

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER:

A224/2012

5 DATE:

10 AUGUST 2012

In the matter between:

DENVER KRUGER

Appellant

and

10 **THE STATE**

Respondent

J U D G M E N T

NYMAN, AJ:

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Introduction:

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The appellant Denver Kruger, was convicted of rape in the regional court held in Oudtshoorn on 20 July 2011. He was sentenced to life imprisonment on 21 July 2011. An application for leave to appeal against conviction and sentence was brought. Leave to appeal was granted only against the sentence. The appellant was represented by an attorney from the Legal Aid Board.

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Summary of salient evidence:

I will provide a summary of the circumstances in which the offence was committed as recorded in the trial court's judgment. The complainant is the biological daughter of the appellant and she was 14 years old at the time of the trial. During April 2008 when she was 12 years old her father was working at the Kunste Fees. That evening on her father's return from work, he told her to come and lie with him, which she did. During the evening while she was on the bed, she saw her father removing her pants and panty. Her father had sexual intercourse with her for the first time without her consent. He told her to go to sleep, but she could not because her vagina was burning.

The appellant told the complainant that she should not tell anyone about the incident otherwise he would hurt her. After the first incident there was another incident about four days thereafter. Some times when she was asleep and her father saw that she did not wake up he would hang on her and pull her feet. When she woke up he would tell her to go to the bathroom or to lie on the bed with him. The incidents occurred in the bedroom or in the bathroom. When the incidents occurred in the bathroom, the appellant would remove her panty, pick her up and put her on the wash basin with her legs

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open, and then have sexual intercourse with her.

The incidents happened every third or fourth evening and every time, the appellant would force her. He was sober some
5 times and sometimes he was drunk. The appellant would make certain that her grandmother was asleep before the incidents. On 23 September 2010 the last incident occurred. During the evening the appellant was sitting and drinking inside the house with his friends. After the appellant's friends had left, the
10 complainant was sleeping on the bed with her younger sister. When she woke up, she was lying at the end of the bed and the appellant was having sexual intercourse with her.

She scratched him against his back and bit him. He slapped
15 her in her face. She cried and the appellant told her that she must lie still. He only stopped when he heard a noise at the window. The complainant heard her mother knocking on the door, after which the appellant told her to quickly pull up her panty. The appellant opened the door to allow the
20 complainant's mother to enter the room. While the complainant was sitting on the bench her mother asked her why she was crying. She gave her mother a sign and told her that she would tell her everything the following day. This sign was her thumb between her two fingers.

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The following day was her mother's birthday and her paternal grandmother came to visit. The complainant then used the opportunity to tell her grandmother that she was going to visit her later. The complainant went to visit her grandmother and
5 she told her about the wrongs that her father had done to her. Her grandmother immediately took her to the police station whereupon the complainant made a statement. She was also taken to the hospital for examination.

10 Judgment of the trial court in respect of sentence:

The trial court introduced the reasons for the sentence by confirming that the appellant was found guilty of the charge of rape which occurred over a period from 2008 to 2010 and that
15 the victim in the case, is the appellant's biological daughter. The trial court confirmed that the objective of sentence is deterrence, retribution, prevention and rehabilitation. What had to be considered is the seriousness of the offence, the interest of the community, the personal circumstances of the
20 appellant and the interest of the minor child who is the victim in the matter.

The trial expressed its opinion on the seriousness of the offence in the following passages:

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“Wat die klagte van verkragting betref behoeft dit geen betoog, dit is ’n ernstige tipe misdryf. Ernstig in die sin dat die ’n minderjarige is en ook dat dit u eie biologiese dogter is. Dit word in ’n ernstige lig gesien. Die aanklaer
5 het die Hof toegesprek met betrekking tot die toeneem van hierdie tipe van misdrywe en dit is ook korrek. Vandaar die instelling van seksuele howe om hierdie tipe misdrywe so spoedig as moontlik mee te handel om die minste trauma vir vrouens en selfs kinders te verseker.
10 Hierdie voorkomsyfer van verkragting, dit was nie nodig dat ’n hof moet ingestel word nie. Dit blyk dan dit is duidelik dat die hoogty vier. Dit kom gereeld voor en vandaar ook dat hierdie hof die hof is wat die meeste verkragtingsake hanteer en vonnisse opleë. Verkragting is
15 die misdryf wat die mees algemeenste voorkom in hierdie gebied is, daar is nie ’n ander misdryf wat so algemeen voorkom in hierdie hof se gebied as verkragting nie. Aan die ander kant nie net verkragting nie, maar ook die afgelope tyd in hierdie maande waar minderjariges die slagoffers is waar minderjarige kinders verkrag word deur
20 hulle eie biologiese pa selfs stiefpa. Na hierdie saak moet die hof voortgaan om agt klagtes mee te hanteer wat nog ’n deelverhoor is waar ook ’n vader, ’n stiefpa of nadat hy bekend geraak het DNA bewys het dat hy nie
25 eintlik die wettige pa is van hierdie kind nie. Dit is hoe

dit gaan. Minderjariges kinders slagoffers waar vaders, stiefvaders die beskuldigdes is. Dit is so dat die hof moet daarteen waak om vir hom blind te staar net teen die misdryf en die voorkoms daarvan."

