

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

CASE NO.: A492/13

In the matter between

L P

Appellant

versus

THE STATE

Respondent

JUDGMENT DELIVERED: 7 FEBRUARY 2014

SAMELA, J

[1] The Appellant was charged with two counts, Ad count 1, for contravening Section 3 of Act 32 of 2007, and Ad count 2, Common Law Crime of Rape.

[2] The Appellant pleaded not guilty on both counts. After evidence was led he was found guilty of contravening Section 12 of the Sexual Offences and Related Matters Act 32 of 2007 (incest). He was sentenced to 6 years imprisonment. He now appeals to this court against the sentence only.

Legal Principles

[3] Section 12 of the Sexual Offences and Related Matters Act 32 of 2007 provides:

“12 Incest.

[1] Persons who may not lawfully marry each other on account of consanguinity, affinity or an adoptive relationship and who unlawfully and intentionally engage in an act of sexual penetration with each other, are, despite their mutual consent to engage in such act, guilty of the offence of incest.

[2] For the purposes of subsection (1)-

(a) the prohibited degrees of consanguinity (blood relationship) are the following:

- (i) Ascendants and descendants in the direct line; or
- (ii) Collaterals, if either of them is related to their common ancestor in the first degree of descent;

[4] Mr Sebueng on Appellant’s behalf argued that the court a quo erred in not taking into account the following factors when sentencing the Appellant:

- (i) by over-emphasizing the offence over the Appellant’s circumstances, consequently, failed to properly balance the interests of the community, the nature of the offence and the offender;
- (ii) failed to attach proper weight to the Appellant’s personal circumstances;
- (iii) the Complainant played a role in the commission of the crime of incest in that she willingly kept on going back to the Appellant’s place of residence and both indulged in sexual activities;
- (iv) there was no evidence in court of the actual effects of this crime (incest);

(v) the Appellant had showed true remorse when he testified on mitigation of the sentence; and

(vi) the sentence imposed on the Appellant clearly lacked a blend of mercy and that the Appellant was punished to a point of being broken, given the circumstances in this case.

[5] Mr Swart argued on behalf of the prosecution that the court a quo accorded due weight to all factors raised by the defence. He submitted further that the appeal against the sentence should be dismissed.

[6] In *DPP v Prins (Minister of Justice and Constitutional Development & two amici curiae intervening)* (369/12)[2012] 106 ZASCA (15 June 2012), the court said:

“No judicial officer sitting in South Africa today is unaware of the extent of sexual violence in this country and the way in which it deprives so many women and children of their right to dignity and bodily integrity and, in the case of children, the right to be children; to grow up in innocence and, as they grow older, to awaken to the maturity and joy of full humanity. The rights to dignity and bodily integrity are fundamental to our humanity and should be respected for that reason alone. It is a sad reflection on our world, and societies such as our own, that women and children have been abused and that such abuse continues, so that their rights require legal protection by way of international conventions and domestic laws, as South Africa has done in various provisions of our Constitution and in the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the Act)”.

I fully agree with the comments made by the court above.

Factual Background

[7] From the Record of the Regional Magistrate, the following factors are clear:

- (a) the Complainant loved having a father figure in her life;
- (b) the Appellant had asked the Complainant via SMS which he sent to her:

“ - - - if she could sleep with him and have sexual intercourse, and then she [I] said no”, and said further:

“ - - - what if I buy you few ciders to calm your nerves . . .”;

- (c) the Complainant testified that the Appellant forcefully had sexual intercourse with her for the first time one Friday in December 2007 when she came from a social outings with her friends and came home drunk, fell asleep, and woke up with the Appellant on top of her;

- (d) the Complainant testified inter alia:

“ - - - I felt disgusted, I felt violated, to think that I have trusted , I trusted my own father after 18 years, after he came to me and asked me to give him a chance to be in my life, . . . (crying). I never went to him, I never asked him to be a part of my life of 18 years, and I accepted the fact that he is not part of my life. He is suppose to be the man, the man that I am suppose to run to as to protect me. Do stuff that human beings do not do stuff like that, man. It is uncivilised, there is no words to describe what, it is sick! It is sick. Sick do not even describe it;

- - -I felt violated by my own father, disgusted, I felt dirty. And I did not want my family to see that I actually feel that way. Because I felt that I could deal with it on my own;

- - - I asked him to stay out of my life, I told him that I do not need a father not if he could do something like that to me. Not if he could rape

me and then he said that, - - - he would not stay out of my life until he destroyed it. And what he meant was that he would send SMSs to my friends and family telling them that I actually agreed to sleep with him;

- - - I did not know how my family and friends would react and that is the reason why I did not tell them in the first place. And I could not live with my family rejecting me, that was what I thought would happen;

- - - Even though, my father had sent the messages to my family, that wasn't the only reason why I feared, - - - my father always said that, I will never get him out of my life. He will make sure that he destroys my life. And I was afraid of him. He took away my, my power, he took away my self-confidence, he took away everything and I feared him. I was afraid of him. I was afraid of what he was capable of. He threatened my life as well. He told me many times that he would kill me and then he will take his own life as well." (my own emphasis).

