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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG, PRETORIA)

CASE NO: A261/14

DATE: 23 APRIL 2014

In the matter between:

ALBERT ZONDI MANGO **Appellant**

And

THE STATE **Respondent**

JUDGMENT

MOLOPA-SETHOSA J

[1] The appellant was arraigned in the Regional court for the Regional Division of Mpumalanga, held at Ermelo, on six counts of rape and one count of attempted rape of minor children. He pleaded not guilty to all seven counts on 17 September 2013.

[2] The appellant was subsequently convicted on two counts of rape, to wit counts 1 and 4 on the 08 October 2013. The two counts were taken together for purposes of sentence and the appellant was sentenced to life imprisonment on the same day, 08 October 2013.

[3] The appellant brought an application for leave to appeal against both his conviction and sentence before the learned magistrate *a quo*, and leave to appeal against both conviction and sentence was granted on the 24th February 2014.

[4] The appellant was legally represented during the trial proceedings in the court *a quo*

[5] The appellant appeals against both conviction and sentence. His grounds of appeal are set out in his notice of appeal on paginated pages 158 to 162 of the record, which is incorporated herein.

[6] The facts that led to the conviction of the appellant can briefly be summarised as follows:

> [6.1] in respect of **count 1,** that on or about 2012 at or near Ermelo the appellant unlawfully and intentionally committed an act of sexual penetration with one Z[...] S[...], a girl aged 12 years old, without her consent.
>
> [6.2] in respect of **count 4,** that on or about 2012 at or near Ermelo the appellant unlawfully and intentionally committed an act of sexual penetration with one N[...] Z[...] D[...], a girl aged 12 years old, without her consent.

[7] The state led the evidence of the following witnesses:

> [7.1] Z[...] M[...], the Complainant in count 7, record page 26;
>
> [7.2] N[...] Z[...] W[...] D[...], the Complainant in count 4, record page 42;
>
> [7.3] Z[...] S[...], the Complainant in count 1, record page 63; and
>
> [7.4] V[...] M[...] M[...], the first report witness, page 76.

[8]The appellant testified in his defence and closed his case without calling any defence witnesses.

[9] From the evidence on record it appears that during 2012 the minor children [the complainant in **count 1,** Z[...] S[...], and the complainant in **count 4,** N[...] Z[...] D[...], together with one Z[...] N[...], who was complainant in count 7], were on their way to the shop when the appellant called them and gave them money to buy him bread and cold drink.

[10] On their return from the shop, and after giving the appellant the bread and the cold drink he had sent them to buy at the shop, the appellant closed and locked the door to his house [with the minor children/complainants aforesaid inside the house]. He told the said minor children/complainants to eat, which they did. He thereafter instructed them to go to his bedroom and undress, which they did. He then raped them one by one, starting with the complainant in **count 4** [Z[...] D[...]], then the complainant in **count 1** [Z[...] S[...]], respectively aged 12 years old and 10 years old. He was acquitted of the attempted rape of Z[...] N[...], the complainant in count 7.

[11] The appellant, after raping them/the minor children as aforesaid, he gave the said minor children money and told them not to tell their parents and/or anyone else about the rape; that if they told anyone about the rape he would kill them.

[12] The appellant denied the allegations against him and stated that he knows nothing about the alleged rapes and or attempted rape.

[13] After all evidence had been led by both the state and the defence, the learned magistrate considered and weighed the evidence. He convicted the appellant on count 1 and 4, and acquitted him on counts 2, 3, 5, 6 and 7. He correctly cautioned himself that he was dealing with the evidence of young children. He found corroboration of the minor children/complainants' evidence from the evidence of the respective complainants, who were raped in the presence of each other and in the presence of Z[...] N[...], the complainant in count 7; as well as from the appellant himself; e.g. the appellant confirmed that he used to give the complainants money when they came to his house; stating that the complainants were friends to his daughter, and that when he gave his daughter money he would also give money to his daughter's friends, i.e. the complainants. From the evidence on record it turned out that during the incident in question herein, the appellant's daughter was not present at her home, and in fact was no longer staying at her home with the appellant.

[14] The trial court has the advantage to see and hear witnesses. It is trite that a trial court is better placed to make findings of credibility. Looking at the totality of the evidence it would have required a deliberate fabrication by the minor children/complainants to falsely implicate the appellant. On the facts this is highly improbable, and it could never be so.

[15] The minor children/complainants were minor children aged 12 years old respectively. They could, in any event, not give valid consent to an act of sexual penetration. The mere fact that they may have not resisted when the appellant ordered them to undress cannot and does not validate what may be seen as consent on their part. Any sexual penetration with a minor child of their age constitutes the crime of rape. The complainant in **count 1,** Z[...] S[...], in her evidence stated that when she cried out while the appellant was raping her the appellant ordered her to keep quiet because she would make neighbours aware that something untoward was happening, and that that would cause him to be arrested. The appellant clearly knew that what he was doing to the minor children/complainants was wrong and unlawful.

