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

CASE NO: A257/2022

In the matter between:

WILLEM MATROOS Appellant

and

THE STATE Respondent

Coram: Justice J Cloete *et* Acting Justice E Grobbelaar

Date of Appeal: 24 February 2023

Delivered electronically: 27 February 2023

JUDGMENT

CLOETE J:

[1] On 26 April 2022 the appellant, who pleaded not guilty and denied any knowledge of the incident, was convicted in the Oudtshoorn Regional Court on one count of the rape of his intellectually impaired daughter, and sentenced to life imprisonment on 13 June 2022. He appeals only against sentence by exercising his automatic right of appeal in terms of s 309(1)(a) of the Criminal Procedure Act 51 of 1977.

[2] Given availability constraints currently experienced by the parties' legal representatives, it was agreed that the appeal be determined on the papers and heads of argument filed. Condonation is also granted for the late filing of the appellant's heads of argument (counsel for the respondent did not oppose the condonation sought).

[3] The proven facts may be summarised as follows. At the time of the incident the complainant lived with the appellant and her brother (her mother had passed away in 2019). On 31 August 2020 a relative by marriage, Ms S[...] H[...] who lived across the road, was told something disturbing about the complainant by a friend of her daughter's.

[4] This caused Ms H[...] to call the complainant to her home and upon examining her, she immediately suspected that the complainant was pregnant. She took the complainant to the girl's aunt, M[...], and thereafter they went together to another of her aunts, M[...]. After also examining the complainant these two women arrived at the same conclusion. M[...] asked the complainant who had done this to her and she tearfully responded that it was the appellant. They immediately took her to the police station, whereafter she was taken to Bridgton Clinic. Upon examination by a staff sister it was confirmed that the complainant was 17 weeks pregnant.

[5] With the intervention and assistance of a social worker the pregnancy was terminated a week later by Dr Heather Ray at the George Provincial Hospital. Forensic analyst Warrant Officer Fransonette Slabbert performed a DNA analysis of samples taken from the foetus, complainant and appellant and concluded that it was a 99.99% probability that the appellant was the biological father.

[6] The complainant was assessed by clinical psychologist Colonel Kirsten Clark on 6 October 2020. She confirmed the complainant's previous diagnosis at birth of fetal alcohol syndrome. Colonel Clark also found the complainant to be functioning within the range of moderate intellectual impairment with an estimated mental age of between 6 and 9 years. In her professional opinion the complainant could not lawfully have consented to sexual intercourse and was also not competent to testify.

[7] A conviction of this nature attracts a minimum sentence of life imprisonment in terms of s 51(1) read with Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 unless the court is satisfied that substantial and compelling circumstances exist to justify the imposition of a lesser sentence. The appellant did not testify in mitigation but his legal representative addressed the court *ex parte* on his behalf. The trial court gave a careful and fully reasoned judgment (which need not be repeated, save for certain aspects highlighted below) and concluded that no such circumstances existed.

[8] The appellant's grounds of appeal are essentially three-fold. The first is that his personal circumstances, taken cumulatively, constituted substantial and compelling ones. These were listed as follows. He was 57 years old at date of commission of the offence and 58 years old at the time of being sentenced. He had been married to the complainant's mother for 20 years prior to her passing away. He has two children including the complainant (although according to the correctional supervision report he has four children). He takes chronic medication. At the time of the incident he was unemployed. The complainant's mother had been unemployed and he took care of her. He had been in custody when arrested on the charge and his possessions were destroyed. The case was previously withdrawn and he had been on warning awaiting the finalisation of the matter which commenced on 25 January 2022. He left school at primary level. He is a first offender for this type of offence (although it is noted that he has a total of 14 previous convictions spanning the period 1979 to 2013 of which 5 involved elements of violence).

[9] Secondly, it was submitted that the trial court failed to take into account that *'this was not the worst kind of rape and the complainant had not sustained serious physical injuries as in other rape cases, nor was there evidence led to indicate that the complainant was raped numerous times'* (reliance was placed on *S v S M M* 2013 (2) SACR 292 (SCA) at para [26]). It was further submitted that although the complainant was *'inevitably traumatised… there is only some thin evidence in which to measure the emotional impact of the crime upon the victim'.* It was however acknowledged on behalf of the appellant that this was due to the complainant's intellectual disability.

[10] Thirdly, it was submitted that there is no indication that the offence was premeditated nor any evidence that the appellant had threatened or used violence in the commission of the offence. No pre-sentence report was obtained to indicate that the appellant was a sexual predator or has poor prospects of rehabilitation which require him to be removed *'permanently'* from society. The latter submissions also relate to the proportionality enquiry (*S v Malgas* 2001 (1) SACR 469 (SCA) at paras [22] to [25]; *S v Dodo* 2001 (1) SACR 594 (CC) at para [40]; *S v Vilakazi* 2009 (1) SACR 552 (SCA) at para [58]).

