



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 number: A79/2017

In the application between:

MOSHE JOHN MBELE

Appellant

and

THE STATE

Respondent

CORAM: MATHEBULA, *et* CHESIWE

HEARD ON: 21 AUGUST 2017

JUDGMENT BY: CHESIWE, AJ

DELIVERED ON: 14 SEPTEMBER 2017

- [1] The appellant was convicted in the Regional Court of Harrismith, of raping a thirteen year old girl, who is mentally retarded¹ as defined in Section 1(1) of the Sexual Offences and Related Matters Amendment Act 32 of 2007 (the Sexual Offences Amendment Act). The provisions of Section 51(1) of the criminal Law Amendment Act 105 of 1997 (the Act) are applicable.
- [2] The appellant was sentenced to life imprisonment, as a result of the Judicial Matters Amendment Act of 2013 the appellant has an automatic right to appeal against his conviction and sentence that was imposed on 22 March 2010.
- [3] The appellant now approaches this Honourable Court with an appeal against sentence that the sentence is shockingly inappropriate.
- [4] Mr Kambi, on behalf of the appellant in his heads of argument and oral submission submitted that the mitigating factors and the personal circumstances of the appellant cumulatively amounted to compelling and substantial circumstances which justified the court to have to deviate from the prescribed sentence of life imprisonment.
- [5] He highlighted the following to the courts attention:
- 5.1 The appellant was 21 years old at the time of the offence.

¹ Although the Act refers to “retarded” I will throughout the judgment use the term “impaired” as it is the most appropriate term to use.

5.2 Appellant does not have a child.

5.3 Appellant was employed and was earning R 500.00 per month.

5.4 That the appellant was not advised by the trial court of the provisions of section 51 (1) of the Act, that the Prescribed Minimum Sentence would be life imprisonment, nor did the court advise that in the event of a guilty conviction the appellant could be sentenced to life imprisonment.

[6] Adv Nameka on behalf of the respondent submitted in and oral submission the heads of argument that the sentence was shockingly inappropriate and conceded that an interference by the appeal court is warranted. She highlighted the aggravating circumstances that the complainant was 13 years of age at the time of the offence. Though the complainant sustained no severe injuries, but the appellant used a knife to threaten the complainant. The appellant had previous convictions, though not similar to the current conviction.

[7] Adv Nameka submitted that a sentence of 18 years would be more appropriate punishment for the appellant.

[8] The proven facts of this case are briefly that the complainant was forcefully taken by the appellant to a neighbourhood in Warden. The complainant's two cousins, B. and S. attempted to persuade the appellant to leave the complainant alone, whereby the appellant threatened the two girls with a knife. After the incident the complainant went home and reported that she was raped by the appellant.

- [9] During evidence at the trial court, an enquiry was conducted into the complainant's mental condition in terms of Section 1 of the Sexual Offences Act. The state witness, Professor Frederick Calitz confirmed that the complaint was mentally challenged as defined in the Act. This is noted on the state witness's comments with regard to the mental impairment of the complainant.

“Sy beskik oor die verstandelike vermoëns van ‘n kind tussen drie en vier jaar. Dit is ook duidelik dat sy nie sinvolle gesprekke kan voer nie.”

- [10] Mr Kambi submitted that the trial court misdirected itself by not finding that there are no compelling and substantial circumstances that it would deviate from the Prescribed Minimum Sentence. Further that the appellant's rights to a fair trial was violated² in (that) the appellant was not forewarned on the implications of the Prescribed Minimum Sentence. Mr Kambi submitted that a sentence of 15 years would be more appropriate.

- [11] In every appeal against sentence, the Judges hearing the appeal should be guided by certain appellate principles. The first is that punishment of an offender is primarily for the discretion of the trial court. The second is that such judges should be careful not to erode such discretion. The third is that the sentence should only be

² It was their submission that this lies in Section 35(3) of the Constitution, that provides that every accused person has a right to a fair trial which, inter alia includes the right to be informed of the charge with sufficient detail to answer it.. It requires in clear terms that, before a trial can start, every person must be fully and clearly informed of the specific charge(s) which he or she faces. This evidently would include all competent verdicts. This is intended to avoid trials by ambush.

altered, on appeal, if the discretion has not been judicially and properly exercised.³

[12] It is indeed so that the first principle that the sentencing courts should not readily depart, for flimsy reasons, from the Prescribed Minimum Sentence ordained as an ordinarily appropriate punishment. The Prescribed Minimum Sentence of life imprisonment is the harshest a court can impose on an offender. It is the ultimate punishment in our Criminal Law system. The sentencing court always has that choice dictated by the peculiar circumstances of a particular case. To say that the court has no choice boiled down to some kind of neglect to exercise the sentencing discretion judicially and constitute a material misdirection. **S v Rabie** supra.

[13] Rape is a very serious offence and the punishment to be imposed must be proportionate to such seriousness. Rape is a violation of a person's constitutionally entrenched rights. It is an invasion of a woman's most valuable of all rights, namely dignity. The courts cannot ignore the frequency at which rape offences takes place in the country especially if it's perpetrated against children and worse in the case of a mentally impaired child. The interests of the public must be protected against people of the appellant's calibre.

[14] The court must take into consideration the appellants personal circumstances, the nature and gravity of the offence and the interests of the community. These factors must be balanced

³ **S v Rabie** 1975 (4) SA 855 (A) at Per **Holmes JA**.

against each other, in order for the court to reach an appropriate sentence as set out in **S v Malgas**⁴ at 481 b-c where the court states

“The court must strive to impose sentences that are proportionate to the crime, the criminal and the needs of the society and achieve justice.”

[15] It is trite that a court of appeal should not replace the sentence imposed by the trial court with its own, unless it is justified to do so.⁵ Further that the respondent conceded that the trial court has over emphasised the aggravating factors at the expense of the mitigating factors. Counsel for the plaintiff submitted that the appeal court may interfere in the sentence, as the appellant was not advised on the implications and consequences of the Prescribed Minimum Sentence. Therefore it warrants the appeal court to deviate, in order to restore a balance.

[16] I therefore see no reason not to interfere and replace the sentence imposed.

[17] In view of the aforesaid, I am persuaded that the trial court misdirected itself and that the sentence is shockingly inappropriate.

[18] In the circumstances I make the following order:

1. The appeal against sentence succeeds;
2. The sentence of life imprisonment imposed on the appellant is set aside and is substituted with the following sentences:
 - 2.1 The appellant is sentenced to 15 years imprisonment.

⁴ 2001 (1) SACR 469 (SCA)

⁵ **S v Obisi** 2015 (2) SACR 35 w at 35i-j

2.2 The sentence must be deemed to have been imposed on
23 March 2010.

S CHESIWE, AJ

I concur

AM MATHEBULA, J

On behalf of applicant: Attorney SS Kambi
Instructed by: Bloemfontein Justice Centre
Southern Life Plaza Building

On behalf of respondent: Adv. C Nameka
Instructed by: Director of Public Prosecutions
Waterfall Centre
Bloemfontein