



Reportable:
YES/NO
Of Interest to other Judges:
YES/NO
Circulate to Magistrates:
YES/NO

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

Appeal Number: A189/2015

In the appeal between:

M. J. R.

Appellant

and

THE STATE

Respondent

CORAM: NAIDOO, J *et* MOHALE, AJ

JUDGMENT BY: MOHALE AJ and NAIDOO J

HEARD ON: 7 DECEMBER 2015

DELIVERED ON: 31 MAY 2016

- [1] The appellant was charged with the rape of his 11 year old granddaughter in the Phuthaditjhaba Regional Court. He pleaded not guilty but was found guilty as charged and sentenced, on 10 September 2013, to life imprisonment, in terms of section 51 of the Criminal Law Amendment Act 105 of 1997 (the Minimum Sentences Act). The appellant is before us by virtue of his automatic right of appeal and appeals only against his sentence. He was represented in this court by Mr TB Van Rensburg and the respondent was represented by Ms MMM Moroka.
- [2] On 5 February 2010, in Phuthaditjhaba, the appellant sent the complainant to buy a cold drink. On her return with the cold drink, he put the complainant on the bed, undressed her and raped her. The appellant was married to the complainant's grandmother at the time, but they were separated and not living in the same house. The incident in question took place at the appellant's house. The complainant was taken to the hospital by her grandmother, where she was medically examined. A charge was thereafter opened against the appellant. The prosecutor handed into evidence a medical examination form, commonly referred to as the J88, which recorded the doctor's findings after she examined the complainant. The injuries found by the doctor were bruising of the posterior fourchette and a tear of the vagina at the 6 o'clock position, which, according to the doctor, did not look fresh. The vaginal examination also revealed a whitish discharge.

- [3] The appellant lodged his Notice of Appeal late and applied for condonation for such late filing. The respondent did not object and the court granted condonation. The appellant advanced the following grounds, in essence, for his appeal against sentence:
- 3.1 The court erred in not finding that substantial and compelling circumstances existed which warranted the imposition of a lesser sentence than life imprisonment;
 - 3.2 The sentence in all the circumstances of the case is unjust in that it is out of proportion to the crime, the criminal and the interest of the community.
 - 3.3 The trial court over-emphasised the seriousness of the crime and the interest of the community and under-emphasised the personal circumstances of the appellant;
 - 3.4 The trial court erred in not bearing in mind that life imprisonment is the ultimate penalty that the courts can impose and that it should not lightly be imposed.
- [4] Mr Van Rensburg argued for a lesser sentence and Ms Moroka, agreed that life imprisonment was too harsh, given the circumstances of the case and the appellant's personal circumstances. Mr Van Rensburg, in his address to court, recommended a sentence of Twelve (12) Years' imprisonment, while Ms Moroka submitted that a sentence of Twenty (20) Years' imprisonment was more appropriate. Both counsel were of the view that the trial court misdirected itself in the imposition of sentence, which warranted the interference of this court in the sentence. It is generally accepted in our law that an appeal court

should interfere with the sentence imposed by a trial court only if the trial court has misdirected itself in the imposition of sentence, resulting in a sentence which is so inappropriate that it induces a sense of shock. This principle was succinctly stated in the case of **Gregory Lex Blank v The State 1995(1) SACR 62 (A)**, where the court said:

“It has repeatedly been emphasized by this court that the imposition of sentence is pre-eminently a matter falling within the discretion of the trial judge and that a court of appeal can interfere only where such discretion was not properly exercised. One of the ways in which it may be shown that a trial court's discretion was not properly exercised is by pointing to a misdirection in the court's reasons for sentence.”

These sentiments were also expressed in the cases of **S v Pillay 1977 (4) SA 531 (A)** at p 535 E-F and **S v Rabie 1975 (4) SA 855 (A)**.

[5] The appellant's personal circumstances are as follows:

- he is 58 years old;
- he is still married to the complainant's grandmother;
- he is a first offender;
- the complainant did not suffer any serious physical injuries;
- he earns a small salary by doing casual jobs.

Counsel for the appellant pointed out that no victim impact statement was presented to court to assist the court in determining what the impact, if any, was suffered by the complainant as a result of the rape.

[6] There are numerous cases, many of them cited by both counsel in this matter, where it has been held that life imprisonment is the ultimate sentence that a court can impose in this country and it

should, therefore, be reserved for the most serious cases. In rape matters, life imprisonment should be reserved for the worst cases where substantial and compelling factors are absent. (See **S v Abrahams 2002(1) SACR 116 (SCA)**; **S v Mahometsa 2002(2) SACR 435 (SCA)**; **S v Nkomo 2007(2) SACR 198 (SCA)**; **S v GN 2010(1) SACR 93 (T)**) In the GN case, the court advocated the approach that "...where the prescribed minimum is life imprisonment, a court should more readily conclude that the circumstances peculiar to the case are substantial and compelling, to the extent that justice requires a lesser sentence than life imprisonment." This approach was followed in a judgment, emanating from this Division, by my brother Rampai J, in which my sister Van Zyl J concurred. The matter is that of **Vessel Thabethe v The State, Case number A161/2010**, where the judgment was delivered on 9 September 2010.

