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

Case Number: A67/2024

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO.

(3) REVISED.

DATE 2025-03-06

SIGNATURE

In the matter between:

M[...] **E[...]** **M[...]**

Appellant

and

THE STATE

Respondent

This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for handing down is deemed to be 6 March 2025.

JUDGMENT

POTTERILL J

Introduction

[1] The appellant was charged with rape¹ of a minor 17 year old girl, his biological daughter. The offence was committed in August 2016 and he pleaded guilty to the charge on 29 August 2023 and was found guilty as charged. He was sentenced to life imprisonment. The appellant is before us by virtue of his automatic right to appeal his life sentence.

Appellant's submissions

[2] It was submitted that the Magistrate paid lip service to substantial and compelling circumstances by taking the position of an "armchair critic." In doing so the Magistrate erred in not taking into account the interest of the victim, the remorse and personal circumstances of the appellant. This led to the Magistrate exercising his discretion improperly and unreasonably which allows for this Court of Appeal to interfere with the sentence.²

[3] As for the interests of the victim, the victim had attempted to have the charges withdrawn against the appellant but was unsuccessful. She had forgiven her father and she and the child born from the rape were staying with her father as a family unit. This was not a coerced situation as they were supporting the appellant; not being financially reliant upon him.

[4] The court *a quo* erred in finding that the evidence of the DNA conclusively linking the appellant as the perpetrator of the crime negated the remorse of the appellant. Despite a strong case against him, he had expressed sincere remorse.

[5] The appellant was 42 years when he committed the crime and was a first offender. He was sentenced at the age of 49 years old. He was married to the mother of the victim and from this marriage four children were born that he supported before he was arrested. He had passed grade 12 and from Vista obtained training in motor mechanics from General Motors but was retrenched in 2017 when General Motors closed operations in South Africa. He pleaded guilty.

¹ Contravention of Section 3 read with sections 1, 2, 50, 56(1), 56A, 57, 58, 59, 60 and 61 of the Criminal Law Sexual Offences and Related Matters Amendment Act 31 of 2007 as amended. Further read with sections 94, 256 and 261 of the Criminal Procedure Act 51 of 1977. Further read with sections 51(1) or 51(2)(b) and Schedule 2 of the Criminal Law Amendment Act 105 of 1977 as amended. Further read with section 120 of the Children's Act 38 of 2005.

² *S v Pieters* 1987 (3) SA 717 (A)

Submissions on behalf of the respondent

[6] The argument went that this Court cannot interfere with the sentence imposed because the Magistrate exercised its discretion properly and judiciously and there was no substantial and compelling circumstances to deviate from the sentence.

[7] It was submitted that the rape was a deliberate self-serving act to obtain sexual gratification. In doing so the appellant abused his position or authority as the father of the complainant and betrayed her trust. This prevalent crime of rape and incest, “has perverted the very bonds of love and trust that the family relation is meant to nurture.”³

[8] The interests of the victim support the sentence imposed because the factors that the victim attempted to withdraw the charges and had forgiven the appellant are neutral facts, not substantial and compelling facts.⁴ The incident had impacted on the victim emotionally and the child born from the incest shares a father with his mother. This will create a crisis for the child.

[9] As for remorse, the appellant did not voluntarily admit to his guilt, only when he was brought to book. He had no way to escape the truth being linked with the DNA. The appellant did not take the Court into its confidence as to whether he had a true appreciation of the consequences of his actions; completely disrupting a family unit.

[10] The respondent’s argument thus concluded that the appeal against sentence should be dismissed.

Decision on sentence

[11] This Court’s power to interfere with the trial court’s sentence imposed is limited to where there is an irregularity that results in a failure of justice, the Court misdirected itself, or the sentence is so shocking or disproportionate that no reasonable court would have imposed such sentence.⁵

³ *S v Abrahams* 2002 (1) SACR 116 (SCA) at 23C

⁴ *S v Matyityi* 2011 (1) SACR 40 (SCA) par [13]

⁵ *S v Bogaards* 2013 (1) SACR 1 (CC) at [41]

[12] Furthermore, in *S v Malgas* 2001 (1) SACR 469 (SCA) par [25] the Supreme Court of Appeal found that “Courts are required to approach the imposition of sentence conscious that the legislature has ordained life imprisonment ... as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances. Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts. The specified sentences are not to be departed from lightly and for flimsy reasons.”

With these principles in mind the Court must entertain this appeal.

[13] Raping your minor daughter is a heinous crime in that it is the most dehumanising violation a child can ever endure, let alone from her biological father. From his plea explanation he became sexually aroused, he undressed her and overpowered her despite his daughter’s attempts to fight him. From this horrific incident a child is born who is going to have to work through how he was conceived and how he fits in the family. It must also be remembered that only after the child was born and the biological mother of the victim insisted to ascertain who the father was did the victim reveal who the father was. The appellant did not come to his senses during the incident, nor did he show remorse after the incident and confess it. It was only when the state insisted on prosecution that he pleaded guilty.

[14] The interest of the victim was set out in the probation officer’s report. When confronted with the incident again she became emotional and unable to talk audibly. She stated she had cut herself off from that chapter and had to confront it again. She was dreading the day that the child would ask about his identity and she did not want to divulge this family secret. It was accepted that explaining this could “get ugly”. The probation officer explained that although the victim did state that she forgave the appellant he has left her with the child’s identity as “a major problem.”

[15] The dread of trying to explain the unlawful and terrible way the child was conceived and who his father is, negates any forgiveness the victim might have

expressed. She expressed forgiveness “for the sake of the family and especially her siblings.” The interests of the victim does not render it to be a substantial and compelling reason to deviate from the prescribed sentence.

[16] As for the personal circumstances of the appellant there is not a single factor, or all the factors set out in paragraph [5] above, cumulatively, that can sustain classification as substantial and compelling circumstances. The Magistrate thus correctly did not deviate from the prescribed sentence on this basis.

[17] Despite various programmes from the Government and NGOs rape statistics belie any success in curtailing rape. This is also true of the disturbingly increasing phenomenon of sexual abuse within the family context. The public expects harsher sentences to exact retribution and act as deterrence.

[18] I have dealt with the fact that the remorse only manifested after the state persisted with the prosecution with proof of the DNA evidence to who the perpetrator was. I can accept the appellant regretted his actions, but it did not manifest as genuine remorse.

[19] I am satisfied that the sentence was individualised with the punishment fitting the crime, the appellant and with careful consideration of all the factors relating to this matter. There were no substantial and compelling circumstances and the court *a quo* did not strive for severity or surrender to misplaced pity. The appeal against sentence is dismissed.

S. POTTERILL
JUDGE OF THE HIGH COURT

I agree

M.P. MOTHA
JUDGE OF THE HIGH COURT

CASE NO: A67/2024

HEARD ON: 4 March 2025

FOR THE APPELLANT: MR. S. MOENG

INSTRUCTED BY: Legal Aid Board

FOR THE RESPONDENT: Ms. E. Mafunisa

INSTRUCTED BY: Director of Public Prosecutions

DATE OF JUDGMENT: 6 March 2025