

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No.: A349/2010

In the appeal between:-

RETSHEDISITSWE CLEMENT MANYAKALLE

and

THE STATE

CORAM: EBRAHIM, J *et* MATLAPENG, AJ

JUDGMENT BY: MATLAPENG, AJ

HEARD ON: 8 OCTOBER 2012

DELIVERED ON: 1 NOVEMBER 2012

- [1] This is an appeal against a sentence imposed by the trial court. Mr Retshidisitswe Clement Manyakalle who I will henceforth refer to as the appellant was charged and tried for rape in the Regional Court, Bloemfontein. At the end of the trial he was convicted as charged and sentenced to serve a period of twenty six years imprisonment. He appeals against this sentence only.
- [2] The evidence adduced at the trial which led to the conviction of the appellant is briefly as follows:

The appellant and the victim who was eleven years of age at the time of the incident were known to each other. They are related. During the relevant period, it was during the school holidays, both the complainant and the appellant were visiting their uncle and aunt who are residing together. It was whilst at this place that the appellant committed this offence by raping the complainant on three different occasions.

[3] The complainant did not initially inform anyone of the rapes as the appellant had threatened her with death should she do so. Although her aunt could see from her behaviour that something was amiss the complainant refused to tell her anything. It was only when she reached her parental home that she disclosed her ordeal to a tenant at her parental home. She was taken to the police station and later the appellant was arrested.

[4] A court of appeal is not without much ado entitled to interfere with the sentence imposed by the trial court. The reason for this is self evident namely that sentencing discretion falls primarily to be exercised by the trial court. It is only in certain limited instances where a court on appeal may interfere with this discretion for

example where it is shown that the sentence imposed by the trial court is amongst others unreasonable, there was a material misdirection or there appears to be an irregularity committed by the trial court. (See **S v RABIE** 1975 (A) SA 855 (A); **S v SALZWEDEL & OTHERS** 2000 (1) SA 786 (SCA).

- [5] Even in the absence of the above-mentioned factors, a court on appeal may interfere with the sentence if there is a striking disparity between the sentence imposed by the trial court and the one the appeal court would have imposed. This is aptly stated as follows in the matter of **S v MALGAS** 2001 (1) SACR 469 (SCA) at 478f:

“However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate Court would have imposed had it been the trial court is so marked that it can properly be described as 'shocking', 'startling' or 'disturbingly inappropriate'. It must be emphasised that in the latter situation the appellate court is not at large in the sense in which it is at large in the former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the

sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned.”

[6] It was submitted on behalf of the appellant that the sentence imposed on the appellant induces a sense of shock. This will be so more particularly if regard is had to the personal circumstances of the appellant and the fact that the trial court found that there were compelling and substantial circumstances which resulted in the court not imposing a prescribed minimum sentence. The respondent on the other hand submits that the sentence imposed by the trial court was an appropriate one under the circumstances.

[7] The trial court before deciding on an appropriate sentence had the following factors in mitigation placed before it: the appellant was 19 years of age at the time of the commission of the offence, he had no previous convictions; he had passed grade 12, although he was not working he was previously employed and earned a salary of R900,00 per month.

- [8] On the other hand in aggravation the following factors came to the fore: the appellant raped the complainant not once but on three occasions; the complainant was 11 years of age at the time of the rape, she was known to the appellant and regarded the appellant as an elder brother. He was in a position of trust vis-à-vis the complainant, although it appeared that the complainant had sustained no physical injuries, the rape affected her emotionally as she started to wet the bed although she did not do so prior to the rape.
- [9] The offence committed by the appellant is one of the offences delineated by the legislature to attract a minimum sentence, namely life imprisonment. The trial court found that taken cumulatively the personal circumstances of the appellant constituted compelling and substantial circumstances. Therefore it could deviate from the minimum sentence prescribed by the legislature namely life imprisonment.
- [10] In assessing what suitable sentence to impose two important factors stood out calling for attention, namely: the appellant's youthfulness and the fact that he was a first offender. Youthful offenders unlike adult offenders should be treated differently as

they are more amenable to be rehabilitated and become useful members of the society. This was recognised as follows in **S v Z en Vier Ander Sake** 1999 (1) SACR 427E at 430F:

“Besondere omstandighede geld by die bestrawwing van jeugdige oortreders, juis vanweë die feit van hul jonkheid. Die jeug is kenlik van kosbare waarde vir die gemeenskap - soos weerspieël word in art 28 van die Grondwet. Hulle is ons toekoms. Verbandhoudend hiermee is die feit dat jeugdige se persoonlikhede in die algemeen nog nie ten volle ontwikkel is nie. Hulle is meer buigsaam as volwassenes en dus uiteraard meer vatbaar vir beïnvloeding, ten goede sowel as ten kwade. Kriminele wangedraginge deur 'n jeugdige voorspel àl te dikwels (maar nie noodwendig nie) 'n kriminele volwassenheid. Jeugdige wat misdrywe pleeg is dus potensiële volwasse misdadigers en is as sulks 'n bedreiging nie net vir die gemeenskap nie, maar ook vir hul eie welsyn en toekoms. Dit is derhalwe die dure plig van elke persoon en instansie gemoeid met jeugdige, ook dan die howe, om te poog om jeugdige oortreders vir die geledere van wetsgehoorsames te win.”

- [11] The trial court was not only faced with the appellant's youthfulness but the appellant was also a first offender. He was coming into conflict with the law for the first time in his life. Although there is no law that states that first time offenders should not be sent to jail, the courts have over the years treated first offenders differently to a recidivist. First time offenders are not inclined to commit crime and a sentencing court has in its

hand a person with a good potential for rehabilitation and this has to be reflected in the sentence imposed. Having found in the appellant's favour that the minimum sentence is not applicable, the trial court was at liberty to pass any sentence which would take into account the nature and purpose of punishment. In so doing it should take into account the bench mark laid down by the legislature in the act relating to minimum sentences. However, such punishment although robust should in my view be humane and not have the effect to shock as it is currently the position in this case.

- [12] The appellant was relatively young and had just started out in life. The punishment that has to be imposed on him should not have the effect of breaking him but crucially should direct him on the path of rehabilitation. It should also express the society's displeasure of his deed. In my view a sentence of 26 years imprisonment is shockingly disproportionate as it is akin to locking this young appellant in jail and throwing the key away. It fails to accord the mitigating factors especially the youthfulness of the appellant and the fact that he is a first offender its proper place in the determination of punishment. The appellant although he has offended the community should be given an opportunity to

reflect on his actions and be given hope that at the end of his incarceration he would still be accepted as a useful member of the society. This can only be done by imposing an appropriate sentence, which in my view would be one of eighteen (18) years imprisonment.

[13] I am of the view that the sentence imposed on the appellant cannot stand and has to be set aside.

ORDER

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

- (a) The appeal against sentence is upheld;
- (b) The sentence imposed by the trial court is set aside and replaced by the following:

The accused is sentenced to 18 (eighteen) years imprisonment.

- (c) The sentence is antedated to 29 June 2010.

D. I. MATLAPENG, AJ

I concur.

S. EBRAHIM, J

On behalf of appellant: K. Pretorius
Instructed by:
Justice Centre
BLOEMFONTEIN

On behalf of respondent: Adv. E. Liebenberg
Instructed by:
The Director:
Public Prosecutions
BLOEMFONTEIN

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