IN THE NORTH GAUTENG HIG COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

4/9/14

CASE NO: A171/2012

In the matter between:

ELIJAH JOAHANNES MSIZA Appellant

and

THE STAT E Respondent

IS NOT APPLICABLE

ABLE: YES/NO.

RES TO OTHER JUDGES: YES/NO.

ED.

04-09-14

DATE

JUDGMENT

LAKA AJ:

Introduction:

1. The Appellant was convicted at the Regional Court, a Division of Gauteng of Rape of a minor girl under the age of 16, an offence falling under Part 1 of Schedule 2, Criminal Law Amendment Act, No. 105 of 1997 (Section 51) which carries mandatory minimum sentence of life imprisonment.

2. The Regional Court Magistrate then referred the matter to the High Court for sentencing. The matter served before **Legodi J,** who confirmed the conviction and sentenced the Appellant to 20 years imprisonment having found compelling and substantial circumstances which mitigated against life imprisonment.

3. The Appellant appeared before us, challenging 20 years imprisonment as an appropriate sentence in the circumstances of this case.

The Appeal is against sentence only.

4. Personal circumstances of the Appellant.

The following were advanced as the personal circumstances which Appellant argued that they constitute compelling and substantial circumstances the existence of which would militate against life sentence. **Legodi J**, agreed that compelling and substantial circumstances indeed do exist that is why he did not impose life sentence.

4.1 Appellant was 44 years old then;

4.2 Is a first offender;

4.3 That there was no evidence suggesting permanent or temporary psychological effects suffered by the victim as a result of the rape;

4.4 Appellant was in custody for over 20 months.

5. It is trite that the imposition of sentence is pre-eminently a matter within the judicious discretion of a trial court. The Appeal Court's power to interfere with a sentence imposed by the trial court is circumscribed to instances where the sentence is vitiated by irregularity, misdirection or where there is a striking disparity between what the trial court and the Appeal court would have imposed.

S v Snyder 1982 (2) SA 694 (A) at 697 D
S v Sadler 2000 (1) SACR 331 (SCA) at 334-5 H-A
Director of Public Prosecution KZN v P 2006 (1) SACR 243 (SCA) at para 10
S v Dodo 2001 (1) SCAR 594.

6. Did the Appellant prove any legally valid ground to warrant interference by the Appellant Court with the sentence imposed by **Legodi J.**

7. In this judgment, **Legodi J** referred to the following:

7.1 The period the Appellant was in custody before sentence;

7.2 To the fact that Appellant is a first offender;

7.3 There was no apparent physical or psychological injuries;

7.4 The age of the Appellant.

8. It does not appear that the sentencing Court **Legodi J**, overlooked any factor which is material to our assessment.

9. In the absence of any demonstrateable and material misdirection, gross irregularity or adequate grounds that the trial court was wrong in accepting the evidence before it, the appeal court will not be entitled to interfere with the trial court's verdict and sentence.

See: S v Hadebe and Others 1997(2) SACR 641 (SCA) at p. 645.

10. Rape is a serious offence as it was observed in **S v Chapman 1997 (3) SA 341 (SCA) at 344 I-J**, where it was said: *"rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim".*

11. The sentencing Court per Legodi J, was entitled to impose any sentence short of the prescribed sentence on consideration of the particular circumstances of this case.

See: S v Vilakazi 2009(1) SACR 552 (SCA) para 14-15.

12. If a Court is indeed satisfied that a lesser sentence is called for in a particular case, can any Court then dictate to the sentencing Court what sentence it should impose or it remains the domain of the sentencing Court? The question does not need any answer.

13. Legodi J, imposed a 20 years imprisonment on the Appellant. Is the sentence too harsh as the Appellant argued?

14. In the present case the victim an underage girl, who looked up to the Appellant as a father from whom she expected protection, but he had abused that position and trust and violated her. That there is no evidence of the effect of rape on her does not mean that she is not scared psychologically. In the words of the SCA in S v Chapman, supra, rape is *"humiliating, degrading and brutal invasion of privacy, the dignity of the person of the victim*", it calls for severe punishment in protection of a girl child in particular and women in general.

15. In my view, there is no reason to interfere with the sentence for all the reasons mentioned above.

16. The Appellant has failed to make a case for the intervention by this Court and the appeal must fail.

17. In the circumstances, I propose the following order:

17.1 The appeal is dismissed.

LAKA AP

Acting Judge of the high Court

02nd November 2012

I agree.

Tolmay R. G.
Judge of the High Court

I agree.

De Klerk L. S.
Acting Judge of the High Court