REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: A533/2012

DATE: 19 JUNE 2014

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

In the matter between:

H[...] C[...] B[...] Appellant

and

THE STATE Respondent

JUDGMENT

THOBANE, AJ

[1] The Appellant was on the 28th November 2011, found guilty in the Regional Court sitting at Pretoria of the following charges:

2 Counts of accomplice to rape of a minor,

4 Counts of accomplice to indecent assault of a minor,

2 Counts of abuse/abandonment of a minor.

[2] At the commencement of the proceedings the Appellant had been warned that the provisions section 51(2) of Act 105 of 1997, were applicable. She was legally represented throughout the trial proceedings.

[3] 3.1. She was sentenced to life imprisonment for each of the two counts of being an accomplice to rape of a minor,

3.2. In respect of each of the four counts of being an accomplice to indecent assault, she was sentenced to 8 years, 5 years, 8 years and 8 years, imprisonment respectively,

3.3. On the two counts of abuse/abandonment of minor children, she was sentenced to 5 years imprisonment.

[4] It was ordered that the sentences run concurrently.

[5] The Appellant appeals against sentence with leave of the trial court.

[6] 6.1 The record in the appeal proceedings has been extremely difficult to put together. The matter having been postponed by this Court, for purposes of reconstruction of the record, one can safely say that even though it happened virtually at the very last minute, the record has been reasonably reconstructed.

6.2. The parties agreed that in the current form the record be deemed to be constructed and that in the interest of justice, the appeal be proceeded with.

6.3. It is my view that in the current form, the record is sufficient to enable the appeal court to deal with the appeal.

[7] It is trite law that the guiding principle is that the sentence is pre-eminently a matter for the discretion of the trial court. **S *v Rabie 1979 (4) SA 855 (A) at 857*** the dictum by Holmes JA,

> *"In every appeal against sentence, whether imposed by a magistrate or a judge, the court hearing the appeal,*
>
> *(a) should be guided by the principle that punishment is pre-eminently a matter for discretion of the trial court*; *and*
>
> *(b) should be careful not to erode such discretion hence the further principle that the sentence should only be altered if the discretion has not been "judicially and properly exercised".*

[8] Again in S *v Mtungwa en Ander 1999 (2) SACR (1) (A),* it was held that the appeal court will be entitled to interfere with the imposed sentence if one or more of the recognized grounds are shown to exist, that the sentence is,

(i) disturbingly inappropriate,

(ii) so blatantly out of proportion to the the magnitude of the offense,

(iii) sufficiently disparate,

(iv) is otherwise such that no reasonable court would have imposed it.

[9] Section 51(1) and (2) of Act 105 of 1997 read as follows:

Discretionary minimum sentences for certain serious offenses

(1) 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 offense referred to in Part I of Schedule 2 to imprisonment for life.

(2) Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offense referred to in-

a) Part II of Schedule 2, in the case of-

(i) a first offender, to imprisonment for a period not less than 15 years;

(ii) a second offender of any such offense, to imprisonment for a period not less than 20 years; and

(iii) a third or subsequent offender of any such offense, to imprisonment for a period not less than 25 years; and

(b) Part HI of Schedule 2, in the case of-

(i) a first offender, to imprisonment for a period not less than 10 years;

(ii) a second offender of any such offense, to imprisonment for a period not less than 15 years; and

(iii) a third or subsequent offender of any such offense, to imprisonment for a period not less than 20 years; and

(c) Part IV of Schedule 2, in the case of-

(i) a first offender, to imprisonment for a period not less than 5 years;

(ii) a second offender of any such offense, to imprisonment for a period not less than 7 years; and

(iii) a third or subsequent offender of any such offense, to imprisonment for a period not less than 10 years:

Provided that the maximum term of imprisonment that a regional court may impose in terms of this subsection shall not exceed the minimum term of imprisonment that it must impose in terms of this subsection by more than five years.

[10] In the trial proceedings after the charges were read out but before the Appellant could plead, the magistrate enqired from the defense if the minimum sentences Act has been explained to the Appellant. The defense indicated that they were of the view that there was doubt as to its applicability on accomplices. The magistrate nonetheless proceeded to explain the provisions of section 51(1) of Act 105 of 1997 as follows:

"Indien u wel dan skutdig bevind word op verkragting op 'n kind onder 16 is dit 'n schedule 2, dee11 misdryf, lewensgevanginisstraf is dan, of moet opgeie word".

[11] The defense were seemingly at that time only concerned with the applicability of the Minimum Sentences Act on accomplices. This is evident in their address to the Court as follows:

> *"Daar is gesag, nuwe gesag wat gekom het Edeiagbare, dat daar twyfel is of die wet van toepasing op medepligtigheid".*

This in my view points to the fact that all the parties to the proceedings, particularly the accused, were aware, as early as the plea stage of the trial proceedings, that the provisions of section 51(1) of Act 105 of 1997, were applicable.

