

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

Case No.: A75/2015

In the matter of:

BOIKIE LOYISO WOLF

Applicant

and

THE STATE

Respondent

CORAM:

MOLEMELA, JP *et* MOKOENA, AJ

JUDGEMENT:

MOKOENA, AJ

HEARD ON:

31 AUGUST 2015

DELIVERED ON:

10 SEPTEMBER 2015

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- [1] This is an appeal against sentence only. The appellant was convicted in the Bloemfontein Regional Court on a charge of rape. On 11 February 2011 the court *a quo* sentenced the appellant to life imprisonment. The court ordered the appellant's name be included in the register of sexual offenders. Appellant has an automatic right of appeal.
- [2] The grounds of appeal relating to the sentence are that the court *a quo* (a) misdirected itself by finding that there were no compelling and substantial circumstances justifying it to deviate from imposing the minimum sentence of life imprisonment and (b) erred by not giving sufficient regard to

the mitigating factors which were present and instead gave too much weight to the aggravating factors.

- [3] The issues to be determined are (a) whether the court *a quo* should have found that substantial and compelling circumstances existed, justifying a departure from the mandatory minimum sentence of life imprisonment and (b) whether the life imprisonment imposed by the court *a quo* was such as to render the sentence disproportionate.
- [4] On the night of 8 December 2008 the appellant raped the complainant, a 15 year old girl, more than once. The complainant, together with her friend, were visiting the appellant's step daughter at latter's grand-mother's house in Freedom Square. The appellant found the three girls in the kitchen eating dinner and after a few minutes he ordered them to switch off the lights. The girls did not switch the lights off as they were busy eating. The appellant turned the lights off himself. The three girls then ran into the bedroom. Appellant followed them and dragged the complainant back into the kitchen where he undressed her and raped her. He ignored one of the girls when she told him to stop and instead took the complainant to the outside toilet where he raped her again. The two girls called the neighbour who came and knocked at the toilet door. The appellant opened the door and managed to run away. He was arrested after eluding the police for several months.

[5] Section 51(2) read with Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 (“the Act”) provides for a prescribed minimum sentence of life imprisonment for the rape of a child below the age of 16 years and also where the offender raped his victim more than once unless the court finds substantial and compelling circumstances that justify a lesser sentence.

[6] In **S v Bogaards** 2013 SACR 1 at para [41] the CC stated that:

“Ordinarily, sentencing is within the discretion of the trial court. An appellate courts’ power to interfere with sentences imposed by courts below is circumscribed. It can only do so where there has been an irregularity that results in a failure of justice, the court below misdirected itself to such an extent that its decision on sentence is vitiated, or the sentence is so disproportionate or shocking that no reasonable court could have imposed it.”

[7] In sentencing the appellant, the court *a quo* took these mitigating factors pertaining to the appellant’s personal circumstances into consideration namely: (a) the appellant was 40 years old, (b) the appellant was self-employed as a hawker earning between R1 000 and R1 8000 per month, (c) he was unmarried and had three minor children even though it was unclear whether or not he maintained those children and (d) he can be regarded as a first offender in that his previous conviction of rape of a girl under the age of 16 years was committed more than 10 years prior to the rape offence *in casu*.

- [8] In **Madiba v S** (497/2013) [2014] ZASCA 13, 2015 (1) SACR 485 (SCA) para 13g, the court said:

“All of the circumstances paled into insignificance when the brutality of the rape perpetrated by the appellant was considered.”

- [9] Child rape is a national scourge that shames our nation. See **MDT v S** (548/2013) [2014] ZASCA 15 para [7].

- [10] The court *a quo* correctly took into account the fact that it was an aggravating factor that: (a) the appellant is well known at least to the two girls, (b) the complainant was raped in front of her two friends, (c) the offence impacted on all the three girls, (d) the age of the complainant and (e) the seriousness of the offence.

- [11] It was argued on behalf of the appellant that the offence was committed without the use of a weapon. Rape is inherently an act of violence – See **S v Ncheche** [2005] ZASPHC 21, 2005 (2), SACR 386 (W) at para [25].

- [12] It was also argued on behalf of the appellant that no victim impact evidence was led. I have no doubt that the complainant would have suffered untold emotional harm resulting from this heinous rape.

[13] In Netshivhodza v S (962/2013) [2014] ZASCA 145 (26 September 2014 at 8 at para [7] it was said:

“The fact that an impact report regarding the effect the rape had on her was not obtained, does not detract from the severity of the crime and the fact that it can be accepted that the complainant has suffered psychological harm.”

[14] The appellant showed no remorse. I am satisfied that the court *a quo* gave sufficient regard to the mitigating factors which were present.

[15] I am also satisfied that the court *a quo* was correct in its conclusion that there were no substantial and compelling circumstances present to justify the imposition of a sentence less than the prescribed minimum sentence of life imprisonment.

[16] In the result, I find that the life imprisonment sentence is proportionate in the circumstances.

ORDER

[17] The following order is made:

1. The appeal against sentence is dismissed.
2. The sentence of life imprisonment imposed by the Court *a quo* is confirmed.

R. MOKOENA, AJ

I concur, and it is so ordered.

M.B. MOLEMELA, JP

On behalf of the appellant: Mr. P. L. van der Merwe
Instructed by:
Justice Centre
BLOEMFONTEIN

On behalf of the respondent: Adv. S. Mthethwa
Instructed by:
Director: Public Prosecutions
BLOEMFONTEIN

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