

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, PRETORIA

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

CASE NO: A2/2020

18 August 2020

A handwritten signature in black ink, appearing to read "J. M. M.", is written over the signature line.

DATE

SIGNATURE

In the matter between:

ALFFRED BENINYANA MATHONSI

Appellant

and

THE STATE

Respondent

JUDGMENT

LAMONT, J:

- [1] The appellant was convicted on a charge of contravening Section 3 of the Criminal Law (Sexual Offences and Related Matters) Act 32 of 2007 (rape),

read with the provisions of section 51(1) of Criminal Law Amendment Act 105 of 1997 in the Regional Court sitting in Benoni on 7 August 2019.

- [2] He pleaded guilty to raping his stepdaughter who is mentally disabled in Section 1 of the Mental Health Act 18 of 1973.
- [3] The appellant was sentenced life imprisonment on 25 September 2019.
- [4] The appellant was legally represented during the trial.
- [5] This is an automatic appeal in terms of Section 309(1) of Act 51 of 1977 Criminal Procedure Act.
- [6] The appellant appeals against the sentence.

SENTENCE

- [7] The rape of the complainant falls under Section 51 (1) of the Criminal Law Amendment Act 105 of 1997 on the basis that the complainant is defined '*(b)(iii) is a person who is mentally disabled as contemplated*' as in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act of 2007 and the minimum sentence prescribed applies unless there are substantial and compelling grounds justifying deviation from it.
- [8] The appellant was aware that the provisions of Section 51(1) of the Criminal

Law Amendment Act 105 of 1997 were applicable. The provisions are in the charge sheet and were explained to him by the magistrate.¹

[9] As stated in *S v Malgas* 2001(2) SACR 469(SCA) at P 481 to 482,

"the specified sentences are not to be departed from lightly and for flimsy reason, speculative hypotheses favorable to the offender undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded."

[10] In *S v Kibido* 1998 (2) SACR 214 (SCA) at P 216 G-H, it was stated that:

"it is trite law that the determination of a sentence in a criminal matter is pre- eminently a matter for the discretion of the trial court. In the exercise of this function, the trial court has a wide discretion in:

- (a) deciding which factors should be allowed to influence the court in determining the measure of punishment and*
- (b) in determining the value to attach to each".*

[11] In *S v Rabie* 1975 (4) SA 855(A) at P 857 D-E, it was decided as follows:

"In every appeal against the sentence, whether imposed by the Magistrate or a judge, the Court hearing the appeal:-

- (a) should be guided by the principle that punishment is pre-eminently a matter for the discretion of the trial Court and*

¹ See :*S v Ndlovu* 2003 (1) SACR 331 (SCA), *S v Legoa* 2203 (1) SACR 13 (SCA), *S v Makatu* 2006 (2) SACR 582 (SCA) ,*S v Tshimbudzi* 2013 (1) SACR 528 (SCA)

(b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been judicially and properly exercised. The test under (b) is whether the sentence is vitiated by irregularity or by misdirection or is disturbingly inappropriate”.

[12] In my view the trial court took all the relevant factors into consideration in imposing an appropriate sentence. It considered the crime, the appellant, society, deterrence, retribution and whether there were circumstances justifying a lesser punishment than the minimum.

[13] The sentence imposed is commensurate with the gravity of the offence and does not in any way evoke a feeling of shock.

[14] Rape is a serious offence. In *S v Mosethla* 2014 JDR 1282 (GP) at P10, the court held that rape is a horrendous crime that mars our society.

[15] Rape is prevalent in the whole country. There was a relationship of trust between the appellant and the complainant. The appellant was the complainant's stepfather and both stood in a position of trust had a responsibility to protect her.

[16] The appellant took the advantage of both the relationship he had to the complainant as her stepdaughter and the complainant's mental illness. The complainant falls amongst the most vulnerable members of our society and needs full protection.

[17] The complainant's child will have difficult upbringing due to the mental condition of her mother.

