29/03/2018

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

[REPUBLIC OF SOUTH AFRICA]

A415/17

CASE NUMBER: ~~A658~~ / 14
NGHC CASE No CC215/01

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

29 / 03 / 2018
DATE

SIGNATURE

JOSEPH GHINGA SIYALE — **APPELLANT**

AND

THE STATE — **RESPONDENT**

JUDGMENT

MAVUNDLA J,

[1] The appellant was on 4 May 2004 convicted in the Sebokeng Regional Court of the following charges:

1.1 Count 1: Contravention of section 3 of Act 32 of 2007 read with the provisions of section 51(1) of Act 105 of 1997 (rape);

1.2 Count 2: Contravention of section 3 of Act 32 of 2007 read with the provisions of section 51(1) of Act 105 of 1997 (rape);

1.3 Count 3: Attempted indecent assault and;

1.4: Count 4: Indecent assault.

[2] After conviction the matter was referred to the High Court Gauteng Division for sentence as by then the Regional Court did not have jurisdiction to impose life sentence. On the 26 of October2004, Masipa J sentenced the appellant as follows:

1.1 Count 1: life imprisonment;

1.2 Count 2: life imprisonment;

1.3 Count 3: Five years imprisonment;

1.4: Count 4: Eight years imprisonment.

The sentences in Counts 2, 3 and 4 were ordered to run concurrently with the sentence in count 1. Thus the effective sentence is life imprisonment. The order of concurrency was *ex abudante cautela* because life sentence automatically "swallows" the rest of the other sentences.

[3] The appellant appeals against the sentences, with leave to appeal against sentences only having been granted by the Supreme Court of Appeal.

[4] The background facts leading to the convictions can be summarized as follows:

4.1: The victim in count 1 is a girl of 7 years and in count 2 also a girl of 9 years. The appellant called the two girls to his house. Once the girls entered the house, the appellant locked the door. He then took the complainant in count 2 to his bedroom, leaving the other girl in the kitchen. He undressed the complainant in count 2 and then threw her on the bed. He undressed himself and then lied on top of her and raped her. He placed his hand over her mouth to muffle her screams.

4.2 After raping the complainant in count 2, the appellant then instructed her to go back to the kitchen. He followed her to the kitchen wherefrom he then took the

complainant in count 1 to the bedroom. He undressed the complainant in count 1 and then raped her. He also placed his hand over her mouth to muzzle her screams. After satiating his lust, he warned the two little girls that he would kill them were they to tell their parents about the incident.

4.3 According to Dr. Peter Antal Mayer who examined the two girls, the hymen of the complainant in count 2 was absent. The hymen of complainant in count 1 was perforated.

4.4 There is evidence that the complainant in count 2 subsequent to her ordeal has developed abscess and boils. She is no longer performing well at school. She is now temperamental, shouts and cries.

4.5 Unfortunately there was no evidence to determine whether both these little girls were not infected with HIV or Aids. In such matters involving young children, it should be imperative that both the accused person and the victim child be taken for tests to determine whether the victim has not been infected with this dreaded virus.

[5] In respect of:

5.1 count 3, attempted indecent assault, the complainant was a 13 year old girl at the time when she testified at the Court *a quo*. On the day in question, her mother sent her to the appellant's place to take a lunch box to him. They were neighbours and the appellant was also a friend to her stepfather. The complainant was also supposed to bring back from appellant her father's bus ticket. On her arrival at the appellant's place where she found the appellant, the appellant invited her into the house. The appellant first went to the bedroom, supposedly to fetch the ticket. He came back but went back to the bedroom. When he came out from the bedroom for the second time he was naked and holding a sjambok. The appellant then ordered the complainant in this count to undress but she refused. He then threatened to assault her with the sjambok. He held her on her hand and tried to kiss her but she turned her face away from his as she refused to kiss him. She thought the appellant was going to rape her as

she saw his penis. The appellant touched her thighs and body. She however managed to bolt out of the house and escaped.

5.2: Count 4 was indecent assault, the complainant on a particular day at her home where his step father was with his friends including the appellant; she was seated on her father's lap. The appellant was sitting next to her father. The appellant placed his hand underneath her dress and panty and inserted his finger in her womanhood. Her father slapped the appellant's hand. It would seem that her father and some of his friends including the appellant were on that occasion busy drinking liquor, when this incident happened. Although his step father was called as a witness, he said that he could not remember anything, understandable so, in my view, because he and his friends were imbibing liquor. This complainant was however corroborated by another little girl who is her friend who witnessed the episode.

