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REPUBLIC OF SOUTH AFRICA



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

CASE NUMBER: 134/2018

DPP REF: 10/2/5/1-2018/124

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

DATE

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SIGNATURE

In the matter between:

F B

Appellant

and

THE STATE

Respondent

J U D G M E N T

SKIBI AJ

Introduction

- [1] The appellant who was legally represented stood arraigned in the Magistrate Court, Johannesburg, wherein he was charged with rape in contravention of section 3 of the Criminal Law Amendment Act (Sexual Offences and Related Matters) 32 of 2008, read with the provisions of section 51(1) and Schedule 2 of the Criminal Law Amendment Act 105 of 1997. (the “Minimum Sentencing Act”) On 13 April 2017 he was found guilty as charged. The appellant was sentenced to life imprisonment.
- [2] The appellant’s appeal is before this court by way of an automatic right of appeal against sentence only in terms of the provisions of section 309(1)(a) of the Criminal Procedure Act 51 of 1977.
- [3] There is an application for condonation by appellant for the late filing of heads of argument. The application is not opposed by the respondent. The application for condonation is granted.

Factual background

- [4] The complainant, a 12 year old minor child, her uncle, F, and the appellant were staying in the same house in 2015. She was attending school during that year and the appellant used to transport her to school in the morning and pick her up in the afternoon. Around May 2015 after school hours she phoned the appellant to come and pick her up as usual and the latter came and fetched her. Upon arrival at home, her uncle, F was not around. She went to her room and lay on the bed as she was not feeling well. Shortly thereafter the appellant entered her room and started to take off her tights and underwear and he undressed himself by removing his pants. The complainant resisted pushing the appellant away but he had sexual intercourse with her against her will. She says she was crying during the rape. When the appellant finished he said he had sexual intercourse with her because he loves her.
- [5] In the other incident the complainant was sitting at F's room alone watching TV. The appellant came and started to touch her, he undressed her and had sexual intercourse with her without her consent.
- [6] On both occasion the complainant says that she did not report the incident because the appellant was staying in the house with her family. After some months the complainant was taken to a doctor who diagnosed that she was pregnant. When she was asked as to who impregnated her, she told the mother she was raped by a person other than the appellant because of her fear of the

appellant. She only disclosed that she had been raped by the appellant when she was consulted by a psychologist. At this stage the appellant was no longer staying with her family.

[7] The Appellant admitted having sexual intercourse with the complainant but claimed that she had consented. He says he believed that she consented to have sexual intercourse with him because she initiated the sexual activity. The appellant knew that the complainant was 12 years old.

[8] The magistrate convicted the appellant as charged after all the evidence was led. The appellant was sentenced to life imprisonment in terms of section 51(1) read with Part I of Schedule 2 of the Criminal law Amendment Act¹ after making the magistrate's finding that there were no substantial and compelling circumstances justifying a departure from the imposition of the prescribed minimum sentence.

[9] The issue to be determined is whether the magistrate erred in finding that there were no substantial and compelling circumstances which justified a deviation from the imposition of the prescribed minimum sentence of life imprisonment.

¹ 105 of 1997

Law

[10] Section 51 (1) of the Minimum Sentencing Act prescribes a sentence of life imprisonment in cases where the victim of the rape is a minor child under 16 years of age or where the rape was committed by the perpetrator more than once.

[11] It is trite law that the task of sentencing an accused person falls with the discretion of the trial court and the court of appeal may not lightly interfere with such a direction unless it is vitiated by irregularity or there is a misdirection of a material nature.

Submissions by counsel

[12] It is submitted on behalf of the appellant that because of his ill-health, the fact that he suffering from a stroke and is human immunodeficiency virus (HIV) positive the magistrate should have imposed a lesser sentence. The complainant testified that the appellant raped her at a time when he was suffering from the stroke. The appellant in his testimony said that he had only had sexual intercourse with the complainant before and after he suffered from stroke. Counsel for the appellant relied on *Shawn Palmer v The State* (599/2016)[2017] ZASCA 107 (13 September 2017) and *Tankiso Abel Mokoena v The State*².

