IN THE CAPE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

REPORTABLE **CASE NO: A622/2007**

In the matter between:

GODFREY HENRY DE BEER **Appellant**

and

THE STATE **Respondent**

JUDGMENT BY : **PJ NGEWU, AJ**
S DESAI, J Agrees and it is so ordered.
H J ERASMUS, J Agrees.

For the Appellant : Adv. J VAN DER BERG

Instructed by : Enslin Meyer Attorneys
18 Allegro Lane
Town Centre
Mitchell's Plain 7785
Ref: E F Meyer

For the Respondent : Adv. J VAN DER MERWE.

Instructed by : Director of Public Prosecution

Date(s) of hearing : Wednesday, 23 JULY 2008

Judgment delivered : Tuesday, 05 AUGUST 2008

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

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CASE NO: A622/2007

In the appeal of:

GODFREY HENRY DE BEER **Appellant**

vs

THE STATE **Respondent**

JUDGMENT: 05 AUGUST 2008

NGEWU, AJ:

[1] The appellant was arraigned in the Somerset-West regional court on a single charge of rape of a 10 year old girl. After conviction the matter was referred to this court for consideration of an appropriate sentence in terms of section 52(1) of the Criminal Law Amendment Act, 105 of 1997.

[2] Msimang AJ, as he then was, confirmed the conviction and proceeded to sentence the accused to the prescribed term of life imprisonment as the offence falls within the purview of Part 1 of Schedule 2 to the Criminal Law Amendment Act (i.e. rape committed where the victim is under the age of 16 years). He found there to be no substantial and compelling circumstances warranting deviation from the prescribed minimum sentence. The appellant subsequently applied for and was granted leave to appeal against both his conviction and sentence to the full Court.

[3] The appellant had pleaded not guilty to the charge and was legally represented throughout his trial by Ms Renchen. His defence was a bare denial of all the allegations against him. He only admitted being at the scene and further did not dispute the identity and the age of the complainant.

[4] The state led the evidence of the complainant, P.H., that of Ms Elizabeth Isaacs and Dr Blignault, who had examined the complainant and completed the J88 form. The appellant, in turn, testified in his own defence.

[5] Briefly, the evidence tendered for the state was that the complainant and her friends were playing next to the accused's shack. The friends went to the shop leaving her behind. The appellant approached from behind and grabbed the complainant. He placed a hand over her mouth to stop her from screaming. He dragged her to his shack and closed the door. He stripped her naked and threw her clothes into the corner of the shack. He undressed himself to the knee level. He had caused her to lie down and then inserted his penis into her vagina and made up and downward movements. She tried to scream but appellant already had the rope which he used to tie her mouth. She had attempted to escape when appellant reached for the rope but he dragged her back. Aunt Emma (i.e. Ms Elizabeth Isaacs) walked in and found appellant lying on top of her and pulled him off. Appellant attempted to flee but Ms Isaacs apprehended him. She then called the police. Complainant was taken to the hospital by the police officers. She knew the appellant very well. She had seen him at Aunt Emma's place.

[6] Ms Elizabeth Isaacs testified that she is also known as Aunt Emma. She knew the complainant as her deceased son went out with the complainant's mother. For five years, as at the date of the incident, complainant would visit her place everyday after school and she would give her something to eat. She also knew the appellant as he had stayed at her premises for a year prior to the incident. He had since had a shack at a corner nearby. On the 23 November 1998, the date of the incident, P.H. had visited her place after school as usual. She told her to wait for a while outside as she was still having a conversation with Mrs Martin. When the latter left P. was no more there and she looked for her. She then went to look for empty bottles in

the appellant's shack and saw appellant lying covered with a blanket. Appellant appeared shocked and she asked him why. The reaction of the appellant struck her as being very strange. She then saw a child's legs protruding under the appellant. She got shocked and pulled him away. She saw that the child was P.. She asked the appellant what he was doing and he responded that P. had come to him. He was half naked and P. was completely naked. She apprehended the appellant and asked her daughter to call the police who then arrested the appellant. She and the police officers took P. to hospital.

[7] Dr Blignault testified that she examined the complainant on the 23 November 1998 and completed the J88 form. Complainant presented with redness of the vestibule, redness in the hymen region and also redness of the labial membrane. Her hymen was not completely intact. She had a thick whitish discharge. It was her finding that the above was consistent with sexual assault or rape. The minor child had no infection.

[8] Appellant testified that he had drunk 4 bottles of Oom Tas wine that day and was drunk. He decided to go and sleep in his shack. At some point he went out to pass water. Mrs Isaacs came and was shocked to find him drunk in those premises as he was not supposed to be drunk there. She then told him that he had raped P.. He only then saw that P. was in his shack. Appellant knew P. as a child who frequented his neighbourhood and would play and mingle with other children in the area. There was no bad blood between the two of them.

[9] In convicting the appellant the court rejected his version as improbable and senseless. His evidence was fraught with many flaws and contradictions.

[10] The conviction is basically attacked on the following bases:

- The provisions of the Criminal Law Amendment Act were not invoked as per charge sheet and there is no indication that the appellant was informed of the potential life imprisonment;
- Mrs Isaacs made no mention of the rope being tied around the complainant's mouth;

- Doctor Blignault conceded that the injuries she noted could have been caused by means other than penetration;
- There was no blood present on the complainant after the incident and at best appellant should have been convicted of attempted rape or indecent assault;
- Complainant was a child and a single witness. It is not apparent that the court *a quo*considered the cautionary rules applicable;
- Complainant's evidence was not clear and satisfactory in all respects.