[13] The submission in the heads of argument and before us, that the first encounter with the term *life imprisonment",* in the record proceedings, was during the sentencing proceedings is incorrect. So is the submission that the Appellant was not made aware that life imprisonment may be imposed. She was made aware and she confirmed that she understood, (pg 15 line 6 of the record).

[14] The circumstances of this case are comparable with those in **S *v Kolea 2013 (1) SACR 1409 (SCA)***. The question that arose in the ***Kolea*** decision, was whether a sentencing court was precluded from imposing a term of life imprisonment or from referring the matter to the High Court for consideration of that sentence, solely on the basis that the charge sheet refers to s 51(2) instead of s 51(1) of the Criminal Law Amendment

Act 105 of 1997 (the Act). To the extent that is was submitted by the legal representative of the Appellant, that on this reason alone, the sentence of life imprisonment was not competent and that it's imposition was a misdirection, I must explain that the SCA, in *Kolea*, put that argument to rest. The following *dictum* by Mbha AJA, deal decisively with that point;

> *"In S v Seleke (S v Sekele 1976 (1) SA 675 (T))(referred to by Cameron JA) it* was *held that although it was desirable for a charge to contain a reference to a penalty, this was not essential, and that the ultimate test was whether the accused had had a fair trial. And the presence of prejudice to the accused will point to an unfair trial. Thus the question that should be posed should be the following: Did the appellant have* a *fair trial and more specifically*; was *the appellant sufficiently apprised of the charge he or she was facing and was he or she informed in good time, of any likelihood of his or her being subjected to any enhanced punishment in terms of the applicable legislation. This of necessity entails a fact based enquiry into the entire proceedings of the trial*."

[15] In my view, there can be no doubt that the Appellant as well as her legal representative, were alive throughout the trial, to the reality that a term of life imprisonment could be imposed. I am fortified in this view by what the legal representative of the Appellant said early in his address during sentencing proceedings in the court a *quo,*

> *"Beskuldigde 1 staar 'n voorgeskrywe vonnis van lewenslange gevangenisstraf in die gesig"* (pg 326 line 22).

[16] The awareness of the possibility of life imprisonment, is further apparent in the following passage by the Appellant's legal representative;

> *"My pleidooi sal egter wees dat, indien u wel afwyk van die voorgeskrywe vonnis van lewenslange gevangenisstraf.....u dan die kumulatiewe effek van vonnis sal temper en 'n spesifieke bevel vir samelopend van die vonnisse maak, aangesien dit in elk geval, indien u die lewenslange vonnis sou ople, daar die nodigheid vir so iets is nie, om dat die ander vonnis in elk geval saam met die lewenslange vonnis sou loop, Edel Agbare"*

[17] For completeness, and to further deal with the contention that once a charge sheet refers to section 51(2), a sentence of life imprisonment, referred to in section 51(1), is not available, Mbha AJ A, had the following to say in **S *v Kolea***,

> "I*n my view the majority*; *with respect, misread the provisions of* s *51(2). The term of 10 years' imprisonment referred to therein is the minimum sentence that can be imposed. This means that any sentence in excess of 10 years' imprisonment, and possibiy even iife imprisonment, couid be imposed*

by a court having jurisdiction to do so. Furthermore, the fact that a statute provides for an increased sentence with reference to a *particular type of offence when committed under particular circumstances does not mean that a different offence has been created thereby, in S v Moloto, Rumpff CJ,* ***(S v Moloto 1982 (1) SA 844 (A))*** *held that, where an accused is charged with robbery committed with aggravating circumstances, this did not create a new category of robbery but simply meant that the court had a discretion, where such aggravating circumstances existed, to impose the increased sentence in terms of s 277(1)(c) of the Criminal Procedure Act, in that case the death penalty The fact that the Act specifies penalties in respect of certain offences (in this case rape, where more than one person raped the victim), does not in any way mean that a new type of offence has been created. Rape remains rape, but the Act provides for a more severe sanction where, for example, the victim has been raped more than once or by more than one person.*

[18] The charge sheet was clear and one can discern therefrom that the Appellant was charged as an accomplice. She pleaded as an accomplice, was convicted as an accomplice and was sentenced as such. It is clear that three types of perpetrators are identified in the Act, i.e. the accused, a co-perpetrator and an accomplice. There is no doubt therefore that the Appellant has all the hallmarks of and stands squarely to be treated as provided for in Schedule 2 Part 1 of Act 105 of 1997.

