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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA DIVISION)

- | | |
|-----|--|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED: Yes |

Date: **1 March 2021** Signature: _____

APPEAL CASE NO: A198/2020

COURT A QUO CASE NO: SH249/2019

DATE: 23 February 2021

In the matter between:

MAPHOSA: GIFT

Appellant

- and -

THE STATE

Respondent

Coram: Kubushi J et Millar AJ**Heard on:** 23 February 2021 – This appeal was, by consent between the parties, disposed of without an oral hearing in terms of s 19(a) of the Superior Courts Act 10 of 2013.**Delivered:** 1 March 2021 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GPD and by release to SAFLII. The date and time for hand-down is deemed to be 10H00 on February 2021.**Summary:** Criminal law and procedure – conviction for the rape of a minor child – evidence of a single witness corroborated by medical evidence – imposition of life sentence absent any substantial or compelling factors – conviction and sentence upheld – guilty plea in respect of contravention of the Immigration Act – appeal against sentence dismissed – order that appellant be deported after completion of sentence.

ORDER

On appeal from: The Benoni Regional Court (Regional Magistrate Schutte sitting as Court of first instance):

- (1) The appeal against the conviction and sentence on the count of rape is dismissed
- (2) The appeal against the sentence imposed for contravening section 49(1)(a) of the Immigration Act 13 of 2002 is dismissed.
- (3) The appellant's conviction and sentence by the Benoni Regional Court be and is hereby confirmed.
- (4) A copy of this Judgement is to be forwarded to: -
 - 4.1.1 the National Director of Public Prosecutions and
 - 4.1.2 the South African Human Rights Commission and
 - 4.1.3 the Department of Justice and Correctional Services and
 - 4.1.4 the Department of Home Affairs.
- (5) The appellant is to be deported after serving his sentence.

JUDGMENT

MILLAR, A J

5 On 2 October the appellant, a 33-year-old man was arraigned in the Regional Court

for Benoni on 2 counts. The first, count 1, was a charge of rape¹ in respect of a 12-year-old child and the second, for contravention of the Immigration Act², in that he entered and remained within the Republic without the required valid documentation.

6 He was found guilty and convicted on both counts. On 13 May 2020 he was sentenced to life imprisonment for the rape and to 2 years' imprisonment for the contravention of the Immigration Act. The appellant was legally represented throughout the proceedings.

7 The appeal before this court is against both conviction and sentence in respect of the count of rape. The right to appeal in circumstances such as the present is automatic.³

8 The complainant, T[....] M[....] testified⁴ that she is a 13-year-old girl who was born in Zimbabwe. She lived with her family there and during March 2018 was brought, by persons she did not know, to the Republic to live and work as a child minder and domestic worker for Alfred Phiri and Fortunate Sibanda whose 2-year-old child she looked after while they were out to work during the day. She was not related to either Alfred or Fortunate but Fortunate is related to the appellant. She lived in the home of Alfred and Fortunate. The appellant together with his partner, Constance Dube, lived in a different house within the same yard. She did not attend school and the child minding and domestic work filled her days.

9 Ms. M[....] was unable to recall the specific date when the appellant had first raped her but testified in some detail about what he had done to her. She thereafter testified that the appellant had raped her repeatedly on succeeding "Wednesdays" as that was

¹ The charge sheet specifically drew the attention of the appellant to the relevant provisions of the Criminal Law Amendment Act 32 of 2007 and Criminal Procedure Act 51 of 1977 in terms of which he was charged. It also specifically drew his attention to the minimum sentencing provisions of Section 51 and Schedule 2 of the Criminal Law Amendment Act 105 of 1997 in the event of a conviction.

² 13 of 2002

³ Section 309(1)(a) and 309B(1)(a) of the Criminal Procedure Act 51 of 1977

⁴ Through an intermediary given her young age and the nature of the complaint.

the day that he was off work. This had occurred over a 6-month period from March to September 2018.

10 Ms. M[...] testified that she had been too scared to tell anyone about what the appellant was doing to her as he had warned her that he would kill her if she did. This was why she had not told anyone with whom she lived about the ongoing rapes. It was only after she had been taken to the place of safety that she reported what had happened to her. Significantly, her “mother” who she reported had come to visit her at the place of safety within a short period of time after she was taken there was told of the rapes but had said and done nothing and it was only after the report was made to Ms Mthimkhulu that she was then taken to a social worker and referred for medical examination.

