



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. A21/2018

In the appeal of:

DUNJIWANE PAULUS MABASO

Appellant

and

THE STATE

Respondent

CORAM:

MATHEBULA J et I VAN RHYN AJ

JUDGMENT BY:

I VAN RHYN AJ

HEARD ON:

23 APRIL 2018

DELIVERED ON:

10 MAY 2018

- [1] The Appellant was charged in the regional magistrate's court, Bethlehem with one count of rape, alleged to have been committed on 9 July 2014 near Bohlokong, Bethlehem. He was

legally represented during the trial and pleaded guilty to the charge against him. He was found guilty and sentenced to life imprisonment on 6 July 2016.

- [2] The Appellant enjoys an automatic right of appeal and appealed against the sentence only.
- [3] In the Appellant's statement in terms of the provisions of Section 112(2) of the Criminal Procedure Act 51 of 1977 he admitted that he unlawfully and intentionally committed sexual penetration with the Complainant, who was ten (10) years old at the time without her consent. He further admitted the DNA testing as well as the results thereof. The Appellant admitted the contents of the J.88 which was handed in as an exhibit during the trial. The said statement concluded with his contention that he regrets his actions and requested the court to be merciful when imposing sentence upon him.
- [4] As the appeal is against the sentence only, those facts which are germane to the determination of an appropriate sentence for the Appellant, deserve to be briefly recounted.

[5] The facts relating to the crime were placed on record by the Prosecutor which facts were not disputed by the defence. The Appellant lived with the mother of the Complainant as husband and wife, though they were not married. During the morning of 9 July 2014 the Complainant's mother took her two (2) other children to the local clinic and left the Complainant in the care of the Appellant. The Complainant got in bed with the Appellant to watch television, but fell asleep. She was awoken when the Appellant was lying on top of her, raping her. The Complainant, by requesting the Appellant to leave the room to fetch a glass of water, managed to run away to the police station to request assistance. The incident occurred during winter and the Complainant ran to the police station without being properly dressed. The Appellant was arrested and was detained whilst awaiting trial.

[6] The grounds upon which the Appellant's appeal rests are that the sentence is shockingly harsh and inappropriate, as it is out of proportion with the totality of the accepted facts in mitigation. It is contended that the court *a quo* erred by finding no compelling and substantial circumstances present to deviate from the prescribed

sentence of life imprisonment and that another court will impose a different sentence.

[7] In imposing an appropriate sentence the court is duty-bound to consider the triad of facts relevant to sentencing namely: the interests of society, the nature and seriousness of the crime and the personal circumstances of the accused.¹ In considering an appropriate sentence on appeal one must not lose sight of the settled principle of law that sentencing is eminently a matter for discretion of the trial court. However, a court of appeal may interfere with the sentence imposed provided that the trial court misdirected itself or where the sentence imposed is shockingly inappropriate.²

[8] Rape is a serious crime and although the offence was not committed in a violent manner, the Appellant's conduct was a despicable violation of trust. In imposing sentence, the regional magistrate found that no substantial and compelling circumstances existed which justified a departure from the minimum sentence of life imprisonment.

¹ S v Zinn 1969 (2) SA 537 (A) at 540 F - H

² S v Malgas 2001 (1) SACR 469 (SCA) – S v Pillay 1977 (4) SA 531 (A) at 534 H – 535 A

- [9] The Appellant's personal circumstances were placed on record during his legal representative's address on sentencing. He was 31 years of age at the time of the incident. He was not married and was gainfully employed as a technician. He earned an income of R4 500.00 per month. He is the father of two minor children aged 13 and 9 years respectively. The Appellant's highest scholastic qualification is Grade 11.
- [10] He was in custody awaiting trial from 9 July 2014 until he was sentenced on 6 July 2016 and therefore spent a period of two (2) years in custody awaiting trial.
- [11] It was argued before us that the fact that the Appellant pleaded guilty indicated his remorse. On behalf of the State it was submitted that the overwhelming evidence against the Appellant and particularly the DNA results, positively linking the Appellant with the offence, could have motivated the Appellant to plead guilty. The Appellant was a first offender and stated that he regretted his actions. The regional magistrate found that the mere fact that the Appellant pleaded guilty did not necessarily support the conclusion that the Appellant showed remorse for his

actions. It has been held, quite correctly, that a plea of guilty in the face of an open and shut case against an accused is a neutral factor.³ It has also been held that many accused persons might regret their conduct, but that does not necessarily translate to genuine remorse.⁴ In the matter **S v Matyityi**⁵ it was found that remorse is a gnawing pain of conscience for the plight of another. Whether an offender is sincerely remorseful, and not simply feeling sorry for himself or herself at having been caught, is a factual question. Therefore, in order for remorse to be a valid consideration the Appellant should have taken the court *a quo* fully into his confidence and explained what motivated him to commit the deed, what provoked his change of heart and whether he does indeed have a true appreciation of the consequences of those actions.

