

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

Appeal No.: A276/2013

In the matter between:

P[...] **M[...]** **M[...]**

Appellant

and

THE STATE

Respondent

CORAM: VAN ZYL, J *et* JAJI, AJ

HEARD ON: 5 MAY 2014

JUDGMENT BY: JAJI, AJ

DELIVERED ON: 15 MAY 2014

- [1] The appellant has been convicted on three counts of rape and sentenced to life imprisonment in terms of section 51(1) of Act 105 of 1997 by the court *a quo*.
- [2] The appellant was legally represented in the court *a quo*. The aforesaid conviction and sentence followed from his plea of not guilty. The appeal comes before the court on account of the appellant's right to automatic appeal at the time he was sentenced by the court *a quo*.
- [3] The appellant admitted indeed the following and were recorded as per section 115(2)(b) of the Criminal Procedure Act 51 of 1977:
- (i) that complainant was his daughter;
 - (ii) she was 17 (seventeen) years old at the time of the offence;
 - (iii) repeated sexual intercourse (at least three times) did take place albeit appellant claimed it was consensual (complainant having forced herself unto him, it was alleged).
- [4] Professor Calitz, an expert with B.A. degree, Master's degree and Doctor of Philosophy in clinical psychology, employed as a head of clinical psychology at the University of Free State, as well as working at the Free State Psychiatric Hospital, gave evidence that:

- (i) complainant was mentally challenged and was not able to testify;
- (ii) she would not be able to give informed consent to sex.

[5] The finding by the court *a quo* that the appellant more than once (actually three times) raped the complainant, who was mentally challenged, therefore fell within the provisions of Part 1 of Schedule II of the Criminal Law Amendment Act of 2007, which mandates a compulsory or mandatory sentence of life imprisonment in the absence of substantial and compelling circumstances, which justify the imposition of a lesser sentence, is not challenged on appeal. The grounds of appeal, which the appellant relies on, can be summarised as per the appellant's head of argument as follows:

“11. that the court *a quo* erred with its finding that no substantial and compelling circumstances exist and that there was nothing warranting deviation from the prescribed sentence;

13. that the following circumstances be regarded cumulatively as substantial and compelling in nature warranting a lesser sentence than life imprisonment:

13.1 appellant was 40 years at the time of the offences;

13.2 did not attend school and is a person of low intelligence;

13.3 he is removed from the farm and does not work there anymore;

13.4 complainant did not suffer any physical harm.

14. that therefore enough reason exists from deviation from mandatory sentence of life imprisonment and impose a lesser sentence of 20 (twenty) years imprisonment.”

[5] Mr Botha, legal representative of the appellant in the court *a quo*, could “unfortunately cannot try and convince the court to anything else, because the facts speak for itself”. The complainant was a minor; was raped more than once; she was mentally challenged and all these arose from the fact that she was unable to give consent. The result was that a child was born out of the rape.

[6] The following mitigating factors and personal circumstances of appellant are evident from the judgment on sentence by the court *a quo*, which factors and circumstances were clearly taken into proper consideration by the court *a quo*:

6.1 Appellant was 40 years of age at the time of sentencing;

6.2 Has low intelligence;

6.3 He has not been to school;

6.4 He is no longer involved in a relationship with his wife.

[7] The aggravating circumstances are very evident from the record. The evidence of the complainant’s aunt regarding the state of the complainant. The rejection of the child clearly demonstrating the fact that she abhors the process that led to

the birth of the child. These are some of the psychological and emotional effects on the complainant. The appellant was the father of the complainant. He was in a position of trust when he took advantage of her. Complainant was his own mentally challenged child requiring attention and protection. The incident clearly left long term emotional scars not only on her. Her own mother is sick and traumatised by this experience. The whole experience will remain with them for the rest of their lives, because a child was born and would be a stark reminder of what had happened.

- [8] It is clear from the record that the mitigating factors are far outweighed by the aggravating factors. The court *a quo* wrote a detailed and well-reasoned judgment. The judgment is justified in the circumstances. The sentence cannot be considered to be shockingly excessive and cannot induce a sense of shock in these circumstances. The court *a quo* in weighing appellant's circumstances against the offence stated that the sentence is not unjust given the circumstances. Appellant complied with the provisions of Part 1 of Schedule II of the Criminal Law Amendment Act of 2007 not just once but on two occasions. He raped his own child more than once and she is mentally challenged. Appellant has no remorse; he believe what he did was right. His low intelligence is immaterial, because he could still put on his clothes; know basic things about life and the question is why wouldn't he know that it is wrong to have sexual intercourse with one's

daughter. The court *a quo* correctly believed that injustice would result if life imprisonment was not imposed.

- [9] The court *a quo* was on point upon quoting the case of **S v Malgas** 2001 (1) SACR 469 (SCA):

“What stands out quite clearly is that the courts are a good deal freer to depart from the prescribed sentences than has been supposed in some of the previously decided cases and that it is they who are to judge whether or not the circumstances of any particular case are such as to justify a departure... ...In so doing, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the benchmark which the Legislature has provided.”

Indeed a rape of the child deserves full maximum sentence permitted by law. The record at page 90 and 91, the court *a quo* correctly highlighted the victim’s rights, views of broader community, courts having to show the community that rape is unacceptable and that all rapes deserve exemplary punishment.

- [10] In light of all the circumstances, there is no basis upon which the court *a quo*’s finding could be interfered with.

- [11] The appeal against sentence is accordingly dismissed.

I concur.

N.P. JAJI, AJ

C. VAN ZYL, J

On behalf of appellant:

Mr K. Pretorius
Instructed by:
Bloemfontein Justice Centre
BLOEMFONTEIN

On behalf of respondent:

Adv M. Lencoe
Instructed by:
Director of Public Prosecutions
BLOEMFONTEIN

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