

IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

Case number: A511/2011

Date: 3 August 2012

In the matter between:

W[...] V[...]

Appellant

and

THE STATE

Respondent

JUDGMENT

Heard on 23 July 2012

Handed down: 3 August 2012

Coram: Legodi J Mnqibisa-Thusi J Lebala AJ

LEGODI J.

[1] The appellant was initially convicted on two charges of rape and one charge of indecent assault by regional court magistrate sitting at Brakpan. Subsequent to his conviction, the proceedings were stopped and the matter was referred to the High Court for sentencing. At the time, the regional court did not have jurisdiction to impose life sentence.

[2] The appellant then appeared in the Delmas circuit court (hereinafter referred to as the court *a quo*) before Rabie J, who then confirmed all the convictions as having been in accordance with justice.

[3] The court *a quo* having confirmed the convictions, proceeded to consider sentence after having heard evidence on both aggravating and mitigating circumstances.

[4] The appellant was then sentenced as follows:

4.1 Count 1: Rape; life imprisonment;

4.2 Count 2: Rape; life imprisonment;

4.3 Count 3: Indecent assault; seven (7) years imprisonment.

4.4 The court a quo further ordered that the sentences on counts 2 and 3 were to run concurrently with the sentence in count 1.

[5] The appellant on the 8 September 2009 launched an application for leave to appeal against sentence only. The court a quo granted such leave to appeal to the full bench of this court.

[6] The grounds of appeal as set out in the appellant's application for leave to appeal, written heads of argument and oral argument can be summarised as follows:

6.1 That the appellant was not warned about the application of the minimum sentence.

6.2 That the court over emphasised the interest of the community over that of the appellant.

6.3 That the court did not attach weight to the appellant's difficult childhood.

6.4 That the court easily dismissed the fact that the appellant was a first offender and can be rehabilitated.

[7] The first issue is whether the court a quo erred in finding that there were no compelling and substantial circumstances justifying a lesser sentence.

[8] When the appellant was granted leave to appeal against sentence, the court a quo expressed itself as follows:

"I am not going to refer to all the factors, but the question may for example be asked, as to whether another court might not have more regard to the applicant's upbringing, the clean record and other such matters, and the effect thereof on his ultimate moral blameworthiness? Could another court not find differently in respect of the issue of rehabilitation, should that not be answered in favour of the applicant?"

Are two life sentences in the circumstances of this case not possibly disproportionate, especially having regard to the above. In my view, the circumstances are such that another court might find

differently in respect of sentence than the decision I came to?"

[9] I tend to agree with the postulation by the court *a quo*. The appellant's personal Circumstances can be summed up as follows:

9.1 He was born on the [...] 1973,

9.2 He went to school up to standard 8 and thereafter did N3 which according to him is equivalent to matric.

9.3 He completed standard 8 during or about 1989. Thereafter he did military service.

9.4 He started schooling, when he was living at a children's home. He left children's home at the age of 18 .

9.5 He indicated that he felt remorseful about what he did to the complainants.

9.6 After having completed standard 8, he left children's home. He went to live with friends and occasionally visited his people.

9.7 The appellant and his older brother were initially at children' home in Johannesburg. He was there until up to grade 2. He frequently visited his parents at that time. The parents also visited them at children's home. Thereafter, he was transferred to Pretoria together with his older brother to join his younger brother and sister. In Pretoria, parents visited them for about two or three times and thereafter no visits, no telephone calls and no birthday cards. They heard nothing from the parents.

9.8 He saw his parents after he had been out of the children' home and after he had done his military service. He went to visit them with his sister and younger brother. They went there during a weekend. They made a braai. It was at a certain plot where the parents were staying in De Deer. They drank. His father also smoked dagga. The father smoked dagga in front of the appellant's younger brother. The appellant became angry. His younger sister was also upset and she insisted that they should leave the place.

9.9 He felt terrible about the conduct of his father. That reminded him of the fact that he had to live at a children's home. It reminded him of the fact that together with his siblings did not live with their parents and were not brought up like other children.

[10] His blameworthiness should have been seen in the context of his background. Clearly the appellant had a rough time in his upbringing together with his siblings. His sister described him as a person who grew up

very often being on his own and reading books. He grew up as a quite person.

[11] From the evidence that was tendered, the appellant clearly grew up wishing to be part of his parents. Whilst he wasted no time to display his frustrations at the conduct of his parents, he did not seem to be an outright person who would always look for problems. He obviously did not have a parental guidance and love. In all probabilities, if he had a proper upbringing, he would not have committed the offences for which he had been convicted and sentenced.

[12] His upbringing, together with failure to charge the appellant properly and failure to explain the prescribed sentences in terms of Act 105 of 1997, in my view, should have been found to constitute compelling and substantial circumstances.

[13] However, counsel for the respondent in her written heads of argument drew our attention to the decision in *S v Mvelase* 2004(2) SACR 531 (WLD). At page 544 E-G of the judgment, it was held that although there was no reference to the provisions of the Minimum Sentences Act, in the three counts of rape, the fact that all the three charges were framed in identical terms, can lead a legal representative to no other conclusion than the accused facing charges of rape defined in Part I Schedule 2 of the Act. It was further held that the fact that if convicted, the accused can face the possibility of imprisonment for life, while there might be a failure to state this fact specifically, there can be no question of the accused or his legal representative being misled by the charge sheet in regard to the nature of the sentence, which the accused faced.