[18] The supreme court of in appeal *S v Chapman* 1997 (2) SACR (SCA) at P 5 a-d, held that:

"Rape is a 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 echoes of the Constitution and to any defensible civilization. Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquility of their homes without fear, the apprehension and the insecurity, which constantly diminishes the quality, and enjoyment of their lives. The courts are under a duty to send a clear message to the accused, to other potential rapists and to the community: We are determined to protect the quality, dignity and freedom of all women, and we shall show no mercy to those who seek to invade those rights"

- [19] *DPP, North Gauteng v Thabethe* 2011 (2) SACR 567 (SCA) 577

G-I, it was held that:

"Rape of women and young children has become cancerous in our society. It is a crime, which threatens the very foundation of our nascent democracy, which is founded on protection and promotion of the values of human dignity, equality and the advancement of human rights and freedoms. It is such a serious crime that it evokes strong feelings of revulsion and outrage amongst all right thinking and self-respecting members of society. Our courts have an obligation in imposing sentences for such a crime, particularly where it involves young, innocent, defenseless and vulnerable girls, to impose the kind of sentences which reflect the natural outrage and revulsion felt by the law-abiding members of society. A failure to do so would regrettably have the effect of eroding the public confidence in the criminal justice system".

- [20] *Director of Public Prosecutions, Western Cape v Prins and others* 2012 (2) SACR 183 (SCA) at p186, the Court held that:

"No judicial officer sitting in South Africa today is unaware of the extent of sexual violence in this country and the way in which it deprives so many women and children of their right to dignity and bodily integrity and, in the case of children, the right to be children; to grow up in innocence and, as they grow older, to awaken to the maturity and joy of full humanity. The rights to dignity and bodily integrity are fundamental to our humanity and should be respected for that reason alone. It is a sad reflection on our world, and societies such as our own, that women and children have been abused and that such abuse continue."

- [21] The facts of this case are almost similar to the facts in the *Director of Public Prosecutions, Grahamstown v Mantashe* (131/2019) [2020] ZASCA 05 (12

March 2020 in that a 9 year old complainant went to live with her and aunt and aunt's boyfriend after the death of the complainant's mother. The boyfriend of the aunt raped the complainant. The complainant was only 9 years when it occurred. The High court imposed a sentence of 22 years imprisonment. On appeal, the Supreme Court of Appeal altered the sentence to life imprisonment.

[22] In *Munyai v The State* (546/2013) [2014] ZASCA 36 (28 March 2014), life imprisonment for rape of a 13 year old victim by 55 a year old perpetrator was confirmed. The court held that despite the fact that no evidence was led on the effect of the rape on the complainant; the lack of such evidence should not be construed as an absence of the existence of post-traumatic stress.

[23] In *S v Vilakazi* 2009 (1) SACR 552 (SCA) at par 58 where it was held that:

"In cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the background. Once it becomes clear that the crime deserves of a substantial period of imprisonment question whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be, and those seem to me to be the kind of 'flimsy' grounds that Malgas said should be avoided."

[24] In *S v Radebe* 2019 (2) SACR 381 (GP) at paragraphs 24 and 25, the court held that:

"[24] Rape directly impacts on the victim's right to dignity, equality, bodily integrity, freedom of association and the entitlement to choose with whom to share the most intimate of relationships. In the present case the girl would have just reached puberty at the time she was violated. Rape erodes the victim's right to bodily and emotional integrity because the violation cannot be undone. In this manner the victim's constitutional right to freedom of security of person has also been trampled on.

[25] Rape therefore is not just the invasion of a right not to be physically harmed. Rape impacts on the person as a whole and diminishes the fundamental bundle of rights which the Bill of Rights secures for each individual. Rape constitutes a gross violation of a person's physical integrity and psyche. It is likely to leave indelible emotional and psychological scars with sequelae which will almost certainly impact on the enjoyment of the qualities of life. The literature referred to by the probation officer who compiled the victim-assessment report speaks to this".

[25] There was no misdirection by the magistrate and the circumstances of the case warrant life imprisonment. The personal circumstances do not afford the appellant a right to a lighter sentence they are merely factors to be considered as part of the sentencing process. The appellant is 62 years old. He has two previous convictions but is a first offender as far as sexual offences are concerned. He has very limited education and cannot read or write. He had steady employment, supported, and was a caregiver to minor children. As

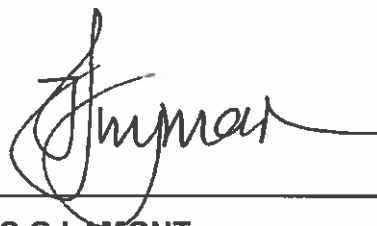
against that must be considered the seriousness of the offence, the youth and impact of the offence on the complainant.

[26] In my view the appeal should be dismissed.

[27] I make the following order:

The appeal is dismissed.

PP/



C G LAMONT
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree



F M M SNYMAN
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

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