
**FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA**

Appeal No. A175/2010

In the matter between:

FELIZ KHUMALO

Applicant

and

THE STATE

Respondent

CORAM:

MOCUMIE, J *et* CHESIWE, AJ

JUDGMENT:

CHESIWE, AJ

HEARD ON:

13 FEBRUARY 2012

DELIVERED ON:

8 MARCH 2012

[1] The appellant was convicted in the Regional court, Welkom, of raping a fifteen year old girl, who is mentally retarded¹ as defined in section 1 (1) of the Sexual Offences and Related Matters Amendment Act 32 of 2007 (“the Sexual Offences Amendment Act”).² The provisions of section 51(1) of

¹ Although the Act refers to “retarded” I will throughout the judgment use the term “impaired” as it is the most appropriate.

² Section 1 provides: - “person who is mentally disabled means a person affected by any mental disability, including any disorder or disability of the mind, to the extent that he or she, at the time

the Criminal Law Amendment Act 105 of 1997 (“the Act”) are applicable. He was sentenced to eighteen years imprisonment. He now appeals against the sentence with leave of the court *a quo* on the basis that the sentence is shockingly inappropriate.

- [2] Advocate Kruger, on behalf of the appellant, in her Heads of Argument and her oral arguments submitted that the mitigating factors in this case and the personal circumstances of the appellant, cumulatively amounted to compelling and substantial circumstances, which justified the court to have deviated from the prescribed sentence of life imprisonment. She highlighted the following as such circumstances:

- 3.1 Appellant was 46-years of age;
- 3.2 Appellant although not married has two adult children;
- 3.3 Appellant attended school up to Standard 6 (Grade 8);
- 3.4 Appellant was in custody since 25 May 2010 and therefore spent 10 months in custody awaiting trial;

of the alleged commission of the offence in question, was –

- (a) unable to appreciate the nature and responsibly foreseeable consequences of a sexual act;
- (b) able to appreciate the nature and reasonably foreseeable consequences of such act, but unable to act in accordance with that appreciation;
- (c) unable to resist the commission of any such act; or
- (d) unable to communicate his or her unwillingness to participate in any such act”.

3.5 Appellant is HIV positive;

3.6 This was not the worst category of rape.

[3] Advocate Ferreira, on behalf of the respondent, in her Heads of Argument, submitted that the court did not commit any irregularity or misdirection when imposing sentence as it did not impose the prescribed sentence when it could have. The State highlighted the aggravating circumstances of the cases in that:

3.1 the complainant was 15-years of age at the time of the commission of this offence;

3.2 that she was and is still mentally ill;

3.3 that the appellant is HIV positive and the possibility exists that he might have infected the complainant although no such medical evidence was led. It is quite a concern that the HIV status of the appellant was disclosed at such a late stage, before sentencing, and not during his evidence-in-chief as the State would have had the opportunity to interrogate and establish whether he knew of his HIV status or not before he raped the complainant. This situation also leaves me wondering whether the complainant has been through any counselling or treatment to check on whether she was infected with HIV/ AIDS

or not and whether the complainant's whole family went through to any family counselling after the rape;

3.4 that the appellant stayed with the complainants for quite some time and knew about the complainant's mental impairment .

[4] She submitted further that the appellant abused his position of trust as he was the complainant/victim's step father. She submitted that the aggravating factors in this case far outweighed the mitigatory factors and thus eighteen years was appropriate in the circumstances. She reminded this Court that a court of appeal can only interfere with a sentence of a trial in cases where the sentence was disturbingly inappropriate.

[5] The proven facts of this case are shortly that the complainant and her twin sister were walking home after school, and the complainant took another route, in the direction of the appellant's house. She went to the appellant's home at his request the previous day. The appellant raped her and then gave her R30, 00 not to report the incident to anyone. She bought herself a pair of socks with the money.

[6] During evidence, the presiding officer conducted an enquiry into the complainant's mental condition in terms of section 1 of the Sexual Offences Act and found that she was mentally retarded as defined in the Act. These findings were common cause between the State and the defence during the trial and the appeal hearing. I also could find no misdirection on his part in this regard.

[7] I am of the view that the trial court came to an informed and processed decision on whether compelling and substantial circumstances as set out in paragraph [2] above were indeed such that he should deviate from the prescribed. The appellant could not point at any misdirection in that regard. Neither could I.

[8] As the trial court correctly found s51 of the Act has limited but not eliminated the court's discretion in imposing sentence in respect of offences referred to in Part 1 of Schedule 2 such as in this case. The legislature has deliberately left it to the courts to decide whether circumstances of any particular case call for a departure from the prescribed sentence. In **S v MALGAS**

2001 (1) SACR 469 (SCA) at 4711, clear guidelines have been set down and the Supreme court of Appeal expressed itself as follows,

“ [I]f the sentencing court on consideration of the circumstances of a 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.”

- [9] Rape is a very serious offence and the punishment to be imposed must be proportionate to such seriousness. Rape is a violation of person's constitutionally entrenched rights. It is an invasion of a woman's most valuable of all rights, namely dignity. The courts cannot ignore the frequency at which rape take place in the country especially perpetrated against children and worse in this case a mentally impaired child. The interest of the public must be protected against people of the appellant's calibre. I am of the view that taking into consideration the principles set out in **S v MALGAS** *supra* the sentence imposed for the offence committed is reasonable and is not harsh and inappropriate nor did the trial court misdirect itself in any

manner.

[10] The court must take into consideration the appellants personal circumstances, the nature and gravity of the offence and the interests of the community. These factors must be balanced against each other, in order for the court to reach an appropriate sentence as set out in **S v Malgas** at 481b-c where the Court states:

“The courts must strive to impose sentences that are proportional to the crime, the criminal and the needs of the society and achieve justice”.

[11] I am satisfied that trial court took cognisance of these circumstances and the above dictum. The sentence imposed is not only appropriate but just.

[12] It is trite that a court of appeal should not replace the sentence imposed by the trial court with its own, unless it is justified to do so. See **S v Obisi** 2005 (2) SACR 35 (W) at 35 i – j. As indicated above I see no reason to interfere and replace the sentence imposed.

[13] In view of the aforesaid I am not persuaded that the court *a quo*

misdirected itself or that, the sentence is shockingly inappropriate.

[14] In the circumstances I make the following order.

ORDER

The appeal in respect of sentence is dismissed.

S. CHESIWE, AJ

I concur.

B. C. MOCUMIE, J

On behalf of the applicant:

Attorney S. Kruger
Instructed by:
Bloemfontein Justice Centre
BLOEMFONTEIN

On behalf of the respondent:

Adv. A. M. Ferreira
Instructed by:
Director of Public Prosecutions
BLOEMFONTEIN

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