THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 89/16

Not reportable

In the matter between:

M. D. **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *D v The State* (89/16) [2016] ZASCA 123 (22 September 2016)

Coram: Maya DP, Tshiqi, Theron and Seriti JJA and Dlodlo AJA

Heard: 18 August 2016

Delivered: 22 September 2016

Summary: Criminal Law – Rape of daughter by biological father on two separate occasions on the same day – daughter falling pregnant – charged on two counts of rape in terms of section 51 of the Criminal Law Amendment Act 105 of 1997 – entered plea of guilty in terms of section 112(2) of the Criminal Procedure Act 51 of 1977 – convicted on two counts of rape – defect in charge sheet did not render the proceedings invalid – sentence of life imprisonment appropriate.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Pietermaritzburg (Nicholson, Bolton and Koen JJ, sitting as a court of appeal):

The appeal is dismissed.

JUDGMENT

Dlodlo AJA (Maya DP, Tshiqi, Theron and Seriti JJA concurring):

[1] On 22 October 2004 the appellant was charged on two counts of rape in the Stanger Regional Court. The charge sheet stated that the provisions of section 51 the Criminal Law Amendment Act 105 of 1997 (the Act) were applicable to both counts. It, however, did not state which provision of s 51 was applicable. The appellant pleaded guilty to both charges. He was convicted. The matter was referred to the KwaZulu-Natal Local Division, Durban, for sentence in terms of s 52(1)(a) of the Act. The high court, having satisfied itself that the appellant was correctly convicted and that the proceedings before the regional court were in accordance with justice, took count 1 and count 2 together for purposes of sentence and imposed a sentence of life imprisonment. On 14 November 2007 the high court granted leave to appeal against sentence only to the full court, KwaZulu-Natal, Pietermaritzburg. On 5 November 2009 the appeal was dismissed. The appellant now appeals against sentence, with the special leave of this court.

[2] In view of the fact that the matter was disposed of on a basis of a plea of guilty, facts surrounding the commission of these offences are

understandably scanty. However, as gathered from the statement in terms of s 112(2) of the Criminal Procedure Act 51 of 1977 (CPA) the following transpired. The appellant is the biological father of the complainant. She was then aged 16 years. On 2 December 2001 the appellant bought a bottle of wine and went to Stanger beach together with the complainant in order 'to cool ourselves off as it was very hot on that day.' The wine bought was consumed at the beach. The appellant then started touching and kissing the complainant who pushed him away. The appellant managed 'to grab her by the arms and pressed her onto the sand, took off her underwear, opened her legs apart and inserted' his penis in her vagina. After he raped her, they travelled home together in his car. On arrival, he 'instructed' the complainant to come to his room where he again undressed her and had sexual intercourse with her. The appellant stated categorically that the complainant had 'not consented to have sexual intercourse with me but had no choice as I had threatened her.' The complainant fell pregnant as a result of the rape and subsequently gave birth to a child whom the appellant supports.

[3] In this Court the sentence was attacked on two grounds. Firstly, that it was disproportionate to the circumstances of the offence, the interests of society and the personal circumstances of the appellant. Secondly, it was contended that the high court should have found substantial and compelling circumstances to have existed justifying it to deviate from the prescribed sentence. It was also contended that the high court misdirected itself by sentencing the appellant to life imprisonment in terms of section 51(1), read with Part 1 of Schedule 2 of the Act, since there were no allegations in the charge sheet which indicated which particular provision of s 51 of the Act was being invoked.

[4] The purpose of the act is described in *S v Malgas* [2001] ZASCA 30; 2001 (1) SACR 469 (SCA) para 7 as a measure aimed at dealing with an 'alarming burgeoning in the commission of crimes of the kind specified resulting in the government, the police, prosecutors and the courts constantly being exhorted to use their best efforts to stem the tide of criminality which threatened and continues to threaten to engulf society'. In *Malgas* it was made

clear that the court must be mindful of the fact that the legislature ordained life imprisonment or the particular prescribed period of imprisonment as the sentence which should be imposed. It was also added that the approach proposed did not mean that all other considerations were to be ignored, but that specified sentences were not to be departed from lightly and for flimsy reasons. See also *S v Matyityi* [2010] ZASCA 127; 2011 (1) SACR 40 (SCA) para 23.

[5] Section 51(1) of the Act reads as follows:

'Discretionary minimum sentences for certain serious offences

(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 offence referred to in Part I of Schedule 2 to imprisonment for life.'

Part I of Schedule 2 of the Act reads as follows:

'Rape as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 –

(a) when committed –

(i) in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice . . . '

[6] Section 51(1) of the Act read with Part 1 of Schedule 2 prescribes the imposition of life imprisonment in circumstances where the complainant was raped more than once, whether by the accused or by any co-perpetrator or an accomplice. The offence of rape does not fall within Part II of Schedule 2 of the Act. It was common cause that the complainant was raped more than once by the appellant. The question that arises is whether the defect in the charge sheet rendered the proceedings invalid.

