

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

Appeal Number : A126/2015

In the appeal between:-

ISHMAEL MSELESELE MOTSAMAI

Appellant

and

THE STATE

Respondent

CORAM:

RAMPAL, J et MOHALE, AJ

JUDGMENT BY:

MOHALE, AJ

HEARD ON:

5 OCTOBER 2015

DELIVERED ON:

5 MAY 2016

[1] This appeal is made against the sentence handed down by the trial court.

[2] On June 14, 2011 the Appellant was convicted of the following charges:

- i) Rape: In contravention of section 3 read with section 1, 56, 57, 58, 59, 60 of the Criminal Law Amendment Act 32 of 1997, further read with section 256 and 261 of the Criminal Law Act 51 of 1977.
- ii) Sexual exploitation of a person who is mentally

disabled – in contravention of sections quoted *supra*.

The Appellant pleaded not guilty to the charges and his plea explanation was that of consent and he denied that the Complainant was mentally disabled.

- [3] On 14 June 2011, the Appellant was convicted as charged and on 24 June 2011, the Appellant was sentenced to life imprisonment, both counts were treated as one for the purpose of sentence.
- [4] In terms of section 309(1)(a) of the Criminal Procedure Act 51 of 1977, the Appellant became entitled to an automatic right to appeal against the sentence and conviction.
- [5] The main issues in the appeal were the following:
 - i) The sentence of life imprisonment imposed is shockingly inappropriate.
 - ii) The trial court erred in finding that there were no compelling and substantial circumstances to justify deviation from imposed sentence of life imprisonment.
- [6] The central factor to be considered by this court, is whether or not there exists cause for this court to interfere with the sentence imposed.
- [7] It is trite law that the sentence of an accused must be balanced between interests of the society, the offence and the personal circumstances of the accused.

[8] It is also trite law that a court of appeal will only interfere with a sentence if it is shockingly inappropriate or if an irregularity occurred during sentencing.

[9] **S v Kruger**

“Life sentences ordained by the legislature should be reserved for cases devoid of substantial factors compelling the conclusion that such a sentence is inappropriate and therefore deviate to a lesser charge.”

[10] **S v Malgas** 2001 (1) SACR 469 (SCA):

“The courts ought to evaluate if life imprisonment is indeed a proportionate sentence for the offence.”

[11] Mitigating circumstances were tabled to the court before us. I find them lacking in substance.

[12] **S v Vilakazi** 2012 (6) SA 353 (SCA):

“Once it is clear that the crime deserving of a substantial period of imprisonment, personal circumstances of the accused may appear flimsy.”

[13] **S v Jimminez** 2003 (1) SACR 507 (SCA):

“To focus on the wellbeing of the accused at the expense of aims of sentencing such as community interest is to distort the process of sentencing.”

- [14] The appellant raped his own biological sister who is mentally disabled and then claimed that it was consensual. He further claimed that he is not aware that his sister is mentally disabled.
- [15] The appellant has two previous convictions: one of assault and the other being contravention of section 13 of the Sexual Offence Act 23 of 1957.
- [16] The appellant has failed to show remorse at all.
- [17] In **S v Vilakazi**, Cameron JA made an observation that the rape was not of the worst cases of rape. He further said that some rapes are worse than the others.
- [18] I find that this particular case of rape is harrowing as it is incestuous in its nature.
- [19] I cannot find that there is discrepancy between the offence and the sentence.
- [20] I could not find any compelling or substantial circumstances that would justify deviation from the prescribed minimum sentence of life imprisonment.
- [21] Consequently, the following order is made:

The appeal is dismissed.

I. MOHALE, AJ

I concur.

M. H. RAMPAL, J

On behalf of appellant:

S. Kruger
Instructed by:
Justice Centre
BLOEMFONTEIN

On behalf of Respondent:

Adv. K. G. Mashamaite
Instructed by:
The Director: Public Prosecutions
BLOEMFONTEIN

/eb