

29/03/2018
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IN THE HIGH COURT OF SOUTH AFRICA

THE GAUTENG DIVISION, PRETORIA

CASE NO: A672/2016

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

M. M. M. M.

29 March 2018

DAVID KHOZA

Appellant

and

THE STATE

Respondent

JUDGMENT

Mdalana-Mayisela AJ

1. The appellant was charged in the Regional Court, Klerksdorp, on one count of rape read with the provisions of section 51(1) of the Criminal Law Amendment Act, 105 of 1997 ("the Act"). He pleaded not guilty. On 23 July 2015 he was convicted on rape and a sentence of life imprisonment was imposed. He was legally represented throughout the proceedings in the trial court. This is an appeal directed against sentence only, by way of an automatic right of appeal noted in terms of section 309(1)(a) of the Criminal Procedure Act 51 of 1977.
2. The appeal is brought on the grounds that the trial Court misdirected itself by finding that there are no substantial and compelling circumstances, and that in imposing a sentence of life imprisonment the trial Court erred as the sentence is disproportionate given the circumstances of this case. The respondent supports the sentence and submitted that it should stand.
3. The circumstances of the crime were that the appellant abducted the complainant, a 8 year old girl, whilst she was playing after hours behind a secondary school, and he took her to his home. On arrival at the appellant's home, he took the complainant into a bedroom and ordered her to undress her clothes. She refused to undress, he throttled her and when she screamed he hit her with a clenched fist on her face and threatened to kill her. He assaulted her on her head, forehead and face. He undressed her trousers and panty, and raped her without using a condom. Thereafter he accompanied her back to some shops and left her there. She went to her parental home. On arrival, she went to bed without eating dinner. The following morning, when her mother was warming water for her to prepare to go to school, her mother noticed

that she sustained head and facial injuries. She reported to her mother that she was assaulted and raped by the appellant. The appellant maintained his innocence throughout the proceedings in the trial court.

4. In considering an appropriate sentence on appeal one must not lose sight of the settled principle of law that sentencing is pre-eminently a matter for the discretion of the trial Court. The Court of appeal may interfere with the sentence imposed provided the trial Court materially misdirected itself or where the sentence imposed is shockingly inappropriate (*S v Kruger* 2012 (1) SACR 369 - 372 para 8).
5. Before us, the counsel for the appellant contended that the trial Court misdirected itself in finding that no substantial and compelling circumstances exist justifying imposition of a lesser sentence. He argued that the personal circumstances of the appellant together with the period of 1 year 5 months spend in prison awaiting trial and the lack of serious physical, emotional and psychological injuries suffered by the complainant, cumulatively taken, amount to substantial and compelling circumstances.
6. The trial Court considered the personal circumstances of the appellant, and there is nothing which I find to be substantial and compelling. He was 31 years old at the time of sentencing. He completed grade 9 at school. He was unemployed and received a government grant for epilepsy. He is unmarried and has three children aged 14; 6 and 8 years. In regard to his epilepsy condition, medical and hospital facilities are available

in prison. In *S v Berliner*¹ the Court held that *'while a convicted person's health may, depending on the circumstances, sometimes afford a good reason for not sentencing him to imprisonment, there is certainly no general rule that ill-health automatically relieves a criminal from being imprisoned. Medical and hospital facilities are available for convicts.'* In this matter the state of the appellant's health was not overlooked by the trial court. Furthermore, epilepsy can be medically controlled.

7. In *S v Vilakazi*² the Supreme Court of Appeal with respect to what constitutes substantial and compelling circumstances held as follows:

"In cases of serious crime the personal circumstances of the offender by themselves, will necessarily recede into the background. Once it becomes clear that the crime deserves of a substantial period of imprisonment the question whether accused is married or single, whether he has two children or three, whether or not he is in employment, are in 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 aspect. A material consideration is whether the accused can be expected to offend again."

8. The respondent proved a previous conviction of assault with intent to do grievous bodily harm against the appellant. The appellant's previous conviction is relevant to this case. The complainant testified that the appellant throttled and assaulted her on

¹ 1967 (2) SA 193 A at 199 G

² 2009 (1) SACR 552 SCA para 58

the face, forehead and head. He also threatened to kill her if she continued screaming. The complainant's mother testified that the complainant had visible physical injuries on her head, face and forehead. The head and the forehead of the complainant were both swollen the following morning. The medical doctor who examined the complainant after the incident also testified about the gynaecological and the physical injuries the complainant suffered. The above show that the appellant is a violent man. There was no reason for him to use violence, he could easily overpower the complainant, a girl of eight years at the time of rape. He is a danger to the society.

