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IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE PROVINCIAL DIVISION

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

Case No.: A68/2023

In the matter between:

S[...] B[...] A[...] M[...]

Appellant

and

THE STATE

Respondent

Coram: Opperman, J et Lekhoaba, AJ

Date of hearing: 16 October 2023

Delivered: 19 October 2023. The judgment was handed down in court and electronically by circulation to the parties' legal representatives by email and release to SAFLII on 19 October 2023. The date and time for hand-down is deemed to be 19 October 2023 at 15h00

Judgment by: Opperman, J

Summary: Appeal – sentence – rape & sexual assault – 12-year-old child

JUDGMENT

[1] Appellant appeals against the sentence handed down in the Regional Court on 18 November 2022.

[2] He was convicted of one count of sexual assault and one count of rape. He was sentenced to 5 years direct imprisonment in terms of section 276(1)(b) of the Criminal Procedure Act 51 of 1977 and life imprisonment in terms of section 51(1) of the Criminal Law Amendment Act 105 of 1997; respectively. The sentences were ordered to run concurrently.

[3] The offences were perpetrated against the stepdaughter of the appellant and over a period of time. Counsel for the respondent is correct when he stated in his address to this court that the appellant groomed the complainant with premeditation and then went forth and raped her.

“It is alleged that in respect of Count 1 the incident happened on or about 2014, the year 2014 to the same complainant, EW, who was 12 or 13 years old at the time. And the second Count is that of rape where it is alleged that the complainant was raped in 2014 as well by accused by inserting his finger and also his penis inside her vagina on different occasions.”¹

[4] The appellant has an automatic right to appeal.

[5] The plea of the appellant cannot be regarded as one of guilty from the onset. He clearly waited to see where the evidence turned and only then changed his tune. He put the complainant through the agony of testimony in court. The record shows that Mr Marema initially pleaded guilty to count 1; that was on 4 March 2020. The proceedings

¹ Pages 208 and 209 of the record.

were then adjourned; the then accused alleged that there was a misunderstanding between him and his attorney. On 24 October 2022 accused, at the request of the defence, pleaded once more to both counts and pleaded not guilty to both counts. The accused then denied all allegations against him. The state led the evidence of the complainant who was then 21 years; that was on 24 October 2022. The case was adjourned for the complainant to be cross-examined whereafter the defence prepared a statement in terms of section 220 of the Criminal Procedure Act 51 of 1977. The accused made admissions which were tantamount to admission of all the elements of the crimes proffered against him.² There was not any cross examination on his behalf of the evidence of the complainant.

[6] The report on the *medico* - legal examination and the results of the DNA secured the case for the State beyond any doubt. The matter was finalised after the accused closed his case without tendering any further evidence and the appellant sentenced as above.

[7] This is the case for the appellant:

1. That the sentence of life imprisonment on count 2 is disproportionate, excessive and induces a sense of shock.
2. The court *a quo* erred in finding that there were no substantial and compelling circumstances to deviate from the prescribed sentence having regard to the personal circumstances of the appellant, that he pleaded guilty and showed remorse and, the rehabilitative element.
3. That the court *a quo* over-emphasized the seriousness of the crime and the interest of the community, the deterrent and retributive elements over the personal circumstances of the appellant.

² Exhibit B.

4. The mitigating circumstances of the appellant were argued to be that the appellant was about 47 years old at the time of sentence and 38 years old at the time of the commission of the offences, the appellant have a minor child aged 8 years old, the appellant was employed until his incarceration, on 25 August 2022, the appellant showed remorse and took responsibility for his actions, the appellant is a first offender and the appellant have prospects for rehabilitation.

5. The appellant acknowledges that gender violence is rife in South Africa, the appellant caused the case to be before court and the complainant was traumatised by the actions of the appellant. The complainant, her mother and her siblings are suffering because of the appellant's actions, rape and sexual assault are serious offence and the appellant abused the trust of the complainant.

6. The appellant maintains that the court *a quo* merely mentioned the personal circumstances of the appellant but did not give effect thereto. Punishment must fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy. The court *a quo* overemphasized the retributive element of punishment. No consideration was given to the rehabilitative element of punishment.

7. Counsel for the appellant reiterated that the appellant is a first offender, the appellant had a dependent minor child that he supported, the appellant admitted to the offences and did not waste the court's time further, he took responsibility for his actions; and that he was of an advanced age.

[8] The case for the respondent is that:

1. The complainant was 12 years old and the appellant about 39 years at the time of the incident. The appellant betrayed, abused and misused the trust relationship with the complainant.

2. Violence against any human being is taking on epidemic proportions in this

country.

3. The appellant is unremorseful. He initially pleaded not guilty. The appellant stalled the matter for several years. The complainant was subjected to secondary trauma and forced to testify. Only after the DNA results became available did he change his plea. His remorse can be regarded as lip service and not true and genuine.

4. The complainant suffered severe emotional trauma. She was effectively alienated from her family due to the conduct of the appellant.

5. Counsel for the respondent submitted that the appellant's personal circumstances are not so exceptional that it must weigh more than the interests of society. The emphasis is on this type of offence that must be harshly punished. The court *a quo*, in his submission, also, correctly found that no compelling and substantial circumstances exists in this matter and that the minimum sentence should therefore be imposed. He referred the court to *S v Matyityi* 2011(1) SACR 40 (SCA).

[9] it is trite that a sentence imposed by a trial court should only be altered if an irregularity took place during the trial or sentencing stage, the court *a quo* misdirected itself in respect of the imposition of sentence and, the sentence imposed by the Court *a quo* could be described as disturbingly or shockingly inappropriate.³

[10] From the evidence adduced in the court below and the factors pointed out in the appeal, there is nothing that indicates that the court below did not apply her mind judiciously and with due care. She did not misdirect herself. Her sentence is in accordance with the prevailing legislation and law. There is not any issue that dictates for the interference of this court. The sentences were apt and appropriate in the circumstances.

³ *S v Rabie* 1975(4) SA 855 (A).

[11] **ORDER**

The appeal is dismissed.

OPPERMAN, J

I concur.

LEKHOABA, AJ

APPEARANCES

Counsel for appellant

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LEGAL AID: SOUTH AFRICA
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