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REPUBLIC OF SOUTH AFRICA



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

(1) REPORTABLE: **NO**

(2) OF INTEREST TO OTHER JUDGES: **NO**

DATE

SIGNATURE

Case Number: **A248/2017**

In the matter between:

M B

Appellant

And

THE STATE

Respondent

JUDGMENT

FISHER J, (CAMBANIS AJ CONCURRING):

INTRODUCTION

[1] This case involves the rape by a father of his teenage daughter. The raping took place repeatedly and regularly over a period of approximately 3 months and resulted in her pregnancy.

[2] The appellant was charged in the Germiston Regional Court with: count 1 - rape read with section 51(1) of the Criminal Law Amendment Act 105 of 1997, alternatively, incest; count 2- the display of pornography to a minor and; count 3- the sexual grooming of a child.

[3] The appellant was legally represented throughout. He pleaded not guilty to all counts on 25 June 2015. He was convicted on 27 March 2017 of rape (count 1) and of sexual grooming (count 3). He was acquitted of the alternative charge of incest and count 2. The rape conviction was subject to section 51(1) in that it involved the repeated rape of the complainant, and thus to a minimum discretionary sentence of imprisonment for life.

[4] In respect of the rape conviction the appellant was sentenced to life imprisonment and in respect of the charge of sexual grooming he was sentenced to 5 years imprisonment. As a matter of law, these charges run concurrently.

[5] The appeal was automatic as provided for in section 309B(1) of the Criminal Procedure Act 51 of 1977 and is in respect of both conviction and sentence.

DISCUSSION ON EVIDENCE

[6] The complainant was a single witness to her rape. The appellant did not testify. It appears from the complainant's evidence that she and the appellant resided together in a one bedroom dwelling which was barely large enough to accommodate a bed and a television set. The dwelling is referred to in the evidence of the complainant as "a shack".

[7] The complainant is the biological daughter of the appellant. She was the child of a relationship which had broken down during her early childhood. Her parents separated and she stayed with her mother in Swaziland for her early childhood. When she was approximately 10 years of age and in grade 5, she went to stay with the appellant. She initially resided in a separate dwelling on the property where the shack of the appellant was situated. She resided with the landlady of the property and she had her own bedroom. She testified that, at a stage, the appellant insisted she move into his shack and share it with him. The landlady was, according to the complainant, disconcerted by the fact that the complainant was moving in with her father and she (the landlady) expressed that it was inappropriate that she share a bed with her father.

[8] He justified the new living arrangements to the complainant by stating that the landlady was "a witch" who wished to do her harm. This is but one indication in the complainant's evidence of the use by her father of supernatural elements to seek to manipulate her. The landlady and the complainant were close but became estranged because of the appellant. The complainant's evidence shows a tendency on the part of the appellant to alienate the complainant from the community and from people to whom she was close. She was told by him not to associate with friends and that "nobody liked her". That he sought to create in her the impression that she was alone save for his "protection", is a recurring theme which emerges from the complainant's testimony.

[9] Three woman, referred to by the complainant as Auntie S, Aunty P, and Auntie N were figures who had featured in her life and were seen as family by her. They lived nearby. She had, true to form, been told by the appellant that she may also not associate with them. They emerge from her evidence as women who were able to assist her and convey some sense of security to her. She ultimately turned to them in her predicament.

[10] The evidence of the complainant (who was 18 at the time of her testimony) was cogent and compelling. The offences in question occurred when she was 16 and 17 years of age. The appellant brought pornographic DVDs into the shack and subjected her to such material. She resisted watching the material, however he insisted that she watch it. It was during the watching of this pornographic material that he first raped her. This occurred in January 2013. She was 16 at the time. She turned 17 on 25 February 2013. She was a virgin when he raped her.

[11] This was the beginning of a regular pattern of abuse involving the appellant forcing or coercing the complainant into having sexual intercourse with him. She testified that this occurred on a regular basis between January to March 2013.

[12] The appellant was in a position of power both physically and psychologically in respect of the complaint. He left her in no doubt that she was at his mercy in that she had nowhere to turn and nowhere to live should she deny him his wishes. She was afraid of him also because he hit her.

