

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

Appeal No.: 277/2013

In the matter between:

MOEKETSI DAVID NTHAKO

Appellant

and

THE STATE

Respondent

CORAM: VAN DER MERWE, J *et* JAJI, AJ

HEARD ON: 12 MAY 2014

JUDGMENT BY: JAJI, AJ

DELIVERED ON: 15 MAY 2014

- [1] The appellant has been convicted and sentenced by the court *a quo* to life imprisonment.
- [2] The appellant raped an eight year old minor and was sentenced on 3 November 2008.

- [3] The appellant was legally represented in the court *a quo*. The aforesaid conviction and sentence followed from his plea of guilty.
- [4] As the appellant raped a child below the age of sixteen years, the offence falls within the Criminal Law Amendment Act 105 of 1997. Article 51(1) of the Act obliges the court to impose a life imprisonment sentence if it finds that there were no substantial and compelling circumstances that justify deviation from the prescribed sentence.
- [5] The grounds of appeal which the appellant relies upon can be summarised as set out in the heads of argument of Mr Van der Merwe, on behalf of the appellant:
- 5.1 The court *a quo* overemphasised the aggravating factors;
 - 5.2 No weight was attached to mitigating factors;
 - 5.3 Complainant did not sustain any serious injuries;
 - 5.4 Court's sentence induced a sense of shock;
 - 5.5 Sentence was shockingly inappropriate and a sentence of 15 – 20 years was a more appropriate sentence.
- [6] The appellant is before court as a result of an automatic right to appeal. The appeal is only against sentence.

[7] The following mitigating factors and personal circumstances of appellant, which were considered by the court *a quo*, were as follows:

- (i) Appellant is a first offender, relatively young and spent five months awaiting trial;
- (ii) Appellant is a Lesotho citizen and passed matric;
- (iii) He pleaded guilty and asked for forgiveness from the complainant's father;
- (iv) Complainant did not suffer any serious injuries.

[8] The aggravating circumstances are evident from the record:

- (i) that the victim was helpless and defenceless;
- (ii) she was a young girl of eight years old;
- (iii) the appellant knew her;
- (iv) there is evidence of psychological trauma, although there is no evidence of serious lasting mental injury.

[9] The court, in passing sentence, stated that as far as evidence is concerned and the facts of the case, that there were no substantial and compelling circumstances that warranted deviation from the prescribed sentence. The essential question in this appeal is whether this finding is correct.

[10] Appellant quoted **S v Wood** 1973 (4) SA 95 (RA) 96 H – 97 B:

“The question of the appropriate sentence in the case of the first offender almost always presents a judicial officer with problems of particular difficulty.... The publicity of the trial, his exposure as a criminal, the far-reaching and often devastating effect of imprisonment on his social, family and economic life are, in the case of a first offender, aspects of punishment which should never be over-looked or under-estimated.”

It was argued on behalf of the respondent that the court was alive to the settled authority that prescribes how personal circumstances must be weighed: they constitute one of the triad of circumstances that must be considered, each set be given its due weight without over- or underemphasising one at the expense of the others.

- [11] Appellant submitted that the court *a quo* overemphasised the aggravating factors over the personal mitigating circumstances of the appellant.

In the case of **S v Phulwane and Others** 2003 (1) SACR 631 (T):

“It is true that where a crime is serious and prevalent, particularly where it threatens the well-being of society, that courts should impose appropriate sentences. However, it remains a trite principle of sentencing that each case has to be decided on its own merits..... A sentencing officer must never allow the seriousness of the offence and the interests of the community to receive undue

weight at the expense of the personal circumstances of the accused. This will inevitably lead to a sentence which is flawed.”

- [12] There is no doubt that the offence committed by the appellant is a serious one - rape of an eight year old minor. This is a significant aggravating factor.

The court in as much as it also takes into account the interests of the society, same should not be overemphasised at the expense of the accused. In **S v Toms, S v Bruce** 1990 (2) SA 802 (A) at 806, Smalberger JA gave some reasons for the exercise of sentencing discretion:

“Such discretion permits a balance and fair sentencing which is a hallmark of enlightened criminal justice. The second and somewhat related principle is that of individualisation of punishment.”

- [13] I am of the view that life imprisonment of this young appellant takes away the possibility of rehabilitation of the offender. The appellant clearly was remorseful. He pleaded guilty and had asked for forgiveness. The court has to take into account all the relevant mitigating factors in favour of the accused and also the aggravating factors in assessing an appropriate sentence. Cumulatively, the factors of youthfulness, first offence, plea of guilty and forgiveness and the fact that appellant passed matric, all these should be considered in favour of the appellant. There is a real possibility of rehabilitation of the appellant. He is

clearly somebody with the potential to make something of his life. In the particular circumstances of this case the sentence of life imprisonment is unjust.

Cumulatively I am of the view that these amounted to substantial and compelling circumstances to deviate from the prescribed sentence. In the case of **Malgas** it was held that

“if the sentence of the court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.”

The fair sentence when looking at all factors in totality would be twenty (20) years.

[14] I would therefore make the following order:

1. The appeal against sentence succeeds.
2. The sentence imposed by the court *a quo* is set aside and replaced with the following:
“Twenty (20) years imprisonment.”
3. This sentence must be deemed to have been imposed on 3 November 2008.

N.P. JAJI, AJ

I concur and it so ordered.

C.H.G. VAN DER MERWE, J

On behalf of appellant:

Mr P.L. van der Merwe
Instructed by:
Bloemfontein Justice Centre
BLOEMFONTEIN

On behalf of respondent:

Adv W.J. Harrington
Instructed by:
Director of Public Prosecutions
BLOEMFONTEIN

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