

IN THE HIGH COURT OF SOUTH AFRICA
BOPHUTHATSWANA PROVINCIAL DIVISION

CA NO.: 21/07

In the matter between:

**THE DIRECTOR OF PUBLIC PROSECUTIONS
APPELLANT**

and

MMOLOKA JOSEPH MOENG RESPONDENT

FULL BENCH APPEAL

HENDRICKS J, LANDMAN J AND MOKHAFOLA AJ

JUDGMENT

LANDMAN J:

[1] This is an appeal by the State against the sentence of

15 years imprisonment imposed by Mokgoatlheng AJ on Mr M J Moeng (the respondent) for the rape of his stepdaughter. The appeal serves before us with the leave of the learned sentencing judge.

[2] The respondent's conviction was referred to the High Court by the Regional Magistrate for sentence in terms of section 52 (1) of the Criminal Law Amendment Act 105 of 1997. The learned sentencing judge confirmed the conviction.

[3] Section 51 of Act 105 of 1997 prescribes minimum sentences for certain offences. It reads:

"Section 51 (1) notwithstanding any other law but subject to subsection (3) and (6), a High Court shall....

If the matter has been referred to it under Section 52 (1) for sentence after the person concerned has been convicted of an offence referred to in part 1 of Schedule 2, sentence the person to imprisonment for life.

Schedule 2 reads:

PART 1

Rape

(a) when committed -

(i) in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or

- accomplice.
- (ii)
- (iii)
- (b) where the victim –
 - (i) is a girl under the age of 16 years.
 - (ii)”

[4] Paragraphs (a)(i) and (b)(i) of Part 1 of the Second Schedule were therefore applicable. The result is that the learned sentencing judge was enjoined to sentence the respondent to life imprisonment unless the court came to the conclusion that substantial and compelling circumstances were present. If such circumstances were found to be present the court would be at liberty to impose a lesser but appropriate sentence.

[5] The learned sentencing judge, following the approach in **S v Malgas** 2001 (1) SA 1222 (SCA) had regard to the cumulative effect of the considerations relating to sentencing, including the accused’s personal circumstances and concluded that there were substantial and compelling circumstances present. Marias JA said in **S v Malgas** (*supra*) at 1236 (B – C) that:

“The ultimate impact of all the circumstances relevant to sentencing

must be measured against the composite yardstick ('substantial and compelling') and must be such as cumulatively justify a departure from the standardised response that the legislature has ordained."

[6] The learned sentencing judge said:

"Rape is a very serious offence. More particularly in the jurisdiction of this Court. It is so prevalent that the rolls are inundated with such cases. The complainant was subjected to rape over a sustained period of time, to such an extent that she twice became pregnant and had to undergo two abortions.

In imposing an appropriate sentence, the court must meet the legitimate expectations of society that persons who are demonstrably guilty should be appropriately punished.

The sentence is intended not only for yourself, but to deter would-be rapists in the community. If the Court does not impose appropriate sentences, society will be inclined to take the law into its own hands and the administration of justice would fall into disrepute.

Having said that, your personal circumstances are that you are 39 years old. You are married to the complainant's mother for the past nine years. You have one child with the complainant's mother, the complainant's mother and you are one family unit. The ages of these children are nine and 18 years respectively.

You are employed as a winch driver. You are a resourceful person. apparently you are also an upholster and a builder and you earn an average of about R2 000 per month.

I have watched you giving evidence in mitigation and I believe that you have shown a measure of contrition and remorse. Having taken all these circumstances, your personal circumstances, the seriousness of the offence and the interest of society, and your counsels submission I believe this is one case where an appropriate sentence should be imprisonment.

I, however, agree with your counsel that the cumulative effect of all your personal circumstances amount to substantial and compelling circumstances. The manner in which these rapes occurred over a period, although I am not defending your conduct, were in a large measure perpetrated as a result of the fact the complaint's mother just shut her mind and eyes to what was obviously happening.