[13] The appellant was reckless in his disregard for his daughter's well-being. When she became pregnant, he again resorted to the supernatural. He went as far as to tell her that there was a creature growing inside her which had been invoked by her mother putting an evil spell upon her. This suggests an intention to manipulate and control the complainant and to hide the pregnancy in a bid to protect himself. He continued with this approach in seeking her co-operation to terminate the pregnancy and to this end approached at least 3 people in a bid to obtain a termination of the pregnancy. It appears that, given the advanced stage of the pregnancy by the time he got her to these people, he was foiled in these endeavours. That she was put through a frightening ordeal in being subjected to this process, is without doubt. I must add that the appellant is relatively well educated having obtained matric.

[14] The "aunts" referred to above ultimately stepped in and established themselves as her protectors and advisors. It was them that involved the authorities which led ineluctably to the arrest and prosecution of the appellant. Had they not intervened, one shudders to think what her fate would have been. The appellant certainly tried very hard to alienate her from them.

[15] The baby, a boy, was born and, because of the denial by the appellant of the rapes, he was subjected to paternity testing, which revealed conclusively and positively the paternity of the appellant. The evidence of the DNA testing was led at the trial and, notwithstanding there being no basis for any attack thereon, the appellant assisted in obtaining a second DNA test. This second test confirmed the results of the initial test. The appellant chose not to testify in his defence. He however continued, in the face of all the evidence, to maintain his innocence.

[16] The evidence of the complainant and the corroborating evidence of the DNA results show a very high probability of guilt on the part of the appellant. This notwithstanding, he has continued, from the outset, in his endeavours to exculpate himself, to deny his guilt, and to contrive to protect himself at the expense of his daughter and her unborn child. He has put her through the ordeal of a pregnancy without support and which was fraught with fear and confusion. She was subjected to the scrutiny of schoolmates and others in her growing condition as she had to attend school and go out into the community. She had no emotional or medical support and the appellant sought to alienate her from any possible avenues of comfort. He subjected her to people whose questionable services he engaged in a bid to rid himself of the pregnancy. All the while he appears to have given little thought to the predicament in which he had placed his daughter or for the well-being of the child.

[17] Even once arrested and charged, he denied his guilt to the very end and he continues in this vein. He thus subjected his daughter to the ordeal of a trial which, to her credit, she endured with dignity and forbearance.

CONVICTION

[18] As to the conviction, there can be no doubt that the Magistrate dealt properly with the evidence and the approach and conclusion reached as to the guilt of the appellant cannot be faulted.

SENTENCE

[19] As to sentence, the record shows a marked disregard on the part of the appellant for the wellbeing of the complainant. His role should have been to protect and nurture his daughter. Instead he became her rapist, violator, and tormentor. In the aftermath of her pregnancy, he continued to protect his own position at the expense of the complainant. His actions were calculated and deliberate. The evidence shows that he held himself out in the community to be a religious person. His reputation was important to him. He was said to carry a Bible and engage in scripture readings to and teachings of others. He is clearly a person who is duplicitous and hypocritical. He has continued to attempt to maintain his innocence in the face of overwhelming evidence and thus to state that his daughter is

falsely accusing him of heinous crimes. He has abused his position as father and protector. He has made no amends.

[20] All these aspect are aggravating and the Magistrate raised them as such in a balanced and sensitive weighing up of the various personal and potentially mitigating circumstances put forward by the appellant. The Magistrate took into account the details in and the views expressed by the drawers of the pre -sentencing and victim impact reports. The appellant was 48 years old at the time of the sentencing. He was brought up almost exclusively by his mother, as his father died when he was only 5 years of age. He attained matric and, at the time of the offences he was employed at a salary of between R 2 400 and R 4 000 per month depending on hours worked. He was a first offender and he had spent approximately 4 years in prison awaiting trial. All these factors were taken into account. On the latter concern, it appears from the record that a considerable proportion of the time spent awaiting trial was due to the appellant making application for postponement which related, in part, to his obtaining further DNA testing and the termination of the mandate of his attorney.

[21] The manner in which the evidence and the circumstances of the appellant were considered in relation to the applicable legal principles cannot be faulted. The appellant was unable to show any circumstances which could possibly motivate a lesser sentence than the minimum prescribed. There is thus no basis for setting aside the sentences imposed.

[22] In the circumstances I make the following order:

1. The appeal against conviction is dismissed.
2. The appeal against sentence is dismissed.

FISHER J

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

I agree,

CAMBANIS AJ

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

Heard on: 24 May 2018

Delivered on: _____ 2018.

Counsel for Appellant: Adv. S Mncwango.

Instructed by: Legal-aid South Africa

Counsel for the Respondent: Adv. P Mpekana.

Instructed by: NDPP

