IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NUMBER: A 989/09

4/4/2014

In the matter between:

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.
4/April/2014 DATE
SIGNATURE

JONAS MALESELA KEKANA APPELLANT

and

THE STATE RESPONDENT

JUDGMENT

TLHAPI J

[1] The appellant was convicted of rape of a two year old girl in the Regional Court in Benoni, Gauteng. He was sentenced to life imprisonment. The appellant pursued his right to an automatic appeal and filed a notice to appeal his sentence. The matter was postponed sine die to the full bench with a further order that a victim assessment psychological report be obtained made available for consideration at the appeal hearing.

I shall not summarize the entire evidence save to refer to it where necessary.

[2] It was submitted that the Learned Magistrate had erred in a number of respects. Briefly, that he failed to consider the triad; time spent in custody as an awaiting trial prisoner ; that the appellant was a first offender; in not imposing a shorter sentence coupled with a suspended sentence; his age and in finding that no substantial and compelling circumstances were present justifying imposition of a lesser sentence. Furthermore, that the learned magistrate had erred in over emphasising the seriousness of the offence; the interests of society and prevalence of the offence.

[3] I have regard to the further grounds as supplemented and amplified in the heads of argument and submissions filed on behalf of the appellant. It was contended that the trial court should have conducted a thorough investigation into the circumstances of the appellant by calling for a probation officer's report, a victim impact report and consideration should have been given to his consumption of alcohol prior to the incident. In as far as the victim impact report was concerned it was contended that the report was compiled two years after the incident and that there was no indication that the trauma suffered was of a permanent nature.

Counsel for the respondent submitted that the sentence should not be interfered with in that there was no material misdirection by the trial court in concluding that no substantial and compelling circumstances were present. Furthermore, that the aggravating factors outweighed the personal circumstances of the appellant.

[4] The cardinal rule when dealing with appeals was that sentence imposed by a

trial court should not be interfered with unless it can be shown that there was a material misdirection on the part of such court. In this instance the appellant was further charged with an offence for which a minimum sentence of life imprisonment was prescribed by the legislature under Act 105 of 1997. Unless substantial and compelling circumstances were found to be present, the prescribed sentence had to be imposed.

[5] As I see it, the entire grounds of appeal boil down to a contention that the trial court , should have had regard to the cumulative effect of all the factors advanced on behalf of the appellant before making a finding that no substantial and compelling circumstances were present justifying a lesser sentence.

[6] The appellant was represented at trial. He testified in mitigation that he was 26 years old, a first offender and was not married. He was the father of a six year old girl and was responsible for her maintenance in the amount of R200.00 per month. He had gone up to matric and was employed as a gardener earning a wage of R950.00 per month. He had been awaiting trial since 1 December 2008.

[7] The introductory remarks of the learned magistrate indicate that he was conscious of the factors to be considered in sentencing including what was trite law, being the triad. At page 43 paragraph 3 he stated the correct approach to be adopted by our courts in determining substantial and compelling circumstances. It was not only to be the cumulative effect of factors favouring an accused person with regard to the merits and in mitigation but also those facts which did not favour the appellant as confirmed in S v Vermeulen 2004 (2) SACR 174 (SCA) at 180 para 22.

[8] He did a further comparative analyses of cases where the rape of children below the age of 16 years came before our courts, in S v Abrams 2002 (1) SACR 116 (SCA); S v Mahomotsa 2002 (2) SACR 435 (SCA); Rammoko v Directors of Public Prosecutions 2003 (1) SACR 200 (SCA) and S v Vilakazi 2009 (1) SACR 552 (SCA). He considered the reasons why sentences were either increased or set aside and remitted to the trial court for reconsideration of sentence. He gave reasons why this was a different case by stating the following:

> On page 45
>
> Paragraph 2
>
> "the heinous crime that you committed was the rape of a two year old child"
>
> Paragraph 3
>
> "that the following is not a substantial and compelling circumstance, an apparent lack of physical injury to the complainant"
>
> Paragraph 4
>
> "Your personal circumstances, the fact that you are 26 with no previous convictions, the fact that you have been in custody since 1 December 2008 are mitigating factors, that is so, but taking the facts of this case into consideration that you raped a two year old and showed no remorse whatsoever
>
> Paragraph 6 continuing to page 46
>
> ".....you said Mrs Rooi said she saw you with her child of two years, she is telling lies. You said you do not know how the DNA of yours is found in the vagina of a two year old. A person who admits his guilt and asks for forgiveness is a person that can be rehabilitated. I do not see that in you.

