IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NUMBER: A447/2015

DATE: 9 SEPTEMBER 2016

In the matter between:

M B Appellant

and

THE STATE Respondent

J U D G M E N T

BOQWANA, J:

The appellant was convicted of rape of his 9 year old daughter by the Khayelitsha Regional Court and sentenced to life imprisonment on 20 August 2015. He had pleaded not guilty to the charge but later made formal submissions in terms of s220 of the Criminal Procedure Act, 51 of 1977 effectively admitting to all the elements of the crime. In view of these admissions witnesses were not called, a J88 and the child's birth certificate were handed in and he was convicted on the strength of his admissions. He has exercised his automatic right of appeal.

The conviction arose from an incident that took place on 16 November 2013 at Mandela Park in Khayelitsha. The appellant states in his admissions that on the day of the incident the complainant's mother was not at home. He was left alone with the complainant and her four year old sister. The three of them all slept on the same bed. While the complainant was asleep, the appellant undressed her and inserted his penis in her vagina. The complainant told him it was painful and he immediately stopped what he was doing. He further states that on a previous occasion he indicated that he would not plead guilty but his conscience did not allow him to subject his child to secondary traumatisation by testifying in court. In the J88 the doctor stated that there were external injuries and that the child was withdrawn and quiet. He concluded that the child had clinical findings that were in keeping with previous attempt to penetrate her vagina with a blunt object. The Magistrate held that because the doctor was not called to clarify his findings, she would not put much emphasis on the J88.

Having considered the record of the proceedings and the admissions, I am satisfied that the appellant was convicted correctly.

As regards sentence, it is submitted on behalf of the appellant that the Magistrate misdirected herself, firstly, by finding that

no substantial and compelling circumstances existed to deviate from the prescribed minimum sentence even though the appellant was regarded as a first offender for the purposes of sentence, was kept in custody for the duration of the trial for 1 year 9 months and had admitted to all the elements of the crime. Secondly, by finding that the interest of the child and the society outweighed the personal circumstances of the appellant.

The State also submitted that the sentence is disproportionate and the appeal must be upheld, the State however retracted that position during oral argument. In any event, the Court is not bound by the State's concession. It is entitled to make its own findings based on what it deems just and appropriate in the circumstances.

In Director of Public Prosecutions v Thabethe 2011 (2) SACR (SCA) at para 16 the Court held thus:

> "As far as back as 1997 the late Mohamed, CJ described rape in S v Chapman [1997] ZASCA 45; 1997 (2) SACR 3 (SCA) at 5b as follows: 'rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim.

The rights to dignity, to privacy and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilisation'.

It is regrettable that notwithstanding this observation the rate of rape in the country has reached pandemic proportions. It is no exaggeration to say that the rape has become a scourge or a cancer that threatens to destroy both the moral and social fabric of our society.

What is more disturbing is the emergence of a trend of rapes involving young children which is becoming endemic. A day hardly passes without a report of such egregious incidents. Public demonstration by concerned members of the society condemning such acts has become a common feature of our every day news through the media. In many instances such young, defenceless and vulnerable girls are raped by close relatives, like in this case, a person whom she looked upon as a father. Cameron, JA describes this kind of rape as follows in S v Abrahams 2002 (1) SACR 116 (SCA) para 17 as follows: '...of all the grievous violations of the family bond the case manifests, this is the most complex, since a parent, including a father, is indeed in a position of authority in command over a daughter. But it is a position to be

exercised with reverence, in a daughter's best interest, and for her flowering as a human being. For a father to abuse that position to obtain forced sexual access to his daughter's body constitutes a deflowering in the most grievous and brutal sense. That is what occurred here, and it constituted an egregious and aggravating feature of the accused's attack upon his daughter".

Ms Kuun submitted that the appellate Court's powers are not fettered to reconsider the issue of a disproportionate sentence. In the alternative she referred us to a number of cases which she argued had similar facts where the sentence imposed was found to be shocking or startling. It has become common to cite this line of cases. While it may be useful to look at how other cases treated sentencing, it must be remembered that the sentencing depends on the circumstances of a particular case and lies within the discretion of a trial court. As it was held in the often quoted case of S v Malgas 2001 (1) SACR 469 (SCA) at 478D-E:

"...A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial Court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be usurp the

sentencing discretion of the trial Court….”