[6] The appellant was 44 years old at the time of commission of the offences and 46 years of at the time of sentencing. He is married and has four children, two of whom are still minors. His wife is unemployed. He was employed at HJD Electricians. He was the sole breadwinner. He spent two years in custody awaiting trial and is a first offender.

[7] It was submitted on behalf of the appellant that his personal circumstances amount to substantial and compelling circumstances justifying a lesser sentence. It was further submitted that the sentence of life imprisonment is disproportionate to the offences. Reliance was made on the matter of *S v MN*[1] and S v MM; S v JS; S v JV.[2]

[8] When sentencing a person convicted on a count of rape of a person under the age of 16 years, the Criminal Law Amendment Act[3] prescribes life imprisonment, unless there are substantial and compelling circumstances applicable, in which case the Court may deviate from the minimum prescribed sentence.

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[1] 2011 (1) SACR 286 (EGG).
[2] 2011 (1) 510 (GNP).
[3] 105 of 1997 (The Act).

[9] In the celebrated matter of *Malgas*[4], the Supreme Court of Appeal held that the imposition of the prescribed minimum sentence is not to be deviated from for any flimsy reason. The sentencing court on consideration of the circumstances of a particular case must satisfy itself that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that prescribed sentence, is entitled to impose a lesser sentence.

[10] With greatest respect, there is a growing trend of leniency[5] and deviating from the prescripts of the Minimum sentence Act and lesser sentences imposed than the prescribed life imprisonment sentence in some of the rape cases involving victims below the age of 16 years: *S v GN*[6] where the victim was 5 years old raped by her biological father. The life sentence on appeal was set aside and substituted with 20 years' imprisonment; *S v MN (supra)* the victim was 10 years old raped by the 47 year old first offender who had made a contribution to the community, his life imprisonment sentence on appeal was set aside and substituted with sentence of 15 years' imprisonment; *S v MM; S v JS; S v JV(supra)* the life sentences imposed in all these three cases on appeal were set aside and substituted with the following sentences respectively: 12 years' imprisonment; 12 years' imprisonment; the two life sentences in the latter matter were substituted with two sentences of 15 years' imprisonment from which 17 months to be deducted when calculating the date upon which the sentences are to expire; in terms of s 282 of Act 51 of 1977, the substituted sentences are deemed to have been imposed on September 2005; and in terms of s280(2) of Act 51 of 1977, it was ordered that the two substituted sentences run concurrently, so that the effective term is 15 years; *S v Vilakazi*[7] the victim was under 16 years old, the life imprisonment sentence was set aside and substituted with 15 years' imprisonment from which two years are to be deducted when calculating the date upon which the sentence is to expire; *S v Tshoga*[8] the

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[4] 2001 (1) SACR 469 (SCA)

[5] *Vide S v Ngomane* 2007 (2) SA 535 (W) where the rape victim was 13 years, the sentence of 25 years imprisonment was on appeal reduced to 15 years imprisonment.

[6] 2010 (1) SACR 93 (TPD).

[7] 2009 (1) SACR 552 (SCA).

[8] 2017 (1) SACR 420 (SCA).

victim was 10 years old, the life sentence imprisonment was set aside and substituted with 10 years' imprisonment. The list is inexhaustible.

[11] It is trite that rape under any circumstances is seen as a serious and heinous crime[9]. In *S v Chapman*[10] rape was described as *"a very serious offence constituting as it does a humiliating, degrading and brutal invasion of the privacy, dignity and the person of the victim".* In other cases described as a *"cancer in our society"*[11], and *"an appalling and outrageous crime which violates a 'woman's body [which] is sacrosanct"*[12]. In *N v T*[13] it was described as *"a horrifying crime and ...a cruel and selfish act in which the aggressor treats with utter contempt the dignity and feelings of [the] victim".*

[12] Goldestein J in *S v Ncheche*[14] held that: "[35] Rape is an appalling and utterly outrageous crime, gaining nothing of any worth for the perpetrator and inflecting terrible and horrific suffering and outrage on the victim and her family. It threatens every woman, and particularly the poor and vulnerable. In our country, it occurs far too frequently and is currently aggravated by the grave risk of transmission of Aids. A woman's body is sacrosanct and anyone who violates it does so at his peril and our Legislature, and the community at large, correctly expect our courts to punish rapist very severely."