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In its assessment of the circumstances under which the offence occurred, the trial court commented that these circumstances were not rosy but constituted aggravating factors. The appellant, an adult male, had raped his own daughter over a period. During the absence of the mother from the home because she was working in Langebaan, the appellant acted as mother and father to his two daughters. Instead of protecting his daughter he committed the offence of rape against her.

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In its consideration of the impact of the offence on the complainant, the trial court commented that she had reached a stage in her life when she had told herself that enough is enough and that she could not continue any more with the abuse. During her testimony, the complainant became very emotional when she was asked how she felt. She testified that she had cried many evenings and she could not believe that her father had done that to her. It was her testimony that she still loved her father because he was her father.

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The trial court placed great stress on the need to send a clear message to the community that perpetrators of this kind of offence will receive a severe punishment. In the words of the trial court:

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“Dit is jong kinders, dit is u eie kind, u moet respek toon vir u kind.”

In respect of the physical injuries suffered by the complainant, the trial court referred to the testimony of the doctor who had examined her. The complainant's labia minora was swollen and her hymen showed two fresh tears. These tears, which were less than a week old, corroborated the complainant's version. It was clear that she had been abused. The trial court criticised the appellant's repeated denial of the charge, despite overwhelming evidence against him.

In the consideration of the appellant's personal circumstances, the trial court took into account the appellant's unemployment; that he had broken the law by selling alcohol, his previous convictions and that imprisonment was not new to him. The trial court confirmed that the minimum sentence of life imprisonment was applicable where the victim was below the age of 16 years except where there substantial and compelling circumstances present. With reference to S v Malgas the trial

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court emphasised that a court should not likely and on speculative grounds deviate from the minimum sentence.

It was the opinion of the trial court that in considering whether
5 substantial and compelling circumstances were present which justified a lesser sentence, the interest of the victim has to be considered. Important factors are that the victim is a minor and is the appellant's biological daughter. These factors also include the trauma that the complainant must have suffered
10 everyday at home. Additionally she suffered injuries as a result of the rape.

The trial court referred to the decisions of S v Blaauw, S v D
and S v Knightly wherein the horrific impact of rape on children
15 was spelt out. It also referred to the decisions of S v Matyityi and S v Baultain where a sentence of life imprisonment was imposed. The trial court did not find any mitigating factors to justify deviation from the minimum sentence of life imprisonment.

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Grounds of appeal:

The following grounds of appeal were submitted on behalf of the appellant:

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1. The complainant suffered no serious trauma which is clear from the fact that her schoolwork did not suffer.
2. The appellant has four children and he was in a stable relationship with the mother of his children for more than 13 years. The appellant was employed at various businesses since 1996. He maintained his four children and was the only breadwinner in the house hold.
3. The appellant left school in grade 3 and is illiterate. It has been considered potentially mitigating if the offender is unsophisticated.
4. The appellant has previous convictions but it is for minor offences such as malicious injury to property, crimen injuria and common assault. The appellant is therefore a good candidate for rehabilitation.
5. The appellant was incarcerated for a period of eight months as at the date of sentencing.
6. The complainant was not harmed physically in any way and did not suffer any long lasting trauma due to the incident.

7. In conclusion all the above factors taken into account constitute substantial and compelling circumstances which would allow the court to deviate from the prescribed minimum sentence of life imprisonment.

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The appeal decision:

Whether the above factors amount to substantial and compelling circumstances should be evaluated in the light of the Criminal Law Amendment Act, 105 of 1997, which prescribes a minimum sentence of imprisonment for life for rape. Subsection 51(3)(aa) stipulates that:

15 "When imposing a sentence in respect of the offence of rape the following shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence:

- (i) The complainant's previous sexual history;
- (ii) An apparent lack of physical injury to the complainant;
- (iii) An accused person's cultural or religious beliefs about rape or;
- (iv) Any relationship between the accused person and the complainant prior to the offence being committed."

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It is agreed law that I should follow the approach to minimum sentencing set out in the decision of S v Malgas where it was held that when a minimum sentence is applicable to an offence, the court must be conscious that the legislature ordained life imprisonment. Therefore, the minimum sentence should ordinarily be imposed except where there exist truly convincing reasons to justify a deviation. The prescribed specified sentence must not be departed from lightly and for flimsy reasons.

In considering an appropriate sentence on appeal regard must also be had for the settled principle that sentencing is a matter for the discretion of the trial court. A court of appeal may only interfere with the sentence imposed in instances where the trial court materially misdirected itself or where the sentence is shockingly inappropriate. See S v Pillay and S v Kruger. In the decision of S v Kruger the court confirmed that the elements and purposes of punishment are prevention, retribution, individual and general deterrence and rehabilitation.

