IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, MAKHANDA

Case No: C.A. & R 158/2020

In the matter between:

TIMOTHY TYHOBEKA Appellant

and

THE STATE Respondent

APPEAL JUDGMENT

RAWJEE AJ :

[1] The appellant was convicted in the regional court, Cradock, for the rape of a 12 year old boy child in contravention of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. He was sentenced to life imprisonment.

[2] The appellant faced financial challenges in prosecuting the appeal. The lack of adequate financial resources resulted in the appellant's Heads of Argument being filed outside the prescribed time periods. The State accordingly filed a notice to strike the appeal off the roll. The State withdrew its notice to strike the appeal off the roll after considering the appellant's reasons for the delay in complying with the prescribed time periods. This Court, in the interests of justice, condoned the non-compliance with the prescribed time periods and entertained the appeal.

[3] The grounds of appeal raised by the appellant are that the trial court erred in finding that the State proved its case beyond reasonable doubt and erred in finding that there were no substantial and compelling circumstances to deviate from the imposition of a life sentence.

[4] On 31 December 2017, the complainant was playing outside in the street in front of the appellant's yard with his cousin and two other friends. The appellant, who was sitting on the porch, called the complainant to go and buy him cigarettes. Indeed the complainant went and returned with ten cigarettes. This much is common cause. The complainant testified that when he went to give the appellant the cigarettes, the appellant pulled him inside his house and locked the door. The appellant told him to go and sit in the bedroom. The appellant then went to the toilet. When he came back he told the complainant to sleep with him. The complainant refused and he was then thrown on the bed by

the appellant. The complainant was lying on his back. The appellant then took off the complainant's shorts and underwear and then proceeded to take off his own long pants, shorts and underwear. He inserted his penis into his buttocks. He lifted the complainant's legs up to do this. The complainant cried and kicked the appellant. The complainant's cousin then came to knock on the door of the appellant's home and called the complainant's name out. The appellant did not open the door at that stage. A short while later, the complainant's mother knocked and kicked at the door to the appellant's home. The appellant gave the key to the complainant to go and unlock the door. The complainant's mother entered the appellant's home and found him in the bedroom with his belt loose. She asked him why he locked her son up in the house with him. He did not answer her question. They went home and the complainant's mother and granny went to the appellant's mother's home to report to her that the appellant had locked the complainant up in his house. The complainant's evidence is that he was scared to tell his mother that he was raped as she had warned him about it. The next day he was nauseous and had a headache and could not stand up. The complainant's mother asked him to tell her the truth and he then reported the rape to her. She went to the appellant's home to confront him and without explaining in any particularity, he asked her to forgive him. The neighbours witnessed the complainant's mother's confrontation with the appellant and that she was assaulting him. She then took him to the hospital with the help of a friend.

[5] At the hospital the complainant was attended to by Dr Ratyana. The complainant's mother reported that he had been sodomised. Dr Ratyana completed a medical examination and reported that there was anal penetration. No condom was used and the complainant had to be submitted to a HIV test. This medical evidence was not contested by the appellant at the trial.

[6] The appellant's version at the trial was that the complainant wanted to watch TV and he had refused as he was waiting for his girlfriend. Absent how and when he had a change of heart and decided to allow the complainant to watch TV, he then tweaked his version to state that the complainant was in his house to watch TV. It is the uncontested evidence of the complainant's mother that the TV was not on. I find his version to be false. His explanation for locking the door was that it was late. This was not accepted as true as he was sitting outside on the porch a few minutes ago and the complainant's cousin and other children were still playing on the street just outside his house and his girlfriend was also about to visit. Having considered the evidence as a whole, including the objective, uncontested medical evidence, I find that the court *a quo* correctly convicted the appellant of rape.

