



**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

Case Number: A124 /2019

JEFFREY NCOBO

Appellant

and

THE STATE

Respondent

CORAM: **MUSI, JP *et* MBHELE, J**

JUDGEMENT BY: **MBHELE, J**

HEARD ON: **4 NOVEMBER 2019**

DELIVERED ON: **28 NOVEMBER 2019**

- [1] The appellant was, following his plea of guilty, convicted by the Regional Magistrate, Bloemfontein, of raping a 9 year old complainant. He was sentenced to life imprisonment on 07 June

2017. The appellant is the complainant's neighbour and her grandfather's friend. Aggrieved by the sentence, the appellant exercised his right to automatic appeal, due to the sentence of life imprisonment imposed, and approached this court on appeal.

- [2] The offence took place on 1 January 2014. The appellant came home drunk and saw the complainant playing with other kids in the street. He lured the complainant to his house by sending her to the shop to buy him a box of matches. On her way back he grabbed her and penetrated her vaginally with his penis. His wife caught him in the act.
- [3] In his notice of appeal the appellant contended that the court *a quo* erred in not taking into consideration the fact that he was, at the time of sentencing, a 71 year old first offender who pleaded guilty. He submitted, further, that the court over emphasized the seriousness of the offence and the interests of society at the expense of his personal circumstances.
- [4] The issue in this appeal is whether the trial court erred in concluding that there were no substantial and compelling circumstances present that justified the imposition of a lesser sentence than the prescribed minimum sentence of life imprisonment for the rape of a child under the age of 16.
- [5] Before us, Mr Steyn, counsel for the respondent, conceded that the court *a quo* should have found that the appellant's age, remorse and guilty plea constitute substantial and compelling circumstances justifying a departure from the prescribed minimum

sentence. He submitted that the appellant's advanced age calls for imposition of a sentence lesser than life imprisonment. In his view 8 years imprisonment would be appropriate in the circumstances.

[6] The sentencing powers are pre-eminently within the judicial discretion of the trial court, the court of appeal should be careful not to erode such discretion. The court sitting on appeal will interfere if the sentencing court exercised its discretion unreasonably or in circumstances where the sentence is adversely disproportionate. See **S v Rabie 1975 (4) SA 855 (A) AT 857 D-E** also **S v De Jager and Another 1965 (2) SA 616 (A)**

[7] When sentencing, the court must consider the main objectives of punishment, being the prevention of crime, retribution, the deterrence of criminals, and the reformation of the offender. Simultaneously, the court must strike a balance between the crime, the offender and the interest of society. The court should also take into consideration the provisions of Section 51 of The Criminal Law Amendment Act 105 of 1997 (The Act) where applicable. In the end, the appellant as an individual must be sentenced.

[8] In **S v Mudau 2013 JDR 0938 (SCA)** para 13. Madjiet JA, as he then was, remarked as follows:

"I hasten to add that it is trite that each case must be decided on its own merits. It is also self-evident that sentence must always be individualised, for punishment must always fit the crime, the criminal and the circumstances of the case. It is equally important to remind ourselves that sentencing should always be considered and passed dispassionately, objectively and upon a careful consideration of all relevant factors. Public sentiment cannot be

ignored, but it can never be permitted to displace the careful judgment and fine balancing that is involved at arriving at an appropriate sentence. Courts must therefore always strive to arrive at a sentence which is just and fair to both the victim and the perpetrator, has regard to the nature of the crime and takes account of the interests of society. Sentencing involves a very high degree of responsibility which should be carried out with equanimity. . .”

- [9] It is so that sentence must be tailored to suit the offender, the crime and the circumstances surrounding the case. In sentencing, a ‘one size fits all approach’ does not translate into fairness and justice. Every case presents its own considerations, ranging from the facts and circumstances of the offence to the personal circumstances of the offender and the sentencing court must give due regard to all these factors.

- [10] The offence committed by the appellant is undoubtedly a serious one. The appellant was a friend to complainant’s grandfather. He was like a family member to the complainant. The complainant trusted him and he, in turn, took advantage of her.

- [11] The fact that the Constitution regards a child’s best interests as of paramount importance must be emphasized. It is the single most important factor to be considered when balancing or weighing competing rights and interests concerning children. All competing rights must defer to the rights of children unless unjustifiable. Whilst children have a right to inter alia, protection from maltreatment, neglect, abuse or degradation, there is a reciprocal duty to afford them such protection. Such a duty falls not only on law enforcement agencies but also on right thinking people and, ultimately the court, which is the upper guardian of all children. See **De Reuck v DPP WLD 2003 (1) SACR 448 (WLD) at 457 par 10**

- [12] It is clear from the above dictum that the rape of minor children must be viewed in a serious light worst if committed by those entrusted with the care and safety of the child. Sexual violence against children evokes communities' indignation and often prompts them to resort to self-help to keep their children safe.
- [13] The complainant was violated at a place she was familiar with and considered safe, a place that was supposed to be her sanctuary. The evidence of the complainant's mother shows that the incident has affected the complainant adversely. The complainant has become violent, she struggles academically and is unable to relate well with her peers. She has turned rebellious since this event.
- [14] In **S v Malgas 2001 (1) SACR 469 SCA** it was held that courts are required to regard the prescribed sentences as "being *generally appropriate*" for crimes of the kind specified and enjoined not to depart from them unless they are satisfied that there is weighty justification for doing so.
- [15] Mandatory sentences are not intended to strip judicial officers of their ability to devise punishments that fit specific crimes and offenders and to temper such sentences with mercy if circumstances warrant. As stated *supra*, punishment must be proportionate to the offence.
- [16] When weighing up the mitigating factors against the aggravating circumstances, as well as the interest of community, I am persuaded that justice will be served if the sentence imposed by

the trial court is overturned. Upholding it would be to sacrifice the appellant on the 'altar of deterrence' while turning a blind eye to all the other objectives of punishment and the provisions of the Act.

[17] In my view the following circumstances are substantial and compelling circumstances. The appellant is a first offender; he was 71 years old and the sole breadwinner of his family. He committed the offence while under the influence of alcohol and showed remorse by pleading guilty. The chances of him recidivating are slim. Based on the substantial and compelling circumstances that I found I am of the view that the magistrate did not pay due regard to the appellant's personal circumstances. Owing to the misdirection committed, we are obliged to interfere with the sentence. The peculiar circumstances of the current matter dictate that a sentence lesser than the life imprisonment imposed will serve the purpose of punishment. The appeal ought to succeed.

ORDER

[18] The following order is made:

1. The appeal is upheld;
2. The sentence of life imprisonment is set aside and replaced with 10 years imprisonment.
3. The sentence is antedated to 07 June 2017.

N.M. MBHELE, J

I concur.

C.J. MUSI, JP

On behalf of the appellant:

Adv. V. Abrahams
Instructed by:
Justice Centre
BLOEMFONTEIN

On behalf of the respondent:

Adv. C.J. Steyn
Instructed by:
Director: Public Prosecution
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