[16] The correctness of the contents of the following documents was admitted by the defence and was handed in as:-

[16.1] Exhibit "A", birth certificate of Z[...] S[...], record page 143.

[16.2] **Exhibit "B",** birth certificate of N[...] W[...] [Z[...]] D[...], record page 144.

[16.3] **Exhibit "C'** J88, medical report of the Complainant Z[...] S[...], record page 145.

[16.4] **Exhibit "D",** J88, medical report of the Complainant N[...] Z[...] D[...], record page 150.

[17] The medical report which was compiled for both complainants confirms that there were scars and old tears which were of suggestive forceful penetration in the past. It may not be disputed with any degree of success that the Complainants were sexually penetrated.

[18] The identity of the appellant is not in dispute. He admitted that the Complainants were known to him and that they used to play at his home with his children. The only issue in dispute is whether the appellant raped and/or sexually penetrated the Complainants in count 1 and 4 and or whether he tried to penetrate the other complainant.

[19] The minor children/complainants appeared to be honest witnesses who could not lie to make the appellant's life hard. They admitted that they went to the appellant's place even after they were raped by him. On the other hand, the appellant did not seem to be an honest and reliable witness. His evidence was correctly found to be a fabrication and thus rejected as false and not reasonably possibly true.

[20] On the facts before this court I cannot find any fault with the conviction aforesaid; neither can I find any misdirection on the part of the learned magistrate *a quo.* When the evidence of the state witnesses and that of the appellant is viewed in its totality, the defence version cannot have any validity.

[21] In the light of the above the appeal on conviction cannot succeed. The appellant's counsel in this appeal also conceded that the conviction in this matter was in order, and that the learned magistrate cannot be faulted for the findings and conclusion he came to.

[22] With regard to sentence, having found that no substantial and compelling circumstances existed, the learned magistrate *a quo* sentenced the appellant as follows:

[22.1] to an effective term of life imprisonment, the two (2) counts having been taken together for purposes of sentence.

Further, the learned magistrate *a quo* ordered that:

[22.2] in terms of section 50 (2) (a) (i) of Act 32 of 2007, the particulars of the appellant must be included in the National Register for sex offenders;

[22.3] that in terms of section 50 (8) (a) of Act 32 of 2007, the appellant whose name has been submitted to the registrar must notify the registrar of any change to his name, sex, identity no., physical or postal address or other details, as contemplated in Section 49 of the Act, within 14 days after such change;

[22.4] that in terms of section 120 (4) (b) of Act 38 of 2005, the appellant is declared unsuitable to work with children; [the correct section should be section 120 (4) (a) of Act 38 of 2005], and this court accordingly amends the section cited as 120 (4) (b) to read as 120 (4) (a) of Act 38 of 2005.

[22.5] that in terms of Section 103 of Act 60 of 2000, the accused is declared unfit to possess a firearm.

[23] The Criminal Law Amendment Act, Act 105 of 1997 prescribes a minimum sentence for rape where the victim is a girl under the age of sixteen (16) years as imprisonment for life. It is this sentence (life imprisonment) which was imposed by the Court a quo.

[24] The appellant in essence appeals against the severity of the sentence and submits that there are substantial and compelling circumstances which justified the imposition of a sentence less than the minimum sentence prescribed.

[25] The imposition of a sentence is pre-eminently for the sentencing court. It is trite that a court of appeal does not lightly interfere with a sentence imposed by the court of first instance; see **R v Lindley** 1957 (2) SA 235 (N). A court of appeal will interfere with the sentence only if there is a material misdirection or if the court could not, in the circumstances of the case, reasonably have imposed the particular sentence; see S **v Pieters** 1987 (3) SA 717 (A) **at** 734 E.

[26] It became clear that the issue in this appeal is whether the court *a quo* erred in not finding that the facts put forward by the appellant amounted to substantial and compelling circumstances justifying a sentence other than life imprisonment as envisaged by s *5\(3)(a)* of the Act. The section requires that, if the court is satisfied that substantial and compelling circumstances exist which justify the imposition of a sentence less than life imprisonment, it must enter those circumstances on the record of the proceedings and may thereupon impose such a lesser sentence as it deems appropriate.

[27] The personal circumstances of the appellant which were placed on record were as follows:

[27.1] The appellant was 50 years old when he was sentenced. The appellant's counsel submitted that the appellant was near old age and was not above rehabilitation. Further that a term of life imprisonment meant that he will have to turn 81 years old before he may be considered for parole.

That he will be very old and may be harmless to the community after spending a long period of time in custody. It transpired from the appellant's ID no. ([...]) during sentencing that the appellant was actually 48 years old [not 50 years old].

[27.2] He was married.

[27.3] His wife was unemployed and he was the sole bread winner at home.

[27.4] He had 3 minor children to maintain.

[27.5] He was illiterate. He never went to school, never received any life skill and or anger management lessons.

[27.6] He was not gainfully employed. He only worked as a builder and he earned income of about R1500-00 per month.

[27.7] He was a first offender.