[7] In *S v Legoa* [2002] ZASCA 122; 2003 (1) SACR 13 (SCA) Cameron JA stated that:

'[20] Under the common law it was therefore "desirable" that the charge-sheet should set out the facts the State intended to prove in order to bring the accused within an enhanced sentencing jurisdiction. It was not, however, essential. The Constitutional Court has emphasised that under the new constitutional dispensation, the criterion for a just criminal trial is "a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the

Constitution of the Republic of South Africa Act 108 of 1996 came into force". The Bill of Rights specifies that every accused has a right to a fair trial. This right, the Constitutional Court has said, is broader than the specific rights set out in the sub-sections of the Bill of Rights' criminal trial provision. One of those specific rights is "to be informed of the charge with sufficient detail to answer it". What the ability to "answer" a charge encompasses this case does not require us to determine. But under the constitutional dispensation it can certainly be no less desirable than under the common law that the facts the State intends to prove to increase sentencing jurisdiction under the 1997 statute should be clearly set out in the charge-sheet.'

[8] In *S v Ndlovu* [2002] ZASCA 144; 2003 (1) SACR 331 (SCA) this Court held that where the state intends to rely upon the sentencing regime created by the Act, a fair trial will generally demand that its intention be pertinently brought to the attention of the accused at the outset of the trial, if not in the charge-sheet then in some other form, so that the accused is placed in a position to properly appreciate in good time the charge that he or she faces as well as its possible consequences. According to this authority what will at least be required is that the accused be given sufficient notice of the state's intention to enable the accused to properly conduct his or her defence.'

[9] In *S v Kolea* [2012] ZASCA 199; 2013 (1) SACR 409 (SCA) the court held at para 18 that:

'The fact that the charge sheet had a defect which was never rectified in terms of Section 86 (1) . . . did not of its own render the proceedings invalid.'

The Court held further at paras 17 and 18 that the error in the charge sheet, by referring to Section 51(2) instead of 51(1) of the Act, did not render the proceedings invalid as far as the imposition of the life sentence was concerned. Based on these authorities, although the charge sheet did not specifically state that the applicable provisions were s 51(1) in this matter, that on its own did not render the proceedings in the present matter invalid. It sufficed that a reference to section 51 of the Act appeared on the charge sheet. The record of the proceedings also reveals that before the charges were put to the appellant, the State informed the court that it was relying on section 51 read with Part I of Schedule 2 of the Act. The magistrate enquired from the defence if the fact that the State relies on s 51 and schedule 2 of the

Act in circumstances where the victim was raped more than once, and the fact that the matter shall be referred to the high court for sentencing, were explained to the appellant. The defence confirmed that the appellant was fully aware of all this as the attorney had explained it to him. The appellant had been sufficiently warned of the charges he faced. This clearly satisfies the required standard of sufficient detail contained in Section 35(3)(a) of the Constitution.

[10] It remains to consider whether substantial and compelling circumstances were established. It was submitted on behalf of the appellant that the following factors were not accorded due weight: (a) The appellant was 40 years old; (b) He was married and was father to 5 children; (c) He was a first offender; (d) He drank alcohol prior to the commission of the offences; (e) He pleaded guilty.

[11] In *Malgas* this court pointed out that all factors traditionally taken into account in sentencing continue to play a role. The court stated further that the ultimate impact of all the circumstances relevant to sentencing must be measured against the 'composite yardstick' ('substantial and compelling') and must be such as cumulatively justify a departure from the sentence prescribed. It was explained in para 22 how a court in a particular case, can nevertheless deviate from the imposition of a prescribed sentence. Marais JA said:

'The greater the sense of unease a court feels about the imposition of a prescribed sentence, the greater its anxiety will be that it may be perpetrating an injustice. Once a court reaches the point where unease has hardened into a conviction that an injustice will be done, that can only be because it is satisfied that the circumstances of the particular case render the prescribed sentence unjust or, as some might prefer to put it, disproportionate to the crime, the criminal and the legitimate needs of society. If that is the result of a consideration of circumstances the court is entitled to characterise them as substantial and compelling and such as to justify the imposition of a lesser sentence.'

The appellant's personal circumstances do not constitute substantial and compelling circumstances.