With regard to the personal circumstances of the appellant, the following are relevant. He is a first offender. He originates from Genadendal in the Western Cape. He was 44 years old at the time of sentencing. He grew up with his parents before leaving them for Cape Town in search for job opportunities. He is married to the complainant’s mother having met her in 2003. The couple have two children and the complainant is the older of the two. He was working as a security officer when the incident happened and reported to have been the breadwinner. He left school in Grade 9.

A victim impact report was submitted. In S v Matyityi 2011 (1) SACR 40 (SCA) paras 16 and 17, the Supreme Court of Appeal emphasised the importance of accommodating the victim during the sentence process. It is conveyed in the report that from the psychological impact point of view, the complainant’s mother reported that ever since the incident, the complainant would scold her younger sister when she is not wearing a panty at home; her mental health and that of her mother appear to be good; the family was in shock about what happened but there were no conflicts. The family has kept the matter private from the community to avoid gossip. According to the social worker the victim is coping well and does not

show signs of traumatic stress. She was however shy to talk about the incident but did speak out. She did not want her mother to leave the interview room when she was talking about the incident. The complainant had only been to one counselling session before the interview but the social worker re-referred her and the mother for more sessions.

Something disturbing is revealed in the report although I cannot dwell on it as it was not led in evidence. The child told the social worker that it was not the first time that the father raped her, even on the previous occasion her mother had left her with the appellant she told the social worker that when the incident of 16 November 2013 happened. The appellant undressed himself; he took off her panties and raped her. She cried and the younger sister woke up and that is when the appellant stopped. Rape of a daughter by her father is appallingly ghastly. A daughter shares a close bond with a father. He is the man she should look up to for nurturing and for him to provide her with security, dignity, stability and protection.

In this case it was reported that the complainant was close to her father and by raping her he had betrayed her trust.

His wife also trusted him, as she should because he is the

father of the child, by leaving him with the children, not knowing that she was giving him an opportunity to violate one of them. It must be a horrifying experience for a child to be raped by her father inside her home, whilst sleeping on the same bed, who ought to be her number one protector and shield from criminals and thugs.

The act of rape by itself is heinous but it is more dreadful when a person the child is expected to run to is the one who betrays the trust by breaking her right to dignity in the privacy of their home. Where should children go if they cannot be safe in their own home? What precautions can anyone take when they are inside their home?

These offences happen all too frequently in our communities. Our courts hear these matters ever so often. What is becoming of our society where adults attack defenceless children who are in subservient positions, stripping them of their innocence? A tendency has developed where it is often argued that rapes that do not involve physical injuries or that did not involve violence or where no apparent emotional scars are shown is less heinous. Sight is lost to the fact that even though no violence is used to threaten the victim, like in this case, a child would often relent because the person committing the act on her is in a position of authority. Thus, the argument

that circumstances under which the rape occurred, such as those in this case, must favour the appellant because it is less heinous must be rejected. To the contrary, they are more horrendous.

Although the victim impact report may appear not to note any serious psychological impact, the fact that the complainant shouts at her sister when she is not wearing a panty at home since the incident occurred, indicates how she was affected by the ordeal, to the point that she feared that her younger sister might also be vulnerable at home. It must be accepted that this horrifying experience would have deep and lasting psychological scars for the complainant. She was robbed of her innocence at a very young age in a cruel manner. While she was reportedly coping, she was shy to talk about the incident. An assumption cannot be made that she was left less unscathed emotionally. See S v GN 2010 (1) SACR 93 (T).

Minimum sentences were introduced for a reason. The legislature ordained life imprisonment for the rape of young children. As has been stated by our Courts many times, following S v Malgas, the prescribed minimum sentences should ordinarily and in the absence of weighty justification, be imposed. The Court may impose a lesser sentence if on consideration of circumstances of the particular case, it is satisfied that they render the prescribed sentence unjust in

that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence. In my view the cumulative effect of the personal circumstances of the appellant, including that he is a first offender, are far outweighed by the gravity and the circumstances of the offence. I therefore agree with the conclusion of the Regional Court that substantial and compelling circumstances are not present to justify a departure from the prescribed minimum sentence. The appellant has made himself guilty of a very serious crime and he must face the consequences. Perpetrators need to be held responsible for their deeds, if this scourge is to be fought. Such offences should never reach a level where they are accepted as normal in our society. For those reasons, **I AM OF THE VIEW THAT THE APPEAL SHOULD FAIL.**

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BOQWANA, J

I agree and it is so ordered.

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LE GRANGE, J