S v Mkhonza 2018 JDR 1252 (GJ)

KEY CONCEPTS	
Rape	Grooming
Life imprisonment	Trauma
Impact of abuse	

ISSUE: The appellant was convicted of the rape and sexual grooming of his biological daughter. The rape conviction was subject to s51(1) in that it involved the repeated rape of the complainant, and thus to a minimum discretionary sentence of imprisonment for life. The appellant was sentenced to life imprisonment and in respect of the charge of sexual grooming he was sentenced to 5 years imprisonment. The appeal in respect of both conviction and sentence was automatic as provided by s309B(1) of the Criminal Procedure Act 51 of 1977.

FACTS: The appellant, the father of the complainant, raped her repeatedly and regularly over a period of approximately 3 months which resulted in her pregnancy. The complainant was the biological daughter of the appellant. She had been born as a result of a relationship that had broken down when she was still in her early childhood. Her parents separated and she stayed with her mother in Swaziland for her early childhood. When she was approximately 10 years of age and in grade 5, she went to stay with the appellant. She initially lived in a separate dwelling on the property where the shack of the appellant was situated. She lived with the landlady of the property and had her own bedroom. At a later stage, the appellant insisted that the complainant move into his shack with him, which was a one bedroom dwelling which was barely able to accommodate a bed and a television set.

The landlady was not happy about the complainant moving into the shack with her father and said that it was inappropriate for her to be sharing a bed with her father. The appellant accused the landlady of being a witch, who wished to harm the complainant. From the evidence, it is clear that the appellant used supernatural elements to manipulate the complainant, and as a result the complainant and the landlady became estranged even though they had been close before.

The appellant tried to alienate the complainant from the community and from people to whom she was close. She was told by him not to associate with friends and that "nobody liked her". He made her believe that she was alone except for his “protection”. There were three women in the community that had played a part in complainant’s life and whom she saw as family. The appellant told her that she was not allowed to associate with them, but it was to them that she turned for help.

The complainant was 18 when she testified and explained that the offences

[6] The complainant was a single witness to her rape. The appellant did not testify.

[10] The evidence of the complainant (who was 18 at the time of her testimony) was cogent and compelling. The offences in question occurred when she was 16 and 17 years of age. The appellant brought pornographic DVDs into the shack and subjected her to such material. She resisted watching the material, however he insisted that she watch it. It was during the watching of this pornographic material that he first raped her. This occurred in January 2013. She was 16 at the time. She turned 17 on 25 February 2013. She was a virgin when he raped her.

[11] This was the beginning of a regular pattern of abuse involving the appellant forcing or coercing the complainant into having sexual intercourse with him. She testified that this occured on a regular basis between January to March 2013.

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[12] The appellant was in a position of power both physically and psychologically in respect of the complaint. He left her in no doubt that she was at his mercy in that she had nowhere to turn and nowhere to live should she deny him his wishes. She was afraid of him also because he hit her.

[13] The appellant was reckless in his disregard for his daughter's well-being. When she became pregnant, he again resorted to the supernatural. He went as far as to tell her that there was a creature growing inside her which had been invoked by her mother putting an evil spell upon her. This suggests an intention to manipulate and control the complainant and to hide the pregnancy in a bid to protect himself. He continued with this approach in seeking her co-operation to terminate the pregnancy and to this end approached at least 3 people in a bid to obtain a termination of the pregnancy. It appears that, given the advanced stage of the pregnancy by the time he got her to these people, he was foiled in these endeavours. That she was put through a frightening ordeal in being subjected to this process, is without doubt. I must add that the appellant is relatively well educated having obtained matric.

[14] The "aunts" referred to above ultimately stepped in and established themselves as her protectors and advisors. It was them that involved the authorities which led ineluctably to the arrest and prosecution of the appellant. Had they not intervened, one shudders to think what her fate would have been. The appellant certainly tried very hard to alienate her from them.

[15] The baby, a boy, was born and, because of the denial by the appellant of the rapes, he was subjected to paternity testing, which revealed conclusively and positively the paternity of the appellant. The evidence of the DNA testing was led at the trial and, notwithstanding there being no basis for any attack thereon, the appellant assisted in obtaining a second DNA test. This second test confirmed the results of the initial test. The appellant chose not to testify in his defence. He however continued, in the face of all the evidence, to maintain his innocence.

[16] The evidence of the complainant and the corroborating evidence of the DNA results show a very high probability of guilt on the part of the appellant. This notwithstanding, he has continued, from the outset, in his endeavours to exculpate himself, to deny his guilt, and to contrive to protect himself at the expense of his daughter and her unborn child. He has put her through the ordeal of a pregnancy without support and which was fraught with fear and confusion. She was subjected to the scrutiny of schoolmates and others in her growing

condition as she had to attend school and go out into the community. She had no emotional or medical support and the appellant sought to alienate her from any possible avenues of comfort. He subjected her to people whose questionable services he engaged in a bid to rid himself of the pregnancy. All the while he appears to have given little thought to the predicament in which he had placed his daughter or for the well-being of the child.

[17] Even once arrested and charged, he denied his guilt to the very end and he continues in this vein. He thus subjected his daughter to the ordeal of a trial which, to her credit, she endured with dignity and forbearance.

CONVICTION

[18] As to the conviction, there can be no doubt that the Magistrate dealt properly with the evidence and the approach and conclusion reached as to the guilt of the appellant cannot be faulted.

SENTENCE

[19] As to sentence, the record shows a marked disregard on the part of the appellant for the wellbeing of the complainant. His role should have been to protect and nurture his daughter. Instead he became her rapist, violator, and tormentor. In the aftermath of her pregnancy, he continued to protect his own position at the expense of the complainant. His actions were calculated and deliberate. The evidence shows that he held himself out in the community to be a religious person. His reputation was important to him. He was said to carry a Bible and engage in scripture readings to and teachings of others. He is clearly a person who is duplicitous and hypocritical. He has continued to attempt to maintain his innocence in the face of overwhelming evidence and thus to state that his daughter is falsely accusing him of heinous crimes. He has abused his position as father and protector. He has made no amends.

[20] All these aspect are aggravating and the Magistrate raised them as such in a balanced and sensitive weighing up of the various personal and potentially mitigating circumstances put forward by the appellant. The Magistrate took into account the details in and the views

expressed by the drawers of the pre -sentencing and victim impact reports. The appellant was 48 years old at the time of the sentencing. He was brought up almost exclusively by his mother, as his father died when he was only 5 years of age. He attained matric and, at the

time of the offences he was employed at a salary of between R 2 400 and R 4 000 per month depending on hours worked. He was a first offender and he had spent approximately 4 years in prison awaiting trial. All these factors were taken into account. On the latter concern, it appears from the record that a considerable proportion of the time spent awaiting trial was due to the appellant making application for postponement which related, in part, to his obtaining further DNA testing and the termination of the mandate of his attorney.

[21] The manner in which the evidence and the circumstances of the appellant were considered in relation to the applicable legal principles cannot be faulted. The appellant was unable to show any circumstances which could possibly motivate a lesser sentence than the minimum prescribed. There is thus no basis for setting aside the sentences imposed.

[22] In the circumstances I make the following order:

1. The appeal against conviction is dismissed.
2. The appeal against sentence is dismissed.