[13] Rape violates the victim's inherent right to dignity, which is a right entrenched in the Bill of Rights in the Constitution.[15] It violates the child victim of its right in terms of s28 (d) 'to be protected from maltreatment... abuse or degradation."

[14] In ***Mtyala v S***[16] the Supreme Court of Appeal (referring to child rape) held that "[d]espite the introduction of the minimum sentence regime, there is no sign that these kinds of incidents are on the decline."[17] Quoting from *S v Jansen*[18] the situation was put as

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[9] S v Zinn 1969 (2) SA 537 (A).
[10] 1997 (2) SACR 3 (SCA).
[11] S v Swartz and another 1999 (2) SACR 380 CPD.
[12] S v Ncheche 2005 (2) 386 (W).
[13] 1994 (1) SA 862 (C).
[14] 2005 (2) SACR 386 (W) at page 395 .
[15] S10 of Act 108 of 1996.
[16] [2015] JOL 32899 (GP).
[17] See also Kwanape v S at [15]: *"Recently this Court reiterated in S v Matyityi 2011 (1) SACR 40 (SCA) that 'the crime pandemic that engulfs our country' has not abated. Thus court are duty-bound to implement the sentence prescribed in terms of the Act and that ' ill-defined concepts such as relative youthfulness or other equally vague and ill-founded hypotheses that appear to fit the particular sentencing officer's personal notion of fairness' ought to be eschewed."*
[18] *Supra.*

follows: "Rape of a child is an appalling and perverse abuse of male power. It strikes a blow at a very core of our claim to be a civilized society...

The community is entitled to demand that those who perform such perverse acts of terror be adequately punished, and that the punishment reflect the societal censure. It is utterly terrifying that we live in a society where children cannot play in the streets in any safety; where children are unable to grow up in the kind of climate which they should be able to develop their lives in an atmosphere which behooves any society which aspires to be an open and democratic one based on freedom, dignity and equality, the very touchstones of our Constitution. The community is entitled to demand of the police that they bring those who subvert these minimum aspirations before the courts in punishing such persons, should ensure that the sentence adequately reflects the censure which society should and does demand, as well as the retribution which it is entitled to extract".

[15] In *S v Vilakazi*[19] is was held by Nugent JA that: "[t]here comes a stage at which the maximum sentence is appropriate to an offence and the fact that the same sentence will be attracted by an even greater horror means only that the law can offer nothing more."

[16] In ***S v Matyityi***[20] the Court stated: "Our constitutional order can hardly survive if courts fail to properly patrol the boundaries of their own power by showing due deference to the legitimate domains of power of the other arms of State. Here Parliament has spoken. It has ordained minimum sentences for certain specified offences. Courts are obliged to impose those sentence unless there are truly convincing reasons for departing from them. Courts are not free to subvert the will of the legislature by resort to vague, ill-defined concept such as 'relative youthfulness' or other equally vague and ill-founded hypotheses that appear to fit the particular sentencing officer's personal notion of fairness. Predictable outcome, not outcomes based on the whim of an individual judicial officer, is foundational to the rule of law which lies at the heart of our constitutional order."

[17] Children are the innocent and vulnerable and cry out for protection. They are prey to relatives, family friends, educators and law enforcement officials, all and sundry. They are ravaged with and without violence with impunity. In *S v Muller*[21]S Satchwell J. held as follows:

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[19] 2009 (1) SACR 552 (SCA).
[20] 2011 (1) SACR 40 (SCA) at 53 e-g.
[21] 2006] ZAGPHC 5 (23 May 2006) at [39] and [40] at [39] and [40].

"[39] The accused occupied a position of power in relation to his stepdaughter. She was vulnerable to his seniority in age and familial standing, his affinity with her mother who was the only other adult in the home, his role as paterfamilias in the home and family. This was appreciated in S v Jansen 1999 (2) SACR 368 CDP where it was said that 'rape of a child is an appalling and perverse use of male power'; S v Swart 2000 (2) SACR 566 SCA where reference made to how the rapist 'exploited to the full the position of power which he held over them': in S v G 2004 (2) SACR 296 (W) where the court commented 'she was raped in the safety of her own home by a person towards whom she was affectionate, and from whom she was entitled to expect protection. The accused has violated the trust which the complainant and her mother placed in him'; in S v P 2000 (2) SA 656 SCA where the court commented how a grandfather had 'violated that love and abused that position of trust.'

