REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE : ~~NO~~ Yes
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

DATE 30/1/15

SIGNATURE

CASE NUMBER A874/13

In the matter between:

MAHLANGU, WHITEY — Appellant

And

THE STATE — Respondent

JUDGMENT

MUDAU AJ

[1] The appellant appeared before a regional magistrate in Pretoria, Gauteng, on a charge of rape in violation of s3 read with other relevant provisions of the Criminal Law(Sexual Offences and Related Matters) Amendment Act 32 of 2007 as well as s 51 (1) of the Criminal Law Amendment Act 105 of 1997. In addition,

as well as s 51 (1) of the Criminal Law Amendment Act 105 of 1997. In addition, the appellant was also charged with a second count of kidnapping. Notwithstanding his not guilty pleas he was sentenced to life imprisonment for the rape charge and to 5 years imprisonment on the second count. It is against the sentences imposed that he now appeals to this court with leave of the court below. The only issue in dispute before us is whether the trial court should have found that substantial and compelling circumstances existed, justifying a departure from the mandatory minimum sentence of life imprisonment.

[2] S51 (2) read with Part I of Schedule 2 of the Act provides for a prescribed minimum sentence of life imprisonment for the rape of a child below the age of 16 years and also under circumstances where the offender has raped his victim more than once unless the court finds substantial and compelling circumstances to justify a lesser sentence. In this case appellant qualified for life imprisonment in that the girl was 15 years of age at the time the rape; secondly that he raped her more than once (vaginally and anal orifice).

[3] The attack against sentence is primarily that the trial court should have deviated from imposing the life terms given the cumulative factors such as that no previous records of convictions were proved against him. In addition it is contended that "*the sentence of life imprisonment imposed induces a sense of shock*".

[4]The salient facts of the case are as follows: the complainant, KM (referred to as such with a view to protect her identity), and her parents were next-door neighbours to the appellant. On the day of the incident she went to fetch her cell phone from a friend at another section of the informal settlement. There she found the Appellant as well as a third person. The appellant offered to buy her a cool drink which she accepted. Her friend left to by the cool drink. Upon her return they all shared the cool drink. As they were drinking the appellant asked to her to step outside of the shack for a word with her. She asked him why he could not speak to her in the presence of the other two. Thereafter she excused herself. The appellant however followed her outside whereupon he grabbed her by her

hand and dragged her away to another shack. At the gate of the second shack she held on the gate and refused to enter the premises.

[5] The appellant produced a knife with which he threatened to stab her. As a result thereof she let go of the gate after which the appellant dragged **her** inside the shack. Thereafter the appellant threw her on top of the bed after which he ordered her to undress. She refused to undress herself. After undressing himself he proceeded to rape her by inserting his penis inside her vagina. She described her ordeal as painful which took about 2 minutes. She was crying during the rape. Unbeknown to her, the doctor was later to find that she was violated during her periods.

[6] Dr Cele conducted the gynaecological examination on the child, found bruises on her clitoris, urethral orifice (which was also swollen), fraenulum of clitoris, and fresh tear of the posterior fourchette. In addition, there were multiple tears around the anal orifice. The injuries sustained were consistent with forced vaginal and anal penetration of the child.

[7] The trial court took into consideration that the appellant was 36 years of age and a father to 2 minor children at the time of sentencing. He spent 3 years in custody whilst awaiting trial. It is unclear what work he did if any it is also unclear what level of education he accomplished at that stage. His marital status also, was not disclosed. The appellant was 35 years of age at the time of the incident.

[8] The late Mohammed CJ described rape in ***S v Chapman*** 1997 (2) SACR 3 **(SCA)** at 5b as follows:

"*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 rights to dignity, to privacy and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilisation."

[9] In **Director of Public Prosecutions v Thabethe 2011 (2) SACR 567 (SCA) (30 September 2011)** para 16 echoing the above approach by Mohammed CJ Bosielo JA put it thus:" *It is regrettable that notwithstanding this observation the*

rate of rape in the country has reached pandemic proportions. It is no exaggeration to say that rape has become a scourge or a cancer that threatens to destroy both the moral and social fabric of our society."