- [12] The question remains whether the personal circumstances coupled with the fact that the Appellant is a first offender and pleaded guilty to the charge against him, cumulatively amount to substantial and compelling circumstances and that the imposition of the minimum sentence in this instance constitute an injustice.

³ **S v Barnard** 2004 (1) SACR 191 (SCA) at 197

⁴ **S v Mokoena** 2009 (2) SACR 309 (SCA) at para [9]

⁵ 2011 (1) SACR 40 at 47

[13] The minimum sentences to be imposed are ordained by the Legislature and the courts must not shrink from their duty to impose, in appropriate cases, the prescribed minimum sentences. It was found in **S v Malgas** that all factors traditionally taken into account during sentencing continued to play a role and must be measured against the yardstick of substantial and compelling circumstances. Marais JA on p. 480 in the **S v Malgas**-matter found that:

“... a departure must be justified by reference to circumstances which can be seen to be substantial and compelling as contrasted with circumstances of little significance or of debatable validity or which reflect a purely personal preference unlikely to be shared by many.”

[14] There is no doubt that the offence forming the subject of this appeal is a serious, appalling and an utterly outrageous crime inflicting horrific suffering and outrage on the Complainant.⁶

⁶

S v Ncheche 2005 (2) SACR 386 (W)

- [15] The Complainant according to the contents of the Victim Impact Statement said that since the incident happened her “life turned into a mess”. She understands that what her stepfather did to her was “bad” and that she expected him to protect her and her mother but he failed miserably. It is evident from the contents of the Victim Impact Statement that the rape of the Complainant was not just a physical act, causing her physical injuries but the psychological impact remains and continues to have a debilitating effect in her life. She states that she lives in anger and at times feels suicidal. She is experiencing nightmares and sometimes wet her bed whilst sleeping. The crime committed by the Appellant was a callous exploitation of the Complainant, a 10-year old girl with whom the Appellant was in a trusting relationship.
- [16] From the J.88, handed in as an exhibit during the trial, it is evident that there were no substantial injuries to the vaginal areas of the Complainant, but fresh tears to the perineum and redness of the skin which is consistent with forceful, uncooperative genital penetration were noted.

- [17] Rape of young girls is a violation of the dignity, security and wellbeing of the victims and is considered to be a “*scourge of cancer that threatens to destroy both the moral and social fabric of our society*”.⁷ In **S v PB**⁸ it was found that the approach should be different where a sentence had been imposed in terms of the provisions of Section 51(1) of the Criminal Law Amendment Act, as these prescribed sentences could not be departed from lightly or for flimsy reasons.
- [18] Undoubtedly, the full extent of the emotional and psychological suffering as it appears from the Victim Impact Statement by the Complainant, combined with the seriously degrading and callous exploitation by the Appellant, whom the Complainant referred to as her “*father*”, are seriously aggravating circumstances which deserve to be given appropriate weight in consideration of an appropriate sentence. Since a life sentence is theoretically indeterminate and the date on which it commences should therefore have no impact on its duration, the time spent in custody awaiting trial should not cause a sentencing officer not to impose a life sentence where it was statutorily required.

⁷ **Director of Public Prosecutions, North Gauteng v Thabethe** 2011 (2) SACR 567 (SCA)

⁸ 2013 (2) SACR 533 (SCA) at 539 f - g

[19] I am therefore not persuaded that the Appellant's personal circumstances, the fact that he pleaded guilty to the charge nor the fact that he was a first offender meet the threshold of substantial and compelling circumstances as provided for in Section 51(3)(a) of the Act. The appeal ought to be dismissed. I accordingly propose the following order:

1. The appeal against the sentence is dismissed.
2. The conviction and sentence of life imprisonment imposed on 6 July 2016 are confirmed.

I. VAN RHYN. AJ

I concur and it is so ordered:

M.A. MATHEBULA, J

On behalf of the Appellant:
Instructed by:

S. KRUGER
BLOEMFONTEIN JUSTICE CENTRE

On behalf of the Respondent:
Instructed by:

ADV. S GIORGI
DIRECTOR: PUBLIC PROSECUTIONS,
BLOEMFONTEIN