[40] In S v Abrahams 2002 (1) SACR 116 (SCA), the court was concerned with the rape of a pubescent child by her father. The court stated, '[o]f all the grievous violations of the family bond the case manifests, this is the most complex, since a parent, including a father, is indeed in a position of authority and command over a daughter. But it is a position to be exercised with reverence, in a daughter's best interest, and for her flowering as a human being. For a father to abuse that position to obtain forced sexual access to his daughter's body constitutes a deflowering in the most grievous and brutal sense. That is what occurred here, and it constituted an egregious and aggravating feature of the accused's attack upon his daughter.'"

[18] Satchwell J further held in Muller *supra* that: "[84] ... no violence or threat of violence was needed by the rapist to achieve his deeds. As was pointed out by Brochers *J in S* v G 2004 (2) SACR 296 (W) 'a physically immature child of ten is no match for an adult man, and little violence was needed to achieve his purpose'. Similar considerations apply where the rape victim is a girl of 14 years old and the assailant has the additional power of paternal status in the family home where he simply enters her bedroom and lies on her bed or takes her from the table where she is doing her homework, to the bedroom.

[19] Children are the most vulnerable, yet the repository of posterity, and we dare not allow that they be deflowered with impunity at the risk of polluting posterity. Children cry out for protection. Whether there has been violence used or not, the scars of rape on the child victim, are the same, with the pain suffered in silence, for fear of being ridiculed by her pears, or chastised by the parents. In *Van Zijl v Hoogenhout*[22] the

[22] 2005 (2) SA 93 (SCA).

Court discussed, at length, the consequences of sexual abuse and the effects thereof on the victim. In paragraph [9] the Court refers to the following: "...'Finkelhor and Browne analyze sexual abuse in terms of four trauma-inducing factors (traumagenic dynamics) – traumatic sexualisation, betrayal, powerlessness and stigmatization. All of these distort a child's cognitive and emotional relationship with the world. Traumatic sexualisation is a process in which a child's sexuality is developed and shaped inappropriately and dysfunctionally at an interpersonal level. Betrayal involves the discovery by a child that someone on whom he or she is vitally dependent has caused the child harm. It can be experienced at the hands of an abuser or a family member who is unable or unwilling to protect or believe the child or who has a changed attitude to the child after disclosure of the abuse. Powerlessness develops through the repeated contravention of a child's will, desires and sense of efficacy. It is reinforced when children see their attempts to halt the abuse frustrated and is increased by fear and an inability either to make adults understand to believe what is happening or to realize how conditions of dependency have trapped them in the situation. Stigmatization refers to the negative connotations – badness, shame, guilt – that are communicated to the child and become incorporated into the child's self-image: 'These negative meanings are communicated in many ways. They can come directly from the abuser, who may blame the victim for the activity, demean the victim, or furtively convey a sense of shame about the behavior. Pressure for secrecy from the offender can also convey powerful messages of shame and guilt. But stigmatization is also reinforced by attitudes that the victim infers or hears from other persons in the family or community. Stigmatization may thus grow out of the child's prior knowledge or sense that the activity is considered deviant and taboo, and it is certainly reinforced if, after disclosure, people react with shock or hysteria, or blame the child for what has transpired. Children may be additionally stigmatized by people in their environment who now impute other negative characteristics to the victim (loose morals, 'spoiled goods') as a result of the molestation.'[23] *Vide* also *S v Jansen*[24] where the Court held that: "[I]t is sadly to be expected that the young complainant in this case, already burdened by a most unfortunate background...and who had, notwithstanding these misfortunes, performed reasonably well at school, will now suffer the added psychological trauma which resulted in a marked change of attitude and of school performance."

