



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Appeal No: A98/2019

In the appeal between:-

TEBOHO ISAAC MOTSOAHOLE

Appellant

and

THE STATE

Respondent

CORAM: MOLITSOANE, J *et* MURRAY, AJ

JUDGMENT BY: MOLITSOANE, J

HEARD ON: 21 OCTOBER 2019

DELIVERED ON: 31 OCTOBER 2019

- [1] The appellant was arraigned in the Regional Court: Kroonstad on three counts of contravention of s3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007(rape), read with the provisions of s51(1) of the Criminal Law Amendment

Act, 105 of 1997 (the Act) . He initially pleaded not guilty on all three counts and during the ensuing trial he made certain admissions in terms of s220 of the Criminal Procedure Act (the CPA) which prompted the state to close its case. He also closed his case without leading evidence. He was subsequently convicted and sentenced to three life imprisonment terms. This appeal is directed at the sentences only and to this end he exercised his automatic right of appeal.

- [2] The facts surrounding these three counts of rape are essentially similar. At the time of the commission of these offences the complainant was fourteen years old. She was staying with the appellant and her aunt who is the appellant's wife. They also stayed with three young children of the appellant. The appellant slept in the kitchen during the night while the appellant and his wife slept in the bedroom. The incidents of rape took place over two days and at that time the appellant slept alone on the floor in the kitchen while the children and her aunt were asleep on a bed in the bedroom.
- [3] One night on a Sunday, in February 2015, while the complainant was asleep the appellant came into her blankets. He closed her mouth. He took off her panties and inserted his penis into her vagina and thereby had sexual intercourse with her without her consent. The following day on a Monday he again came into her bed in a similar manner and had his way with her in a similar fashion. He repeated this ordeal again on the same Monday. The complainant testified that she did not report any of the incidents to her aunt as she believed that she (the aunt) would not believe her.

[4] The appellant as alluded above made the following similar admissions in respect of each of the counts of rape, *to wit*, that during February 2015 and at Snake Park, Kroonstad, he had an act of sexual penetration with MN, a fourteen year old girl without her consent. Those admissions were recorded in terms of s220 of the CPA.

[5] The grounds on which the appellant relies are briefly set out as follows:

1. An effective sentence of life imprisonment is strikingly inappropriate in that it is out of proportion to the totality of the accepted facts in mitigation;
2. The Court *a quo* erred by finding that there were no substantial and compelling circumstances to deviate from the prescribed minimum sentence, more particularly in view of the following factors:
 - a) The absence of planning;
 - b) The age and personal circumstances of the appellant;
 - c) The Court did not take into consideration the time the appellant spent in custody awaiting the finalisation of the trial;
 - d) The fact that the appellant did not have any previous convictions of a sexual nature.
3. The Court *a quo* further erred in over-emphasising the following factors:
 - a) The seriousness of the offence;

- b) The interest of the society;
- c) The prevalence of the offence;
- d) The deterrent effect of the sentence;
- e) The retributive element of sentencing.

- [6] It is trite that sentencing is pre-eminently a matter for the discretion of the trial court. A court sitting on appeal may only interfere with a sentence imposed where the trial court misdirected itself or where the sentence imposed is shockingly inappropriate- See **S v Malgas**¹. In exercising its judicial discretion the court must be guided by the established and valid principles governing sentencing which espouse a proper consideration and balancing of the well-known triad consisting of the personal circumstances of the accused, the seriousness of the offence and societal interest².
- [7] It is undisputed that the appellant was convicted of charges of rape for which life imprisonment is prescribed as a minimum sentence. The court is obliged to impose a minimum sentence unless it finds that there are substantial and compelling circumstances warranting it to deviate from imposing such a sentence as envisaged in s51(3)(a) of the Act. It is settled that minimum sentences are ordained by legislation and cannot be departed from lightly and for flimsy reasons- See **Malgas** (*supra*) and **S v Dodo**³.
- [8] The court *a quo* did not find that substantial and compelling circumstances existed which warranted that court to impose a lesser sentence. On appeal against a minimum sentence in terms of the

¹ 2001(1) SACR (SCA) at par [12]

² Bailey v The State (454/11)[2012] ZASCA 154 (01 October 2012) at par [19]

³ 2001(3) SA 382(CC)

Act, it is incumbent on us to enquire whether the facts which were considered by the sentencing court, taken cumulatively, were substantial and compelling or not.

- [9] The appellant did not testify in mitigation of sentence and the following personal circumstances were placed on record from the bar: That the appellant was thirty two years old and married with three children aged nine, six and ten months old. He was employed as a painter and plasterer but his earnings were not disclosed. He was a first offender.
- [10] It is submitted in the heads of argument that the fact that the appellant was a first offender, was in custody for several months whilst awaiting trial and had rehabilitative prospects should have served as substantial and compelling for the court to deviate from imposing life imprisonment.
- [11] It is indeed so that the accused was a first offender and had a clean record. There is, however, no principle in our law which entitles first offenders to shorter imprisonment where life imprisonment is prescribed. In **S v Kekana**⁴ the following was said:

“It is true that the appellant has an unblemished record and that he was a useful member of society in gainful employment at the relevant time. Those circumstances, however, have to be weighed against the nature and severity of the offence and the requirements of society. Notwithstanding those mitigating factors being present, the seriousness of the offence makes it necessary to send out a clear message that behaviour of the kind encountered in this case cannot be countenanced. The natural indignation that the

⁴ 2013(1) SACR 101(SCA) at page 105 par [11]

community would feel at conduct of this kind warrants recognition in the determination of an appropriate sentence.”