9. No victim impact report was tendered in the trial Court. The State did not present the evidence on emotional and psychological trauma suffered by the complainant. In *Munyani v The State*³, life imprisonment for rape of a 13 year old victim by a 55 year old perpetrator was confirmed. The Court held that '*despite the fact that no evidence was led on the effect of rape on the complainant, the lack of such evidence should not be construed as an absence of post-traumatic stress.*' In this matter the complainant testified that she was crying during the rape incident and on arrival at her parental home, she went to bed without eating dinner. This evidence shows that the complainant was traumatised and hurting. In *S v Vilakazi* supra para 56 the Supreme Court of Appeal remarked that '*... it is sufficient to say that it is evident from the literature that emotional distress and damage that accompanies rape might be extensive even if it is not manifested overtly and even more is that so in the case of young girls.*'

³ (546/2013) (2014) ZASCA 36 (28 March 2014)

10. The other aggravating factors are the lack of remorse, the appellant maintained his innocent throughout the trial, and he did not make use of a condom during the commission of the offence. In *S v PB*⁴, the Court held that:

"The appellant did not use a condom. This is yet another aggravating factor, specifically at a time when the whole world is grappling with the scourge of the HIV and Aids pandemic. The majority of rape victims are not only left to deal with the physical, emotional and psychological trauma of rape, but also exposed to the possible hardships associated with living with HIV, its side effects and stigma. The only manner in which victims may be protected is through anti-retroviral drug, which also has side effects."

11. The appellant spent one year five months in custody awaiting trial. Awaiting trial detention on its own does not provide for a substantial and compelling circumstance that justifies the imposition of a lesser sentence than any minimum sentence called for by the law. In *S v Dlamini*⁵ the Full Bench Court held that:

"The fact that he spent two years in prison awaiting trial does not mean that the sentence court (or the Court of Appeal) should now impose another sentence lesser than life imprisonment. For the trial Court (or Court of Appeal) to be able to properly compute a lesser sentence than life imprisonment it will have to take parole legislation and policies into account to determine how long a sentence of life imprisonment would effectively be, before it can be adjusted downward. That is, however the domain of the

⁴ 2011 (1) SACR 448 SCA p 455 B – C

⁵ 2014 (1) SACR 530 at 537 para (18)

executive, and courts should be wary to tread on the terrain of other arms of government in order to preserve the separation of powers doctrine.... "

12. In *S v Jansen*⁶, the learned judge aptly put it as follows:

"rape of the child is an appalling and preserve of male power. It strikes a blow at a very core of our claim to a civilised society...' "The community is entitled to demand that those who perform such preserve acts of terror be adequately punished, and that the punishment reflect the societal censure, it is utterly terrifying that we live in a society where children cannot play in the streets in any safety: where children are unable to grow up in the kind of climate which they should be able to demand in any decent society, namely in freedom and without fear. In short, our children must be able to develop their lives in an atmosphere which behoves any society which inspire to be an open and democratic one based on freedom, dignity and equality, the very touchstone of our Constitution. The community is entitled to demand of the police that they bring those who subvert these minimum aspirations before the courts and that the courts, in punishing such persons, should ensure that the sentence adequately reflect the censure which the society should does demand, as well as the retribution which it is entitled to extract"

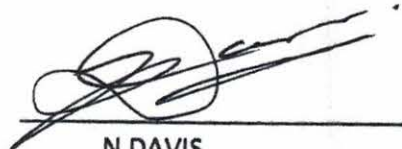
⁶ 1999 (2) SACR 368 (CPD) at 378G-379B

13. The trial court correctly found that there are no substantial and compelling circumstances warranting the imposition of a lesser sentence than life imprisonment. The appellant abducted the complainant to satisfy his sexual desires without using a condom. He did not minimise the risk of pregnancy and transmission of disease by using a condom. He physically assaulted the complainant and threatened to kill her. He subjected the complainant to the agony and indignity of rape. The age of the complainant when she was raped, coupled with her immaturity and anatomical underdevelopment, and physical assault, rendered the rape a dreadful one. There is no doubt that the complainant will carry the emotional scars of rape with her for life.
14. I can find no basis upon which to interfere with the sentence of the trial court. This rape was serious enough to justify the imposition of a minimum sentence of life imprisonment. In my view the prescribed sentence imposed is proportionate to this offence upon a consideration of all the relevant circumstances.
15. In the premises the following order is proposed:

'The appeal against sentence is dismissed'


M P MDALANA-MAYISELA
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree and it is so ordered



N DAVIS
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date of hearing: 19 March 2018

Judgment delivered: 29 March 2018

Appearances

For the Appellant: Adv F Van As

Attorney for Appellant: Pretoria Justice Centre

For Respondent: Adv M Molatudi

Attorney for Respondent: Director Public Prosecutions, Pretoria