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[23] *The Traumatic Impact of Child Sexual Abuse: A Conceptualisation', by David Finkelhor and Angela Browne of the Family Violence Research Programme of the University of New Hampshire, Durham, published in the American Journal of Orthopsychiatry in October 1985.*

[24] *Supra.*

[20] We dare not sacrifice the innocent at the altar of justice, by imposing lenient sentences which contradict the very import of the Minimum sentence Act designed to be a tool to curb the ever rising scourge of rape. Sachs J in *Christian Education South Africa v Minister of Education*[25] reminded us that "under section 7(2) the State is obliged to 'respect, protect, promote and fulfill' these rights" enshrined in the Bill of Rights, such as the right to be free from all forms of violence; not to be tortured in any way (s12(1); right to bodily and psychological integrity, which includes: right to security in and control over their body (s12(2)); right to be protected from maltreatment, neglect, abuse or degradation (s28(1)(d).

[21] *In casu* the personal circumstances of the appellant[26] are, in my view, not extra ordinary to warrant being regarded as substantial and compelling circumstances. On the other hand, all the complainants mentioned in all four counts were minors, clearly showing a tendency on the part of the appellant to prey on young girls. The nature of the offences suggests a lewd and deviant character on the part of the appellant. Children deserve to be protected against such characters.

[22] In the matter of *S v Kruger*[27] Shongwe JA (Harms and Plasket AJA concurring) while addressing appellant's previous convictions and the fact that the offences were committed at different places and different times, commented on the cumulative effect of the sentences as follows:

"The trial as well as the high Court reasoned that it was inappropriate to order the sentences to run concurrently because the offences were committed at different places and different times. While this may be a consideration, it cannot justify a failure to factor in the cumulative effect of the ultimate number of years imposed. I believe that a sentencing court ought to tirelessly balance the mitigating and aggravating factors in order to reach an appropriate sentence. I also acknowledge that it is a daunting exercise indeed.'

[23] It is trite that the imposition of sentence is a matter for the trial court's discretion. The Court of appeal may only interfere with such discretionary imposed sentence, if it is vitiated by misdirection or is startlingly inappropriate, or if there is striking disparity

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[25] 2000 4 SA 757 (CC) para 47
[26] (para 6 supra).
[27] 2012 (1) SACR 369 (SCA) p372 par [9].

between the sentence imposed and the sentence the court of appeal would have imposed; vide S v Kgosimore.[28]

[24] *In casu,* the court *a quo* imposed life sentence in respect of each count 1 and count 2 and ordered that the sentences in count 2, 3 and 4 to run concurrently with the sentence in count 1. In the matter of *Mafoho v The State*[29] the Supreme Court of Appeal did not interfere with a sentence of 275 years imprisonment and held that: "The appellant is entitled to be considered for parole once he has served 25 years of his term of imprisonment. There is accordingly no need to interfere with the sentence imposed in order to ameliorate its effect. This is not to say the sentence imposed by the regional court is appropriate (its clearly being a Methuselah sentence) but to interfere with it would, in the circumstances of this case, be purely academic because, as I have already indicated, the legislature has stepped in to ameliorate the position of the person subjected to that sentence, by directing that he or she will be considered for parole once 25 years has been served."

[25] In the circumstances of this case, I am unable to find that the sentences imposed are shockingly inappropriate, nor that the court *a quo* misdirected itself in any way, to warrant this Court's interference therewith. The only aspect is to order that the period of 2 (two) years the appellant spent awaiting trial should be factored in in determining when he would qualify to be considered for parole.

[26] In the result the following order is issued:

1. The appeal against sentences is dismissed and the sentences imposed are confirmed.

2 It is further ordered that the period of 2 (two) years the appellant spent as awaiting trial be factored in in determining when the appellant would qualify to be considered for parole.

N.M. MAVUNDLA

JUDGE OF THE HIGH COURT

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[28] 1999 (2) SACR 238 (SCA) at par10.

[29] (149/12) 92012) ZASCA 49 (28 March 2013) at para21.

I agree and it is so ordered.

N. P. MNGQIBISA-THUSI

JUDGE OF THE HIGH COURT

I agree and it is so ordered

V. V. TLHAPI

JUDGE OF THE HIGH COURT

DATE OF HEARING : 23 / 02 / 2018

DATE OF JUDGMENT : 29 / 03 / 2018

APPELLANT`S ATT : PRETORIA JUSTICE CENTRE

APPELLANT`S ADV : ADV M. B. KGAGARA

RESPONDENT'S ATT : DIRECTOR OF PUBLIC PROSECUTION

RESPONDENT'S AD : ADV M. J. MAKGWATHA