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**THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT)**

Case No: A158/2013

In the matter between:

FA

APPELLANT

and

THE STATE

RESPONDENT

Coram: YEKISO, GAMBLE J & ROGERS JJ

Heard: 27 JANUARY 2014

Delivered: 4 FEBRUARY 2014

JUDGMENT

ROGERS J:

Introduction

[1] The appellant was charged in the Regional Court for Worcester on five counts. The first three counts alleged that he had raped his oldest daughter S in 1995 (when she was eight or nine), in December 1998 (when she was 12) and on 17 January 2000 (she was 14). The fourth count alleged that over the period 1998 to 3 August 2000 the appellant had indecently assaulted his daughter F (she was 11 as at 3 August 2000). The fifth count alleged that on 3 August 2000 the appellant had indecently assaulted his youngest daughter M (then aged nine). The appellant pleaded not guilty but on 13 February 2002 was convicted on all counts following a trial at which he was legally represented.

[2] The regional court referred the appellant to the high court for sentencing in accordance with s 52(1) of the Criminal Law Amendment Act 105 of 1997 as it then read. The matter served before Van Heerden J (as she then was) on 23 May 2003. The appellant's counsel did not contest the convictions and Van Heerden J was satisfied that the convictions were in accordance with justice. The state led the evidence of the social workers who had assessed the three complainants. The appellant did not tender evidence though submissions were made on his behalf.

[3] On 26 May 2003 Van Heerden J handed down judgment. On count 1 (to which Act 105 of 1997 did not apply, since the said Act only came into force on 1 May 1998) Van Heerden J sentenced the appellant to 18 years' imprisonment. On counts 2 and 3 (to which Act 105 of 1997 did apply) Van Heerden J held that there were no substantial and compelling circumstances not to impose the life sentence required by s 51(1)(b) of the Act read with Part I of Schedule 2 and thus sentenced the appellant to life imprisonment on both counts. On count 4 Van Heerden J sentenced the appellant to 8 years' imprisonment. In regard to count 5, Van Heerden J was persuaded by the State's counsel that the indecent assault on M involved the 'infliction of bodily harm' as contemplated in Part III of Schedule 2 (as it then read) and that a minimum sentence of 10 years' imprisonment thus had to be imposed in terms of s 51(2)(b)(i) in the absence of substantial and compelling circumstances, which she found to be absent. On that count she thus sentenced the appellant to 10 years' imprisonment.

[4] The appellant attempted on various occasions thereafter to pursue an appeal and obtain legal aid. Owing in part to the fact that he was unrepresented and in part to administrative oversights and delays, a formal application for condonation and for leave to appeal was only filed on 3 December 2012. Because Van Heerden J had in the meanwhile been elevated to the Supreme Court of Appeal, the application served before another judge (me, as it happens) on 29 January 2013. Condonation was granted, and the appellant was given leave to appeal to a Full Bench against the sentences imposed.

The facts

[5] The facts of the matter are set out in the judgment of the Regional Magistrate and summarised in the judgment of Van Heerden J. The account which follows is taken largely from Van Heerden J's judgment. The dates of birth of the three complainants were 3 July 1985 (S), 10 April 1989 (F) and 8 June 1991 (M). The appellant lived in the family home together with his wife, who sometimes worked night shifts, the three daughters and three sons.

[6] In regard to the first count, the appellant went into the room where the three girls were sleeping. His wife was at work. The appellant vaginally raped S while the younger children slept. S said no and cried but her father continued. Her vagina hurt and she bled. S felt dirty and degraded. She did not tell anyone because she was scared of her father. He had said he would kill her if should told anyone. He had been violent with her in the past.

[7] In regard to counts 2 and 3, similar rapes occurred in December 1998 and on 17 January 2000. On both occasions the appellant forced himself on S despite the fact that she was crying. He said she should shut up. On both occasions the experience was painful for her. After the rape in December 1998 she confided in a friend but did not tell her mother as she did not enjoy a good relationship with her. At the time of the rape on 17 January 2000 her mother was actually at home but sleeping in the parents' bedroom. On this occasion she confided in another friend, bursting into tears and saying she could not stand it any longer. On the friend's advice S spoke with a social worker and was then examined by a Dr Maria

Reyneke. Dr Reyneke, who testified at the trial, found that S's hymen was no longer intact. She observed that S was very emotional during the examination.