[14] I cannot fully agree with what was stated in *Mvelase's* matter. The assumption of the accused or legal representative not been misled by the charge-sheet, in my view, cannot be considered at face value. It depends on the calibre and experience of the legal representative and or the accused concerned. In my experience and having dealt with a number of criminal matters where the prescribed or minimum sentences were applicable, the assumption as suggested in *Mvelase's* matter cannot randomly be adopted.

[15] Secondly, in the instant case, both the rape charges were framed in charge sheet as follows:

“*VERKRAGTING*

Die beskuldigde(s) is skuldig aan die misdaad van VERKRAGTING

Deurdat op of omtrent gedurende 2001 en te of naby Brakpan en in die Streekafdeling van Suid-Transvaal die beskuldigde(s) wederregtelik vir C[...] V[...] 'n vroulik person aangerand het en teen haar wil vleeslike gemenskap gehad het”

[16] The charge-sheet makes no reference to the age of the complainant, no reference to the provisions of Act

105 of 1997 and no reference to whether it was a Part I Schedule 2 rape offence or Part III Schedule 2 rape offence or whether it was repeated rape and or gang rape that makes it an offence falling under Part I Schedule 2.

[17] On the face of the charge-sheet, one wonders what really makes it to be a Part I offence justifying minimum sentence of life imprisonment or whether it is an offence justifying a minimum sentence of ten years as a part III offence. The lack of clarity in the charge-sheet in my view could have misled the appellant even his counsel for that matter.

[18] Taking it a step further, it is not clear from the record of the proceedings as to how the charges were put to the appellant. All what is indicated on the record is:

“AANKLAER STEL KLAGTES 1, 2 EN 3 AAN BESKULDIGDE”

[19] The court then asked the appellant if he understood the charges and he answered in the affirmative. The appellant then pleaded not guilty on all the charges.

[20] The trial court then expressed itself as follows:

HOF:

[21] It is clear that the court expressed the view that it was a matter that was subject to be tried in the High Court because of the age of one complainant.

[22] The record is silent as to why the age of one of the complainants became an issue. There is no indication on record that Ms Ntloko who appeared on behalf of the appellant was aware that the appellant if convicted could be sentenced to two life sentences in the High Court.

[23] All what is reflected on record is the explanation of plea which was outlined by Ms Ntloko as follows:

“... Your worship, he informs me that he knows nothing about this offence, he never touched the children. He informs me that before he went to stay in his brother’s place, there was a charge for molestation which was laid by the biological mother of the children, a case was opened but not against him” (The underlining is my own emphasis).

[24] It is not clear whether Ms Ntloko was giving an explanation of plea in respect of the two rape charges or only in respect of count 3 which related to the indecent assault charge, the allegations amongst others, being that the appellant leaked the complainant on her private parts and or her breasts.

[25] Specific reference to the minimum sentence was made by the trial court only after the appellant was convicted. The trial court referred to the age of the complainant on the rape charges as the reason to stop the proceedings and referred the case to the High Court for sentence.

[26] The court *a quo* in my view in sentencing the appellant as it did erred in not finding that substantial and compelling circumstances exists justifying departure from imposing the minimum sentence. The personal circumstances of the appellant and failure by the respondent and or the trial court to draw the appellant's attention to the prescribed sentences in terms of Act 105 of 1997, should have been found to constitute compelling and substantial circumstances.

[27] This finding then brings me to deal with the appropriate sentence that should have been imposed in the appellant. Having found the existence of compelling and substantial circumstances, the discretion is wide in reconsidering the appropriate sentence to be imposed. The offences for which the appellant was convicted of are very serious. It is always difficult to understand why women and children should continue to be abused. These are the most innocent defenceless members of our society.

[28] The complainant in count 3 was the youngest victim who was seriously traumatised by the commission of the offence, indecent assault. She was about six years old at the time of the commission of the offence. She was the first one to make a complaint. She had to undergo psychological treatment. Her performance at school was affected. The parents were traumatised as well. The effect of the crime appeared to have been very traumatic and serious.

[29] The complainant in respect of count two on the rape charges made a complaint sometime after the youngest complainant had done so. At the time of the commission of the offences, she was about 10 years old. She was said to have been less affected or traumatised victim. Apparently, her performance at school was not seriously affected by the commission of the offences on her. However, the offences remained to be very serious.

[30] It is when offences of this nature which are committed against innocent and defenceless society that the society looks upon our courts for protection.

[31] It is the kind of sentences which we impose that will driver ordinary members of our society to either have confidence or loose confidence in the judicial or justice system. The sentences that our courts impose when offences of this nature are committed, should strive to ensure that people are not driven to take the law in their own hands, but rather to scare away the would be offenders.

[32] However, whilst the society expects offenders of serious offences to be appropriately punished when convicted, it is expected that personal circumstances of each offender should be accorded an appropriate

consideration in assessing a balanced sentence to be imposed.

