had told her. The principal advised them to contact the Family Child Violence and Protection Unit of the South African Police Service who arrested Mr Zayo.

[13] On his arrest, Mr Zayo made a statement to Inspector Sebuledisho attached to the Family Child Violence and Protection Unit. Inspector Sebuledisho testified that Mr Zayo admitted the sexual intercourse as according to him the complainant enticed him as she would walk in their one room house naked in his presence. In fact according to the statement Mr Zayo made to her, it is in fact the complainant who requested Mr Zayo to have sexual intercourse with her. After the sexual intercourse had taken place, he realized that he was tricked by the complainant whereafter he felt sorry for what he did. He apologised to the complainant whereafter the rape was discussed with the neighbours. The issue was then amicably resolved. According to Mr Zayo's statement, the complainant ran away from their home as Mr Zayo was unwilling to have further sexual intercourse with her. In his statement Mr Zayo confirmed that the complainant indeed fell pregnant as a result of the sexual encounter with him. He also confirmed that the complainant aborted the pregnancy although he did not state that the complainant was persuaded to do so.

[14] In his testimony, Mr Zayo testified that the complainant slept around with other boys and that it was in fact one N..... who impregnated her contrary to the admission he made to Inspector Sebulodisho. In his testimony he emphatically denied that he ever raped the complainant. According to Mr Zayo the complainant had sexual intercourse with one M....., the complainant's boyfriend, not him.

[15] Mr Zayo stated further that it is N..... Who prevailed upon the complainant to lay false charges against him as she, N....., was encouraging her to have sexual intercourse with other boys. He is falsely being implicated by N..... as he and the latter are no longer on speaking terms.

[16] Although the complainant is a single witness her version of events is supported by the evidence of N....., the doctor who examined her early in 2002, and by Mr Zayo himself in the statement he freely made to Inspector Sebulodisho.

[17] Mr Zayo's version as to what happened between him and the complainant is not only improbable but beyond reasonable doubt false. It is improbable that the complainant, a child of 14 years would ask him to have sexual intercourse with someone she regards as her own father. It is also beyond belief and illogical that a child of 14 years could boast to her father that she had had sexual intercourse with older men than her own '*father*'.

[18] His version that N..... is falsely accusing him of rape is also false beyond reasonable doubt. N..... is the person who rescued and was prepared to listen to the complainant, when during that time, no one, including the aunt, was prepared to listen to her cries for help.

[19] In the result I find that, in the circumstances of this matter, the complainant's evidence complies with the provisions of s 208 of the Criminal Procedure Act 51 of 1977, i.e. that is to say is satisfactory in all material respects. The totality of the evidence on record indeed proves beyond reasonable doubt that during 2001, Mr Zayo, on several occasions, raped the complainant resulting in her falling pregnant which pregnancy was aborted on the advice of both Mr Zayo and the complainant's aunt.

Sentence

[20] It is settled that imposition of sentence falls squarely within the discretion of the trial Court. An appeal court is not at liberty to interfere with the discretion unless the trial court is found to have misdirected itself or the sentence imposed is so disturbingly inappropriate or shocking that had the appeal court sat as the trial court would not have imposed such sentence. This proposition is well articulated in *S v Malgas* 2001 (1) SA 469 SCA in para [12] where it was stated:

'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 the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate Court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate Court is at large. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate Court would have imposed had it been the trial court is so marked that it can properly be described as 'shocking', 'startling', or 'disturbingly inappropriate'. It must be emphasised that in the latter situation the appellate court is not at large in the sense in which it is at large in the former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned. No such limitation exists in the former situation.'

[21] In argument before us, Counsel for Mr Zayo submitted, in the main, that the age of Mr Zayo; the fact that he was a first time offender and that no fortuitous violence was used in perpetrating the rape constitute substantial and compelling circumstances. I do not agree. The facts of this matter reveal that the rape took place on many occasions during 2001. The rapes resulted in pregnancy. The complainant was implored to abort the pregnancy and to keep it a secret so that the truth of the abuse should not be known.

[22] Furthermore, it can hardly and seriously be argued that no fortuitous violence was used to commit the rapes. In the present matter, the complainant was a child of 14 years of age. She was violated not by a stranger but by someone she regards as a father figure. The rapes took place in the sanctity of her own home, a place of all places where she must feel safe and secure from the scourge of unabating violence against members of the vulnerable section of our society: girls and women.

[23] No amount of force or violence is required to subdue a child such as the complainant to submit to rape. The mere fact that Mr Zayo was 40 years old and that he was a first offender can hardly be argued as remorse which remorse enhances the prospects of rehabilitation. In *S v Matyityi* 2011 (1) SACR (SCA) at para [13] the court reasoned that:

'...before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of, inter-alia: what motivated the accused to commit the deed; what has since provoked his or her change of heart; whether he or she does indeed have a true appreciation of the consequence of those actions. Until the facts are known, it is difficult, so the court reasoned, to determine whether an accused person is indeed remorseful in that he or she 'has a growing pain of conscience for the plight of another'.

[24] If anything else, the facts of this matter reveal more aggravating than mitigating factors. As clearly pointed out above, the complainant was raped by a person she regards as her father figure. She was raped by a person whom

society expects to protect than to violate. The complainant was violated in the sanctity of her own home.

[25] Mr Zayo's apology and admission of the rapes in his statement to Inspector Sebulidisho is not appreciation of the wrongfulness of his actions. The apology is regret that his actions have been exposed. No remorse. Had it not been the maternal instinct and the rare civic duty of N....., the rapes and abuse of this poor child would have remained a secret.

[26] Lastly, it is worth reiterating the words of Mathopo AJA in *S v Kekana* (629/2013 [2014] ZASCA 158 (1 October 2014) when confirming life imprisonment imposed on an appellant who was convicted for murder of his wife. In para [20] of the judgment, the learned Judge of Appeal said the following:

'[20] Domestic violence has become a scourge in our society and should not be treated lightly. It has to be deplored and also severely punished. Hardly a day passes without a report in the media of a woman or a child being beaten, raped or even killed in this country. Many women and children live in constant fear for their lives. This is in some respects a negation of many of their fundamental rights such as equality, human dignity and bodily integrity. This was well articulated in S v Chapman 1997 (3) SA 341 (SCA) at 345A-B when this court said the following:

'Women in this country have a legitimate right to walk peacefully on the streets to enjoy their shopping and their entertainment to go and come from work and to enjoy the peace and tranquillity of their homes without the fear the apprehension and the insecurity which constantly diminish the quality and the enjoyment of their lives.'

[27] Having regard to the circumstances of the rape which resulted in the pregnancy of this 14 year old girl; the fact that the complainant was violated in

her own home by someone she regards as her father; the trauma she went through to the extent that she thought of ending it all by committing suicide; the trauma she went through abortion at her tender age of 14 years; the emotional scars, which probably would endure for life, Mr Zayo's personal circumstances, in the context of this matter, cannot by any stretch of imagination be regarded as substantial and compelling circumstances warranting any other sentence than life imprisonment. The sentence imposed by the court *a quo* is, in my view, appropriate. It fits the crime, the appellant and above anything else, serves the interest of society. In the result I find no basis for this court to interfere with the discretion of the court *a quo*.

[28] In the result, the appeal against the conviction must fail. It is dismissed.

M P TSOKA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree:

G M MAKHANYA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree:

B NDAMASE
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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INSTRUCTED BY: The Director of Public Prosecutions

DATE OF HEARING: 10 October 2014

DATE OF JUDGMENT: 14 October 2014