- [12] In my view the fact that the appellant is a first offender should recede to the back in view of the nature, gravity and how these offences were committed. Like all other personal circumstances once it becomes clear that the crime is deserving of a substantial period of imprisonment those circumstances would largely be immaterial to what period it should be⁵.
- [13] It is further submitted that the court failed to take into account the period the appellant spent while awaiting trial. When one peruses the record of the proceedings, it appears that the appellant was arrested on the 19th April 2015 on these charges. The charge sheet further reveals that the appellant was not kept in custody. What is not clear is when he was released following the arrest. Having been released, he failed to appear before court on the 19th May 2015. A warrant for his arrest was authorised. He was apprehended later and brought before court on the 29th May 2019. Upon his appearance in court he was convicted for failure to appear before court and was sentenced accordingly. The court also ordered that he be kept in custody. He spent about a year in custody awaiting finalisation of his trial.
- [14] The appellant thus played a part in the fact that he had to endure the incarceration while awaiting finalisation of his trial. I am mindful that he is also not to be solely blamed for the delay in finalisation of his trial. The court *a quo* also indicated in its judgment on sentence

⁵ Vilakasi v The State (576/07) [2008] ZASCA 87(2 September 2008)

that the appellant appeared twelve times in the Regional Court before his matter could be finalised.

- [15] The period an accused spent in custody is but one of the factors the court takes into account in determining whether the effective period of imprisonment to be imposed is justified or whether it is proportionate to the crime committed- (See **S v Radebe and Another**⁶).
- [16] An averment is made that the appellant has prospects of rehabilitation and it appears to me that a submission is made that the court *a quo* failed to consider that aspect. Save to aver that the appellant was thirty two years old no averments are made to indicate the maturity or otherwise of the appellant. The appellant is not a youthful person but a married man with three children. In **S v Mhlakaza and Another**⁷ the court pointed out that rehabilitation becomes less important when the seriousness of the crime demands a long term of imprisonment.
- [17] The personal circumstances of the appellant must be mirrored against the aggravating circumstances of this case. The complainant was 14 years of age at the time of these incidents. She stayed in the house with the appellant. She was family of the appellant and appellant was expected to nurture and protect her and not to harm her. The incidences of child rape are a national scourge that shames us as a nation⁸. While the complainant was not the biological daughter of the appellant, she stayed in his house and

⁶ (726/12)[2013] ZASCA 31(27 March 2013) par [13]

⁷ 1997(1) SACR 515(SCA) at 519 h-i

⁸ MDT v S (548/2013)[2014] ZASCA 15(20 March 2014)

most likely looked up to him as a father or at the most appellant represented a father figure in her life.

- [18] It is apt to liberally refer to **S v Abrahams**⁹ where Cameron JA (as he then was) dealt with the rape in a family of a daughter by her father and said:

“[17] Of all the grievous violations of the family bond the case manifests, this is the most complex, since a parent, including a father, is indeed in a position of authority and command over a daughter. But it is a position to be exercised with reverence in the daughter’s best interest, and for her flowering as a human being. For a father to abuse the position to obtain forced sexual access to his daughter’s body, constitutes deflowering in the most grievous and brutal sense.”

- [19] The mother of the complainant had passed on and that is why she came to stay with her aunt. She was vulnerable and helpless. What is most disconcerting is that she was raped in the same house where her aunt and her children were present and asleep. The appellant raped her three times on two consecutive days. It is clear to me that the appellant has little or no regard for women. It is for this reason that he would venture to rape such a little child while his wife was present in the house.

- [20] The victim impact report sets out in detail the extent of the emotional and psychological effect this ordeal had on the complainant. She has become very shy. She no longer interacts with her friends like in the past. She has indicated that her performance had dropped at school. She indicated that every time when the case was to appear

⁹ 2002(1) SACR 116

before court she became scared. These rapes have in most probability left very serious emotional scars on the complainant. Having regard to the mitigating circumstances and the aggravating circumstances I am not convinced that the court *a quo* misdirected itself in finding that there were no substantial and compelling circumstances to warrant deviation from the applicable minimum sentence. I accordingly make the following order:

ORDER

1. The appeal against the sentences is dismissed.
2. The sentences are confirmed.
3. The order in terms of s103 (1) of the Firearms Control Act 60 of 2000 is confirmed.

PE MOLITSOANE, J

I agree

H MURRAY, AJ

For the Appellant:

Adv S Kruger

Instructed by:

**Legal Aid South Africa
BLOEMFONTEIN**

**For the Respondent:
Instructed by:**

**Adv Bontes
Deputy Director of Public Prosecutions
BLOEMFONTEIN**