



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: A295/2014

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES:NO
(3) REVISED:YES

[2 June 2016]

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In the matter between:

RAKHUDU, PRINCE

Appellant

and

THE STATE

Respondent

JUDGMENT

MUDAU J:

[1] The appellant, a 29 year old man at the time of the incident, was convicted in the Johannesburg regional court of the rape of his 13 year old relative. Acting in terms of s 51(1) of the Criminal Law Amendment Act 105 of 1997 (the

CLAA), the regional magistrate sentenced him to life imprisonment as ordained, having found that there were no 'substantial and compelling circumstances' justifying a lesser sentence, coupled with an order that he was unfit to possess a firearm in terms of s103 (1) of the Firearms Control Act 60 of 2000. The present appeal is against that sentence. In the case of rape the prescribed sentence where the victim is under the age of 16 years is imprisonment for life. The CLAA demands the imposition of the prescribed minimum sentences unless a court is satisfied in a particular case that there are 'substantial and compelling circumstances' that justify the imposition of a lesser sentence than that prescribed.

- [2] The salient facts leading to the conviction of the appellant are as follows. On Friday 31 October 2008, the complainant, her mother and two siblings left their home in Soweto for her great grandmother's place of residence in Brixton to attend a traditional family ritual that was to be held on Saturday, 1 November 2008 consequent upon the death of her great-grandfather. The complainant's great-grandmother is the appellant's mother. The appellant, who had his own place of abode, also attended the ritual.
- [3] During the course of the afternoon on the Saturday, the complainant borrowed a cell phone from the appellant in order to listen to music. After some time its battery became flat. She approached her great-grandmother for a charger, but her great-grandmother had no charger. Left without much choice she then approached the appellant with the same request. The appellant informed her that the one he had was in his room at his place and he asked her to accompany him to fetch it. She obliged and found it unnecessary to tell anyone where she was going to as the appellant also stayed in Brixton.

- [4] Upon arrival at the backroom of the property where the appellant stayed, and after he had unlocked the door, he gave her the charger whilst they were inside the room. Thereafter the appellant closed the door which he then locked from inside. He then picked up a bread knife from the table. He went over to the complainant and placed it sharp edge against her throat after which, he instructed her to get undressed threatening to stab her if she refused to cooperate. She refused to undress. He threw her on the bed as a result of which she started screaming. He started to throttle her to prevent from screaming. He then undressed her clothing, including her panties and then raped her without the use of the condom. Once done, after dressing up they went back to her great-grandmother's place. The appellant had warned her not to mention the incident to anyone. She was still crying when she arrived back at the house.
- [5] She however reported the incident to the first two relatives she met and also to her mother. The incident was reported to the police and the appellant was arrested. She was subsequently taken to the Hillbrow Clinic for medical examination. According to the evidence of the doctor who attended to the complaint, the complainant's hymen had fresh tears and the injuries observed were consistent with forced penetration which she noted on a J88 report form.
- [6] The appellant had during the trial testified and refuted the allegations of rape. Not only was he implicated by the version of the complainant but he was also implicated by the DNA evidence presented by the state. The conviction of the appellant on the rape charge can therefore not be faulted.

[7] It remains to deal with the question of sentence. It is trite that sentencing falls within the discretionary domain of the sentencing court. A court on appeal may not simply substitute a sentence by the sentencing court for its preferred sentence. This court will therefore only be entitled to interfere if the sentencing court materially misdirected itself or the disparity between its sentence and the one which this court would have imposed had it been the trial court, is 'shocking', 'startling' or 'disturbingly inappropriate'.

[8] It has been often stated in a long line of authorities that rape 'is a repulsive crime' (see for example *Vilakazi v S* 2012 (6) SA 353 (SCA) at para 1). In *S v Chapman* 1997 (3) SA 341 (SCA) at 345A-B the SCA called it a 'humiliating, degrading and brutal invasion of the privacy, dignity and the person of the victim' and went on to say that -

'[w]omen in this country...have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives.'

[9] In sentencing the appellant, the trial court took into consideration that he was 34 years of age, still single but a father to a 10 year old son. In his favour, the appellant had no records of previous convictions. Further personal details are gleaned from the probation officer's report showing that the appellant was the second born of two children. He was raised by his mother and stepfather. His biological father died in 2010. His upbringing was good as he was raised in a stable environment. By his own account to the probation officer he was not

exposed to any form of abuse or violence. He had a steady relationship at the time of the commission of the offence. After completing grade 12 in the year 2000, he obtained employment as a general worker in a bakery store. He maintained his innocence to the probation officer. The probation officer in conclusion recommended a custodial sentence as provided for in section 276 (1) (b) of the Criminal Procedure Act 51 of 1977 (the CPA) which includes imprisonment for life or imprisonment for an indefinite period as referred to in s286B (1).

