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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NO A43/2018

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

In the matter between:

M.P.M

APPELLANT

And

THE STATE

RESPONDENT

JUDGEMENT

KGANYAGO J

- [1] The appellant was convicted by the regional magistrate Modimolle on one count of rape of a 14 years girl in contravention of section 3 of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act*¹, read with the

¹ 32 of 2007

provisions of section 51(1) and Part I of Schedule 2 of the *Criminal Law Amendment Act*².

- [2] The appellant has pleaded guilty to the charge, and in his statement in terms of section 112(2) of the *Criminal Procedure Act*³, he had admitted having sexual intercourse with the complainant who was 14 years of age at the time of the incident, by inserting his penis into her vagina without her consent. He had also stated that he gained entry into the house through the kitchen window which was open. On entering the house, the appellant went to the complainant's bedroom and found her asleep. The appellant got into the complainant's bed, closed her mouth with his hands and ordered the complainant to undress. After the complainant had undressed, the appellant inserted his penis into the complainant's vagina without her consent. The appellant was duly convicted based on his guilty plea and sentenced to life imprisonment. Since the appellant has been sentenced to life imprisonment by the regional court, he is having automatic right of appeal.
- [3] The appellant had launched an appeal against sentence only. In his grounds of appeal, the appellant has stated that the effective term of life imprisonment is harsh and strikingly inappropriate in that it is out of proportion to the totality of the accepted facts in mitigation of sentence, and also disregards the personal circumstances of the appellant. Further that the court a quo has overlooked the fact that the appellant's statement in terms of section 112(2) does not admit the age of the complainant to be 14 years at the time of the commission of the offence. That the court a quo failed to properly consider the probation officer's

² 105 of 1997

³ 51 of 1977

report, and that had the report been properly considered, it would have found that the mitigating factors contained in that report cumulatively constitutes substantial and compelling circumstances.

- [4] After the conviction of the appellant, the probation officer was requested to compile a presentence report. In the report the probation officer has stated that the appellant had self confidence issues; the appellant had trouble in expressing himself to women; the appellant uses alcohol to gain courage; the appellant got sexual urges from the complainant the first time he saw her; that on the day of the incident the appellant saw an opportunity and he used it and that he was not thinking straight as he was drunk. The probation officer has further stated that on the day of the incident the appellant had forgotten that the complainant was his sister.
- [5] The appellant's personal circumstances are that his parents were never married to each other, and he was raised by his maternal grandmother. He schooled up to grade seven and that he dropped out of school after the death his mother as there were no more sufficient funds for him to further his studies. His mother has passed away hence he is residing with his grandmother. He has been kept in custody awaiting trial for two years and eight months. He is not a first time offender, and he is having a previous conviction of rape of his cousin.
- [6] A victim impact report was also prepared. In that report, the probation officer had stated that the complainant had told her that a week before the incident, her mother and stepfather had introduced the appellant to her and her siblings. That the complainant's mother and stepfather were coming home only during month ends. That the complainant was still suffering from having flash back of the incident. That the incident had affected the complainant psychologically as

she had developed learning problems at school, was having trust problems on male persons and was also not comfortable to have male persons around her. Further that the complainant was having problems of sleeping at night. That the complainant's grandmother had told the probation officer that the complainant had developed to be moody, short tempered and defensive. That the family of the complainant has been deeply affected and disappointed by what the appellant did to the complainant. The probation officer had attached the birth certificate of the complainant to her report.

- [7] It is trite that sentencing is the prerogative of the trial court, and should not lightly be interfered with. An appeal in which the interference with sentence will be justified is when it is found that the trial court has misdirected itself in some respect or if the sentence imposed was so disturbingly disproportionate that no reasonable court would have imposed it. The test is not whether the trial court was wrong, but whether it exercised its discretion properly. (See *S v Romer*⁴).
- [8] The court a quo sentenced the appellant to life imprisonment on the basis that he had raped a victim who was below the age of sixteen years and whilst still serving a sentence of rape which he was sentenced during 2015. For that 2015 sentence, the appellant was sentenced to seven years imprisonment. The appellant had served five of that 2015 sentence. That rape which he is having a previous conviction is in relation to his cousin who is also his close relative.
- [9] The appellant in one of his grounds for appeal has stated that the presiding magistrate had overlooked the fact that the appellant in his section 112(2) statement did not admit that the complainant was 14 years at the time of the

⁴ 2011 (2) SACR 153 (SCA) at paras 22 and 23

commission of the offence. Basically what the appellant is submitting is that the State has failed to prove the age of the complainant, and therefore the jurisdictional facts to sentence the appellant to life imprisonment are not present.

[10] In cases where the victim is a minor child, the age of the complainant has to be proved by the State beyond reasonable doubt, because it is a vital element in the determination by the trial court whether a prescribed minimum sentence has to be imposed. It is trite that the age of the complainant could be proved by the evidence of her mother or someone else present at her birth or by the production of her birth certificate. (See *Lubando v The State*⁵).