- [7] Rampai J, in citing with approval the GN case where the Full Bench held that "...even where the law prescribes a minimum sentence the courts must still seek to differentiate between sentences of cases falling in the same category in accordance with the dictates of justice", remarked that "In other words the statutory category of the crime, in this instance, Part 1 Schedule 2...does not in itself rigidly call for the imposition of the ultimate punishment." (paragraph 41) I too agree with this approach. The circumstances of the present matter call for intervention by this court.

- [8] The lack of experience on the part of both the prosecutor and the presiding magistrate is evident. The trial court unfortunately dealt with the sentencing aspect of this matter in a perfunctory and unsatisfactory manner. There was no attempt at all to consider the

appellant's personal circumstances in relation to the circumstances of the case as a whole. The presiding magistrate, for reasons unknown, also declined and failed to deal with the seriousness of the offence and the interests of society. This in my view, is a serious misdirection as he gave no reasons whatsoever for imposing life imprisonment, other than to intimate that the Criminal Law Amendment Act eliminates his discretion in the absence of substantial and compelling circumstances. He did not state any reasons for holding that there were no substantial and compelling circumstances in this matter. As I indicated, this warrants the interference of this court in the matter of the sentence imposed on the appellant.

- [9] In this matter, the actions of the appellant were abhorrent. He abused the relationship of trust between him and a young child. Worse still, the young child just happened to be his granddaughter, by marriage at least, as it is not clear if the complainant is his biological granddaughter. However, this is not a case of the worst rape that has come before this court. Physically, it is true that the complainant did not suffer serious physical injury, other than a bruise on the posterior fourchette. The medical report indicated that the tear in the vagina did not appear to be fresh. This was not pursued by the defence, prosecution or the court. No victim impact assessment report was filed, and this in no way means that the complainant was not negatively affected by this incident. Regrettably, the court did not pursue this important aspect with the complainant when she testified nor did the court indicate that some

evidence should be placed before the court in this respect, as would have been expected, given the relationship between the appellant and the complainant.

[10] The strongest factor in the appellant's favour is that at age 58, he was a first offender. For his entire life he maintained a clean record, but his moral compass appears to have failed him on this occasion resulting in a serious lapse in judgment which caused him to commit this offence. He also took on casual work to earn a living, and in my view there is a good prospect of him rehabilitating himself, even if it means that a lengthy term of imprisonment is necessary in order for him to repay his debt to society. The aggravating factors in my view are that the complainant was his granddaughter and was 11 years old at the time. In **S v Olivier 2101(2) SACR 178 (SCA)**, the court remarked that "It is trite that, during the sentencing phase formalism takes a back seat and a more inquisitorial approach, aimed at collating all relevant information, is adopted. The object of the exercise is to place before the court as much information as possible regarding the perpetrator, the circumstances of the commission of the offence, the victim's circumstances, including the impact which the commission of the offence had on the victim. The prosecutor, the defence counsel and the presiding officer all have a duty to complete the picture as far as possible at sentencing stage."

[11] The court in the present matter failed to take any steps whatsoever to place itself in a position to have at hand all relevant information to enable it to impose a proper sentence. Given this paucity of information, and the complete lack of consideration of relevant factors, such as a victim impact assessment or the impact of the

rape on the complainant's life, it is difficult to see understand the imposition of life imprisonment. (See also **Rasiburu v The State (2013) ZASCA 140**). In my view, the appellant's circumstances viewed, cumulatively, against the other circumstances of this matter justify a deviation from the prescribed minimum sentence and the imposition of a lesser sentence. Both counsel in this matter agree that a lengthy term of imprisonment will be appropriate, although they differ in their submissions regarding the exact length of the sentence. The appellant is at an advanced age, but must still bear the punishment for his heinous deed. I am more inclined towards a lengthier term of imprisonment than that proposed by Mr Van Rensburg, bearing in mind that the appellant will be considered for parole after serving a portion of his sentence.

[12] In the circumstances, the following order is proposed:

- 12.1 The appeal in respect of sentence succeeds;
- 12.2 The sentence of life imprisonment, imposed by the court *a quo*, is set aside and substituted by one of Eighteen Years' (18) imprisonment.
- 12.3 The sentence so imposed is ante-dated to 10 September 2013 being the date when the court *a quo* imposed sentence in this matter.

I.MOHALE, AJ

I agree, and it is so ordered

NAIDOO, J

On behalf of the appellant:

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On behalf of the respondent:

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The State