11 Besides Ms. M[....], the respondent also led the evidence of Ms. Margaret Mthimkhulu who had testified about the circumstances under which Ms. M[....] had been taken into a place of safety and how the complaint had come to light. Ms. Mthimkhulu testified that she had never met the “mother” of Ms. M[....] as she had visited her when she was not on duty. The evidence of Sister Rollin, a professional nurse who is also an advocate of this Court and who conducted an examination of Ms. M[....] and had completed the J88 medical report form in which she had recorded her findings was also led. The findings of Sister Rollin were consistent with Ms. M[....]’s evidence. The evidence of neither Ms Mthimkhulu nor that of Sister Rollin was challenged..

12 The appellant testified that he lived in the same “yard” as Ms. M[....]. He testified that he was her uncle – being the brother of her father. He denied that he ever raped her

and testified that he was in employment and had been at work on the days that it was alleged the rapes had occurred. The place where he worked utilized a “clock in system” and he was off work on Tuesdays but not Wednesdays. He worked 6 days a week.

13 He also testified that he had reprimanded Ms. M[...] because “*she would leave the minor child and go and sit with these other men who stayed in the same yard as us and do their washing*” and that “*up to 6 – 7 other men were renting in the same yard*”.

14 During cross examination the appellant was asked why it had not been put to Ms. M[...] that his evidence would be that he was off work on Tuesdays and not Wednesdays.

15 He was unable to offer any explanation other than to state that he “*was not given a chance to speak*” and when asked why he had not informed his representative of this he said, “*I thought I was going to be given a chance to say my side of the story*” and that he had consulted with his representative before Ms. M[...] had testified. When the appellant’s evidence was concluded the case was adjourned so that his representative could obtain evidence from his employer to corroborate that he worked 6 days a week and was off on a Tuesday and not a Wednesday. When the trial resumed however, no further witnesses were called by the appellant and his case was closed.

16 The learned Magistrate considered all the evidence presented on behalf of both the state and the appellant and, mindful of the fact that Ms. M[...] is a minor child, and a single witness was careful in the evaluation and consideration of her evidence and

applied the cautionary rules⁵ when doing so. After having carefully considered the defence proffered by the appellant, the learned Magistrate rejected it *in toto* and having found that the state had established the appellant's guilt beyond a reasonable doubt, convicted the appellant of rape.

17 There is no fault to be found with the learned Magistrates evaluation, consideration and findings in respect of the evidence led at the trial and the conviction on the charge of rape is sound and must stand.

18 Neither the appellant nor the state led any evidence in respect of sentence for either count 1 or count 2.

19 It was submitted in mitigation that the appellant is a 33-year-old who attended school to grade 9 in Zimbabwe. He is the eldest of 4 siblings. His father passed away in 2002 and his mother is still alive and residing in Zimbabwe. He is unmarried and has no dependent children although he has been in a relationship with Ms. Dube since 2016. He commenced full time employment in December 2017 and was still employed by the same employer at the time of conviction. These were the factors which it was argued should be taken into account as mitigating factors in regard to the imposition of sentence.

20 It was held in *S v Kumalo*⁶ that *"Punishment must fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances. The last of these four elements is often overlooked."*

⁵ *S v Artman* 1968 (3) SA 339 (A) at 341B; *S v Hlapezula and Others* 1965 (4) SA 439 (A) at 440G

⁶ 1973 (3) SA 697 (AD) at 697B-C

- 21 In respect of count 1, the rape charge, the imposition of the minimum sentence can only be deviated from if the court finds that in terms of section 51(3)⁷ “*substantial and compelling circumstances exist which justify the imposition of a lesser sentence*”.
- 22 In her judgment, on sentence, the learned Magistrate took cognizance of the nature and seriousness of the offence, the community’s interests as well as the appellant’s personal circumstances, the purpose of sentencing as well as the relevant mitigating and aggravating factors.
- 23 There were no personal circumstances of the appellant placed before the court that can be regarded as “*substantial and compelling*” and the learned Magistrate was correct in finding no such circumstances and imposing the minimum sentence of life imprisonment
- 24 The test to be applied, when considering sentence on appeal is set out in S v Kgosi⁸ - “*It is trite law that sentence is a matter for the discretion of the court burdened with the task of imposing sentence. Various tests have been formulated as to when the Court of appeal may interfere. These include whether the reasoning of the trial court is vitiated or whether the sentence imposed can be said to be startlingly inappropriate or to induce a sense of shock or whether there is a striking disparity between the sentence imposed and the sentence the Court of appeal would have imposed. All of these formulations, however, are aimed at determining the same*

⁷ of Act 105 of 1997

⁸ 1999 (2) SACR 238 (SCA) at paragraph 10

thing; viz. whether there was a proper and reasonable exercise of the discretion bestowed upon the court imposing sentence.”