² A323/2010) [2012] ZAFSHC 12 (9 February 2012)

- [13] It is submitted on behalf of the respondent that even though the appellant was negatively affected by ill-health the probation officer who gave evidence in mitigation of sentence testified that he is able to function at an acceptable level. The respondent's submission is that in prison there are health facilities where the appellant will be appropriately treated for his condition.
- [14] Counsel for the respondent contends that as each case must be decided on its own peculiar facts and refers the court to the case of³ *S v Fraser* and that 'it is an idle exercise to match the colours of the case at hand and the colours of other cases with the object of arriving at an appropriate sentence'. There is authority for imposing life imprisonment for rape of a 12 year old girl by an HIV positive man matter was also HIV positive⁴ *S v Kwanape*.
- [15] The respondent's contention is that the magistrate correctly concluded that none of the personal circumstances placed before court either considered cumulatively or individually as compared to the aggravating circumstances which could be regarded as constituting substantial and compelling circumstances allowing the court to deviate from the imposition of the prescribed minimum sentence.

³ *S v Fraser* 1987 (2) SA 859 (A) at 863C-D

⁴ *S v Kwanape* 2014 (1) SACR 405 (SCA)

[16] Analysis magistrate's findings:-

- 16.1 it is common cause that the complainant was 12 years old at the time of the incident,
- 16.2 the sexual assault was perpetrated more than once,
- 16.3 the complainant became pregnant as a result of this sexual assault,
- 16.4 DNA results positively identified the appellant as the father of the child,
- 16.5 the complainant became infected with HIV as a result of this sexual assault,
- 16.6 the appellant was not aware of his HIV status at the time.

[17] The magistrate did weigh the mitigating factors against the aggravating factors and came to the conclusion that there are no substantial and compelling circumstances which justify the deviation from the imposition of the prescribed minimum sentence of life imprisonment.

[18] The magistrate took into consideration the following mitigating factors:

- 18.1 The appellant was born on [...] December 1976 and on the date of sentencing was 40 years old,
- 18.2 His parents separated when he was 12 years old,
- 18.3 He was raised by his grandparents and had a pleasant life, never exposed to abuse,

- 18.4 He dropped out of school at grade 10,
- 18.5 He worked as a mechanical fitter,
- 18.6 He is married and is the father of three children aged 16; 12 and 8 years respectively. He has separated from his wife and children,
- 18.7 He came to Johannesburg in search of work. He suffered a stroke and is unable to work. He is only able to wash himself. The stroke affected his left hand side but condition appears to be under control,
- 18.8 He spent nine months in prison awaiting trial.

[19] The following aggravating circumstances were considered by the magistrate:

- 19.1 The accused raped the complainant over a period of time,
- 19.2 He abused his position of trust that he had as an uncle and a father figure in the life of the complainant,
- 19.2 The complaint was 12 years old at the time of the incident,
- 19.3 The appellant raped the complainant without using protection exposing her to serious life threatening illness and she did in fact become infected with HIV,
- 19.4 The complainant became a mother as 13 years of age,
- 19.5 The complainant is seriously affected by what happened to her. She said:-

19.5.1 *“Every day is hell for me and there is not a day that goes by where I don’t feel like my life is over, When I was diagnosed with HIV I couldn’t believe it and I am still feel like I’m dreaming. This isn’t happening to me. At my age how was it possible? I hate life and I hate myself and the suspect. I also say things like everything would be better if I just die. How would I look at my child one day? Such an innocent human being. I am so angry.”*

19.5.2 *“The suspect took everything from me. Waking up in the morning is like being in hell. I have to face life, a reality of my sickness and baby daily. Am I ever gonna be a good mother at my age. I hate this life. The suspect must be punished for what he did. He took my whole childhood life away from me. I’m a mother at this young age.”*

[20] The magistrate dealt extensively with the issue of remorse and made a finding that the appellant did not show true remorse but he regrets what he had done to the complainant and relied on several cases on this view.

[21] It is trite law that the task of sentencing an accused is pre-eminently a matter which is within the discretion of the trial court. The appeal court may not lightly interfere with the sentence unless there is substantial misdirection as to law or

fact, or if the sentence is manifestly inappropriate. See *R v Maphumulo and Others*⁵; *S v Rabie*⁶; *S v Romer*⁷

[22] *Tankiso Abel Mokoena v The State*⁸, concerned a gang rape involving a complainant who left a tavern at about 02h00 and accepted a lift from two men who offered to take her home. On the way they asked for a reward in the form of sexual intercourse with her; she refused. They took her to a secluded place where they took turns raping her. When they finished they took her home. Soon thereafter they were arrested and charged with rape. The court imposed a sentence of life imprisonment but on appeal the sentence was reduced to 17 years' imprisonment.