[33] The personal circumstances of the appellant and his background had already been sketched out earlier in this judgment. It suffices for now to mention further the followings:

He was born on 6 [...] 1973. At the time of the commission of the offences he was about 31 years old. He was a first offender. When asked about how he felt about what he did to the children, he expressed himself in Afrikaans as follows:

“Ek voel sleg, seergemaak, hoe kan ek sé, ..., di is moeilik om te beskrywe ‘n situasie soos dit, dit is elke dag by my, ek dink omtrent die meeste van die tyd daaraan, jy kan nie regtig aangaan met jou lewe nie, jy weet nie wat lé voor nie, dit is moeilik om te sé.

[34] When asked about how he felt with regard to the conduct of his father when they at one stage visited him that was at the time when his father smoked dagga in their presence and in the presence of the youngest child, he expressed himself in Afrikaans as follows:

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[35] As I said earlier in this judgment, the appellant did not have a fair treatment and proper upbringing. Despite his attempt to be with his parents, he must have felt dejected and frustrated by the lack of realisation in them, that their children were trying to reach out despite their terrible upbringing. One might say his anger and frustration as articulated above was understandable.

[36] But of course, the circumstances under which these offences were committed had to be seen in context. The appellant's older brother was married. The wife came into the marriage relationship with a daughter, that is, the complainant in the two rape charges. This complainant established a very good relationship with the appellant's brother, despite the fact that he was not the biological father. The relationship was so good that the complainant preferred to confine in the appellant's brother then her biological mother.

[37] The complainant in the indecent assault charge was the biological daughter of the appellant's brother. The appellant at the time of the commission of the offences was living with his brother, his brother's wife and the complainants. He was accommodated at his brother's residence. His brother was a truck driver and was often not at home. The wife was also not at home at all times.

[38] The offences were committed in the absence of the parents of the complainants. I have no doubt that the complainants must have looked up to the appellant as their protector in the absence of their parents. He was in a somewhat position of trust towards the children.

[39] Instead, he decided to betray them, not once, not twice, but on three occasions. He did not only betray the complainants, but also his brother and his brother's wife. If you cannot even trust your own brother with your children, you ask yourself what kind of a society are we been turned into. All of these must be seen as aggravating against the appellant.

[40] Assessing an appropriate sentence is not a one way process. All relevant factors, mitigating and aggravating had to be considered. When they are so considered, they must be considered on an equal basis without over emphasising or underemphasising the one against the other.

[41] It is therefore not an easy judicial task to perform. The appellant could never have escaped a long term of imprisonment. He was convicted of very serious charges. He allowed himself to succumb to unexplained temptation by sexually molesting young children. He was not a youngster at the time. He had the maturity and the opportunity to reconsider his move towards or against the children. He did not, and for this he can only blame himself.

[42] However, I do not think the appellant is a person incapable of being rehabilitated, moulded and shown the right path of life. His sister who testified in mitigation did not display him as a child who grew up as being aggressive and prone to committing crimes. To the contrary, he appeared to be a person who longed for proper family life. Lastly, his expression of how he felt as quoted in paragraph 33 of this judgment, does not suggest the kind of a person who is not capable of being corrected.

[43] The appellant was sentenced to life imprisonment in respect of counts 1 and 2 respectively, the rape charges.

[44] He was sentenced to seven years imprisonment in respect of count 3, the indecent assault charge. Although the indecent assault charge may appear to be too harsh, I do not think that the court *a quo* could be said to have misdirected itself in this regard.

[45] The sentences in counts 2 and 3 were ordered to run concurrently with the sentence in count 1. In doing so, the court sought to avoid the cumulative effect of the sentences imposed. Whatever sentences are to be imposed hereunder, cumulative effect thereof will still be considered.

[46] In the circumstances of the case, I am satisfied that the appeal in respect of the two life sentences on counts 1 and 2 ought to succeed. Sentence of 10 years in respect of each charge of rape, in my view would be appropriate. Regarding a sentence of seven years imprisonment on count 3, I do not think that there is any basis to interfere with the sentence taking into account the manner in which the offence was committed, discretionary powers of the court *a qua* and traumatic effect of the crime on the complainant. The appeal in respect of the sentence in count 3, should therefore fail.

[47] I would therefore conclude by making an order as follows:

47.1 The appeal against sentence on both counts 1 and 2 is hereby upheld and the sentence of life imprisonment on counts 1 and 2 respectively is hereby set aside and substituted as follows:

“Count 1: Ten (10) years imprisonment;

(Count 2: Ten (10) years imprisonment.

47.2 The appeal against sentence in respect of count 3 is hereby dismissed.

47.3 It is hereby ordered that five (5) years of ten imprisonment in count 2 and four (4) years of seven years imprisonment in count 3 to run concurrently with the ten years imprisonment in count 1.

M F LEGODI

JUDGE OF THE HIGH COURT

I, AGREE

N P MNGQIBISA-THUSI

JUDGE OF THE HIGH COURT

I, AGREE

S M LEBALA

ACTING JUDGE OF THE HIGH COURT