IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: A709/10

DATE: 6 May 2011

In the matter between:

SIZWE SIPWAXA Appellant

and

THE STATE Respondent

JUDGMENT

CLEAVER, J

The appellant was found guilty of the rape of a girl of six years old in the Wynberg Regional Court on 19 March 2008. He was duly represented at the trial. His conviction brought into play the provisions of the Minimum Sentence Legislation, Act 105 of 1997, which were duly and very carefully considered by the Regional Magistrate. She came to the conclusion that substantial and compelling circumstances were present which justified the imposition of a lesser sentence and imposed a sentence of 18 years imprisonment.

Although counsel for the appellant and the respondent seemed to be under the impression that leave had been granted to the

appellant to appeal against both the conviction and the sentence it is apparent from the record that leave was granted to appeal only against the sentence, and this was pointed out to counsel this morning and they agreed that that was so.

The evidence presented by the State was that of the complainant, who was a girl of six years of age, as I said, when this incident occurred. The appellant was at the time the boyfriend of the mother of the complainant and ~~it seems that~> the three of them, that is the appellant, the mother of the complainant, and the complainant herself, seemed to have slept in the same bed. On the morning in question the mother left the appellant and the complainant in the bed, and it would seem that during the course of the morning the appellant drew the complainant onto his chest and committed a rape of the appellant.

The complainant was taken to a District Surgeon whose finding was that he could not examine her properly and that ~~he found~> he could not say whether any tears were present but he found some bruising around the vagina.

The Regional Magistrate had the benefit of a report from the probation officer, whose report was handed in and accepted by both the parties. From this it appears that the appellant was

then 32 years of age, ~~he~~ had become the father of ~~the~~ a child when he was 21, and he had moved from the Eastern Cape to Cape in 2000 and was employed on a part-time basis as a tiler in Wynberg at the time of the commission of the offence. At the time he was living with his three younger siblings in a shack and it would appear that he supported them. He earned about R700 per week and shared his income with his siblings, and also contributed to the support of his ten year old son. He is described as being very quiet and respectful towards the elderly, and a neighbour described him as being soft spoken and well behaved. They were all shocked to hear of the offence. He has no record of any previous convictions and completed only standard 8 at high school in Queenstown ~~only~~.

The information concerning the complainant, which was put before the Regional Magistrate was also in the form of a report from the ~~Correctional Supervision officer~~ – Probation Officer, and this revealed that the complainant did not communicate much with her at all. During the interview she played mostly with things in the interview room. According to her mother there were no visible signs of the impact of the crime on her daughter at all, although she did indicate to the probation officer that the complainant had started wetting the bed after the incident. She displayed no other outward behavioural problems and she also had been tested negative for HIV and

the probation officer informed the Court that while interviewing the victim it appeared that she remained physically unaffected by the incident.

Those were the factors which were placed before the Regional Magistrate.

Now I must say that I thought that the Regional Magistrate gave a very comprehensive judgment. She quite correctly referred to a number of cases dealing with the Minimum Sentence Legislation, and correctly, in my view, found that there were substantial and compelling circumstances which justified the imposition of a lesser sentence.

The issue before us is whether the submissions advanced on behalf of the appellant were such as to entitle us to interfere with the sentence which had been imposed. What was advanced on behalf of the appellant was that this was not a most serious crime, and that no weight had been attached to the possible rehabilitation of the appellant. I agree with the submission that this is not the most serious crime, and in fact ~~are~~ is very much in line with the circumstances in the judgment described in S v Vilakazi 2001(9) SACR 552. I highlight in particular the following which appears in paragraph 59 of the judgment:

"When viewed as a whole the only material feature that the evidence discloses as having aggravated what is inherently a serious crime was the complainant's age. Bearing in mind where the complainant's age fits in the range between infancy and 16 I do not think that her age by itself justifies what would otherwise have been a sentence of ten years imprisonment being raised to the maximum sentence permitted by law."

The same considerations apply in this case.

It is trite that an appeal court will not easily interfere with a sentence imposed by a lower court, and the test on appeal has been stated over and over again, that is that an appeal court will not interfere unless it is satisfied that the lower court did not exercise its discretion in imposing sentence correctly. One manner in which an appeal court will test whether that discretion has been properly exercised in order to consider whether there is a striking disparity between the sentence which it might impose or it would impose, and the sentence which was imposed in the court below.

In the current matter a sentence of 18 years is a very stiff sentence. I have no doubt that in today's climate a crime of

this nature must attract a sentence of imprisonment which is substantial, but the issue is whether 18 years is excessive. After careful consideration I am of the view that the sentence which was imposed is so strikingly different from that which this Court would impose that we are entitled to interfere.

In the circumstances the CONVICTION REMAINS, THE APPEAL AGAINST SENTENCE SUCCEEDS, the sentence imposed on the appellant is set aside and substituted with a SENTENCE OF 12 (TWELVE) YEARS IMPRISONMENT, that sentence is to be effective from the date of the previous sentence, which, unless I am mistaken, is 12 June 2008.

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CLEAVER, J

I agree,

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STEYN, J

/ds