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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

**CASE NUMBER: A231/2018
20/9/2019**

FANA SIBUSISO MWELASE

Appellant

and

THE STATE

Respondent

JUDGMENT

FMM SNYMAN (AJ)

- [1] On 3 July 2017 the young life of S[....] C[....] S[....] was changed irrevocably. He was walking home in Mayfield Extension 9, Benoni, an act performed by many children every day. At the age of 13 he still was a young boy with dreams for the future. This all changed due to the sadistic needs of a 24 year old man addicted to Nyaope, named Fana Sibusiso Mwelase (the appellant in this matter).
- [2] Upon seeing young S[....], the appellant approached and demanded money. S[....] did not have any, and the appellant assaulted S[....] and with force and at gunpoint proceeded to rob the child of his cellular phone. He informed S[....] that he can get his cellular phone back if S[....] accompanied him to the appellant's home. Seeing no other choice, S[....] complied.
- [3] When the appellant's house was reached, the appellant did not give S[....] his phone back as promised. Instead, he ordered the young boy to take off his pants and threatened him. If he does not cooperate, the appellant then

proceeded to rape the young boy by inserting his Penis in S[...]'s anus. Distraught, the young man left the appellant's house, long forgotten the cellular phone whilst the appellant amused himself with his newly obtained cellular phone .

- [4] On 26 February 2018 the accused pleaded guilty to one count of robbery and one count of rape in that on 3 July 2017 near Mayfield in the Regional Division of Gauteng the accused assaulted young S[...] and with force took his Alcatel cellular phone valued at approximately R800 He also pleaded guilty on Count 2, namely contravention of the provisions of Section 3 read with Sections 1, 55, 56(1), 57, 58, 59 and 61 of the Sexual Offences and Related Matters Act 32 of 2007 in that he unlawfully and intentionally committed an act of sexual penetration with a male person S[...] C[...], S[...], who was 13 years old at the time, by inserting his penis in the victim's anus.
- [5] The appellant gave a statement with the guilty plea, which confirmed that the accused knew his actions were unlawful at all relevant times. The appellant also Informed the Probation Officer that, he had consumed alcohol on the day of the crimes, which clouded his judgment.
- [6] The appellant was then found guilty and the matter was postponed in order to obtain the pre sentence and victim impact reports for the purposes of sentencing.
- [7] The appellant was sentenced to seven (7) years imprisonment for the robbery and imprisonment for life for the rape.
- [8] The appellant had the automatic right to appeal in terms of section 10 of the Judicial Matters Amendment Act 42 of 2013. He only appeals against the sentence.
- [9] The pre-sentencing report highlighted the following personal circumstances of the appellant in mitigation of sentence. the appellant was 23 year old at the commission of the offences. He went to school up to grade 11. He lived with his mother and siblings at the time of the commission of the offences. He was working as car guard at the time of his arrest. He was remorseful for his actions. He had been in custody for nine months throughout the trial. He was a first offender.

- [10] The pre-sentencing report further stated that the appellant had no children and was addicted to Nyaope since 2015. His father passed away when he was 14 years old and his mother is the sole provider in the family, working as a domestic worker. The appellant did attempt rehabilitation from Nyaope during 2017, but he was expelled as he was violent with other patients
- [11] In its turn, the State placed the victim impact report before the Court *a quo* in aggravation of sentence. The following factors were highlighted- as mentioned, the victim was 13 years old when the robbery and rape occurred. He was robbed at gunpoint by 3 men of which the appellant was one, and was dragged into a house where he was raped by the appellant. The rape ordeal lasted approximately 15 minutes.
- [12] Upon returning home, the victim immediately told his mother what happened to him and they went to the local SAPS to lay charges.
- [13] The victim report further details the horrific impact that the crimes had on the young man. He gets scared easily, is anxious constantly and does not want to be alone. Following the crimes, the victim's performance at school was of such a detrimental nature that he failed grade 9. He lost interest in life, became suicidal and played truant. Unlike to his personality prior to the crimes, the victim became aggressive towards teachers, shouted at them and did not obey their instructions. His friends noticed the dramatic change in his behaviour, but he cannot share with them the cause thereof. The school that the victim is attending, is not aware of the crimes committed against the victim, and both the victim and his mother requested the probation officer to not inform the school, due to a fear of stigma. His attitude towards his mother has also changed significantly, where he was a respectful and obedient child prior to the crimes, he has become moody and undisciplined at home. The victim refused any counselling and persisted that he would deal with the trauma on his own.
- [14] It is clear to this Court that the crimes irrevocably changed a young boy's life in the worst way possible. He will live with the knowledge of the gruesome crimes and trauma, whilst attempting to solve it on his own.
- [15] The Court *a quo* noted the following when considering the appropriate

sentences and addressing the appellant:

"Needless to say you did not complete the rehabilitation program. Obviously your mother is very disappointed as to what had happened because according to her, initially you were a good young man until you started keeping bad friends.