[27.8] He was in custody for a period of 8 months awaiting trial in this matter

[28] The appellant's counsel submitted that the complainants, who were minor children, were not harmed save for injuries sustained in the commission of the offence. That the victim impact reports were not compiled. Further that the complainants did not appear to have suffered irreparable damage as they could still go to the appellant's place. Further that the court *a quo* should have found that the personal circumstances set out above cumulatively constitute substantial and compelling circumstances.

[29] The state counsel on the other hand argued that nothing in the personal circumstances set out above constituted substantial and compelling circumstance to justify this court from deviating from imposing the minimum sentence as envisaged by s 51(3 *)(a)* of the Act. Further that rape of minor children is prevalent in our society.

[30] Sentencing in this matter must attach due weight to the seriousness of the crime. The seriousness of the crimes must weigh heavily in deciding upon appropriate sentences. The trial court was fully aware of this and largely imposed sentence of appropriate severity.

[31] Whilst this court may not presume that the appellant's conduct inclines towards a strong prospect against rehabilitation the appropriate sentence in this case should bring home to the appellant and like-minded people that:

(i) Rape is a serious offence that will not be tolerated in our society;

(ii) Women have the right to bodily integrity and the law will bear heavily on those who violate their rights;

(iii) The molestation and abuse of children likewise, will never be tolerated.

[32] The fact that no victim impact reports, showing what impact the rape had on the minor children/complainants, served before the court cannot detract from the fact that rape by its nature is atrocious. Rape is a repulsive crime. It is an invasion of the privacy, the dignity and the person of a woman/child; truly a violation of any woman and/or child's privacy and dignity, and is bound to have adverse psychological impact on any rape victim.

[33] The raping of the complainants by the Appellant, young children old enough to be his daughters, is gruesome, heartless, cruel and abominable. There is evidence that he threatened them with violence should they have informed anybody of the rape; and the complainants only spilled the beans after one of their peers heard them arguing and mocking each other about having been raped by the appellant respectively, and the said child having then informed her mother about the said accusations, the mother [Vera] then reported the matter to the police.

[34] In Kearns v The State 2009 (2) SACR 684 GSJ at 690 Jajbhay J, *inter alia*, remarked that:

> "*A rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim; a victim degrades the very soul of helpless female. The physical scar may heal up, but the mental scar will always remain. When a woman is ravished, what is inflicted is not merely physical injury but the deep sense of some deathless shame. It is violation with violence of the private person of a woman. This constitutes an outrage by all means. By the very nature of the offence it is an obnoxious act of the highest order.* "

[35] Reverting to this appeal, the question to be answered is whether the court *a quo* erred in failing to find that the circumstances of this case were so substantial and compelling, as to justify a departure from imprisonment for life. I cannot find on the facts before this court that the learned magistrate misdirected himself in finding that there were no substantial and compelling circumstances warranting that he deviates from imposing the minimum sentence of life imprisonment in the circumstances herein. The appellant can in fact regard himself lucky that he was only convicted of 1 count of rape each on the minor children in question herein. From the evidence on record it appears that he had sexual intercourse with these young girls

on more than one occasion, after which he would give the complainants money in the amount of 50c or R1.00. He clearly corrupted these little girls/complainants.

[36] I have considered both arguments before this court, keeping in mind what was said in **S v Malgas, 2001(1) SACR 469 (SCA) at 477 d - e** regarding the concept of substantial and compelling circumstances.

> "*The specified sentences were not to be departed of lightly andfor flimsy reasons which could not withstand scrutiny. Speculative hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances.* "

[37] The Supreme Court of Appeal has in S v Malgas supra at paragraph [18] observed that the wording of the Statute signals that it is deliberately and advisedly left to the Courts to decide in the final analysis whether the circumstances of any particular case call for a departure from the prescribed sentence. In doing so the Court is required to regard the prescribed sentence as being generally appropriate for the crime specified and enjoined not to depart from them unless they are satisfied that there is weighty justification for doing so.

[38] It is so that society cries for protection against all types of criminals who should not be sent to prison today to return tomorrow showing bold and daring faces as heroes of crime in a community that shuns crime. The convicted offenders must do their stint in prison for all serious crimes (as the one here) so that when they return they must respect the right to life and dignity and all other rights of the citizen, including the rights of women and children. The appellant was clearly sexually abusive of the minor children/complainants herein. He has not shown any remorse whatsoever for his conduct; he in fact does not take responsibility for his atrocious conduct.

[39] I am not persuaded that the appellant's personal circumstances set out above meet the threshold of substantial and compelling circumstances set out in s 51(3*)(a)* of the Act. There are no circumstances relating to the commission of the offence which amount to such weighty circumstances.

[40] The appeal against the sentence imposed can thus in my view, not succeed.

[41] In the result, I propose that the following order be made:

1. The appeal against conviction is dismissed. The conviction is confirmed.

2. The appeal on sentence is dismissed. The sentence imposed by the court *a quo* is confirmed.

L M MOLPA-SETHOSA

JUDGE OF THE HIGH COURT

I agree

AJ BAM

JUDGE OF THE HIGH COURT

It is so ordered.