[8] The appellant was arrested on 21 January 2000 but was released on bail shortly thereafter.

[9] In regard to count 4, the evidence was that the appellant sexually molested F on about five occasions over the period 1998 to August 2000 by lying on top of her and touching her private parts. This took place in the parents' bedroom while the mother was at work. Although it hurt, he told her to keep quiet. She kept things to herself because she was frightened her father would hit her. Following the appellant's sexual molestation of M (see below), F, like M, was examined on 5 August 2000 by a Dr Danie Theron. Dr Theron had relocated to the United Kingdom by the time of the trial. His reports in respect of F and M were identified and explained by a Dr Martinus de Klerk. Dr Theron noticed that S's labia majora were somewhat red, and no hymen was visible. He also observed a white discharge from the vaginal area. Although Dr Theron could not find any evidence of current molestation, he concluded that it could possibly have occurred in the past.

[10] In regard to count 5, M was at home on 3 August 2000 with F and two of her brothers. Her father called her and said they should have a sleep. She went into her father's bedroom, where her six-year-old brother was also sleeping. Her father removed her underpants and inserted his penis into her private parts. She found this painful and bled. She was frightened of her father and thought he would hit her, so she did not tell anyone. Later that evening her father again took her to his bedroom where he inserted his penis into her private parts, which again caused pain and bleeding. She was taken for a medical examination on 5 August 2000 together with S. Dr Theron's examination provided clear indication of sexual molestation. No hymen was visible. There was an abrasion on the right-hand side of the labia minora and redness around the vagina and urethral opening. The doctor also observed a white vaginal discharge.

[11] At some stage after 5 August 2000 (and by not later than 27 November 2000) the appellant was re-arrested because of the further incidents involving F and M. He remained in custody until being sentenced by Van Heerden J on 26 May 2003.

[12] At his trial the appellant denied all the charges, claiming that they were fabricated by his children because he was a strict father.

Applicability of Act 105 of 1997

[13] It is common cause that the minimum sentencing regime in Act 105 of 1997 did not apply to the appellant's convictions on counts 1 and 4. In regard to counts 2, 3 and 5 (where Van Heerden J applied the legislation), Mr Klopper for the appellant submitted that the appellant had not at his trial been properly warned of the potential applicability of the legislation and that Van Heerden J had thus violated the appellant's fair trial rights by sentencing him in accordance with the legislation.

[14] Insofar as counts 2 and 3 are concerned, the complaint in my view has no merit. Counts 2 and 3 recorded, at the foot of the charge sheet, that the charge was one of rape as contemplated in Part I of Schedule 2 of Act 105 of 1997. The charge sheet alleged that S was 12 and 14 years old respectively at the time of the rapes in question. The age of the complainant was the only circumstance which could have brought the rapes within the ambit of Part I.

[15] The appellant was legally represented at the trial. At the commencement of the trial his attorney placed on record that the defence had seen the charge sheet and that the appellant pleaded not guilty to all the charges. Furthermore, at the commencement of his evidence in chief, the appellant, who said that he had prepared something which he wished to share with the court, started off by saying that it was his life which was at stake and that it was he who was staring s 51 of the Act in the face.¹

¹ 'Dit is my lewe wat hier ter sprake is en dit is ek wat Artikel 51 van die Strafbeg Wysigingswet in die gesig staar..'.

[16] I am thus satisfied that the appellant was fully aware that because of the minimum sentencing legislation he faced a potential life sentence if convicted on counts 2 and 3.

[17] The position in regard to count 5 is different. The charge sheet in respect of that count made no reference to Act 105 of 1997. The charge sheet did not allege that the indecent assault had involved the infliction of bodily harm. At no stage during the hearing before the Magistrate was reference made to the minimum sentencing legislation in regard to this particular count. Ms Cecil for the state did not seek to support Van Heerden J's invocation of Act 105 of 1997 in relation to count 5. She was correct not to do so. Of course, the failure on the part of the State to make reference to Act 105 of 1997 in relation to count 5 almost certainly did not affect the appellant's decision to testify. That decision was clearly taken in the light of the risk he faced in respect of counts 2 and 3. However, it is quite possible that the conduct of his defence and the cross-examination of witnesses, particularly medical witnesses, would have differed had the accused been squarely warned that the state intended to argue that the indecent assault was one involving the infliction of bodily harm.