[10] The report by the Correctional Service Officer depicted that the appellant did not take responsibility for the offence committed and that he was not remorseful. Furthermore that he had escaped from custody in respect of the same offence and was a risk to other children and women. The Correctional Service Officer found the appellant as an unsuitable candidate for a correctional supervision sentence as intended in s 276 (1) (h) of the CPA.

[11] It was contended on behalf of the appellant that as the complainant did not sustain other visible external body injuries, was not performing badly at school, and further that the appellant was a first offender and had been in custody for about two years before being sentenced, the magistrate ought to have considered these factors and other personal circumstances and not impose the ultimate sentence of life imprisonment. As authority for this approach, reference was made to *Vilakazi v S* referred to above. It was contended on behalf of the respondent in the court below and also before this court for a number of reasons that life imprisonment was justified.

- [12] The facts in *Vilakazi* were as follows as extracted from the SCA judgment: The child victim had no formal schooling and lived in poor circumstances. On the day in question she had been visiting at a nearby mine and she was walking home in the late afternoon. The appellant came driving by in what appears to have been a tanker-truck that is used for spraying water onto gravel roads and he stopped to give her a lift. After traveling for a while the appellant turned the truck off the road into a plantation where he stopped and the rape took place. The complainant was 15 when she gave evidence, which places her age at between 14 and 16 when the offence was committed (footnote omitted).
- [13] The appellant in *Vilakazi* was convicted in the regional court at Volksrust and was committed to the High Court for sentence as required by s 52 of the CLAA which at the time required a regional court, if it has convicted an accused person of an offence for which life imprisonment is prescribed, to stop the proceedings and commit the accused for sentence by a high court. The High Court at Pretoria (per Els J) found that no substantial and compelling circumstances existed and sentenced the appellant accordingly. The SCA held that “to take account of the fact that she was 11 when in fact she was at least 14 and might have been over 15 was a misdirection” (at para 26).
- [14] The SCA also found at para 55 that “There was also no threat of extraneous violence of any kind. The appellant at least minimized the risk of pregnancy and the transmission of disease by using a condom” as opposed to the facts in this case where none was used. The Court also found it “unfortunate” that no attempt was made to establish “the emotional impact of the crime” on the child (at para 57).

- [15] In this case however, the respondent had before sentence was imposed introduced 'a victim impact report' by a probation officer which therefore distinguishes this matter from the Vilakazi case in many ways than one. According to this report, the complainant had developed "aggressive" behaviour and "abnormally high appetite" since the rape. Predictably the child became socially withdrawn immediately after the incident and avoided playing with other children. She also developed a low self-esteem. She expressed discomfort to be around male persons other than her father as she feared being raped.
- [16] According to the probation officer, the child's trust in men in general, was "reduced to near zero level". The rape incident had affected her negatively as she cried during the interview. Although the child attended counselling, she had not recovered from the trauma. The appellant had according to the report, left "a physical and psychological scar which will remain with the child for the rest of her life". The probation officer, in conclusion, recommended further counselling for both the child and her mother as they were still affected by the rape incident.
- [17] The negative impact of the rape on the child in this case is mirrored in all the pre-sentence reports. The Correctional Service Officer also echoed what was expressed in the other reports that the child cried during the interview and that the appellant "left psychological, emotional and physical scars to the child".
- [18] As the sentencing court also found, there are serious aggravating circumstances present in this matter. The crime committed by the appellant was worsened by the fact that his child victim is a close blood relative whom

he had an additional duty to protect. She was still a virgin who lost her purity in this appalling and outrageous manner. The Legislature has ordained life imprisonment as the sentence that should ordinarily, and in the absence of weighty justification, be imposed for the offence committed by the appellant. The courts are obliged to respect and not pay mere lip service to that approach (see *S v Malgas* 2001 (2) SA 1222 (SCA) at para 25). I am not persuaded that the sentencing court misdirected itself in any material respect.

[19] The courts have a responsibility to protect the equality, dignity and freedom of the most vulnerable amongst us, and in particular women and children. I do not find the sentence imposed by the trial court 'shocking', 'startling' or 'disturbingly inappropriate' in any way. There is no disparity between the sentence passed by the court below and the sentence, which this court given the facts of this matter, would have imposed. The appeal against sentence must, therefore, fail.

[20] For all these reasons, the appeal against sentence is dismissed.

MUDAU J
JUDGE OF THE HIGH COURT

I agree.

SWARTZ AJ
ACTING JUDGE OF THE HIGH COURT

Date of Hearing: 2 June 2016

Judgment Delivered: 2 June 2016

APPEARANCES

On Behalf of the Appellant: Adv. T Mpanza

Instructed By: Legal Aid South Africa

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On Behalf of the Respondent: Adv. N Naidoo

Instructed By: Director Public Prosecutions

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