I agree with the trial court's assessment of the seriousness of rape. This is in keeping with the decisions referred to by the trial court. Our courts have also decided that rape violates a

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plethora of women's fundamental rights. In F v Minister of Safety and Security and Others a recent decision made by the highest court of our land the court declared that:

5 "Ms F has a constitutional right to freedom and security
of the person provided for in Section 12(1) of the
Constitution. She also has the constitutional right to
have her inherent dignity respected and protected. This
and the right to freedom and security of the person are
10 implicated by the assault and rape which were
perpetrated against her person. Many men of our society
not unlike the policemen who raped Ms F continue to
force themselves on women and on girl children often
with impunity men forcibly violate women's bodies,
15 privacy, dignity and self worth, freedom and the right to
be treated with equal regard. In short rape of women and
children violates a cluster of interlinked fundamental
rights treasured by our Constitution. The threat of sexual
violence to women is indeed as pernicious as sexual
20 violence itself. It is said to go to the very core of the
subordination of women in society. It entrenches
patriarchy as it imperils the freedom and self
determination of women. It is deeply sad and
unacceptable that few of our women or girls dare to
25 venture into public spaces alone especially when it is

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dark and deserted. If official crime statistics are anything to go by, incidence of sexual violence against women, occur with alarming regularity. This is so despite the fact that our Constitution, national legislation, formations of civil society and communities across our country have all set their faces firmly against this horrendous invasion and indignity imposed on our women and girl children."

10 It is with poignancy that notice has to be taken that on the day when this judgment is handed down is the day after Women's Day. Close to two decades into our new constitutional democracy one more of many judgments is handed down in a case concerning violence against a girl child. Despite the gains that have been made there are still tremendous challenges to the advancement of women and children's rights. The two grounds of appeal to the affect that the complainant suffered no serious trauma or any long lasting trauma due to the incident, cannot be upheld in the light of Subsection 15 51(3)(aa)(ii) of Act 105 of 1997. In any event, the complainant suffered one of the worst forms of abuse. The abuse was perpetrated by her own father for more than two years: the complainant suffered rape every three to four nights.

25 Her testimony speaks of the real fear that she experienced

during this period at a time when ordinary young girls her age were soundly asleep in their beds at night while in the protective care of their parents, the complainant suffered the most horrific abuse at the hands of her father. The trial court
5 observed the emotional damage caused by the rape first-hand. The medical report records the physical damage caused by the rape. In my opinion the complainant will carry deep-seated emotional scars which will require therapy.

10 The violent acts committed against her got to the heart of the trust relationship that she had with her father. She bravely gave evidence against him. This disclosure is the beginning of the healing process, but it is only the beginning. I also dismiss the second ground of appeal in the light of Subsection
15 51(3)(aa)(iv) of Act 105 of 1997. In my opinion I find no reason to uphold the third ground of appeal. Illiteracy cannot be used as a mitigating factor in circumstances where the appellant knew that his actions were wrong and punishable in law. This is borne out by the fact that the appellant told his
20 common law wife that he did not want to confess to his crimes because he faced a possible 30 years in prison.

It is my view point that the appellant is not a good candidate for rehabilitation and therefore the fourth ground of appeal
25 cannot be upheld even though the appellant's previous
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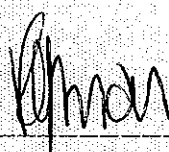
offences may be classified as minor offences, the nature of the offences speak to his violent streak and oppressive attitude towards the women in his life. When regard is had to the record of the proceedings, the uncontested evidence shows
5 the pattern of violence prevalent in the household in which the complainant lived. The appellant ruled his common law wife and children with an iron fist through verbal and physical abuse to such an extent that he spent time in prison for the assault on his common law wife. He furthermore beat the
10 complainant with a hosepipe.

In respect of the final ground of appeal, it is my opinion that the appellant's incarceration for a period of eight months as at date of sentencing cannot be proffered with any success as a
15 mitigating factor against sentence. During his period of incarceration, instead of using the opportunity to reflect on his ways and develop remorse for his wrongdoing, the appellant concocted ways of letting himself off the hook that included fabricating a written statement on behalf of the complainant. It
20 is my view point that the trial court did not materially misdirect itself nor is the sentence shockingly inappropriate. I find that the trial court did not err in the exercise of its discretion by imposing a sentence of life imprisonment.

25 The sentence is necessary to serve as deterrence to the
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unabated rape of children and women. The sentence does not induce a state of shock. It is the reprehensible nature of the appellant's conduct that induces a state of shock. In my opinion the punishment meets the crime. In the result I would

5 dismiss the appeal and confirm the sentence.



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R M NYMAN, AJ
ACTING JUDGE
OF THE HIGH COURT

15 I agree, it is so ordered the appeal against sentence is dismissed and the sentence of life imprisonment is confirmed.



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T NDITA, J
JUDGE OF THE HIGH COURT