

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: A222/2011

In the appeal between:

SAMUEL KARELSON

Appellant

and

THE STATE

Respondent

CORAM:

RAMPAI J *et* VAN ZYL J

JUDGEMENT:

RAMPAI J

HEARD ON:

9 MAY 2011

DELIVERED ON:

9 JUNE 2011

[1] This is an appeal against sentence. The appellant was convicted on a charge of rape, and one of pointing a fire-arm in contravention of section 120(6)(a) of the Arms Control Act, 60 of 2000. On 13th July 2009 he was sentenced to life imprisonment in respect of the rape charge and two years imprisonment in respect of the pointing of an fire-arm. He now comes on appeal in accordance with his automatic right to appeal. The respondent opposes the appeal.

- [2] The sentence of 2 years imprisonment imposed in connection with the pointing of a fire-arm was not challenged in this appeal. The appellant's stance is understandable. I shall say no more about it during the course of this judgment. It was primarily the sentence of life imprisonment which was under attack in this appeal.
- [3] The court *a quo* found that the aggravating factors exceeded the mitigating factors by such a substantial margin that it could not be convincingly held that there was any justification for the imposition of any sentence other than the prescribed minimum sentence of life imprisonment.
- [4] The question in the appeal is whether the aforesaid finding by the court *a quo* was correct on the facts. Mr Van der Merwe, attorney for the appellant, and Mr Pienaar, advocate for the respondent, differed. Contrary to the former's submission, the latter submitted that the court *a quo* committed no misdirection to warrant any interference with the crucial finding.
- [5] On behalf of the appellant it was contended that the

following factors, cumulatively considered, qualified to have been recorded as substantial and compelling circumstances which justified the imposition of a sentence less than the prescribed minimum sentence of life imprisonment, namely: that the appellant was a first rape offender; that he was a family man; that he was the father of 4 dependent minor children; that he was 42 years of age; that he was incarcerated for approximately three years before he was sentenced; that the victim had sustained no physical injuries; that the incident did not have adverse traumatic effects on her and that the circumstances of this case did not put it in the category of the most serious rape cases. Those then completed the sum total of the factors which individualised the appellant's person and conduct.

- [6] In sentencing the appellant the court *a quo* took into account the following aggravating factors: the nature and the gravity of the crime of rape; the need to protect society by deterrently punishing rape offenders; the vulnerable age of the victim as a child; the fact that two adults, the appellant and his friend, acted together, to commit the misdeed against a minor; the family tie between the appellant and the

victim; the cunning plan used to lure the victim; and the apparent anxiety of the victim while she was testifying.

- [7] Where a minor child is raped, as in this instance, the offence is classified under the part I, schedule 2 and attracts a sentence of life imprisonment. Where a victim, irrespective of any legal disability such as the victim's minority, mental impairment, or physical disability – is raped by two persons, the offence is similarly classified and attracts a similar sentence. The fact that the victim was a minor should not have been taken into account again when the aggravating factors were determined – **S v WATSON** 201 FSB A267/2009 at par [5], line 3 – 9 (19.04.2010) per Jordaan J with whom Kruger J concurred. In this instance, the victim was a 14 year old girl child. Rape victims subject to minority legal disability can range from less than one year to just below 16 years of age. All children in that age range are vulnerable. It must be borne in mind that the younger they are the more vulnerable they get.

- [8] This is not just a case of a minor victim who had been raped. The appellant was not alone in it. Here we have a minor

child raped by two adult men. The appellant, her relative for that matter, was one of the two. Had the victim being an adult woman who was not subject to any of the aforesaid legal impediments, there could have been some argument that the court *a quo* erred in using the classifying factor as an aggravating factor. In *casu* the victim was a minor. On that ground alone the appellant's conduct attracted the prescribed minimum sentence of life imprisonment. Moreover, the victim was a minor. The appellant went a step further when he was already in the hot water for life. He participated in the further raping of the victim by his friend.

[9] Where, as in this instance, the offender's conduct attracts the prescribed minimum sentence on two or more classifying grounds, only one such classifying grounds may be correctly ignored in determining the aggravating factors. The fact that the appellant and his co-perpetrator criminally collaborated to violate the victim increased the moral blameworthiness of his initial conduct of raping a minor.

[10] By planning together with another and facilitating the victim's further rape by another he certainly aggravated the minimum

conduct, which initially catapulted him into the first class of the most serious crimes. The natural indignation of society was correctly reflected in this case by treating the second dimension of the appellant's conduct as an aggravating factor. On this particular aspect I am not persuaded that the regional magistrate erred.

[11] The appellant was incarcerated for almost thirty four months from the 15th September 2006 until the 13 July 2009. The court *a quo* did not comment about this aspect at all. This is the first aspect of the critique.

