IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: A217/2022

DATE: 11-05-2023

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO.
(3) REVISED.
2/8/23
DATE SIGNATURE

In the matter between

PRINCE NORMAN MUSHININGA Applicant

and

THE STATE Respondent

***EX TEMPORAE* J U D G M E N T**

FRANCIS-SUBBIAH, J:

[1] The appellant appeals against the sentence pronounced on him by the Springs Regional Court. He was convicted of sexual assault and rape of a 11-year-old child. He pleaded not guilty to both counts but pleaded guilty to a third charge of being an illegal immigrant. He was sentenced to 5 years' imprisonment for sexual assault, 20 years' imprisonment for rape and 2 years' imprisonment for

contravening section 49(1) of the Immigration Act 13 of 2002. He was refused leave to appeal by the trial court and on petition was given leave to appeal his sentence only.

[2] It is clear from the record that the Court *a quo* had not missed any particular factors in regard to sentencing. It is trite that three critical factors are taken into account in sentencing. The first being, the person of the appellant. In this regard he was not a youngster, at the time of the commission of the crime. He was 30 years old, unmarried and has five children. His conduct for the crimes committed cannot be ascribed to poor judgment or to the fact that he was youthful or to the immaturity of youthfulness.

[3] It is further taken into account that the appellant had spent three years in custody awaiting trial. However, it must be clearly acknowledged, that while he was awaiting trial, he escaped from custody. He was rearrested and brought back to court.

[4] Taking into consideration that at a certain point in time he could have been on bail, but had jeopardised that situation all by himself by escaping from custody. Therefore, I cannot accept that because he was an awaiting trial prisoner for three years that it is a compelling and

circumstantial factor and reason to take into account in decreasing the sentence pronounced upon him.

[5] It is evident from the appeal record, that the appellant was the boyfriend of Ms Dube who was the mother of the victim. They were staying in a two-bedroom house which belonged to Ms Dube. The appellant lived in the house with Ms Dube, the victim and a younger child. What is shocking is that the victim was only 11 years old and she looked up to the appellant as a father figure and accepted him as part of her family.

[6] The appellant was in a position of trust, being the stepfather of the victim. It was put to this court today that the appellant was loved by the victim as a father and instead of caring for the victim's mother, the younger sibling and the victim, he abused them and their trust. He was invited into their home as a protector and instead became their abuser.

[7] The second consideration taken by the court is the plight of the victim. A victim impact report was also considered. The fact that this offence was not a single incident of abuse, it was at least on two occasions that this type of sexual abuse had taken place. The family had become victims of the appellant. Ms Dube herself was afraid

of the appellant and did not want to oppose him in any manner. He kept an eye on her and threatened her. She was afraid he was going to hit her. When she became aware of the sexual abuse on her daughter the appellant shouted at her and she had to plead for forgiveness from him. As a mother, she was prevented by the appellant from protecting her child from him and was helpless.

[8] The appellant's submission that the victim although traumatised did not suffer any injuries should be taken into account as a mitigating factor and should justify a lesser sentence than the 20 years imposed. In this regard I accept the State's submissions that the victim and her mother were submissive to the appellant and therefore it is expected that serious physical injury would not have been inflicted. It is also relevant that the rape took place in the very bed where the mother, the victim and the appellant slept in.

[9] I am persuaded by the decision in ***S v SMM*** 2013 (2) SACR 292 (SCA) par 26 that the absence of a serious injury cannot as a factor on its own constitute a substantial and compelling circumstance to decrease a legislated minimum sentence.

[10] It was further submitted that the appellant is a

candidate for rehabilitation but no substantial factors are advanced for this submission.

[11] The third consideration is that of the community and the deterrent impact of a sentence. Thus we come to the point of where it is clear that punishment in respect of rape should be severe. Our Courts have acknowledged this and in ***S v Chapman*** 1997 (3) SA341 (SCA) at page 344 the Supreme Court of Appeal held that:

> 'Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The right to dignity, to privacy and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilisation.'

[12] What is clear, as stated in *Chapman* at 345, that there is a duty for the Courts 'to send a clear message to the accused and to other potential rapists and to the community that we are determined to protect the equality, dignity and freedom of all women and we shall have no mercy for those who seek to invade those rights.'

[13] Taking all the mentioned circumstances into account, it is clear in this case that this Court is not

convinced that there is any misdirection by the Court *a quo* in sentencing the appellant. This appeal Court cannot find any reason why it ought to decrease the sentence imposed by the court a quo. For the sexual assault a sentence of 5 years imprisonment was imposed. In respect of rape and the contravention of the Immigration Act, a sentence of 20 years and 2 years was imposed respectively. The sentence of 5 years and the sentence of 2 years to run concurrently with the sentence of 20 years' imprisonment. This Court does not find that such a sentence, which is legislated, is shocking or is heavy or is disproportionate.

[14] As a result this court cannot find substantial and compelling circumstances to depart from the sentence imposed by the court *a quo*. There is no misdirection in the exercise of the court's sentencing powers. In fact, this Court finds that it is an effective sentence and therefore dismisses the appeal.

FRANCIS-SUBBIAH, J

JUDGE OF THE HIGH COURT

PRETORIA

I concur and it is so ordered.

KHUMALO, J

JUDGE OF THE HIGH COURT

PRETORIA

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