[9] I do not agree with the submission for the appellant that the magistrate felt

duty bound to impose life imprisonment or that he sought 'exceptional' circumstances to be present in order to find that substantial and compelling circumstances were present. The learned magistrate did comment about the lack of a victim assessment report for the two year old, which could have shed better light on the effect of the attack on her. The first court of appeal called for such report and referred the appeal to a full bench.

[10] Since the determination of whether or not substantial and compelling circumstances are present, entails the exercise of a value judgment by the trial court, a court of appeal is entitled to revisit the issue and to substitute its own judgment if it finds that there was a misdirection on the part of the trial court, **S v GK 2013 (2)** SACR 505 at 507 and 508 paragraphs 4 and five. At 509 f - h Rogers J stated,

> "All the circumstances bearing on the question must be examined to see whether, as the sentencing court found, there were or were not ...substantial and compelling circumstances. I take this to mean that the appellate court can form its own view as to the correct answer to that question.....To allow an appellate court to make its own value judgment on appeal provides an accused person with greater safeguards against the imposition of disproportional punishment"

[11] In S v Malgas 2001 (1) SACR 469 (SCA) at paragraph 22 is stated:

> "The greater the sense of unease a court feels about the imposition of a prescribed sentence, the greater its anxiety will be that it may be perpetrating an injustice. Once a court reaches the point where unease has hastened into a conviction that an injustice will be done, that can only be because it is satisfied that the circumstances of the particular case render the prescribed sentence unjust, or as some might prefer to put it, disproportionate to the crime, the criminal and the legitimate needs of

society. If it is the result of a consideration of circumstances the court is entitled to characterize them as substantial and compelling and such as to justify the imposition of a lesser sentence."

[12] The call for a pre-sentencing report to be compiled by a probation officer is regulated by the Children's Act and the Criminal Procedure Act. The report is required in order to assist the court in assessing what factors to take into account when sentencing of a juvenile, especially when a term of imprisonment is under consideration. I am of the view that it was not necessary in the circumstance to call for one. All the aspects of the appellant's personal circumstances could have been engaged in more detail when he testified in mitigation. It is however not a foregone conclusion that more than what was testified to in mitigation and in the circumstances of this case could have been revealed.

The victim assessment report was in my view not very helpful. Probably it would have assisted to call the mother as a witness during the trial to assist the court on the effect the attack had on the child and family.

[13] In this instance I am not persuaded that there was a misdirection by the trial court in considering sentence. The analyses engaged by the trial court displayed the need to consider each case on its own merits. The sentences in the cases referred to above were not prescriptive. In this matter I find that the aggravating circumstances outweigh by far factors to be considered as substantial and compelling. The aggravating circumstances lie in the fact that as at the time of the commission of the offence the appellant was no longer a juvenile. He was a 26 year old unmarried man and an employed father of a six year old. The victim was a two year old who, in my view, could not have had any understanding of sexual

intercourse, let alone the consequences of engaging in such act with an adult person without protection. The appellant was a friend to the victim's uncle and also a neighbour of the family. The appellant was known to the victim. It is safe to conclude that in the majority of child rape cases that come before our courts, the victims are known to the perpetrators. An element of trust in the older person often exposes an unsuspecting child to sexual abuse.

[14] While a victim impact report would have been necessary during sentencing, cognizance should be taken of the fact that because of her age, her speech and intelligence, she had not developed to such a degree that she could have been in a position to give input and properly articulate the effects of the attack on her, that is, over and above the contribution of the parent and tests conducted on the victim by a psychologist.

I further have regard to the prevalence of child rape in our society. It is an evil that deserves utmost attention by our courts when considering sentence. Indeed, present all circumstances to be considered in mitigation, where there is lack of remorse, there is often doubt as to the prospect of rehabilitation. In view of the seriousness of the offence, the interests of society and the victim, I am not inclined to interfere with the sentence of the trial court.

[15] In the circumstances I give the following order:

1. The appeal is dismissed.

TLHAPI V.V

(JUDGE OF THE HIGH COURT)

I agree,

PRETORIUS C

(JUDGE OF THE HIGH COURT)

I agree,

BAM A.J

(JUDGE OF THE HIGH COURT)