It became so bad that she now describes you as a difficult unhygienic young man. So bad that she at times had to force you to wash and at some points she had to bathe you herself. She felt hopeless seeing you getting what was described; as being wasted and destroying your youthful years.

I note in the report that there is no sign of remorse from your side. Yes there are regrets it seems and that is also stated in the report but there is a difference, a vast difference between regretting what a person has done and for remorse for what a person has done.

You are a first offender and that will also be taken into account during your sentencing. At your age it is obviously expected that you behave differently and that you take responsibility for your actions. It is so that you pleaded guilty to the offence. but as indicated by the prosecutor, it appears that what 'forced you' to plead guilty is the fact that DNA proved that you were the person that in fact have anal intercourse with this young boy.

Therefore your guilty plea becomes a neutral factor at this stage. The crimes of which you were convicted is indeed very serious. One of robbery of a cell phone from a 13 year old and then thereafter raping him
"

- [16] The learned Magistrate proceeded In summarising the ramifications for the young victim and mentions duly that the child's life is destroyed. The learned

Magistrate further expressed the campaigns by the government spending millions of rands voicing their concerns about violence against women and children.

[17] The Court *a quo* proceeded to find that there are no substantial and compelling circumstances present which would place the Court in a position where a lesser sentence may be imposed

[18] In the matter of S v C 1996 (2) SACR 181 (C) the court on appeal from the Magistrates' Court aptly described the effect that rape has on its victims:

"Rape is regarded by society as one of the most heinous of crimes and rightly so. A rapist does not murder his victims, he, murders her self-respect and destroys her feeling of physical and mental integrity and security His monstrous deed often haunts his victim and subjects her to mental torment her the rest of her life - a fate often worse than loss of life. Serial rapists and murderers are regarded by society as inherently evil beings. They are the most feared and loathed criminals in our community. Society demands protection in the form of heavy and deterrent sentences from the courts against such atrocious crimes."

[19] In S v Malgas 2001 (1) SACR 469 (SCA) (2001 (2) SA 1222; [2001] 3 All SA 220; [2001] ZASCA 30) para 12 Marais JA states as follows:

'Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate Court is of course entitled to consider the question of sentence afresh In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate Court is at large. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence when the appellate Court would have imposed had it been the trial court is so marked that it can properly be described as startling. startling or disturbingly inappropriate.'

[20] It was submitted on behalf of the appellant that by sentencing the appellant to

an effective term of life imprisonment, the Court *a quo* erred in that it over-emphasised the seriousness of the offences which the appellant had committed as opposed to the interest of the society whilst the personal circumstances of the appellant were under emphasised. It was further submitted that in imposing such a lengthy period of imprisonment the sentencing court erred in imposing a sentence which is shockingly harsh and it induces . . a sense of shock.

- [21] I disagree. The legislature has intended the prescribed minimum sentencing to be a strong deterrent for committing crimes against vulnerable people. The only message that should be sent to the community is that the Court would not tolerate crimes such as rape of a minor, and that any perpetrator would face an imprisonment of life
- [22] The learned Magistrate in the Court *a quo* correctly analysed the evidence presented to him and I agree with the Court *a quo* that there are no substantial and compelling circumstances present which would warrant the Court to deviate from the statutory sentence for rape against a minor.
- [23] In my view the sentences imposed are proportionate to the offences committed.
- [24] I consequently make the following order.

The appeal against the sentence of the appellant is dismissed.

FMM SNYMAN
ACTING JUDGE OF THE HIGH COURT

I agree

MJ TEFFO

JUDGE OF THE HIGH COURT

DATE OF HEARING **21 August 2019**
DATE OF JUDGMENT **20 September 2019**

Appearances

For the appellant: **Adv S Moeng**

 Instructed by Legal-Aid South Africa

 Pretoria Justice Centre

For the respondent: **Adv M Molatudi**
 Instructed by the Director of Public Prosecutions,
 Pretoria