IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA)

CASE NO: A 62/2016

16/5/2017

Reportable: No

Of interest to other judges: No

Revised.

In the matter between:

N T Appellant

and

THE STATE Respondent

JUDGMENT

HOLLAND-MÜTER AJ:

[1] The Appellant was arraigned and convicted in the Regional Court in Atteridgeville on one count of Rape in terms of Section 3 of Act 32 of 2007 in that he on 8 July 2015 raped the complainant S D, who was 10 years old when the incident took place.

[2] The Appellant pleaded not guilty to the charge and made the following admissions in terms of Section 220 of the Criminal Procedure Act during the plea process:

2.1 He admitted that he was at the home where the alleged rape took place;

2.2 He admitted being in the same room together with the complainant and that he slept in the same bed as the complainant but that he never touched her whilst sleeping in her bed.

2.3 He also admitted that the complainant was his own child. See plea p 4.

[3] He denied raping the complainant or that he had any sexual intercourse with her.

[4] The Appellant admitted the J 88 medical examination form and admitted the correctness of the contents thereof. The form J 88 was handed in as an exhibit "A". See p 72 of the record.

[5] The evidence of the complainant was led via an intermediary one Nonzame Veronica Nditshaw.

[6] Although the Appellant has an automatic right to appeal because he was sentenced to life imprisonment by the Regional Court, I deem it not necessary to summarize the evidence of any of the witnesses in view of the concession on his behalf by his now advocate Me L Augustyn. In her heads on behalf of the Appellant in par 5 thereof she states: ***"It is submit- ted that there can be no convincing argument made on behalf of the Appellant on these grounds".*** This refers to the grounds for appeal by the Appellant.

[7] I am of the view that this concession is wisely made and that the Appellant had little if any chance of success on the conviction at all.

[8] Under the circumstances the appeal against the conviction ought to be dismissed.

[9] There is a minimum sentence of life imprisonment applicable on offenders found guilty of raping a minor child of ten (10) years of age. The Appellant was informed hereof by the presiding magistrate at the beginning of the trial before the charge was put to the Appellant. See plea pl.

[10] The Appellant was legally represented during the whole of the trial and when the provisions of the minimum sentence was explained to the Appellant, he was made aware thereof that life

imprisonment was compulsory unless substantial and compelling circumstances could be proved to authorize the court to depart from the minimum sentence and impose a lesser sentence than life imprisonment.

[11] It is trite that a Court of Appeal will not interfere with a sentence imposed unless the sentence is shocking and disturbingly inappropriate. From the outset it needs to be emphasized that rape is serious, more so when the victim is a minor. For that very reason the legislator deemed it necessary to introduce certain minimum sentences for rape. More so when the minor victim is raped by a near relative, in this instance by her own father. She was only ten (10) years old when this shocking incident took place.

[12] When considering an appropriate sentence a court has to take into account the well known three sides of the so-called Triad in **S v Zinn, 1969(2) SA 537 AD**. These are the personal circumstances of the accused, the specific crime committed and the interests of society. In **S v V 1972(3) SA 611 AD** it was held that *"mercy is an element of justice itself '*. This is a factor to consider, but does not overshadow the other factors in Zinn.

[13] Where a prescribed minimum sentence is applicable, the court has to establish whether any substantial and compelling circumstances are to be found to warrant the court to depart from the prescribed minimum sentence.
See **S v Dyanti 2011(1) SACR 540 ECG** where the court confirmed the principles laid down in **S v Malgas 2001(1) SACR 469 SCA**. There are numerous other cases where this approach has been confirmed. In short it is as follows:

- The point of departure is that the prescribed minimum sentence must be imposed;
- It is only when a court is satisfied that substantial and compelling circumstances exits which justify the imposition of a lesser sentence that it may depart from the prescribed minimum sentence;
- In deciding whether substantial and compelling circumstances exit, the court is required to look at all the traditional mitigating and aggravating factors and consider the cumulative effect thereof;
- If the court concludes that the minimum prescribed sentence is so disproportionate to the sentence which would be appropriate, resulting in an injustice by imposing the prescribed minimum sentence, it would be entitled to impose a lesser sentence; and

- There should not be departed from the specific sentences lightly or for flimsy reasons.

[14] The court a quo took into account all relevant factors pertaining to the Appellant; his age, being a first offender, being married with three minor place children, being employed earning approximately R 8 000,00 m per month and his health condition suffering from an ulcer.

[15] The court then examined the aggravating circumstances such as the seriousness of the offence (a father raping his own 10 year old girl), the rape taking place in their house (where she is supposed to feel safe), the small stature of the complainant, the abuse of a position of trust by the Appellant, his lack of remorse and the prevalence of the abuse of children.

[16] The court then concluded that there was no substantial and compelling circumstances warranting a departure from the prescribed minimum life imprisonment sentence.

[17] After comparing the following similar sentences imposed in **S v M 2007(2) SACR 60 W** at 73 c-d; **S v Ncheche 2005(2) SACR W**·386 at 395 h-1; **S v M 1992 (2) SACR 188 W** at 191A-B and other cases referred to by counsel in their heads of argument, I am not convinced that there are any substantial and compelling circumstances to depart from the minimum prescribed life sentence in this matter. I am not persuaded that this rape of the 10 year old victim is not serious at all. Although no visual injuries were sustained, it is in my view one of the worst rapes imaginable when a young daughter of 10 years old is raped in her own bed at home by the very person who is supposed to protect and care for her.

[18] I am of the view that the prescribed minimum sentence is an appropriate sentence for the Appellant. I considered the question of proportionality as set out in S v Vilakazi 2009(1) SACR 552 SCA and S v GN 2010(1) SACR 93 T.

[19] I agree with the view taken in Sv Mabitse 2012 (2) SACR 380 FB that the treatment of physical injury is a mitigating factor which collectively can qualify as a mitigating factor can, and if along with other factors, play a role to make a determination in terms of section 51(3) of the Criminal Procedure Act regarding the existence of substantial and compelling circumstances. There is however no such factor present in this case.

[20] I am of the view that there is no substantial and compelling circumstances to depart from

the prescribed minimum life sentence in this case and pro- pose that the appeal against sentence be dismissed.

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HOLLAND-MÜTER AJ
ACTING JUDGE OF THE GAUTENG
DIVISION, PRETORIA

I agree.

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KHUMALO J
JUDGE OF THE GAUTENG DIVISION,
PRETORIA

It is so ordered.

HEARD ON:_____
FOR APPELLANT: ADV L AUGUSTYN
PRETORIA JUSTICE CENTER

FOR RESPONDENT: ADV M J VAN VUUREN
DIRECTOR OF PUBLIC PROSECUTIONS
PRETORIA