The child reported in 1998 that you are abusing her. The mother did nothing. After being told of the abuse, you cried crocodile tears and she just left you. She did not take the child for an examination to a doctor, neither did she seek counselling through social workers to verify your denials.

For those reasons I find that there are substantial and compelling circumstances justifying a deviation from imposing the prescribed sentence, which should have been life imprisonment."

[7] This court, sitting as a court of appeal, will not lightly interfere with the sentence of a sentencing judge. This

court must follow the general rules applicable to interference with sentences by a court of appeal. The rules are summed up in by Rumpff JA (as he then was) **S v Anderson** 1964 (3) SA 494 (A) at 495 C – E:

“Over the years our Courts of appeal have attempted to set out various principles by which they seek to be guided when they are asked to alter a sentence imposed by the trial court. These include the following: the sentence will not be altered unless it is held that no reasonable man ought to have imposed such a sentence, or that the sentence is out of all proportion to the gravity or magnitude of the offence, or that the sentence induces a sense of shock or outrage or that the sentence is grossly excessive or inadequate, or that there was improper exercise of this discretion by the trial judge, or that the interest of justice requires it”.

[8] Trollip JA in **S v Pillay** 1977 (4) SA 531 (A) pointed out at 535 E – G that the:

“ essential enquiry in an appeal against sentence, however, is not whether the sentence was right or wrong, but whether the Court in imposing it exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence, it must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably. Such a misdirection is usually and conveniently termed one that vitiates the Court’s decision on sentence.”

[9] In my opinion the facts and circumstances of this case lead me to the conclusion that there are no substantial and compelling circumstances which justify a departure from Act 105 of 1997.

[10] I say this for two reasons. The learned sentencing judge misdirected himself as regard two issues to the extent that this court may intervene and set aside his finding that there are substantial and compelling circumstances and decide the issue afresh. Secondly on my appreciation of the facts and circumstances of the case and the goals of sentencing, I differ from the view of the learned sentencing judge to such an extent that I find that there are no substantial and compelling circumstances and in view of the discrepancy in the sentence imposed and the sentence which must be imposed, in the absence of such circumstances, this court is entitled to intervene.

Misdirections

[11] The learned sentencing judge attached some weight to the accused's remorse. But the respondent did not disclose, at the opening of the trial, that, on his version, he had had consensual intercourse with the complainant on only one occasion. This was revealed

later. In his evidence in mitigation (which was omitted from the appeal record but has since been provided) the respondent said on page 41 (line 22 to page 42 line 16):

"You heard that Court has now found you guilty of raping your daughter a period of 1998. What is your attitude towards this?

---M'Lord, I feel hurt. I can't believe. I can't believe what I've heard. Because what happened on 5 December 2000 . . . (inaudible). I do not believe that a . . . (inaudible) so that things will now come on fall on my . . . (inaudible) as they are today. And I will stay that in my conscience until my death. And I say that those who have caused this grieve me, M'Lord, God should be with them, even in my absence. He will reply on this.

What do you, what is your attitude towards the fact that you admitted you had sexual intercourse with your stepdaughter on one occasion? --- M'Lord, on that day I have admitted having done that but now presently I see that what I have done was wrong. That's why I could not hide this thing, M'Lord. Because I could not have hide this while it was hurting me form inside.

And you told this to you attorney from the beginning. --- hat is so, M'Lord.

Did you ever tell this to your wife? Admit it to her. --- I did, M'Lord."

[12] His contrition is restricted to that one time. He persists in denying his repeated rape of the complainant. The learned sentencing judge should have found that the respondent had no remorse. His remorse was limited to one fictitious incident, where he said he had consensual intercourse with the complainant as it was her way of thanking him for not showing pornographic photos of her to her mother. The complainant denied this and she was believed by the learned Regional Court Magistrate and the conviction was confirmed by the learned sentencing judge. The result is that the respondent showed no remorse.

[13] I cannot share the learned sentencing judge's views that any cognisance should be taken of speculation that the accused's wife had "abandoned conjugal responsibilities" and so, this and her failure to act on her daughter's complaint somehow constituted mitigating circumstances. It is not permissible to rely on such speculation. None of this mitigates what the respondent did to the complainant.