25 On consideration of the matter as a whole there are no “*substantial and compelling circumstances*” which justify any deviation from the imposition of the minimum sentence in respect of the conviction on count 1 for rape to life imprisonment.

26 In respect of count 2, the charge of contravening section 49(1)(a) of the Immigration Act 13 of 2002, the sentence of 2 years which was imposed is prescribed in accordance with the provisions of the section, as amended by section 24 of the Immigration Amendment Act 13 of 2011. The sentence imposed on this count was according to law and there is no reason to interfere with it.

27 Two further matters require mention.

28 Firstly, having regard to the offence for which the appellant has been convicted, he is disqualified from ever entering temporarily or remaining permanently in the Republic lawfully. This is apparent from the provisions of Section 29(1)(b) of the Immigration Act⁹. However, notwithstanding this, the learned Magistrate failed to make an appropriate order for the deportation of the appellant once he has served his sentence. This failure is material in my view.

29 A full bench¹⁰ of this Court held that:

⁹ Section 29(1)(b) provides that persons convicted of murder, whether within or outside the Republic do not qualify for either a temporary or permanent residence permit.

¹⁰ Luis Alberto Cuna v S, an unreported decision of the full bench of this Court under case number A6/2020 handed down on 15 December 2020 at paragraphs 3.1.16 and 3.1.20

“once an accused has been found guilty in terms of Section 49(1) and sentenced either to a fine or imprisonment, the trial Court must in addition make an order for her or his deportation.”

And

“....in every case where an order for the deportation of an illegal foreigner has been made, the judgement must be brought to the attention of all the Departments of Government that deal or are entrusted with the deportation of illegal foreigners and all the other institutions in the value chain.”

30 The full bench carefully set out the various State Departments to whose specific attention a deportation order should be brought and the reasons therefore.¹¹

31 These are:

“3.1.20.1 the National Department of Public Prosecutions, so that it is brought to the attention of prosecutors that when arguing sentence, a deportation order should be one of the orders that a prosecutor requests from the trial court;

3.1.20.2 the Director General of the Department of Justice so that it be brought to the attention of judicial officers that when a court convicts an illegal

¹¹ Supra at paragraphs 3.1.20.1 to 3.1.20.4

foreigner in terms of section 49 (1) of the Immigration Act, an order for the deportation of such a person is made, as well;

3.1.20.3 the Commissioner of the Correctional Services in order to facilitate the deportation of the person so convicted when his or her sentence comes to an end; and

3.1.20.4 the Department of Home Affairs so as to commence with the process of the deportation of the illegal foreigner once sentence has been served.”

32 It is in the circumstances necessary to make an appropriate order for the deportation of the appellant, which I intend to do.

33 Secondly, the evidence led at the trial setting out the family circumstances of Ms. M[....], the manner in which she was brought to the Republic and the situation she then found herself in living and working as a child minder and domestic worker and being deprived of the right to attend school is disquieting to say the least.

34 The impression gained from the consideration of this evidence as a whole is that it was neither by choice nor in her interests for her to be brought to the Republic in the manner she was and to be subjected to what she was. The evidence led in the trial gives a clear impression that the “mother” who visited Ms. M[....] after she was taken to the place of safety, was not her biological mother but in fact someone whom she looked up to, possibly one of the women living in the same yard. There is a clear impression when one has regard that she was deprived of the right to attend school

and subjected to what was clearly forced labour as a domestic worker and child minder that she was brought to the Republic solely for that purpose.

35 This requires further and immediate investigation lest other young children find themselves in a similarly precarious situation. It is for this reason that this judgment is to be forwarded to the office of the National Director of Prosecutions as well as the South African Human Rights Commission for urgent investigation and attention.

36 In the circumstances, I propose the following order:

36.1 The appeal against the conviction and sentence on the count of rape is dismissed.

36.2 The appeal against the sentence imposed for contravening section 49(1)(a) of the Immigration Act 13 of 2002 is dismissed.

36.3 The appellant's conviction and sentence by the Benoni Regional Court be and is hereby confirmed.

36.4 A copy of this Judgement is to be forwarded to:-

36.4.1 the National Director of Public Prosecutions;

36.4.2 the South African Human Rights Commission;

36.4.3 the Department of Justice and Correctional Services;

36.4.4 the Commissioner of Correctional Services; and

36.4.5 the Department of Home Affairs.

36.5. The appellant is to be deported after serving his sentence.

A MILLAR

ACTING JUDGE OF THE HIGH COURT

I AGREE AND IT IS SO ORDERED

E KUBUSHI

JUDGE OF THE HIGH COURT

HEARD ON: 23 FEBRUARY 2021

JUDGMENT DELIVERED ON: 26 FEBRUARY 2021

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