[11] On the other hand the respondent submitted that the trial court, in considering the totality of the appellant's personal circumstances, was correct in finding that they had to recede into the background when weighed against the gravity of the offence: *Vilakazi* at para [58]. It was further submitted that this was a very serious and heinous crime. The appellant was in a position of trust which he abused. He is the complainant's father and was supposed to take of and protect her. She was an easy target and completely defenceless against him, particularly given her intellectual age and impairment. The fact that he did not even bother to use protection, and impregnated her which led to her having an abortion, is even more reprehensible.

[12] It was also submitted that the appellant's contentions about *'not the worst kind of rape'* and the lack of evidence pertaining to her physical and emotional trauma lack substance, given that an apparent lack of physical injury is expressly excluded by the legislature as a substantial and compelling circumstance in terms of s 51(3)(aA)(ii) of the Criminal Law Amendment Act, as well as observations made in cases such as *S v M* 2007 (2) SACR (W) at para [99] that *'the responses of rape survivors are surely as complex and multi-layered as are the individuals who experience rape'*.

[13] Having considered the totality of the evidence and the parties' respective submissions, it is my view that the sentence imposed by the trial court cannot be faulted. I say this for the following principal reasons.

[14] The complainant was to all intents and purposes a young child. She had lost her primary attachment figure less than a year before the rape and would thus have

been even more emotionally and psychologically dependent on the appellant. Given his flat denial of any involvement, and the fact that the pregnancy was only discovered, and the rape revealed, 17 weeks later, coupled with the complainant's intellectual impairment, there is no basis from which an inference can be drawn that there was no physical injury to her, or that she was not threatened or subjected to some form of violence. At best for the appellant this is therefore a neutral factor and the findings of the Supreme Court of Appeal in *S v M M* in relation to how s 51(3)(aA)(ii) is to be interpreted do not come into play. It is also an aggravating feature that the complainant would have had to endure continuing to reside under the same roof as the appellant for that 17-week period (she was removed from his care as soon as the rape was revealed).

[15] It was common cause during the trial that such is the complainant's impairment that she was unable to express how she felt about the rape other than to produce a simple drawing. Although the copy in the record is of poor quality it appears to be a stick-like figure with a sad face. Having regard to the observations of our courts in relation to the effects of rape on a victim, there is similarly no basis from which an inference can be drawn that the consequences to the complainant are not severe and long-term. The inability of the complainant to express the trauma experienced by her may well in itself be an aggravating factor, which will complicate the therapeutic process ordered by the trial court.

[16] It is so that the appellant was 58 years old at the time he was sentenced, but this is merely one of the factors which the trial court had to consider, and it would be sending out a completely wrong message if courts were to be lenient towards older offenders purely on that basis. In *S v J A* 2017 (2) SACR 143 (NCK) the appellant was 59 years of age when he was sentenced in the High Court to life imprisonment for the rape of his 12-year old daughter. On appeal to the full court it was contended, *inter alia*, that his advanced age should have been considered a mitigating factor since he would only become eligible for parole no sooner than the age of 74, and possibly, only when he reached the age of 84 (in terms of s 73 of the Correctional Services Act 111 of 1998).

[17] After considering a number of authorities, the court concluded as follows:

'[39] The approach cannot in my view be different where the issue in a particular case is whether life imprisonment would be an appropriate sentence. It is not for the sentencing court to try to work out how old an offender could be when (if at all) the executive decides to release him or her on parole. The fact that "a person who is 25 years old at the time of sentencing is more likely to serve a longer period of imprisonment than a person who is 60 years old at the time of sentencing" if both were to remain in prison for the rest of their natural lives, would also not justify a sentencing court to not "impose a life sentence of imprisonment where it is statutorily required".

[40] I believe that it is for this reason that the Supreme Court of Appeal in the Abrahams case, where the applicable prescribed sentence had been life imprisonment, held that the age of that appellant (53 years old at the time of the rape and 54 years old at the time of sentence) was not a mitigating factor when it came to the issue of substantial and compelling circumstances where such a sentence was concerned.'

[41] In the circumstances, therefore, I am of the view that the appellant's relatively advanced age would not have been a mitigating factor in the context of a prescribed sentence of life imprisonment and in considering whether there are substantial and compelling circumstances justifying a lesser sentence.'

[18] In the circumstances the trial court made no material misdirection, nor was the sentence imposed shocking, startling or disturbingly inappropriate or disproportionate. It follows that the appeal cannot succeed.

[19] **The following order is made:**

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

J I CLOETE

GROBBELAAR AJ

I agree.

E GROBBELAAR