

CASE NO: A359/15



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DATE OF JUDGMENT: 21/9/16

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED. 10 Aug 2016

In the matter between:-

JACOB MOTHAMME MOGOTSI

Appellant

and

THE STATE

Respondent

JUDGMENT

KOOVERJIE AJ:

BACKGROUND:-

1. The Appellant was convicted of contravening Section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007 and to which he pleaded guilty. On 12 August 2014, he was sentenced to a term of life imprisonment by the Regional Court. The accused appeals against sentence only.
2. The accused was charged for raping a 12 year old girl. The complainant was his girlfriend's niece. On the night in question the accused returned to his home. At the time the complainant was staying over with other children, including the accused's son. The accused admitted that he was tempted to have sexual intercourse with her. He forced her onto the bed, removed her clothing and had intercourse with her, without her consent.
3. The Appellant pleaded that the Trial Court misdirected itself in sentencing the Appellant to life imprisonment without considering substantial and compelling circumstances. Furthermore the lengthy period of imprisonment imposed is shockingly harsh and induces a sense of shock.
4. The Court *a quo* should have considered the cumulative effect of the substantial circumstances which existed, namely that:
 - the Appellant is a first offender;
 - this was not one of the worst rapes;

- he pleaded guilty to the offence;
 - he had spent 1 year and 1 month in custody awaiting trial;
 - he was remorseful and apologised to the families for his unlawful actions.
5. In argument, counsel for the Appellant contended that the Appellant is a first offender and that it cannot be said that he will “re-offend” as he took responsibility for his actions and regretted having sexual intercourse with the complainant. The accused could still be rehabilitated, and thus the Court should have exercised mercy.
6. It is trite law that the imposition of sentence is primarily at the discretion of the Trial Court and that an Appeal Court will only interfere with the imposed sentence if the sentence is vitiated by irregularity, misdirection or is disturbingly inappropriate¹.
7. Counsel for the State argued that the consideration of sentence requires the taking into account of all factors in aggravation and mitigation of sentence and their cumulative impact determines whether a departure therefrom is justified. Reference was made to ***S v Malgas 2001 (1) SACR 469 SCA***.

¹ ***S v Sadler 2000 (1) SACR 331 SACR 334E-G***

8. The accused's criminal liability lies in the fact that the victim was a child below the age of 16. At the time of the offence, she was only 12 years and 5 months.
9. The following aggravating factors were highlighted by the State, namely:
 - 9.1 the accused suffered from symptoms of HIV;
 - 9.2 the victim's aunt was his girlfriend;
 - 9.3 he was living with his girlfriend in her home at the time of the offence;
 - 9.4 the complainant had suffered extensive tenderness, extreme discomfort and pain after the incident. She was still a virgin and after the rape she had bled for days;
 - 9.5 the rape occurred in the sanctity of her aunt's home which was considered a safe environment for the complainant as well as her mother;
 - 9.6 the accused lacked remorse. The fact that the accused initially denied having raped the complainant but later admitted to it was only because he was confronted by the complainant's mother shortly after the rape at the scene of the crime.

ANALYSIS: -

10. In this instance the appeal against sentence is premised on the ground that the imposed sentence is disturbingly inappropriate.

11. The determinative test laid down in ***S v Malgas 2001 (1) SACR 469A*** finds application here. This test allows a Court to depart from the prescribed minimum sentence under certain circumstances :

“If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.”

12. This Appeal has to take into consideration all the circumstances in order to assess whether the prescribed sentence is indeed proportionate to the offence.

13. Our Courts have further acknowledged that while public opinion demands a harsh and uncompromising response from our Courts in dealing with rape, one must guard against sentencing policy that caters exclusively for public opinion².

14. Our Courts have further highlighted the destructive impact of undue long sentences. In ***S v Khumalo and Others 1984 (3) SA 327 at 331 (f)***, Nicholas JA stated:

² ***S v MM, S v JS, S v JV 2011 (1) SACR 510 (GNP) at 517***

"It is the experience of prison administrators that unduly prolonged imprisonment far from contributing towards reforms brings about complete mental and physical deterioration of the prisoner."

15. The Court *a quo* in its judgment considered the psychological reports submitted to Court. The Court took cognisance of *inter alia* the following aggravating circumstances which were highlighted in the report.
 - 15.1 the incident has caused severe emotional trauma;
 - 15.2 the incident has caused conflict within the family which eventually has caused the complainant and her mother to sever ties with their family and move away;
 - 15.3 the complainant had been subjected to mockery from the community who were aware of the rape incident.
16. The Court further took cognisance of the fact that he was 40 years old, not married, had one minor dependent child and was in good health.
17. Having considered the Court *a quo*'s findings on sentence this Court is of the view, having regard to the aforesaid authorities, that prolonged imprisonment although in conformity with public interest, may not always serve the purpose of reforming the prisoner. This court finds that the sentence of life imprisonment is rather harsh and inappropriate. In particular, the Appellant was a first offender and his personal circumstances should be taken into

account as well. In similar circumstances, the courts below have reduced the sentences. In **S v MM, S v JS, S v JV 2011 (1) SACR 510 (GNP)** the Court reduced the sentences in the following matters:

- In **S v MM**, the Appellant was convicted of raping his 12 year old stepdaughter in the family home. On appeal his sentence was reduced to 12 years.
- In **S v JS**, the Appellant's sentences for the rape of a 4 year old girl was reduced to 12 years.
- In **S v JV**, the Court reduced the sentence to 15 years in respect of the rape of two victims.

18. In **S v GN 2010 (1) SACR 93 (T)**, the Court reduced the sentence of life imprisonment for the rape of a 5 year old to 20 years.

19. It appears that the Appellant has not shown genuine remorse. There may have been regret but it does not seem that he appreciated the grave nature of the crime committed. Persons convicted of rape should understand that it is a crime of violence which should not be tolerated and furthermore the psychological trauma a victim suffers cannot be ignored. In this instance this incident has had a significant impact on the complainant.

20. However, removing the Appellant from society is certainly not appropriate in the circumstances.

21. Having regard to all the facts and circumstances of this matter, I am of the view that a sentence of 15 years is appropriate. In **S v Mhlakaza 1997 (1)**

SACR 515 SCA at 518F-G, Harms JA cautioned that:

"It remains the Court's duty to impose fearlessly an appropriate and fair sentence even if the sentence does not satisfy the public."

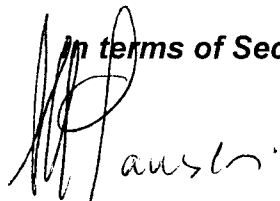
ORDER:-

I therefore propose the following order:

- (1) The appeal on sentence is upheld;
- (2) The sentence of life imprisonment imposed is set aside and substituted with the following:

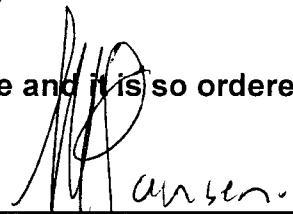
"The accused is sentenced to 15 years imprisonment which is antedated

in terms of Section 282 of the Criminal Procedure Act, 51 of 1977".



KOOVERTJIE AJ
Acting Judge of the High Court

I agree and it is so ordered



M JANSEN
Judge of the High Court