IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: A576/13

DATE: 25 JULY 2014

In the matter between:

MOLEFE JOSEPH MPHANAMA **Appellant**

and

THE STATE **Respondent**

JUDGMENT

MUSHASHA AJ

[1] This is an appeal against both the conviction and sentence. The appellant was charged with and convicted of four (4) counts of rape read with s51 of the Criminal Law Amendment Act 105 of 1997 in the regional court of Springs.

[2] The appellant was sentenced to life imprisonment on each count and all sentences were ordered to run concurrently.

[3] The application for leave to appeal against both the conviction and sentence was turned down/refused by the regional court magistrate.

[4] On petition the appellant appeals to this court against both convictions and sentence **AD CONVICTION**

[5] The facts may be summarised as follows:

Count 1

M[...] D[...] M[...] (the complainant) was born on the [...] 1998. The complainant knew the appellant as a

friend of her family. Complainant testified that during the year 2009 when she was about 11 years old her mother was not home. The appellant arrived at her home during the night and knocked at the window of her sleeping room. She opened for him and he entered through the window. She then closed the window. He then offered her some drinks and asked her to proceed to the kitchen where he raped her. The complainant did not report to any person.

Count 2

The complainant testified that during the same year (2009) appellant arrived at her home and found her with her mother. The appellant invited the complainant to visit him at his home at Pumulo the following day. The complainant proceeded to the appellant's home. At the appellant's home the appellant undressed her and had sex with her. Thereafter they both went to the shops where the appellant bought her some articles and also gave her R150-oo for hair braids. The complainant did not report the incident to anyone.

Count 3

The complainant testified that during the same year (2009) appellant arrived at her house and asked her mother to allow her go with him to his home. Her mother agreed. She spent the rest of the week with the appellant having sex. The complainant did not report this incident to anyone.

Count 4

On 23rd August 2011 the complainant proceeded to the appellant's home. At appellant's home appellant asked complainant to watch a pornographic movie with him but complainant refused. Thereafter appellant undressed the complainant and had sexual intercourse with her. The complainant did not report the incident to anyone.

[6] Few months later, during a church meeting the complainant made a report to one Mamma J[...]. Complainant told Mamma J[...] that she was making the report because she was no longer interested in sleeping with the appellant. She further testified that she was advised it was sinful to engage in sex before marriage.

[7] Medical evidence revealed that complainant had healed scars on her hymen.

Defence Version

[8] The appellant testified:

8.1 That he did not have sexual intercourse with the complainant at all. He contended that

complainant was regarded by him as his biological daughter. He testified that the relationship between him and the complainant was on that basis and that he used to buy her things and support her because she was his biological daughter.

8.2 Meanwhile the complainant and her mother, D[...] P[...] M[...], had denied in their respective testimonies that the complainant was appellant's biological daughter.

[9] On reading the record I am concerned about the conduct of the complainant who was by then hardly eleven years old.

9.1 It appears that at the time of the incident but was able to describe the sexual intercourse as rape.

9.2 during the first incident, at night the appellant knocked at the window and complainant opened the window for him and closed it after him. Then complainant lit the candle and took the candle to the kitchen.

9.3 She testified that he had sex with him and he had sperms ejaculated.

9.4 She did not report the incidents to anybody.

9.5 At the second occasion she proceeded on her own to Pumela where the appellant resides. She found the appellant in bed and the appellant invited her under the blankets. She went under the blankets on her own and had sex with him.

9.6 Without expressing any concern she returned home where she showed her mother the money and some articles given to her by the appellant.

9.7 She testified that she did not report the incident because she was afraid.

9.8 On the third occasion she sought permission from her mother to visit appellant for a week. She proceeded to appellant where she had sex with him for the whole week. She went to school and from school she returned to the appellant.

9.9 The fourth and last incident occurred during 2011 when she was 13 years of age. According to the complainant appellant had sex without her consent but she did not report the incident to anyone. She had visited the appellant on her own without any invitation from the appellant.

[10] In some of the above mentioned occasions the complaint demonstrate her unwillingness to sexual intercourse by merely closing her thighs and nothing more.

[11] It was submitted on behalf of the appellant that the conduct of the complainant as set out above demonstrated improbabilities pointing to the fact that complainant had consented to sexual intercourse.

[12] However, the arguments lost sight of the fact. In respect of the first, second, third counts the complainant was about only 11 years old when the incidents occurred.

[13] In this regard, it is apporite to refer to the provisions of the Criminal Law Offences and Related Matters Amendments Act 32 of 2007. Section 57(1) of this Act which provides "Notwithstanding anything to the contrary in any law contained, a male or female person under the age of 12 years is incapable of consenting to a sexual act". It stands to reasons therefore that all the acts in count 1 to 3 fall within the confines of the provisions.

