

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: SS47/2006

DATE: 14 AUGUST 2008

In the matter of:

THE STATE

versus

SAMKELO MTSHISELWA

S E N T E N C E

MATOJANE, AJ:

[1] In imposing sentence the court takes into account the interests of the community in regard to retribution, rehabilitation, the imposition of deterrent sentences and the protection of society the personal circumstances of the accused.

[2] The accused is 37 years old, he was 33 at the time of the commission of the offence, he is married with four children. Two children are from a previous marriage. The children's ages are 20, 16, 14 and six years. He is a first offender. He has been in custody for the past four years since his arrest. He matriculated in 1992 and worked for Newlands Breweries and was earning R7 000

per month.

[3] The evidence of the complainant was that the accused, who is her biological father, came to her room at night while she was asleep, took off her nightie and panty, positioned her and proceeded to have sexual intercourse with her. When she tried to scream, the accused inserted his tongue in her mouth and squeezed her breasts. The intercourse was painful. She waited for the accused to leave for work before she could tell her mother. It was not for the first time that the accused had raped her.

[4] According to the evidence of the doctor who treated her the day after the rape, the finding of the red, swollen edges of the hymen and the deep, healed tears plus the large entrance into the vagina (25mm x 11mm) is compatible, in his opinion, with recent and past penetration by the penis, as alleged by the complainant. It is clear that the conduct of the accused was aimed at satisfying his perverted, incestuous lust and abuse of male power over a defenceless 11 year old child who looked to him for protection and fatherly love.

[5] The rights of children are enshrined in our Constitution. Section 28(1)(c) of the Constitution states:

"Every child has a right to be protected from maltreatment, neglect, abuse and degradation".

Section (1)(d) of the Constitution states:

"Every child has a right not to be required or permitted to work or provide services that are inappropriate for a child's age. Every child has a right not to have her wellbeing, education, physical or mental

health or spiritual, moral or social development placed at risk".

No information about the psychological and physical impact of rape of the minor child was placed before Court as the mother of the child relocated with her to the rural villages of the Transkei after the rape and they cannot be traced. The mother of the child must have endured deep pain at the accused's actions.

[6] From common sense the psychological trauma the complainant must have suffered is obvious. It is sad that the child may not receive the necessary help in the rural village where she is at the moment. I take all this into account in considering the question whether there are substantial and compelling circumstances. The interests of the community call out for conduct of this nature to be appropriately punished in order to reflect the revulsion that every decent member of society feels for such conduct.

[7] On the basis of the evidence I have set out I am now required to impose a sentence on the accused that takes into proper account the interest of society, the crime and the personal circumstances of the accused. I am acutely aware of the fact that offences like this in which minor children are raped are disturbingly commonplace and are self-evidently extremely serious. It numbs one's mind if it is the father who rapes his own minor child. I am unable to find any substantial and compelling circumstances that would justify a departure from the ordained sentence of life imprisonment. I also consider that life imprisonment is not an unjust sentence in the circumstances.

[8] The following order is made.

The accused is sentenced to life imprisonment.

MATOJANE, AJ