NOT REPORTABLE

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

Case number A292/2012

DATE: 18/12/2012

In the matter between : -

FREDERIK FRANZOOIS VAN DEVENTER Appellant

and

THE STATE Respondent

JUDGEMENT

Introduction

[1] This appeal is against the imposition of a life sentence on the appellant by Raulinga J on 6 December 2002 in the Circuit Local Division for the Eastern Circuit District (High Court of South Africa) held at Evander.

[2] The sentence is in respect of a charge of rape on which the appellant was convicted on 5

October 2000 in the Regional Court for the Region of Mpumalanga held at Evander.

FACTS

(3) The appellant is the father of three children all of whom were minors at the time of the commissioning of the offence relevant to this appeal

(4) The charge of rape is in respect of the eldest daughter. B, who was born on 20 February 1986. The charge reads as follows :

“Dat die beskuldigde oor ‘n tydperk synde 1996-2000 en te of naby SECUNDA in die distrink van die HOEVELDRIF wederregtelik en geweldadig en teen haar sin en wil met B TVD 'n meisie van tussen 9-14 jaar oud, vleeshke gemeenskap gehou het;”

[4] B was therefore raped by the appellant, her father, from the tender age of 10 years for a period of four years According to the evidence, she was on some occasions raped three times a week.

APPLICABLE STATUTORY PROVISIONS

[5] In the circumstances, section 51 (1) of the Criminal Law Amendment Act, 105 of 1997 ('the Act”), is applicable, which section reads as follows

‘ Notwithstanding any other law, but subject to subsections (3) and (6). a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life.'

[6] Part I of Schedule 2 was substituted by section 1 of Act 38 of 2007. Prior to the amendment and at the the the appellant was sentenced, the relevant portion of the schedule read as follows:

'Rape: •

(a) when committed: -

(i) in circumstances where the victim was raped mere than once whether by the accused or by any other co-perpetrator or accomplice:

(ii) by more than one person, where such persons acted m the execution or furtherance of a common purpose or conspiracy.

(iii) by a person who has been convicted of two or more offences of rape, but has not yet been sentenced in respect of such convictions, or

(iv) by a person knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus;

(b) where the victim -

(i) is a girl under the age of 16 years

(ii) is a physically disabled woman who due to her physical disability, is rendered particularly vulnerable; or (Hi) is a mentally ill woman as contemplated in section 1 of the Mental Health Act. l973(Act No. 18 of 1973). or (c) involving the infliction of grievous bodily harm ’

[7] Section 51(1) is subject to the provisions of section 51(3) which reads as follows:

"(3)(a)lf any court referred to m subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence Provided that if a regional court imposes such a lesser sentence in respect of an offence referred to Part 1 of Schedule 2 it shall have jurisdiction to impose a term of imprisonment for a period not exceeding 30 years ’

[8] The Act does not define 'substantial and compelling circumstances' The courts have similarly not given a clear and definitive answer as to the ambit and meaning of ‘substantial and compelling circumstances" Reported cases provide a mere guideline as to what a court considers to be substantial and compelling circumstances” in a specific set of circumstances. [See: S v Malgas 2001 (1) SACR 469 SCA: S v Mahomotso 2002 (1) SACR 116 SCA. S v Abrahams 2002 (1) SACR 116 SCA S v Nkomo 2007 (2) SACR 198 SCA; S v Vilakazi 2009 (1) SACR 552 SCA]

[9] The yet unreported decision in Bailey v The Slate (454/11) [2012] ZASCA 154 (01 October 2012). :s specialty apposite to the principle that each case should be adjudicated on the specific facts of the case.

[10] Bosielo JA in considering the value of decisions in previous cases, held as follows in paragraph [19]

'Those cases remain guidelines Suffice to state that it remains an established principle of our criminal law that sentencing discretion lies pre-eminently in the sentencing court and must be exercised judiciously and in line with established and valid principles governing sentencing as enunciated in a long line of cases which includes S v Zinn 1969 (2) SA 537 (A) which espoused a proper consideration and balancing of the well- known triad. S v Rabie 1975 (4) SA 855 (A) at 862; and S v de Jager and another’ 1965 (2) SA 616 (A) at 628-9 This salutary approach has recently been endorsed by Marais JA in S v Malgas para 12.”