(e) The Appellant testified inter alia:

"- - - It didn't feel like I kissed my daughter and her response was that it didn't feel like she is kissing her father either;

- - - We had intercourse every weekend after the first time, we had intercourse every weekend. And I say the weekend, I am talking about from the Friday till the Sunday;

- - - Behind closed doors we were sort of dating and I say sort of because we were lovers".

[8] I may add the following which were common cause:

- (i) the Complainant is the Appellant's biological daughter. The Appellant denied this and only accepted it when paternity test results were presented in court;
- (ii) the sexual relationship between Complainant and Appellant commenced in December 2007 until the Complainant laid a charge against the Appellant in 2010;
- (iii) the Complainant and Appellant communicated via Mxit;
- (iv) sexual intercourse occurred on many occasions at the Appellant's house;
- (v) the Complainant did not tell anyone about the sex with her father;
- (vi) Appellant paid maintenance for the Complainant, he stopped and consequently was imprisoned;
- (vii) Appellant threatened to send an SMS message to her family and colleagues which read: "I was sleeping with my father and that I am a father fuck".
- (viii) Complainant attempted to commit suicide on two occasions, 1st by using a belt offered by Appellant and had lost consciousness in the process, and when she took a lot of tablets and was helped by a doctor.

Discussion

[9] The Appellant instead of restoring his "father figure" to the Complainant he abused his position by preying on her while he ought to have set an example to his child. He destroyed the trust between a parent and a child. He deprived the Complainant the right to her dignity, bodily integrity, the awakening to the maturity, joy of full humanity, and responsibility The big age

difference should have rung a bell to him that the Complainant looked up to him to show her the right direction in life. He had sexual intercourse with the Complainant over numerous occasions over a period of ± 3 years. He indeed had sufficient time to come to his senses. He treated the Complainant with contempt, disrespect and disgust. The manner he handled the Complainant's suicide attempt was callous in that he offered her a belt to hang herself with. He sent SMS messages to the Complainant's family and friends describing her as " - - - a father fuck".

[10] The systemic abuse of women, children and elderly persons in South Africa has reached an astronomical level. A loud and a clear message should be sent to the community that this disgusting conduct by a father will never, ever be tolerated by our courts.

[11] The Appellant had surely suffered emotional distress and probably will also have emotional challenges/problems in future. I have no doubt in my mind that the scar that she received from her father's treatment will be an indelible mark in her life. I am of the view that she should undergo counselling which will assist her to cope with such scar in her life. The incidents will always come back to haunt her, however, I hope that once she received counselling, the damage will not be great. Externally, she might look alright, but inside her, I believe she is damaged.

[12] It is easy for us to adopt an arm chair critic approach by asking why she went back to her father again and again. That approach begs an important consideration, namely, the effect of trauma she experienced during the unfortunate period of sexual abuse. We should not lose sight of the fact that the Complainant testified that she was scared of the Appellant. Above all, the Appellant had threatened to take her life as well as his.

[13] Equally, the Appellant should undergo prison programme/s that deals with anger and vengeance. This would assist him to cope with the unfortunate, disgusting conduct, and that he should not revenge himself against the Complainant when he comes out of prison.

[14] Although she was a “consenting participant”, it was the Appellant’s responsibility as her father to take steps to prevent such a situation from arising and continuing. The Appellant was not remorseful at all as he pleaded not guilty and denied paternity of the Complainant until paternity test was done and presented in court. He knew that the Complainant was his child as he paid maintenance for her.

[15] The imposition of an appropriate sentence falls entirely within the discretion of the trial court. Unless the trial court has misdirected itself, which misdirection should appear *ex facie* the record, a court of appeal would not lightly interfere with the sentence imposed by the trial court. See ***R v Dhlumayo and Another*** 1948 (2) SA 677 (A). In the present case, there is no misdirection and the sentence cannot be regarded as shockingly inappropriate. In all the circumstances, I believe that the Magistrate was fair in sentencing the Appellant. The sentence, therefore, does not appear to be shockingly inappropriate to the extent that it warrants interference.

Order

[16] I would propose the following order:

The appeal is dismissed. The conviction and sentence are confirmed.

SAMELA J

I agree and it is so ordered.

FOURIE J