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IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG PRETORIA)

10/5/2010

Case No. A857/07

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.

(2) OF INTEREST TO OTHER JUDGES: YES/NO.

(3) REVISED.

10/5/2010.



O M Hlotse

Appellant

and

The State

Respondent

JUDGMENT

Jordaan, J

This is an appeal against sentence only. The appellant was charged with rape in the regional court sitting at Potgietersrus. It was alleged that he, on 30 September 2003 raped the complainant, a 13 year old girl.

The appellant initially pleaded not guilty but after the complainant testified he changed his plea to one of guilty. He was duly convicted as charged and the matter was then referred to the high court for sentence in terms of the

provisions of act 105 of 1997. The law at the time of conviction required such a referral to the high court for sentence.

The matter came before Ismail AJ who sentenced the appellant to life imprisonment. Ismail AJ then granted the appellant leave to appeal against sentence to the full bench of this court.

The court below was obliged to impose a term of life imprisonment unless substantial and compelling circumstances were found to impose a lesser sentence. Before us it was argued on behalf of the appellant that substantial and compelling circumstances were indeed present in this case and that a lesser sentence should therefore have been imposed by the court below.

Before dealing with the personal circumstances of the appellant it is necessary to summarise the facts of the case.

1. The appellant and the complainant are related. He is her uncle. At the time of the incident they stayed in the same house.
2. The complainant testified that at the time the appellant was the one who cared for her.
3. At the time the complainant was a scholar in grade 8. She was 13 years old at the time.
4. The complainant testified that she and others during the evening of 30 September 2003 watched a show on television. When those who

watched the show with her left the appellant locked the gate. The appellant then called her and her sister Minah whereupon there was an argument between the appellant and her and Minah. I find it difficult to determine from the evidence exactly what the argument was about but it was apparently about meat. During the argument the appellant accused them of wasting his money.

5. During the argument the appellant threatened to assault Minah with a fist and ordered her to go to bed. After Minah left the appellant said to the complainant that he was going to sleep with her. When the complainant indicated that she was not willing to do so he said he will hit her with the buckle of his belt.
6. He then instructed her to go to the room, to undress and to get on the bed. He then raped her. During the rape she complained that he was hurting her but he said that she must tolerate it.
7. Thereafter the appellant fell asleep and she "ran out of the room".
8. The next morning she washed and went to school.
9. After she returned from school she told her grand mother about the rape. She was taken to hospital for a medical examination. She was

detained at the hospital. I cannot determine from the evidence for how long. Thereafter she was taken to a social worker.

The medical doctor who examined the complainant testified that she was uncooperative during the examination. The examination took place on 3 October 2003, i.e. 3 days after the event. He said she was "very, very scared." She would not allow him to examine her private parts and would break down in tears and started crying and yelling. Even after she was sedated this continued and the doctor could not examine her. He thus concluded that it was impossible for him to determine whether she was raped or not.

I find it difficult to determine on the evidence whether the complainant's refusal to be examined was because she was in pain, traumatised or just scared. The doctor testified, although he could not remember the details, that the complainant told him that the appellant was under the influence of liquor at the time. This aspect was however not explored during the trial. The appellant also did not testify and thus could not be questioned on this aspect. The nature of the argument between the appellant and the two girls referred to above will however in my view fit in with someone who is to some extent intoxicated. The grand mother of the complainant corroborated the fact that the complainant reported to her that she was raped by the appellant. That was at 17:00 on 1 October 2003. She was not crying but started crying while she made this report to her. Before imposing sentence Ismael J called the mother of the complainant in order to determine whether she suffered any psychological effects as a result of the event. She testified that after the incident her school work deteriorated but that she passed her end of the year

examinations. She said the complainant discontinued reading because she thought of the incident. At times she would just cry. Her condition has however improved. She did consult a psychologist but has stopped doing so because, according to the mother, her condition has improved.

The personal circumstances of the appellant are as follows:

1. He has a previous conviction for theft committed on 4 May a sentence of R 1000 or 3 months imprisonment, half of which was suspended on certain conditions was imposed. He has no previous convictions for any crime of which violence is an element.
2. He was 24 years of age at the time he raped the complainant.
3. He was employed earning R 800 per month.
4. He went to school up to grade 11.

As stated above the legislature has enacted that for certain crimes imprisonment for life is mandatory unless substantial and compelling circumstances to impose a lesser are found. Rape of a child under the age of 16 is such a crime.

After consulting the relevant judgements of the supreme court of appeal and certain provincial divisions (such as S v M 2007 (2) SACR 60 (W) I have concluded that the approach of the supreme court of appeal is somewhat less legalistic and more pragmatically inclined. In this regard I specifically refer to S v Nkomo 2007(2) SACR 204 (SCA) and S v Sikhpa 2006(2) SACR 439 (SCA).

In coming to the conclusion I have reached I regarded this court to be bound by the principles laid down by the supreme court of appeal even if our personal views are at variance therewith.

I make the following findings:

1. Rape of a child is an offence to be punished severely. A long term of imprisonment is as a matter of course called for (unless the circumstances of the case dictates otherwise. I do not think that this such a case.)
2. The appellant was in a position of trust *vis a vi* the complainant which is an aggravating circumstance.

3. There are indications that the appellant was under the influence of liquor. (As stated the evidence of the doctor and the nature of the argument between the appellant and the complainant and her sister seems to be indicative thereof.) This was not explored at the trial due to the fact that the appellant changed his plea before cross examination of the complainant.)
4. From the medical evidence it is not possible to determine what physical injuries there were. Fact of the matter is that the complainant went to school the day after the event. There is no evidence eg. of the grandmother that she was in any physical discomfort when she made the report to her
5. Of course there were psychological scars but according to the mother the complainant was improving.
6. The appellant seems to have been a solid citizen not inclined to violence. The mere fact that he was entrusted by the parents to care for the complainant and her sister seems to be indicative thereof.
7. Although serious this was not the worst kind of rape that I and other courts have been confronted with.

8. I am of the view that there is indeed a chance that the appellant will be able to rehabilitate. (See Nkomo (*supra*) at 203 e.

9. The appellant is relatively young and was in fixed employment.

I am therefore inclined to find that a period of imprisonment for life is not an appropriate sentence.

Accordingly the following order is made:

The appeal succeeds.

The sentence imposed by the court *a quo* is set aside and is replaced with the following:

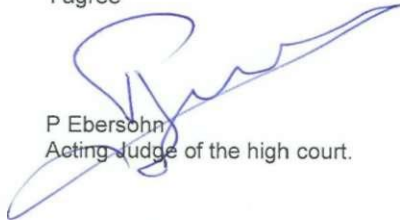
The appellant is sentenced to 15 years imprisonment. The sentence is antedated to 18 October 2004, being the date the appellant was originally sentenced.



E Jordaan
Judge of the high court.

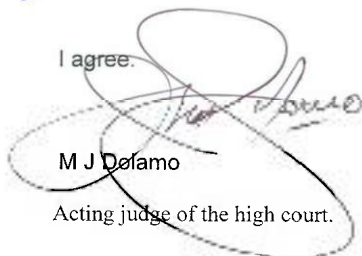
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I agree



P Ebersohn
Acting judge of the high court.

I agree.



M J Defamo
Acting judge of the high court.