[23] In *Shawn Palmer v The State*⁹ the appellant was convicted of rape read with the provisions of section 51(1) of the Minimum Sentencing Act and was sentenced to life imprisonment. The trial court found that the appellant had to establish exceptional circumstances for the court to deviate from the imposition of the prescribed minimum sentence. The appeal court held that the court erred in finding that the appellant had to show the existence of exceptional

⁵ 1920 AD 56 AT 57

⁶ 1975 (4) SA 855 (a)

⁷ 2011 (2) SACR 153 (SCA) at para [22] and [23]

⁸ Supra

⁹ Supra

circumstances. The court set aside the sentence and had to consider the sentence afresh replaced it with an appropriate one.

[24] The appellant invaded the dignity and privacy of the complainant. The complainant's life has been changed tremendously by the incident. A child of 12 years old was sexually assaulted by her relative whom she trusted.

[25] Rape is a humiliating and traumatic experience which violates the dignity and privacy of the victim. In *S v Malgas*¹⁰ it was found that the usual mitigating factors are to be taken into account to determine whether there are substantial and compelling circumstances present and the prescribed sentences should not be deviated from for flimsy reasons. Despite the fact that the appellant suffers from the stroke and other chronic illness and is taking medication, he will receive appropriate medical treatment in the prison where he is detained which is well equipped with resources to address his medical condition.

[26] In *S v Matyityi*¹¹ it was held that courts do not have a clean slate upon which they are free to inscribe whatever sentence they think appropriate when it comes to determining the appropriate sentence in terms of the Minimum Sentencing Amendment Act 105 of 1997. Courts are obliged to impose the prescribed

¹⁰ 2001 (1) SACR 469 (SCA)

¹¹ 2011 (1) SACR 40 (SCA) at para [13]

minimum sentences, unless there are truly convincing reasons for departing from them.

... “ Our Courts derive their power from the Constitution and, like other arms of State, owe their fealty to it. Our Constitutional order can hardly survive if courts fail to properly patrol the boundaries of their own power by showing due deference to the legitimate domains of power of the arms of State. Here Parliament has spoken. It has ordained minimum sentences for certain specified sentences. Courts are obliged to impose those sentences unless there are truly convincing reasons for departing from them. Courts are not free to subvert the will of the legislature by resort to vague, ill-defined concepts such as ‘relative youthfulness’ or other equally vague and ill-founded hypotheses that appear to fit the particular sentencing officer’s personal notion of fairness¹²...”

[27] In *Makati v Vodacom (Pty) Ltd*¹³ the Constitutional Court, Jafta J said the

Following regarding the powers and limitations of the appeal court:

“[38] In our system, as in many similar systems of appeal, the cold record placed before the appeal court does not capture all that occurred at the trial. The disadvantage is that the appeal court is denied the opportunity of observing witnesses testify and drawing its own inferences from their demeanour and body language. On the contrary, this is the advantage enjoyed by the trial court. Hence an appeal court must defer to the trial court when it comes to factual findings.

¹² Matyityi case at para [23]

¹³ 2016 (4) SA 121 (CC) at 38

[40] But even in the appeal the deference afforded to a trial court's credibility findings must not be overstated. If it emerges from the record that the trial court misdirected itself on the facts or that it came to a wrong conclusion, the appellate court is duty-bound to overrule factual findings of the trial court so as to do justice to the case."

[28] Having considered the evidence in its totality and the reasoning of the magistrate I am unable to find any misdirection. He correctly found that there were no substantial and compelling circumstances which justify a deviation from the imposition of the prescribed sentence of life imprisonment.

Result

[29] In the result the appeal against sentence stands to be dismissed. It is apparent from the record that the appellant was correctly convicted of the rape.

Order

[30] I propose the following order:

- 1 The appellant's appeal against sentence is dismissed.

SKIBI AJ

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

I concur and it is so ordered

LAMONT J

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Heard on : 12 February 2019

Judgment delivered : 12 February 2019

APPEARANCES

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