[10] With regard to the application of mandatory minimum sentences, Ponnan JA, in ***S v Matyityi*** **2011 (1) SACR 40 (SCA),** in para [23] with reference to ***S v Malgas*** ***2001 (1) SACR 469 (SCA)*** stated:

"*As Malgas makes plain courts have a duty, despite any personal doubts about the efficacy of the policy or personal aversion to it, to implement those sentences. Our courts derive their power from the Constitution and like other arms of state owe their fealty to it. 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 sentences 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 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. Predictable outcomes, 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.*"

As indicated above in this case, the trial court found no substantial and compelling circumstances which justified deviating from the minimum sentence of life imprisonment with regard to the rape charge.

[11] It is a principle of our law that the trial court exercises discretion with regard to the question of sentence after conviction. The circumstances in which an appeal court will interfere with a sentence imposed by a court of first instance are trite. They were restated in ***S v Sadler*** **2000 (1) SACR 331** (SCA).

[12] However, as it has been held in **S v *Vilakazi*** 2009 (1) SACR 552 **(SCA)** life imprisonment should be reserved for more serious cases of rape. In ***Vilakazi***

Nugent JA also pointed to the vast disparity between the ordinary minimum sentence for rape (10 years imprisonment) and the one statutorily prescribed for rape of a girl under the age of 16 years (life imprisonment) and the startling incongruities which may result (at para 13).

[13] In ***S v Nkawu*** **(*S v Nkawu* 2009 (2) SACR 407 (ECG)),** Plasket J was called upon to consider the provisions contained in **s 51** (3) *(aA)*(ii) of the **Criminal Law Amendment Act, 105 of 1997**, as far as the absence of serious physical injuries to the complainant was concerned. That subsection provides that when a court sentences for rape 'an apparent lack of physical injury to the complainant' shall not be regarded as a substantial and compelling circumstance. Plasket J expressed the view that a literal interpretation of that provision would render it unconstitutional, since it would require judges to ignore factors relevant to sentence in crimes of rape which could lead to the imposition of unjust sentences. (See also **S v Mudau** 2013 (2) SACR 292 (SCA).

[14] No victim impact evidence was led; however, I have no doubt that the complainant would have endured post-traumatic stress considering that she considered the appellant as a father figure. in ***Kwanape*** a sentence of a lifetime imprisonment was confirmed in respect of the rape of a 12-year-old kept away overnight by a 24-year-old offender (**S v Kwanape** 2014(1) SACR 405 (SCA) which make the facts of this matter distinguishable. Although the rape in this matter had not been perpetrated in a family setting as well, the interaction was of a shorter duration as opposed to ***Kwanape***.

[15] However, the appellant's conduct remains undoubtedly reprehensible calling for a sentence both reflecting this Court's strong disapproval and hopefully acting as a deterrent to others like-minded to satisfy their carnal desires with children. In my view the circumstances in this case are such that a sentence of life imprisonment is disproportionate to the crime. I therefore find that there are substantial and compelling circumstances justifying a lesser sentence than the one prescribed.

[16] In the result, having considered all the relevant factors and the purpose of punishment I consider 25 years' imprisonment to be an appropriate sentence for the rape charge.

[17] In the result I suggest the following order:

1. The appeal against the sentence of life imprisonment in respect of the rape is upheld.

2. The sentence of the court below in respect of the rape charge is set aside and replaced with the following:

The accused is sentenced to 25 years' imprisonment. The sentence imposed for the kidnapping charge to run concurrently with the 25 years sentence. This sentence is antedated to 30 November 2012.

30 January 2015

MUDAU T P
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

I agree and it is so ordered

JANSE VAN NIEWENHUIZEN, N
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

APPEARANCES

For the appellant: R S Matlapeng
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For the respondent: Adv MNC Menigo
NPA, Pretoria