[14] It was argued on behalf of the Respondent that given the youthfulness of the complainant as well as the gentle persuasion by the appellant through gifting her no adverse inference should be drawn from her failure or delay in reporting the matter.

[15] Counsel for the Respondent argued strongly on the doctrine of grooming. According to counsel the appellant took advantage of the vulnerability of the complainant and over time moulded her to believe that as long as complainant would submit herself to sexual intercourse she would in return benefit materially from him.

[16] Regard being had to the facts of this case I am persuaded to accept counsel's submissions in this regard.

[17] In the premises I find no reason to interfere with the credibility finding of the court *a quo* regarding the complainant or its rejection of the appellant's version. In the circumstances the appellant has failed to prove a material misdirection that merits the setting aside of the conviction.

AD SENTENCE

[18] It was submitted before us that the sentence of life imprisonment on each count is startling inappropriate.

[19] During argument before us Counsel for the Appellant argued that the Regional Court Magistrate misdirected himself on the question of sentence. Counsel submitted that the trial court gave insufficient weight to the available mitigating factors when arriving at the conclusion that there were no substantial and compelling circumstances.

[20] In my view the following are such factors which should be considered as mitigatory:

20.1 Regarding the incident in count, the appellant obtained easy access into the house with the co-operation of the complainant who even closed the window after the appellant's entry.

20.2 Regarding the incident in count 2, the complainant proceeded on her own accord to appellant's home at Pumela. The appellant invited her under the blankets and had sex with her. It is remarkable that complainant's visit took place despite the fact that she was already previously raped by the appellant as set out in count 1.

20.3 With respect to the incident in count 3 complainant herself sought permission from her mother to go with the appellant to his house. It is remarkable and that all this was done with full knowledge that appellant would probably have sex with her.

20.4 The incident in count 4 took place during 2011 when complainant was 13 years of age. Again the complainant had visited the appellant on her own, without any invitation from the appellant.

20.5 During all the sexual encounters with the appellant the complainant had always showed her unwillness by merely closing her thighs.

20.6 Although there was no victim impact report, there is no evidence that complainant experienced any psychological symptoms. The medical report exhibit "C" reflects complaint' mental health and emotional status as good with no physical injuries observed.

See S v Mabitane 2012(2)SACR 380(EA)

20.7 Before arrest appellant was gainfully employed earning R6000 per month and lost his job as a result of this case.

20.8 The appellant was in incarceration since 5 April 2011 until the date of sentence on 11 February 2013. He was accordingly imprisoned for a period of about 2 years awaiting trial.

See S v Vilakazi 2009(1) SA 552 (SCA) at paragraph 60.

[21] I have given a full consideration of the fact that the somewhat acquiescence conduct of the complainant was the result of the grooming effect.

[22] It is my well-considered view, however, that this matter calls for sentences cognisant of the above-mentioned circumstances but which takes account of the seriousness of the offences and the need for appropriate severity and deterrence.

[23] In my view all the above circumstances collectively! considered constitute substan^j and compelling circumstances and the cumulative impact thereof should justify a departure from the prescribed sentence. It is therefore incumbentlupon us to evaluate whether life imprisonment on each count is a proportionate sentence.

[24] I have studied the judgment of the Regional court Magistrate and I am not convinced that all the mitigating factors set out above were given sufficient weight.

[25] It is seems to me that the only aggravating factor in this case is the age of the complainant

[26] Upon evaluation of the cumulative effect of all thé circumstances in this case I am driven to the conclusion that the sentences of life imprisonment on each of the four counts would result in an injustice in that the sentence would be disproportionate to the offences.

See SvMaleas 2001(2) SA 1222 (SCA)

S v Dodo 2001(1) SACR 594 (CC)

[27] I am of the view that a substantial sentence of 20 years imprisonment on each count seems to me to be appropriate for the crime.

[28] I agree with the trial court that the four counts of rape were committed in an ongoing course of conduct and should be taken together fbr purposes of sentencing.

[29] I accordingly propose that the following orders be made:

29.1 The appeal against convictions is dismissed.

29.1 The appeal against the sentences imposediin count 1,2,3 and 4 succeeds.

29.2 The sentences imposed on those counts are set aside and substituted with 20 years' imprisonment.

29.3 The remaining orders given by the courtjor *quo* remain in place with the result that the effective period of imprisonment on all counts is 20 years imprisonment.

29.4 The sentence is antedated to 11 February 2014 (the date of the sentence in the court *a quo).*

M J MUSHASHA

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

I concur and it is so ordered

N V KHUMALO

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

DATE OF HEARING

DATE JUDGMENT DELIVERED