[12] Having regard to the facts of this matter, there is no substance to the submission that because the appellant is a first offender and that he pleaded guilty, those are factors compelling to the conclusion that there were substantial and compelling circumstances. A plea of guilty is not necessarily indicative of remorse. His plea of guilty could have been motivated by the realisation that there was overwhelming evidence against him. That it was him who impregnated the complainant could easily be proved through DNA testing. In *Matyityi* this Court dealt with the question of whether a plea of guilty translates to genuine remorse. It held that whether the offender is sincerely remorseful and not simply feeling sorry for himself at having been caught, is a factual question. This court stated that 'It is to the surrounding actions of the accused rather than what he says in court that one should rather look.' At para 13 the Court explained that in order for the remorse to be a valid consideration, 'the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined'. *Matyityi* makes it clear that before a court can find that an accused person is genuinely remorseful, the court needs to have a proper appreciation of what motivated the accused to commit the deed and what has since provoked his or her change of heart. And in view of the seriousness of the offence and the fact that he raped and impregnated his own daughter, the mere fact that the appellant is a first offender does not constitute sufficient basis to deviate from minimum sentence. The mere fact that an accused person is a first offender, does not constitute sufficient basis for a finding that he is a good candidate for rehabilitation.

[13] It would be wrong to lose sight of the fact that the appellant failed to protect the complainant as her father. He turned into a molester himself. The offences he committed totally destroyed the natural father daughter relationship. In fact the family at large must have been engulfed in a shadow of shame. The complainant is now shamefully called mother of a child fathered by her own biological father. The psychological and emotional impact are often brought to light by the probation officer's report or any other pre-sentence report. This is of course lacking in the present matter. But the naked

truth is that being raped and impregnated by one's own biological father hardly needs investigation by probation officers in order to conclude that it is reprehensible and serious and must have caused the complainant psychological and emotional trauma.

[14] A sentence must be tailored to the seriousness of the crime committed and one expressing the natural indignation of ordinary citizens would compensate for the seriousness of the crime committed. An appropriate punishment is one which serves to protect not only appellant's female members of the family but other similarly vulnerable members of society. The fact that the complainant became pregnant as a direct result of the rape of which the appellant is guilty, also indicates that the latter probably did not even use a condom. This is an aggravating factor viewed from the perspective of the scourge of the HIV and Aids pandemic with which the whole world is grappling presently.

[15] Rape committed by close male relatives against victims related to them is prevalent. See, for an example, cases such as *S v Sikhipha* [2006] ZASCA 73; 2006 (2) SACR 439 (SCA); *S v Abrahams* 2002 (1) SACR 116 (SCA); and *S v PB* 2013 (2) SACR 533 (SCA). Courts are under a duty to punish such that this new tendency is contained. It is despicable behaviour that fathers totally turn their backs on what is their natural duty to ensure the safety of their daughters, and themselves pose a danger towards their own vulnerable children. Dealing with a similar incident in *S v Abrahams*, Cameron JA stated the following:

[17] 'Of all grievous violations of the family bond the case manifests, this is the most complex, since a parent, including a father, is indeed in a position of authority and command over a daughter. But it is a position to be exercised with reverence, in a daughter's best interest, and for her flowering as a human being. For a father to abuse that position to obtain forced sexual access to his daughter's body constitutes a deflowering in the most grievous and brutal sense.'

[b] 'Second, rape within the family has its own peculiarly reprehensible features, none of which subordinate it in the scale of abhorrence of other crimes.'

On the effect of incestuous rape the judge made the following important observation:

[c] 'Third and lastly, the fact that family rape generally also involves incest (I exclude foster and step-parents, and rapists further removed in family lineage from their victims) grievously complicates its damaging effects. At common law incest is still a crime. Deep social and religious inhibitions surround it and stigma attends it. What is grievous about incestuous rape is that it exploits and perverts the very bonds of love and trust that the family relation is meant to nurture.'

See also in this regard *Kwinda v The State* case number 076/14 [2014] ZASCA 136 (25 September 2014); *S v MDT* [2014] ZASCA 15; 2014 (2) SACR 630 (SCA). Child rape is a scourge that shames the nation.

[16] There is nothing out of the ordinary emanating from the personal circumstances of the appellant. It is an overstatement to say that the appellant was under the influence of alcohol. The appellant did not disclose this in his statement in terms of Section 112 (2) of the CPA. There is simply no evidence that the appellant was intoxicated or under the influence of alcohol to such an extent that it impaired his mental faculties and diminished his moral blameworthiness. I am not in the least persuaded that alcohol played a role at all in the commission of these offences.

[17] The high court correctly found that there were no substantial and compelling circumstances that justified a deviation from the prescribed sentence. In the circumstances, I would not interfere with the sentence imposed. The following order is accordingly made:

The appeal is dismissed.

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D DLODLO
ACTING JUDGE OF APPEAL

APPEARANCES:

For Appellant: P Marimothu

Instructed by:	Durban Justice Centre, Durban
	Bloemfontein Justice Centre, Bloemfontein
For Respondent:	K Essack
Instructed by:	The Director of Public Prosecutions,
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