[7] Insofar as the appeal regarding the sentence of life imprisonment is concerned this Court has to decide whether the sentence imposed is appropriate having regard to the evidence before the magistrate as a

whole. When a court determines an appropriate sentence it must balance the seriousness of the offence, the interests of society and the personal circumstances of the accused person, without over emphasising any of those factors. It is appreciated that the magistrate frowned upon the deed as the victim was a minor child, however, there are mechanisms of addressing the interests of victims in the sentencing process without failing to consider and balance those with the interests of the accused person. The Supreme Court of Appeal when dealing with an appeal against sentence lodged by the Director of Public Prosecutions in **DPP v Thabethe (619/10) [2011] ZASCA 186 (30 September 2011)** at paragraph 21 referred to **S v Matyityi 2011 (1) SACR 40 (SCA) paras 16 -17** where Ponnan JA addressed the sentencing process involving victims and stated :

> *" An enlightened and just penal policy requires consideration of a broad range of sentencing options, from which an appropriate option can be selected that best fits the unique circumstances of the case before court. To that should be added, it also needs to be victim- centred. Internationally the concerns of victims have been recognised and sought to be addressed through a number of declarations, the most important of which is the UN Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power. The declaration is based on the philosophy that adequate recognition should be given to victims, and that they should be treated with respect in the criminal justice system. In South Africa victim empowerment is based on restorative justice. Restorative justice seeks to emphasise that a crime is more than the breaking of the law or offending against the State- it is an injury or wrong done to another person. The Service Charter for Victims of Crime in South Africa seeks to accommodate victims more effectively in the criminal justice system. As in any true participatory democracy its underlying philosophy is to give meaningful content to the rights of all citizens, particularly victims of sexual abuse, by reaffirming one of our founding democratic values, namely human dignity. It enables us, as*

well, to vindicate our collective sense of humanity and humanness. The charter seeks to give to victims the right to participate in and proffer information during the sentencing phase. The victim is thus afforded a more prominent role in the sentencing process by providing the court with a description of the physical and psychological harm suffered, as also the social and economic effect that the crime had and, in future, is likely to have. By giving the victim a voice the court will have an opportunity to truly recognise the wrong done to the individual victim (See generally Karen Muller & Annette van der Merwe 'Recognising the Victim in the Sentencing Phase : The Use of Victim Impact Statements in Court.').."

[8] Ms Teko correctly submitted that this court will only interfere with a sentence if there is a material misdirection committed by the court *a quo*. Ms Teko referred to the *Zinn triad* and submitted that the sentence is shocking and disproportionate. I find that there are indeed substantial and compelling circumstances which should have influenced the trial court to deviate from the minimum sentence. In my view, those circumstances would include, but not limited to, the fact that the appellant is a first offender and that he is a bread winner supporting three minor children.

[9] Mr Kgatwe representing the State conceded that the sentence of life imprisonment was shocking and disproportionate in this case for the same reasons advanced by Ms Teko. He submitted that considering the personal circumstances of the appellant, a sentence between 10 to 15 years would be appropriate.

[10] I find that by imposing a life sentence in the circumstances of this case, the trial court erred. For that reason, this Court is at large to interfere with the sentence imposed by the trial court. I would uphold the appeal against the sentence.

ORDER

I would accordingly make the following Order:

6.1 The appeal against the conviction is dismissed.

6.2 The appeal against the sentence is upheld.

6.3 The sentence of the court *a quo* is set aside and substituted with the following:

> **"The accused is sentenced to undergo fifteen (15) years' imprisonment for the rape of a minor boy child."**

6.4 The sentence is antedated to 11 June 2019.

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A RAWJEE

ACTING JUDGE OF THE HIGH COURT

I agree. It is so ordered.

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T. V NORMAN

JUDGE OF THE HIGH COURT

Appearances:

For Appellant:	Adv Teko instructed by Legal Aid Centre, Makhanda
For Respondent:	Adv K M Kgatwe instructed by National Director of Public Prosecutions, Makhanda
Date heard:	11 May 2022
Date delivered:	31 May 2022