NOT REPORTABLE

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

CASE No. A206/2012

DATE: 13/11/2012

In the appeal of:-

STRIKE MASHABA Appellant

and

THE STATE Respondent

JUDGMENT

Van der Byl AJ:-

[1] The Appellant (to whom I will for the sake of convenience refer to as " the Accused' )

was on 1 December 2008 convicted in the regional court, sitting at Pretoria, on six counts, namely -

(a) three counts of Rape (counts 1, 2 and 3) in that upon or about, respectively, the period

June to December 2005, during 2006 and the period January 2007 to February 2007 and at or near Mamelodi, he did unlawfully and intentionally have sexual intercourse with SC without her consent;

(b) three counts of Assault with the Intent to do Grievous Bodily Harm (counts 4, 5 and 6) in that during the same periods and at or near the same place he did unlawfully and intentionally assault the said SC by hitting her with an open hand and the fist with the intent to do her grievous bodily harm.

[2] On 14 April 2009 the Accused was sentenced to life imprisonment on each of the three charges of Rape and to 10 years imprisonment on each of the charges of Assault to do Grievous Bodily Harm, being, in the case of the rape charges, offences falling in Part 1 and, in the case of the assault charges, offences falling in Part 111, of Schedule 2 to the Criminal Law Amendment Act, 1997 (Act 105 of 1997).

[3] He now appeals, by virtue of his then automatic right of appeal as provided in section 309(1 )(a)(ii) of the Criminal Procedure Act, 1977, against both his convictions and the sentences imposed upon him.

[4] It is common cause that the complainant -

(a) is the biological daughter of the Accused;

(b) was born on 31 December 1992.

[5] The evidence, furthermore, shows that the Accused was on 24 April 1998 convicted on a charge of murder for having killed the complainant’ s mother and sentenced to 10 years

imprisonment. During his imprisonment the complainant stayed with her maternal grandparents in Hammanskraal. Shortly after his release from prison on 10 June 2005 the complainant moved to stay with the Accused in Mamelodi where he stayed with his parents.

[6] The complainant testified that during the period June 2005 when she was only 13 years old until February 2007 the Accused forced her to have sex with him on various occasions and also assaulted her on many occasions by hitting her with his open hands and his fists and sometimes also kicked her. In the process she was impregnated twice. Her first child, S, was born on 7 August 2006, but died seven days later. The second child, W, was born on 22 May 2007.

[7] The Accused denied all allegations against him.

[8] The DNA evidence adduced by the State, however, shows, as was also conceded on behalf of the Accused, indisputably that the Accused was the father of the second child to whom the complainant had given birth to.

[9] The complainant admitted that at some stage during, particularly, her second pregnancy she told the authorities that the father of her child was one "Vusi", but testified that no such a person exists and that she had merely said so out of fear because the Accused had threatened to kill her should she tell anyone of the relationship he had with her. It was only after his arrest on 1 March 2007 on another charge that she felt free to report the matter and had done so to the witness Ms. Gloria Mashapa, an auxiliary social worker at Mamelodi Child Welfare.

[11] The magistrate rejected the Accused's denial of having committed any of the charges of which he was charged as not being reasonably possibly true and accepted the complainant's testimony, as corroborated by the DNA evidence. The magistrate, furthermore, held that although, according to the complainant, the rapes as well as the assaults had taken place on a regular basis since she started staying with the Accused during June 2005 until late during February 2007 during which she had fallen pregnant twice, the Accused cannot be prejudiced if it is held that he had raped and assaulted the complainant once during each period specified in the chargesheet.

[12] I am unpersuaded that the magistrate erred in any respect in rejecting the Accused's evidence and in accepting the State's evidence and, particularly, the complainant's evidence.

[13] As far as sentence is concerned, it is contended on behalf of the Accused that, as has now become a monotonous refrain in the majority of appeals against sentence, that according to the chargesheet the Accused was charged with rape, read with section 51 (2) (instead of section 51 (1)) of the Criminal Law Amendment Act, 1997 (Act 105 of 1997), providing, incidentally, for a minimum sentence of 10 years imprisonment.

[14] There is no merit in this contention. Although the chargesheet contains a reference to section 51(2) of that Act, it is obvious from the record -

(a) that the Accused's legal representative was not only well aware of the fact that the minimum sentence prescribed in the circumstances of this case is one of life imprisonment, but also did her best endeavours to persuade the magistrate not to impose that sentence;

(b) that there is no reason to hold that the Accused, having denied all allegations against him

and having made no incriminating admissions which he may not have made had the chargesheet referred to section 51(1), was in any respect prejudiced by the obvious error in the chargesheet.

[14] I am satisfied that the magistrate duly considered all factors that need to have been considered for and against the Accused and correctly held that there were no substantial and compelling circumstances,

[15] The aggravating features by far outweigh any mitigating factors.

[16] The victim impact report contains a sad picture of the life of this little girl who has been deprived of her childhood and the right to naturally develop into womanhood. In this regard I can, as has been submitted on behalf of the State, refer to the following -

(a) the Accused murdered her biological mother;

(b) he, on his release from prison, raped her regularly over a period of 18 months and impregnated her twice;

(c) her first child died seven days after birth;

(d) she developed a sense of hatred toward her second child because he reminds her of her father, the Accused;

(e) she has become promiscuous since she cannot function normally without being involved in a sexual relationship;

(f) both she and her child are HIV positive;

(g) she dropped out of school in Grade 7 after having given birth to her second child;

(g) she lived, whilst living with the Accused, under critical and desperate circumstances, dirty, with worn-out and shabby clothes and often without food.

[17] In the result the sentence imposed on the Accused is in my view the sentence he deserves.

[18] For these reasons the following order is made:

The Appellant's appeal against his convictions and the sentences imposed is dismissed.

P C VAN DER BYL

ACTING JUDGE OF THE HIGH COURT

I agree

E M MAKGOBA ,

JUDGE OF THE HIGH COURT

ON BEHALF OF THE APPELLANT: ADV KGARARA

ON BEHALF OF THE RESPONDENT:ADV J P VAN DER WESTHUIZEN

DATE OF HEARING:13 NOVEMBER 2012

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