[11] From the reading of the judgment of the trial court, it is clear that in arriving at its decision, the cautionary rules were adopted and applied. It is further evident from the record that the court properly evaluated the evidence before it and considered both the states' and the defence versions. The conclusion arrived at accounts for all the evidence. Given the broader picture, criticisms levelled at the state's case are trivial and cannot be seen as advancing the defence case in any way.

[12] From the court record it is clear that the provisions of section 51 of the Criminal Law Amendment Act were not invoked. The accused was not alerted of the possible penal clause upon conviction throughout the proceedings. However, this omission alone cannot justify setting the conviction aside.

[13] Complainant testified that the appellant inserted his penis into her vagina and made up and downward movements. Mrs Isaac's version was that she found appellant on top of the complainant who was naked and removed him. Dr Blignault's findings were that the injuries the complainant sustained were consistent with rape. There was damage to the child's hymen. For a conviction on a charge of rape the slightest penetration is sufficient. For appellant to reach the hymen of the complainant he had to penetrate the female organ. That there was no blood on the complainant afterwards is of no consequence. There is no room for the contention that appellant should have been convicted on a lesser charge.

[14] This Court cannot fault the finding of the trial magistrate that the State had proved its case beyond reasonable doubt, nor that of the court below in

confirming the conviction. Accordingly, the appeal against the conviction must fail.

[15] As regards sentence, counsel for the state conceded during argument that the sentence of life imprisonment was excessive. Moreover, the appellant had not been alerted of the potential sentence. It is only after conviction that the magistrate brought to his attention that he lacked penal jurisdiction and was therefore referring the matter to the High Court for consideration of an appropriate sentence. In **S v Ndlovu 2003(1) SACR 331 (SCA)**Mpati, JA (as he then was), following the decision of Cameron, JA in **S v Legoa 2003(1) SACR 13 (SCA)**stated as follows:

> "***And I think it is implicit in these observations that where the state intends to rely upon the sentencing regime created by the Act a fair trial will generally demand that its attention pertinently be 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 appreciate properly in good time the charge that he faces as well as its possible consequences.***"
>
> See also **S v Makatu 2006(2) SACR 582 (SCA).**

[16] It is trite that section 51(2) read with Part 1 of Schedule 2 of the Criminal Law Amendment Act, renders the appellant, as a first offender, liable to life imprisonment unless there are substantial and compelling circumstances which justify the imposition of a lesser sentence. In arriving at a conclusion that there were no such circumstances, the court below rejected as irrelevant the mitigating factors that:

1. The appellant was a first offender,
2. he spent more than 2 years in custody awaiting trial

relying on the decision of **S v Malgas.**

[17] In my judgment, the Judge *a quo*misdirected himself in that regard. In **S v Malgas 2001(1) SACR 469 (SCA)**Marais, JA set out the criteria that

should be taken into account or ignored in deciding whether substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the prescribed one as follows:

- ***A court has to consider all the circumstances of the case, including the many factors traditionally taken into account by courts when sentencing offenders (i.e. both mitigating and aggravating factors)***
- ***For circumstances to qualify as substantial and compelling they need not be exceptional in the sense of seldom encountered or rare, nor are they limited to those that diminish the moral guilt of the offenders***
- ***Generally, the legislature aimed at ensuring a severe, standardized and consistent response from the courts unless there were, and could be seen to be, truly convincing reasons for a different response***
- ***In other words, the prescribed sentences are to be regarded as generally appropriate for the crimes specified and should not be departed from without weighty justification for doing so***
- ***Where the court is convinced, on a consideration of all the circumstances, that an injustice will be done if the minimum sentence is imposed, it is entitled to characterize the circumstances as substantial and compelling.***

Thus, the trial court is still vested with a discretion whether to apply or deviate from the minimum sentence prescribed.

[18] In this case the following can be noted as mitigating factors:

a) The appellant is a first offender
b) As at the time of the commission of the offence he was 43 years old, and has thus managed to lead a clean life
c) He is capable of rehabilitation
d) No excessive violence was used in the commission of the offence
e) The rape was not the most serious.

[19] The following are aggravating factors:

a) The appellant was well known to the complainant and was in a position of trust to her.
b) The appellant who was aged 43 raped a 10 year old girl.
c) The traumatic consequences of the offence may manifest later on in complainant's life.
d) Complainant had to attend counseling sessions.
e) By its nature, rape is a very serious offence.
f) Complainant was particularly vulnerable.

[20] From the above it is clear that aggravating factors far outweigh the mitigating factors. Be that as it may, this court is of the view that the following constitute substantial and compelling circumstances in this case:

- The appellant is a first offender at the age of 43.
- The likelihood that he would embark on similar crime is minimal.
- The rape was not complete.
- No real violence was applied to the minor child.
- Appellant spent more than 2 years in custody, awaiting trial.
- The appellant was not advised of the possibility of the sentence of life imprisonment.

[21] The interests of society demand that rapists be removed from free society. Having cumulatively taken into account all the relevant sentencing factors, it is the view of this court that a sentence of life imprisonment is exceedingly inappropriate. A sentence of 15 years imprisonment would send a strong deterrent message to the community.

[22] I would therefore make the following order:

The appeal against conviction is dismissed and the conviction is confirmed.
The appeal against sentence succeeds.
The sentence of life imprisonment is set aside and is substituted

with the following:

"The accused is sentenced to undergo 15 years imprisonment. In terms of section 282 of Act 51 of 1977 it is ordered that the sentence is backdated to 19 July 2001".

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PJ NGEWU, AJ

I agree and it is so ordered.

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S DESAI, J

I agree.

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HJ ERASMUS, J