[18] It follows that in relation to count 5 this Court is at large to determine an appropriate sentence.

Count 1

[19] Mr Klopper understandably focused his submissions on the life sentences imposed on counts 2 and 3. Because of the delays which have occurred in this matter, the appellant would by now be eligible for parole if his only sentence were the 18 years' imprisonment imposed in respect of count 1. For reasons which will be apparent from what I say in relation to counts 2 and 3, a sentence of 18 years' imprisonment on count 1 induces no sense of shock and cannot be regarded as disturbingly inappropriate.

Counts 2 and 3

[20] In respect of counts 2 and 3, Van Heerden J was obliged to impose life imprisonment unless there were substantial and compelling circumstances to deviate from that sentence. Van Heerden J directed herself in accordance with the test laid down in *S v Malgas* 2001 (1) SACR 469 (SCA), a test which remains applicable to this day.

[21] Subsequent to the imposition of sentence in the present matter, there have been many cases concerning the prescribed life sentence for the rape of persons under the age of 16. I had occasion in *S v GK* 2013 (2) SACR 502 (WCC), in a judgment concurred in by Gamble J, to review most of the leading Supreme Court of Appeal cases on the topic. I do not find it necessary to repeat what I said in paras 5 to 14 regarding the test laid down by *Malgas* or the guidance to be obtained from the subsequent decisions of the Supreme Court of Appeal. (In para 8 of *GK* I made reference to two judgements of the Supreme Court of Appeal, both of which have been anonymised by the law reporters as *S v PB*. They are reported respectively at 2011 (1) SACR 448 (SCA) and 2013 (2) SACR 533 (SCA). For convenience I shall refer to them as *PB(1)* and *PB(2)*.) In addition to the judgments reviewed in *GK*, there are three recent full bench judgements in other divisions dealing with the rape of minors, namely *S v FV* 2014 (1) SACR 42 (GNP), *S v AM* 2014 (1) SACR 48 (FS) and *S v SM* 2014 (1) SACR 53 (GNP).

[22] In *PB(2)* Bosiello JA stated that findings in prior cases cannot be elevated to the status of binding precedents or benchmarks or be allowed to become a straitjacket (paras 16-19). One must thus distinguish between the legal principles to be deduced from authoritative judgments and the detailed application of those principles to the facts of particular cases. Nevertheless, and as I observed in *GK* (para 9), if one examines the minutiae of the leading cases it is difficult to discern why in some of them life sentences were upheld where in others, not apparently less heinous, substantial and compelling circumstances were found to exist.

[23] In the present case the appellant was a first offender. He was 40 when he began perpetrating sexual crimes against his daughters (this was in 1995). The

appellant had apparently been in gainful employment for a number of years as an electrician and was supporting his family.

[24] However, and whereas s 51(2) draws a distinction between first, second and multiple offenders in the case of offences referred to in Parts II, III and IV of Schedule 2, no such distinction is made in s 51(1) in regard to offences dealt with in Part I. This does not mean that the absence of prior convictions is irrelevant in assessing whether a sentence of life imprisonment would result in an injustice or (to put it differently) be disproportionate to the crime, the criminal and the legitimate needs of society, but in answering that question it is appropriate to have regard to the purpose of the minimum sentencing legislation and the distinctions drawn by the lawmaker itself. Life sentences for first offenders were upheld in *PB(1)* and also in the recent full bench judgments of *FV* and *AM* mentioned earlier.

[25] There are various factors which go into the scales against the appellant. The first is that he grossly abused the trust which his children were entitled to repose in him as a primary caregiver. The sexual violation of a child is always a shocking crime, the harmful repercussions of which in future years are difficult to predict. But the horror of the crime is made all the worse when the perpetrator is one from whom the child was entitled to expect love and kindness. Abuse of this kind may be impossible for the child to understand and is likely to pervert and distort the child's conception of healthy family relations. One is familiar with the phenomenon, in family rapes, that the victim somehow imagines that she must have been responsible for what happened to her. The child in such cases will be deprived of the support of at least one of her parents in coping with the trauma, and indeed it is not unusual for the child to be unwilling even to confide in the other parent, through fear that the one parent will disbelieve her and side with the other.

