IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A392/2012

DATE: 20 SEPTEMBER 2012

In the matter between:

JACOBUS FREDERICKS Appellant

and

THE STATE Respondent

J U D G M E N T

BOZALEK, J:

The appellant was convicted in the Bellville Regional Court on one count of murder and one count of contravening section 3 of Act 32 of 2007, by sexually penetrating his common law wife without her consent. He was sentenced to life imprisonment on the conviction of murder and 10 years direct imprisonment on the count of rape, the magistrate ordering that the sentences should not run concurrently. With the leave of the Magistrate the appellant now appeals against sentence, the main arguments being that the court erred in not finding the existence of substantial and compelling circumstances and in

over-emphasising the seriousness of the offences.

Briefly, the facts of this matter are that the appellant killed his common law wife by delivering two blows to her head with an axe as she lay in bed. This he did in front of the couple's three children, namely 10 year old twins, a 16 year old daughter, and a fourth child, the latter's friend. All of the children slept in the same room as the appellant and his wife although they were awake at the relevant time and the light was on.

Earlier that night the appellant had wanted to have sexual intercourse with the deceased but she had refused stating that the children were still awake as indeed they were. The appellant had nonetheless disregarded his wife's objections and had intercourse with her against her will. From the children who testified at the trial it would appear that the appellant's reason for killing the deceased, and probably for raping her, was that he suspected her of having an affair with another man. In terms of the provisions of the Criminal Law Amendment Act 105 of 1997, the appellant qualified for minimum sentences of life and 10 years imprisonment in respect of the murder and the rape convictions, respectively, unless substantial and compelling circumstances were found to exist. In the case of the murder the basis for the minimum

sentence was the fact that it was planned and or premeditated. This the evidence satisfactorily established. As far as the rape is concerned, in my view the magistrate erred in not finding that the circumstances of the rape and in particular the fact that the appellant and the deceased were in a long standing relationship, which was in all but name a marriage relationship, were substantial and compelling circumstances. The appellant's rape of his common law wife was a very serious offence but not one which, on its own, merited a sentence of 10 years imprisonment.

In addition the magistrate erred in law in ordering that the sentence on count 2 would not run concurrently with the life sentence. In terms of section 39(2)(a)(i) of the Correctional Services Act 111 of 1998 ("the Act") any determinate sentence of incarceration runs concurrently with a life sentence and thus the magistrate's order was incompetent.

As regards the sentence of life imprisonment, appellant's counsel relied on the remorse he had expressed for his actions. In truth, the appellant's few expressions of remorse appeared to be pro forma utterances and were completely belied by his actions both at the time that he killed his wife and in the four years or more between that time and when he was convicted. All the indications at the time of the murder

were that the appellant was quite happy at having accomplished what he had threatened and planned to do to the deceased. The appellant's disregard for the deceased's condition, the fact that he prevented his children from obtaining assistance for the deceased immediately after having dealt her the deadly blows, his almost complete failure to support his children over the next four years and his false account at the trial of how the deceased sustained her injuries all put it beyond any reasonable doubt that the appellant had no genuine remorse at all for what he had done.

I should add here that after dealing these deadly blows to his wife, the appellant left the house, this was in the early hours of the morning, and locked it behind him from outside. The result was that the children he left behind could not leave the house to obtain assistance for the deceased. The appellant left the house to deliver a letter to a friend apparently regarding him, the appellant, turning up late for work. It was only when he returned some time later that the house was opened up and the police arrived.

As a result of the factors which I have mentioned, it appears to me that the appellant's potential for rehabilitation is extremely limited. Furthermore, he has a long history of previous convictions involving violence, namely, five convictions for

assault with intent to do grievous bodily harm, over a period of 22 years. As far as his personal circumstances are concerned, the only possible mitigating factor was that the appellant was 53 years of age when he was convicted and sentenced and 49 years of age when he killed the deceased.

Given that in normal circumstances an offender must, in terms of section 73(6)(b)(iv) of the Act, serve at least 25 years of a sentence of life imprisonment before he or she can be considered for parole, a concern arose that the appellant would only be considered for parole when he reached the age of 78 years, which could well give rise to the argument that in these circumstances the sentence of life imprisonment constituted a cruel or unusual punishment. Such an eventuality has, however, been catered for by the provisions of subsection 6(b)(vi) of the Act, which provide that an offender who reaches the age of 65 years may be considered for parole provided that he or she has served at least 15 years of his or her sentence.

The effect of these provisions on the appellant are that he will not become eligible to be considered for parole until he is aged approximately 68 years and has served 15 years of the 25 year minimum portion of a life sentence. In my view this meets any perceived difficulty since, given the gruesome and

merciless nature of the killing and the appellant's complete lack of genuine remorse, it would be a gross injustice were he to serve anything less than a period of 15 years imprisonment notwithstanding that this will take him to the age of 68 years.

In the result, I would dismiss the appeal against sentence as far as count 1 is concerned but uphold the appeal in respect of count 2. Taking all relevant circumstances into account, I consider that a sentence of five years imprisonment in respect of count 2 would be appropriate. In the result I propose the following order:

a. The appeal against sentence on count 1 is dismissed.

b. The appeal against sentence on count 2 is upheld, that sentence being set aside as well as the order that it will not run concurrently with the sentence of count 1, and is replaced with a sentence of five years imprisonment.

BOZALEK, J

I agree.

OLIVIER, AJ

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