GROUNDS OF APPEAL

[11] In order for this Court to interfere with the sentence imposed by Rauling J in terms of the Act. the Court need to consider whether the facts which were considered by him are

substantial and compelling or not. [See Bailey v The State, supra at para 20]

[12] On behalf of the appellant. Ms Henzen-Du Toit. argued that the court a quo erred in not finding that following factors constitute substantial and compelling circumstances:

(a) The personal circumstances of the appellant:

(i) he was 41 years of age at the time of the sentence,

(ii) he is a first offender;

(b) Both the complainants still love their father irrespective of the crimes committed against them;

(c) The appellant was sexually abused himself as a child;

(d) The family depends on the appellant financially;

(e) The appellant pleaded guilty and took responsibility for his actions;

(f) The appellant alleged that his wife was sexually distant as she was raped before:

(g) No evidence was led to prove any physical injuries the complainants sustained

(h) The appellant is not a threat to society;

(I) The appellant is remorseful of his actions

(j) The appellant ts willing to share his pension money with his family

[13] ln submitting that the circumstances set out supra constitute substantial and compelling circumstances. Ms Henzen-Du Toit, did not have regard to the provisions of section 5l(3)(aA) of the Act which reads as follows:

"When imposing a sentence in respect cl the offence of rape the following shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence

(i) The complainant s previous sexual history.

(ii) an apparent lack of physical injury to the complainant;

(iii) an accused person's cultural or religious beliefs about rape; or

(iv) any relationship between the accused person and the complainant prior to the offence being committed '

[14] in view of the provisions supra, this Court may not take cognisance of the fact that no evidence was led to prove that B had suffered physical injuries. in considering whether substantial and compelling circumstances exist.

[15] Mr Geyser, who appeared for the State, in well-prepared heads of argument, pointed out that the following factors are not automatically considered by the courts to be mitigating factors

(i) the appellant's age [See: S v Beyi 2011 (2) SACR 23 ECG];

(ii) the fact that the appellant pleaded guilty [See: Bailey v The State. supra, at para [7]];

[16] As stated supra, the appellant raped B over a period of four years. This is not a case where the appellant committed the offence only once and thereafter ceased his abhorrent conduct To the contrary, the fact that the appellant committed the offence for a continuous period of four years and continued to do so even after his wife intervened. Is an aggravating factor.

[17] The fact that B still loves her father, having regard to her vulnerable age and the conflict she experiences because her father, the one person that was supposed to protect and adore her, took the most precious part of her youth away in a very cruel manner, is not a factor that counts in the appellant's favour. To the contrary, it is indeed very sad that the father B loves deprived her of the privilege to lead a normal and fulfilled life.

[18] The fact that the appellant failed dismally in his responsibilities as a father, is further borne out by the fact that, due to his conduct, he has left his family financially destitute Financial dependence on the appellant is not a substantial and compelling circumstance justifying a lesser sentence.

[19] The appellant might have pleaded guilty, but he did not take responsibility for his actions neither can this court, in view of the evidence, find that the appellant is -emorseful of his actions The appellant chose not to testify, but relied solely on a report by Ms van Dyk. a social worker, in mitigation of sentence.

[20] Ms van Dyk's testimony that B should share responsibility with the appellant for the fact that the appellant raped her, is astounding and not in line with the evidence of Ms van Niekerk, a qualified Educational Psychologist. To the contrary Ms van Niekerk was shocked by this perception of Ms Van Dyk and gave the following testimony in respect thereof
'Dit was vir my skokkend dal die kmders as medeverontwoordeltk of medeaanspreeklik gehou kon word n Kind is nooit 'n verantwoordehke party wanneer daar seksuele misdryf plaasvind nie. 'n Minderjarige kind is nooit in 'n posisie om tc kan nee se, want daar is 'n onregverdige magsposisie daar op grond van ouderdomsverskil, verskil aan gesag, verskil aan kennis ..."

[21] The evidence of Ms van Niekerk on this topic is accepted and that of Ms van Dyk rejected

[22] Remorse should at least include insight into the seriousness of the offence committed Remorse should also be borne out by the appellant's subsequent conduct This is sadly not

the case in the present matter. Two extracts from the evidence will suffice in this regard

(i) Upon a question as to the effect the appellant's conduct had on the children subsequent to him being "found out', Ms van Niekerk testified as follows.

'Ek dink hy plaas geweldig bate skuldgevoelens by die binders want hy verplaas die skuld na hulle toe met ander ivoorde as ek trortk toe gaan is dit me oor wat ek gedoen het me, maar omdat julle gepraat het. As julle me praat nie sal ek me tronk toe gaan me Hy verplaas die skuld direk na hulle toe", and

(ii) Ms van Dyk stated the following in her report

"Die beskuldigde (appellant) is verward en ambivalent oor sy eie gedrag en verstaan self nie hoo hy seksueol by sy dogters kon betrokke raak nie.”

[23] I am of the view that the remaining factors, to wit the sexual distance of the appellant's wife after she was raped that the appellant is not a threat to society and the fact that he is willing to share his pension money with his family, do not constitute substantial and compelling circumstances that justify a lesser sentence.

[24] In the premises, I suggest that the following order be made:

The appeal is dismissed

N. JANSE VAN NIEUWENHUIZEN

ACTING JUDGE OF THE HIGH COURT

I agree

A.A. LOUW

JUDGE OF THE HIGH COURT

I agree

N. RANCHOD

JUDGE OF THE HIGH COURT