[26] Then there is the fact that the appellant abused or began abusing his three daughters when they were each about eight or nine. It is hardly surprising that they gave evidence of the pain which the act of rape or assault caused them.

[27] There was also evidence from two social workers who had interviewed and prepared impact reports in respect of the three complainants. S (she was 17 when

assessed) told the social worker that she would remember for the rest of her life the harm the appellant had done to her. She experienced nightmares until 2001. She felt depressed and disheartened when she thought of the events. She also felt less worthy than her peers because they still had their virginity. She said that she did not have any interest in heterosexual relations because it reminded her of her father's behaviour. In her oral evidence the social worker added that S, who was living with her maternal aunt, had told her that she had become a born-again Christian. She wrote her father a letter and gave it to him at the prison. Her attitude was that as a Christian she forgave him but that he also needed to be subject to secular law and to face punishment under that law.

[28] F (who was 13 when assessed) told the social worker that she initially felt dirty and unclean because of what her father had done to her. She had a facade of bravery but her sister told the social worker that F was afraid of other children and of the possibility that they might tease her. She had not received therapy and had thus had to process the events internally. Her schoolwork had suffered and she failed her grade in 2001. The social worker opined that F had unresolved emotions and that although her defence mechanisms allowed her currently to function well, the prognosis for her situation was poor because the experience could influence her in adult life. In oral testimony she explained the concern that S could in later life experience problems with other authority figures and not properly understand the role of a father in the home. The prognosis could improve if the child underwent therapy.

[29] M, who was 11 when assessed, told the social worker that she still feared her father but felt safe because he was in prison and could thus not continue with his bad behaviour. She also said, however, that she wanted her parents to continue functioning as such and to remain a couple. The social worker remarked, in her oral testimony, that these contradictory views reflected that M, the youngest of the complainants, did not really understand life. She did not socialise with boys because she regarded them as undisciplined. The social worker stated that the long-term consequences could not be determined at that stage but felt that M could benefit from therapy.

[30] A further aggravating circumstance is that this was not an isolated act. S was raped on three occasions over a six-year period while F was molested on about five occasions over a three-year period. By the time the appellant perpetrated the two rapes for which he faced potential life sentences, he had already raped S once and had begun sexually assaulting F. He must have had time to reflect on his conduct and yet persisted with it. Indeed, it is a remarkable feature of this case that even after he was arrested for the rapes perpetrated on S, he made himself guilty of sexually assaulting F and M, leading to his re-arrest. I note, in this regard, that the social worker who examined F also expressed the view that the appellant's own prognosis was not good. She referred to a study which found that sexual offenders' prospects for reformation were poor and that they needed to be constantly monitored.

[31] A further consideration is that the appellant, far from appreciating the appalling nature of his conduct and frankly confessing it, falsely denied his children's version and claimed that they had fabricated stories against him. He expressed no remorse.

[32] Mr Klopper submitted *inter alia* that we should have regard to the fact that the appellant was in custody for a considerable period prior to being sentenced. The precise date of his re-arrest does not appear from the record though by 27 November 2000 he was back in custody. He was sentenced on 26 May 2003, about two and a half years later. Where a life sentence is otherwise appropriate, it is difficult to know quite how to account for time awaiting trial. I accept that in an appropriate case it is a factor which may go into the mix in assessing whether substantial and compelling circumstances are present to deviate from a life sentence. In my view, however, the time spent awaiting trial in the present case is not relevant. In respect of counts 2 and 3, which are the counts now under consideration, the appellant was arrested on 21 January 2000 but released shortly thereafter on bail. His re-arrest after 3 August 2000 was the result of the charges preferred against him in respect of counts 4 and 5. His bail was not forfeited but returned to him at his request. The time awaiting trial would thus more properly be attributed to counts 4 and 5. In any event, I do not think that the period of about 30

months awaiting trial is sufficient in this case to lead to a conclusion that substantial and compelling circumstances existed to depart from the ordained life sentences.

