



**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.: A105/2016

In the appeal between:-

MATABANE ISHMAEL MOTSOENENG

Appellant

And

THE STATE

Respondent

CORAM: REINDERS, J et HINXA, AJ

HEARD ON: 1 AUGUST 2016

JUDGMENT: REINDERS, J

DELIVERED ON: 19 AUGUST 2016

- [1] The appellant, Mathabane Ishmael Motsoeneng, was indicted on a charge of rape in the Regional Court for the Free State Division (held at Phuthaditjhaba) on 5 August

2013. He pleaded guilty and was subsequently convicted and sentenced on the same date to life imprisonment. This appeal comes before us by virtue of the appellant's right of automatic appeal in terms of section 309(1) (a) of the Criminal Procedure Act 51 of 1977 (the "CPA").

- [2] Heads of argument on behalf of the appellant were prepared by Adv Kambi but Ms Kruger appeared before us. Adv Kambi summarized the grounds for appeal as follows:

Firstly, whether the sentence imposed by the court a quo is shockingly and disturbingly inappropriate and/or is vitiated by irregularity, and secondly whether the court a quo erred by not finding compelling and substantial circumstances justifying departure from the minimum sentence of life imprisonment.

- [3] The accepted facts on which the appellant was found guilty appears from appellant's statement in terms of sec 112(2) of the Act:

"On the day in question I was visiting the complainant's brother who is a friend of mine. I excused myself to go to the toilet. The complainant followed me into the toilet and requested that we have sexual intercourse. We had sexual intercourse in the toilet and I had sexual intercourse with a person under the age of 12 years who by virtue of her age could not consent thereto."

- [4] From the record it can be gleaned that the following personal circumstances of the appellant were placed on record by Mr

Dicks who appeared on behalf of the appellant : He is a 26 year old unmarried man who is the father of a child aged 3, unemployed and a first offender. The learned regional magistrate expressed the view that “these are simply flimsy reasons” in respect of mitigating circumstances, and Mr Dicks conceded that he had “nothing to offer”. Ms Kruger argued that she did not support this concession by Mr Dicks. She submitted that, although the complainant was very young, there is no indication of injuries to the complainant and that the rape was not serious.

- [5] The only aggravating factor advanced by the prosecutor was one sentence stating that “the person who was raped here is a minor, 11 year old, it is quite aggravating”. The prosecution did not submit a victim impact report and there was no attempt by the state to elicit any evidence on the emotional impact that the rape had on the complainant.
- [6] In handing down the sentence the learned regional magistrate did not make any mention whatsoever of the factors considered by him in arriving at the conclusion that no substantial and compelling circumstances exist that warranted a deviation from the prescribed minimum sentence of life imprisonment. He merely indicated that there is “nothing, nothing in as far as your circumstances are concerned to enable me to divert from the minimum sentence as prescribed in the Act.” The entire record of the proceedings upon which the appellant was sentenced to life imprisonment, does not even exceed eight typed pages.

[7] We were referred to **Ntepe v S** (A151-2015) (31 March 2016) ZAFSHC wherein Mocumie J, in stressing the importance of a victim impact report, held that in the absence of such a report the sentence imposed is skewed as it lacks the voice of the victim in her own process.

[8] In the unreported case of **Manzini v S** (A45/2016) in this Division (delivered on 28 July 2016) Lekale J articulated as follows on the importance of a victim impact report in rape cases:

“The importance of placing as much information before the sentencing court as possible in respect of the perpetrator, the victim and the circumstances surrounding the commission of the offence has been stressed by the Supreme Court of Appeal. If the defence and the prosecution fail to adduce such relevant evidence the trial court is obliged to take steps to receive such evidence in order to determine whether there exists cause to deviate from the prescribed minimum sentence. In my opinion such a duty on the part of the sentencing court is more pronounced where the accused stares life imprisonment in the eye as a prescribed minimum sentence.”

See: **S v Olivier** 2010(2) SACR 178 (SCA) at para [8]
Calvin v The State [2014] ZASCA 14

The appeal succeeded and the sentence of imprisonment for life for the rape of an eleven year old girl was set aside and substituted with 20 years' imprisonment.

