

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

- (1) REPORTABLE
- (2) OF INTEREST TO OTHER JUDGES
- (3) REVISED

CASE NO: A230/2017

6/11/2017

In the matter between:

**MOJALEFA ELIAS TSOTETSI**

Appellant

and

**THE STATE**

Respondent

---

**JUDGMENT**

---

**Baqwa J**

- [1] The appellant was arraigned before the Regional Magistrate's Court Sebokeng on one count of rape.
- [2] He pleaded guilty and submitted a statement in terms of section 112 (2) of the Criminal Procedure Act 51 of 1977 in which he details how the crime was committed.
- [3] He was convicted and sentenced to life imprisonment.
- [4] He had an automatic right of appeal and he comes before this Court on

appeal against sentence.

### Background

- [5] In the admission of guilt statement the appellant states that on 5 February 2014 at Everton, he raped the complainant, Lebohang Moshue a nine year old female person.
- [6] He states that there had been a feast after which he had to take a tent to his mother's place and he was accompanied by the complainant. On their return from the errand, he decided to have sexual intercourse with the child. He took her into the veldt and raped her. From there he took her home.

### Grounds of Appeal

- [7] In this appeal the appellant makes reference to his plea of guilty and he accepts that a conviction of rape of a minor read with section 51 (1) of the Criminal Law Amendment Act 105 of 1997 carries the minimum prescribed sentence of imprisonment for life.
- [8] The appellant however submits that although any form of rape, especially involving minor children is a serious violation of another person which calls for stringent sentences; it is not in every instance that the ultimate sentence of life imprisonment is appropriate.

### Comparative Case Law

- [9] He makes reference to comparative case law including the case of **S v Abrahams** 2002 (1) SACR 116 SCA in which the following was stated:

*"(S)ome rapes are worse than others and the life sentence ordained by the Legislature should be reserved for cases devoid of substantial factors compelling the conclusion that such a sentence is inappropriate and unjust."*

- [10] It is trite that comparative case law does not bind a Court of Appeal as every case is unique. As a counter to this proposition the appellant submits that widely divergent sentences for similar cases are not ideal in any criminal justice system.
- [11] Whilst the appellant's submission may be true, generally speaking, it is equally true that each case should be judged on its own merits and that the Court's discretion cannot be fettered by previous similar judgments. This however does not prevent a Court from considering the judgments in similar cases and utilising them for guidance. Where circumstances justify a different sentence as the appropriate sentence, the Court must impose the appropriate sentence. See **S v McMillan** 2003 (1) SACR 27 SCA par 10.
- [12] The appellant has made reference to three similar cases in support of his quest for a lesser sentence:

**S v Rooiberg** 2015 JDR 0740 (ECG)

**S v Ngwenya** 2014 JDR 1620 (GP)

**S v Calvin** 2014 JDR 2020 (SCA)

The common factor in these three cases is that a minor had been raped. The appellant had been convicted and sentenced to life imprisonment and on appeal the sentence had been reduced to 20 years imprisonment. I have already commented (**supra**) regarding the weight that ought to be accorded to similar cases.

- [13] The respondent submits that the court **a quo** was obliged to impose the prescribed minimum sentence bearing in mind that the provisions pertaining to imprisonment in terms of section 51 (1) of the Criminal Law Amendment Act No. 105 of 1997 and the absence of substantial and compelling circumstances.
- [14] The respondent makes reference to **S v Malgas** 2011 (1) SACR 469 SCA in which the Court made the following remarks in regard to the concept of

'substantial and compelling circumstances':

*"Whatever nuances of meaning may lurk in those words, their central thrust seems obvious. The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances. Nor were marginal differences in the personal circumstances or degrees of participation of co-offenders which, but for the provisions, might have justified differentiating between them."*

#### Personal Circumstances

[15] The appellant was 44 years at the time of sentence. He was self-employed as a taxi owner earning approximately R3 000.00 per month. He has four children, two of whom are school going.

#### Aggravating Circumstances

[16] There are, however, aggravating circumstances in this case. The State addressed the trial Court on what it referred to as the '*silent*' factors, namely, that the appellant assisted by an aunt of the child victim had attempted to conceal the rape by reporting the case to the police as a rape by an unknown assailant. The child however revealed the truth to the mother when she took her to the hospital. Evidently the appellant was not remorseful of his actions and was prepared to attempt to defeat the ends of justice by colluding with another to lay a false charge and conceal his complicity.

[17] Secondly, the child was treated in hospital for five days because of the severe injuries she suffered as a result of the rape. There was a third degree tear on the perineum and the hymen was also torn. She suffered excessive bleeding and the tears were so severe that the child had to

undergo reconstructive surgery of her vagina. The operation lasted for a whole day.

- [18] A quote from the Victim Impact Report demonstrates how the victim's life has been traumatised and negatively impacted by the incident.

*"Emotional Impact*

*The mother informed that the victim wets herself randomly at home and at school. She added that this has occurred more than once at school and when asked why she does not speak when she needs the toilet she replies by saying she does not know. The mother expressed her pain and a/so at night when the victim is sleeping at times she experiences nightmares wakes up crying and starts crying. The victim used to sleep alone however after the incident she sleeps with her mother due to fear. When the undersigned probed further regarding her behaviour when she randomly starts crying she stated that she is usually thinking of the incident and it hurts her."*

- [19] Regarding her education the Victim Impact Report states:

*"The victim stated that she is currently in grade 3 at [...] School. The mother reported that the victim has always performed well at school however after the incident her academic has changed drastically. She stated that she goes to her school regularly to ask about how she is coping as she can see when looking at her school books that she is not coping well."*

- [20] What is clear is that the victim has suffered psychological, physical and emotional damage. Her life has been seriously negatively impacted.
- [21] Another aggravating factor is the appellant's previous record. When the rape was committed, he was on parole having served a portion of a 35 year sentence for two counts of murder. Evidently, the appellant has no

respect for the law. He had been paroled for crimes involving the use of extreme violence and despite the opportunity he committed yet another crime involving violence on a helpless child victim. In my view, nothing could be more heinous and the case can hardly be equated with cases which the appellant has referred to in his attempt to persuade this Court to interfere with the sentence imposed by the court **a quo**.

- [22] There was no misdirection by the court **a quo** in imposing a life sentence on the appellant. In **S v Pillay** 1977 (4) SA 531 (A) at 535 E - f: Trollip JA remarked :

*""Now the word misdirection in the present context simply means an error committed by the Court in determining or applying the facts for assessing the appropriate sentence. As the essential inquiry 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 misdirection is usually and conveniently termed one that vitiates the Court's decision on sentence".*

- [23] After considering all the facts and submissions by counsel, I propose that the following order be made:

The appeal against sentence is dismissed.

It is so ordered.

---

**S.A.M BAQWA**  
**JUDGE OF THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

I agree.

---

**P.PHAHLANE**

**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA**

Heard on: 06 November 2017

Delivered on: 06 November 2017

For the Applicant: Advocate J. Henzen-Du Toit

Instructed by: Legal Aid

For the First Respondent: Advocate M. J. Nethononda

Instructed by: The Director of Public Prosecutions, Pretoria