[19] It is worth repeating, notwithstanding the fact that it is trite, that in determining an appropriate sentence, the court must strike a balance between the personal circumstances of the accused, the seriousness of the offense, as well as the interest of the public. **S *v Zinn 1969 (2) SA 537 (A)***. In the above endeavor, the sentencing court considered the four pillars, in determining the appropriate sentence, deterrence, prevention, reformation and retribution. The court was alive to the fact that there ought to be a balance of all the above factors, hence the following was taken into consideration by the court a *quo;*

- That the Appellant was a first offender,

- The time spent while awaiting trial,

- The family relations of the Appellant were examined,

- The Appellant's educational advancement,

- The fact that the Appellant was not permanently employed,

- The issues in relation to remorse. The emotion displayed by the Appellant when relating her own abuse or molestation as opposed to the lack thereof when dealing with the abuse of the minor children. The fact that she appeared to fail to display due sympathy or appreciation of the impact of

the abuse of her children at her hand,

• The contradictions inherent in the Appellant's version about her own abuse at the hand of her step father, step grandfather, a neighbor as well as an uncle,

• The fact that the Appellant used alcohol. The sentencing court found that it had no role in the abuse of the minors,

• The fact that the Appellant, as a parent, violated the trust of her own children. That although they had complained to her about the pain they were seemingly sustaining, they were simply ignored by the appellant,

• The court dealt in detail, in the context of sentence, the impact of the deeds of the Appellant on the complainants as captured by the various reports. Their tender age, violation of their rights, the impact of their unfortunate circumstances on their studies as well as the physical harm that befell them,

• The interest of the public was canvassed,

• The various sentencing options were considered.

[20] In the end the court found that whether taken individually of cumulatively, there existed no substantial and compelling circumstances that compel it to deviate from the prescribed minimum sentence of life imprisonment. The court then proceeded to impose life imprisonment.

[21] It was submitted before us that the court overemphasized the interests of the public over those of the Appellant. That although the magistrate said in his judgment that he will take into consideration the time spent while awaiting trial, that he simply paid lip service to it as it was not, so it was argued, reflected in the sentences imposed by the court a *quo*. I am unable to agree with that proposition for three reasons. Firstly, a proper evaluation of all the factors that are critical in the imposition of sentence was undertaken by the magistrate. This is clear from the record. Secondly, the magistrate went a step further to even calculate, mathematically, the number of days the Appellant spent in custody before being admitted to bail. The number of days spent in custody after conviction but before sentence. The magistrate tallied the number of days and arrived at the figure of 269. He thereafter doubled the number of days and arrived at 538 days. The magistrate was at pains to indicate that he was applying the principles or guidelines as laid down in S *v Brophy 2007 (2) SACR 56 (\N).* While the approach of mechanically dealing with the number of days spent in custody while awaiting trial, is discouraged, I am referring to this exercise to illustrate that there was much more than just paying lip service, in considering the number of days spent awaiting trial. Lastly, when one has regard to the sentences imposed in respect of the offense of accomplice to indecent assault as well as that

of abuse/abandonment of a minor, it is clear that the court could have imposed heavier sentences on the facts of this case. In my view, the period spent while awaiting trial was but one of many factors to be taken into account and that such period is reflected in the sentences imposed in respect of the aforementioned offenses.

[22] It was submitted on behalf of the Respondent that each case must be decided on its own merits and that it was self evident that sentence must always be individualized for punishment must always fit the crime, the criminal and the circumstances of the case. I agree with that submission as it is in line with 5 *v Malgas 2001 (2) SA 469 (SCA).*

[23] In considering whether, in particular, the sentence of life imprisonment was an appropriate sentence, if is fitting to reflect on what was said in, S *v Sadler 2000 (1) SACR 331 (A) para 10*, viz:

> "*[I]t is important to emphasise that for interference to be justified, it is not enough to conclude that one's own choice of penalty would have been an appropriate penalty Something more is required; one must conclude that one's own choice of penalty is the appropriate penalty and that the penalty chosen by the trial court is not Sentencing appropriately is one of the more difficult tasks which faces courts and it is not surprising that honest differences of opinion will frequently exist However, the hierarchical structure of our courts is such that where such differences exist it is the view of the appellate Court which must prevail."*

[24] The offenses committed by the Appellant were horrendous. The complainants were minors. This Court is their upper most guardian. They were betrayed by their parents. The Appellant was an accomplice to their rape and to their indecent assault. She also abused them or abandoned them. The serious and horrendous nature of rape can not be overemphasized. **S** *v Chapman 1997 (2) SACR 3 (SCA).* What is worse in this case is that the mother, Appellant, was key to the perpetration of the rape and other forms of abuse against her own children. She failed to protect them, in fact, she facilitated their abuse by making them available for rape and sexual abuse. She, from a distance, watched when they were being degraded, violated, stripped off their dignity and their innocence taken away from them.

[25] In my view, and in light of the aforementioned, it can not be said that the sentences imposed in respect of count 4 and 14, that of life imprisonment, is disproportionate to the offenses committed, nor can it be said that the sentencing discretion was incorrectly or improperly exercised. From the conduct of the proceedings, I can not find that they were vitiated by irregularity, thus warranting the appeal court to intervene.

[26] I would therefore propose the following order:

1. The appeal is dismissed.

S.A. THOBANE

Acting Judge of the High Court, Pretoria

I agree and it is so ordered.

N. KOLLAPEN

JUDGE OF THE HIGH COURT