[12] The appellant was once convicted of theft, way back, on 19th March 1986. He was then sentenced to corporal punishment in the form of five cuts with a cane. He was 22-years of age at the time. When he was sentenced in connection with the current rape conviction, the previous theft conviction was about 21 years old. This fact notwithstanding, the learned regional magistrate still regarded the appellant as an offender. Her worship was obviously reluctant to accept the fact that, for an uninterrupted period of no less than ten years immediately

preceding the 13 July 2009, the appellant had an unblemished criminal record. The comments of the court *a quo* that it could not accept the submission that the appellant was a first offender, regrettably created the impression that no adequate weight or value was attached to the status of the appellant as a first offender in the eyes of the law. There is much to be said for the argument that the mind of the court *a quo* was apparently contaminated by the previous conviction which had long served its purpose and expired almost a quarter of a century ago this is the second aspect of the critique.

- [13] There was no evidence that the appellant excessively used violence other than the violence inherent in the act of forceful penetration itself. The complainant sustained no serious physical injuries, moreover there was no evidence that she sustained emotional injury or lasting adverse effects from this incident. Although there was no evidence to accurately measure the true emotional harm, I accept that the sexual violation did have an adverse impact on her somehow. The third aspect of the critique was that the court *a quo* disregarded the importance of the absence of excessive

violence.

[14] Mr Van der Merwe, attorney for the appellant, submitted that the court *a quo* should have found that substantial and compelling circumstances existed to justify deviation from the ultimate sentence of life imprisonment. He conceded, though that the appellant had committed a despicable deed but argued that the ultimate punishment of life imprisonment was reserved for the most serious of the cases. He further submitted that, on the facts, the instant case could not be described as such.

[15] In **S v ABRAHAMS** 2002 (1) SACR par [29] Cameron JA commented:

“In addition, I agree with Foxcroft J that this is not one of the worst cases of rape. This is not to say that rape can ever be condoned. **But some rapes are worse than others, and the life sentence ordained by the Legislature should be reserved for cases devoid of substantial factors compelling the conclusion that such a sentence is inappropriate and unjust.** As Davis J stated in *S v Swartz and Another*:

'As controversial a proposition as this is bound to be, as **not all murders carry the same moral blameworthiness, so, too, not all rapes deserve equal punishment. That is in no way to diminish the horror of rape; it is however to say that there is a difference even in the heart of darkness."**

[16] In **S v GN** 2010 (1) SACR 93 (TPD) 97 Du Plessis J writing for the majority articulated the view that since the sentence of life imprisonment is the ultimate penalty it should not be lightly imposed. The courts are required to differentiate between sentences in accordance with dictates of justice. Where the prescribed minimum sentence is less than life imprisonment differentiation according to the degree of moral blameworthiness presents no undue difficulties. Where, however, the prescribed minimum sentence is life imprisonment differentiation presents enormous difficulties. This is so because an offender, as a human being has only one lifespan.

[17] In my view the brutality of the offender's violent actions is a critical factor. The greater the degree of an offender's reprehensible moral blameworthiness the less the chances of deviation become **S v MATYITYI** 2011 (1) SACR 40

(SCA). The converse also applies **S v NKOMO** 2007 (2) SACR 198 (SCA). The courts always go to great lengths to search and find sound reasons to deviate from imposing the ultimate sentence. Great care is taken to avoid imposing it merely because it is prescribed. The following passage is instructive:

“Accordingly, in its quest to do justice, a court will more readily impose a lesser sentence where the prescribed minimum sentence is imprisonment for life. Put differently, where the prescribed minimum is life imprisonment, a court will more readily conclude that the circumstances peculiar to the case are substantial and compelling, to the extent that justice requires a lesser sentence than life imprisonment.”

S v GN *supra*, par [12].

[18] I have considered all the points of critique and I am persuaded that those individual points as outlined herein as well as their cumulative effects coupled with the collective impact of the appellant’s personal circumstances as outlined in paragraph [5] warranted a finding that

substantial and compelling circumstances were present to justify a deviation from the ultimate sentence. To the extent that the court a *quo* failed to consider them or considered them but failed to attach sufficient value to them, which weight they individually and collectively deserved, it substantially erred. In view of such material misdirection we are entitled to interfere. I am of the firm view that this was not a case devoid of substantial factors compelling the conclusion that the ultimate sentence was inappropriate and unjust.

[19] Accordingly, I make the following order:

19.1 The appellant's appeal succeeds;

19.2 The sentence of life imprisonment by the court a *quo* on the appellant on 13 July 2009 is set aside;

19.3 The sentence so set aside is substituted with one of 18 years imprisonment;

19.4 The substitute sentence is antedated to 13 July 2009 being the date on which the original sentence was imposed.

19.5 The sentence of 2 years imprisonment imposed in respect of the second charge stands confirmed.

19.6 The two sentences shall run concurrently.

M. H. RAMPAL, J

I concur.

C. VAN ZYL, J

On behalf of the appellant:

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

On behalf of respondent:

Adv. F Pienaar
Instructed by:
Deputy Director:
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