[14] It follows that this court is entitled to intervene and consider the question of whether there are substantial and compelling circumstances present afresh. I

proceed to do this and in so doing I also consider whether in any event a consideration of all the relevant factors cumulatively justify a departure from the “standardized response that the Legislature has ordained”.

The personal circumstances

[15] The personal circumstances of the accused. These have been set out in the passage cited by the learned sentencing judge

The crime

[16] The crime of rape is a serious one. The rapes which feature in this case are particularly serious. They occurred in the following context:

- (a) At the time of when sexual violations were committed, the complainant was only 14 years old.
- (b) The rapes continued almost on a daily basis.
- (c) Although the complainant was beaten when she complained to her mother about the accused’s

conduct, the rapes were not accompanied by violence.

- (d) This does not mean that the complainant did not suffer trauma at the thought of returning from school to be raped by her waiting stepfather.
- (e) During her testimony the complainant testified about her attitude to her men. The accused's action had adversely influenced her attitude towards men.
- (f) The appellant was a stepfather of the complainant. He had no blood relations with her. However, he was a father figure to the complainant. He was in a position of trust.
- (g) Rape in this Division and this country is prevalent.
- (h) The respondent impregnated the complainant twice.
- (i) The respondent forced the complainant to use injections or contraceptives for the prevention of pregnancy.
- (j) The respondent forced the complainant to undergo two abortions. The complainant will have to carry the scar and trauma for as long as she lives.
- (k) These rapes were committed over a sustainable period of time (1998 - 2003).
- (l) The respondent restricted the complainant's movements. She became a prisoner of his

jealousy.

- (m) The complainant had an infection in her bladder and urinated blood as a result of the respondent's actions.
- (n) The complainant's psychological trauma is quite evident in that she state in that: "After conducting this abortion your worship, I was now fed-up and I wrote a letter".

and

"I was afraid that in the absence of my mother, I will be turned by the accused to be my mother and I will have now to be or doing what my mother used to do".

and

"I wrote a letter requesting an advice from the doctor because I was tired, sick and tired of the life that I was living".

and

"He allowed me to go to town and since the Friday, it was on Friday when I left home until today I never went back home."

[17] I have no doubt that taking all the personal circumstances of the respondent as outlined above into account together with the facts relating to the crime and the interests of society in protecting woman and particularly children from rape, I am of the view that there are no substantial and compelling circumstances to depart from the sentence of life imprisonment required by the Act.

[18] I cannot conclude that a sentence of life imprisonment, in the circumstances of this case, is disproportional to the crime, the criminal and the needs of society. See **S v Malgas** (supra) at 1236 D.

[19] In the circumstances I conclude that there are two reasons for concluding that this court is entitled to interfere with and increase the sentence imposed by the learned sentencing judge. These are:

(a) The misdirections committed by the learned sentencing judge; and

(b) My conclusion that I would not have found any substantial and compelling circumstances so that I would have imposed a life sentence. The

discrepancy between a life sentence and a sentence of 15 years is such that it induces a sense of shock.

[20] In the result I would allow the appeal and substitute the sentence of 15 years imprisonment with a sentence of life imprisonment.

[21] In the premises:

1. The appeal is upheld.
2. The sentence imposed by the learned sentencing judge is set aside and substituted by a sentence of life imprisonment.

A A LANDMAN
JUDGE OF THE HIGH COURT

I concur

R D HENDRICKS
JUDGE OF THE HIGH COURT

I concur

KHAMI MAKHOFOLO
ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

FOR THE APPELLANT : ADV MOGOENG
FOR THE RESPONDENT : ADV KAUPANE

ATTORNEYS:

FOR THE APPELLANT : STATE ATTORNEY
FOR THE RESPONDENT : JUSTICE CENTRE

DATE OF HEARING : 1 JUNE 2007
DATE OF JUDGMENT : 5 JULY 2007