- [9] When it comes to interfering with the sentence imposed by the Court *a quo*, it is trite law that the powers of the Court of Appeal are limited as was stated in **S v Matlala** 2003 (1) SACR 80 SCA at 83e-f. Interference is warranted if the sentence imposed by the trial court is shockingly and disturbingly inappropriate and/or vitiated by irregularity.

The essential question to be determined remains whether the trial court could reasonably have imposed the sentence it did.

See: **S v Pieters** 1987 (3) SA 717 (A) at 734C-H.

- [9] I am satisfied that the trial court misdirected himself materially to the extent that he failed to ensure that all relevant information was before him in order to assess the sentence properly resulting in him not exercising his discretion properly. Interference by this court is accordingly justified and the sentence imposed should be considered afresh.

- [10] Our courts have expressed the view that rape is serious offence invading the privacy, dignity of the victim.

See: **Chapman v S** [1997] 3 All SA 277 (A)

- [11] To my view rape of a girl child of 11 years old is morally reprehensive and any civil society would look at the courts for the protection of a vulnerable child. The legislator has deemed sexual intercourse with a child under the age of 12 years so serious that life imprisonment is the sentence that

should be imposed in the absence of any substantial and compelling circumstances.

- [12] Sight must however not be lost of the fact that the prosecutor accepted the plea and indicated that the facts contained in the appellant's section 112(2) statement were in accordance with the contents of the state's docket. This would mean that the complainant followed the appellant to the toilet and upon her request they had sexual intercourse. From the facts before us there is no indication of any injuries to the complainant as a result of the sexual intercourse. It was submitted by Ms Kruger that the rape falls short of the most serious types of rape which have been described as breathtakingly and brazenly brutal and for which life imprisonment is a just sentence.

See: **S v Matyityi** 2011 (1) SACR 40 (SCA)

- [13] The appellant pleaded guilty and took the trial court into his confidence by revealing what transpired on 26 June 2010 when he had sexual intercourse with the complainant, indicating remorse for the crime that he committed. He is a first offender. The prosecution did not introduce any evidence to indicate that the appellant would not be a good candidate for rehabilitation. These factors and the nature of the rape all points towards mitigating factors in favour of the appellant and should be considered in determination of a just sentence.

[14] In light of the aforementioned I am of the view that the cumulative effect thereof warrants the inference that substantial and compelling circumstances are present, justifying a departure from the prescribed sentence of life imprisonment.

[15] Ms Kruger conceded that a lengthy term of imprisonment will address the seriousness of the offence yet take into account the personal circumstances of the appellant and the interests of society. She suggested 18 to 20 years imprisonment. Mr Maphumulo was of the view that 20 years would be appropriate.

[16] In determining the proportionality of the length of a sentence to the offence, all relevant circumstances which could have a bearing on the offender should be considered. In **S v Dodo** 2001 (1) SACR 594 (CC) Ackerman J held as follows at paragraph [38]:

“To attempt to justify any period of penal incarceration...without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not deny, that which lies at the very heart of human dignity”.

[19] In **S v Fhetani** 2007 (2) SACR 590 (SCA) Jafta JA in finding that the sentence imposed by court a quo was excessively disproportionate held that it is a well-established principle of our law that the severity of the sentence must not be grossly

disproportionate to the offence itself. The court at p 593 par [6] referring to **S v Dodo** 2001(1) SACR 594 CC stressed that a grossly disproportionate sentence does not only violate the accused person's right to a fair trial but also his or her right not to be punished in a cruel, inhuman or degrading manner.

[20] To my mind a sentence of 18 years' imprisonment is proportionate to the crime, the criminal and the legitimate interests of society.

[21] In the result the following order is made:

1. The appeal is upheld.
2. The sentence imposed by the trial Court is set aside and replaced with the following:
"The accused is sentenced to imprisonment for 18 years."
3. The sentence must be deemed to have been imposed on 5 August 2013.

C. REINDERS, J

I agree.

M.D. HINXA, AJ

On behalf of appellant:

Miss S. Kruger
Instructed by:
Bloemfontein Justice Centre
Legal Aid SA
BLOEMFONTEIN

On behalf of respondent:

Adv R.B. Maphumulo
Instructed by:
Director of Public Prosecutions
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