[11] The appellant in his section 112(2) statement had admitted that he had unlawfully and intentionally committed an act of sexual penetration with the complainant who was fourteen years old. It is the duty of the State to prove the age of the complainant who is a minor beyond reasonable doubt. The accused 112(2) statement should not amount to a simple regurgitation of the content of the charge. In this case, the appellant had admitted the age of the complainant in his section 112(2) statement. In my view, that was an appropriate admission that had absolved the State from proving the age of the complainant. (See *Mshengu v State*⁶). The probation officer in her victim impact assessment report had also attached the birth certificate of the complainant.

[12] The complainant birth certificate was submitted before the appellant was sentenced during presentation of mitigating and aggravating factors. If there were any issues in relation to that birth certificate, counsel for the appellant had

⁵ [2016] ZASCA 4 (1 March 2016))

⁶ [2009] ZASCA 65; 2009 (2) SACR 316 (SCA); 2009 4 All SA 242 (SCA) (29 May 2009) at para 9

an opportunity to cross examine the probation officer, but did not do so. That version relating to the age of the complainant therefore remained unchallenged. Even if the appellant had not made an appropriate admission in his section 112(2) statement which is not the case in this matter, the stage at which the complainant's birth certificate was submitted, would have enabled the court a quo to determine whether the jurisdictional facts to impose life imprisonment were present. This court is therefore satisfied that the admission by the appellant of the age of the complainant in his 112(2) statement, and also the handing in by the probation officer of the birth certificate of the complainant, the State had proved the age of the complainant beyond reasonable doubt.

[13] On 30th November 2011, the appellant raped his cousin and was sentenced to seven years imprisonment on 30th June 2015. The current offence the appellant had committed it on 24th May 2015 whilst still on trial for 2011 rape case. Despite the appellant been convicted of the 2011 rape whilst the appellant was already on trial for the current rape, the court a quo considered that conviction as a previous conviction. In my view, the court a quo was correct in its approach on that previous conviction since the 2011 rape was committed before the current rape and it also reflect on the character and bad behaviour of the appellant, and therefore vital in determining the appropriate punishment that fit the appellant as well as the crime. (See *Mahlase v The State*⁷).

[14] The court a quo in sentencing the appellant to life imprisonment, had considered the fact that the appellant grew up without a mother; dropped out of school in grade 7 as a result of the death of his mother; and been in custody for two years and eight months whilst awaiting trial as mitigating factors. The court a quo

⁷ [2011] ZASCA 191 (29th May 2013)

found that the aggravating factors were the seriousness of the offence; the fact that the appellant was not a first offender and had a previous conviction of rape; apparent lack of remorse; that the appellant had no prospects of rehabilitation and also the fact that the appellant previously raped her cousin, and now had raped his step sister. After striking a balance of both aggravating and mitigating factors the court a quo came to the conclusion that there were no substantial and compelling circumstances justifying a deviation from the prescribed minimum sentence of life imprisonment.

[15] In *S v Vilakazi*⁸ the court said:

“In cases of serious crime the personal circumstances of the offender, by themselves, will necessary recede to the background. Once it become clear that the crime is deserving of a substantial period of imprisonment the questions whether accused is married or single, whether he has two children or three, whether or not he is in employment, are themselves largely immaterial to what that period should be, and those seem to me to be the kind of flimsy grounds that Malgas said should be avoided. But they are nonetheless relevant in another respect.”

[16] The appellant has been convicted of a serious offence of which he was not a first time offender for a similar offence. The appellant had committed the current offence whilst he was on trial for 2011 rape. The trial which he was undergoing did not deter him from committing a similar offence. The appellant's bad character and behaviour is that of a person who will not be rehabilitated. In both the 2011 and 2015 rape, the appellant had raped close relatives. The appellant is the one who should be protecting his close relatives as they put trust in him, but instead he is preying on them. The appellant is therefore a danger to his close relatives and the society at large. The appellant's case is the type of cases

⁸ 2009 (1) SACR 552 (SCA) at para 58

Vilakazi case says their personal circumstances should recede into the background. It is the duty of the court to protect the vulnerable and defenceless members of the society. In my view, the court a quo was correct in finding that there were no substantial and compelling circumstances justifying a deviation from the prescribed minimum sentence of life imprisonment, and I do not find any reasons to fault the court a quo for arriving at that conclusion. It follows that the appellant's appeal on sentence stands to fail.

[17] In the result I make the following order

17.1 The appellant's appeal on sentence is dismissed.

KGANYAGO J

**JUDGE OF THE HIGH COURT OF SOUTH
AFRICA, LIMPOPO DIVISION,
POLOKWANE**

I AGREE

MULLER J

**JUDGE OF THE HIGH COURT OF SOUTH
AFRICA, LIMPOPO DIVISION,
POLOKWANE**

APPEARANCES:

Counsel for the appellant : SM Mawasha
Instructed by : Legal Aid SA Polokwane Office
Counsel for the respondent : Adv Sebelebele
Instructed by : DPP Polokwane Office
Date heard : 30th July 2021
Date delivered : 18th August 2021