[33] In my view, Van Heerden J cannot, in the light of all these circumstances, be faulted for concluding that there were no substantial and compelling circumstances to deviate from the prescribed life sentences. Applying the *Malgas* test, I cannot say with conviction, when all the circumstances relevant to an appropriate sentence are carefully weighed, that life sentences on counts 2 and 3 would result in an injustice or that life sentences would be disproportionate to the crime, the criminal and the legitimate needs of society.

[34] Mr Klopper intimated from the bar that the appellant, during his years in prison awaiting this appeal, had undergone a change. Mr Kloppers very properly did not seek to place specific information in that regard before us though he indicated that further evidence could be adduced by affidavit if we thought it appropriate. I do not think that this would be the right course to follow. A sentencing court always hopes that a convicted person will use the time in prison to reflect on his conduct and to improve himself. If that is what has happened in the appellant's case, he is to be commended.

[35] However, and except perhaps for very exceptional cases, an appeal on sentence must be decided with reference to the evidence before the sentencing court. Where evidence which could and should have been placed before the sentencing court was not adduced, an appellant might be permitted to adduce that evidence on appeal if he properly explains why it was not timeously adduced. Evidence of subsequent reformation and remorse, on the other hand, is more properly a matter for consideration when parole is assessed.

[36] I would thus dismiss the appeal against the life sentences imposed on counts 2 and 3.

Count 4

[37] On count 4 the appellant was sentenced to 8 years' imprisonment. I did not understand Mr Klopper to contend that this sentence was inappropriate. It certainly does not induce a sense of shock.

Count 5

[38] For the reasons I have already given, Van Heerden J erred in applying the minimum sentencing legislation to count 5. We are thus at large to determine an appropriate sentence. The evidence led in respect of count 5 tends to indicate that M was raped and not only sexually assaulted. However, the appellant was not charged with rape. I consider that imprisonment of 8 years, as in the case of count 4, would be appropriate. For obvious reasons, the precise extent of the sentence on count 5 is not of practical significance to the appellant.

Conclusion

[39] I would thus dismiss the appeal in respect of counts 1, 2, 3 and 4. In respect of count 5, I would set aside the sentence imposed by Van Heerden J and replace it with a sentence of 8 years' imprisonment.

[40] At the conclusion of her judgment, Van Heerden J recorded that in terms of s 32(2)(a) of the Correctional Services Act 8 of 1959² the sentences on all five counts would automatically run concurrently. The said Act was applicable as at May 2003, given that the Correctional Services Act 111 of 1998 only came into force on 31 July 2004. Although s 32(2)(a) of Act 8 of 1959 provided that any determinate sentence of imprisonment to be served by a person was to run concurrently with a life sentence (a similar provision is now to be found in s 39(2)(a)(i) of Act 111 of 1998), it is not entirely clear whether, where a convicted person who is sentenced to life imprisonment is also sentenced to two or more periods of determinate imprisonment, those periods of determinate imprisonment themselves run concurrently with each other, though this seems to have been the view of Stafford J

² The judgment refers mistakenly to Act 8 of 1995.

in *S v Van Wyk* 1997 (1) SACR (T) at 362f-363i. Ordinarily, determinate periods of imprisonment run successively unless there is a contrary direction. In the present case the cumulative duration of the determinate periods of imprisonment is 34 years. It is notionally possible for the cumulative duration of determinate sentences to exceed the minimum period required to be served by a person who has been sentenced to life imprisonment. In the present case, however, it is clear that Van Heerden J intended all the sentences to run concurrently with each other and it would be appropriate, for the avoidance of doubt, to make this clear in our order.

YEKISO J:

[41] I concur. The appellant's appeal against the sentences imposed on him in respect of counts 1, 2, 3 and 4 is dismissed. The appeal against the sentence imposed on him in respect of count 5 is upheld, and the said sentence is replaced with one of 8 years' imprisonment. It is further ordered that all the periods of imprisonment shall run concurrently with each other.

GAMBLE J:

[42] I concur.

YEKISO J

GAMBLE J

ROGERS J

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