



**"IN THE HIGH COURT OF SOUTH AFRICA"
NORTH WEST DIVISION, MAHIKENG**

CASE NO. CA24/2016

In the matter between:

KABELO MATHE

APPELLANT

and

THE STATE

RESPONDENT

GURA J AND GUTTA J

CRIMINAL APPEAL

GUTTA J.

A. INTRODUCTION

- [1] The appellant was arraigned at the Regional Division of North West held at Taung on a charge of rape.
- [2] The appellant pleaded guilty and he was convicted based on his plea of guilty.
- [3] On the 24th July 2014 the appellant was sentenced to life imprisonment.

[4] The appeal is against sentence.

B. CONDONATION

[5] The appellant applied for condonation for the late filing of the Notice of appeal. The application is not opposed. After considering the affidavit filed in support of the application for condonation, this court granted the appellant condonation.

C. GROUND FOR APPEAL

[6] The grounds of appeal are the following:

6.1 An effective term of life imprisonment is shockingly inappropriate and excessive in that it:

6.1 Is out of proportion to the totality of the accepted facts in mitigation.

6.2 The sentence disregards the period spent in custody awaiting trial.

6.2 The court erred by not imposing a shorter term of imprisonment more particularly in view of the following factors:

6.2.1 The age of the appellant.

6.2.2 The appellant pleaded guilty and has shown remorse.

6.2.3 The personal circumstances of the appellant.

6.2.4 The rehabilitation element of sentencing.

6.3 The court further erred in over-emphasizing the following facts:

- 6.3.1 The seriousness of the offence.
- 6.3.2 The interest of society.
- 6.3.3 The prevalence of the offence.
- 6.3.4 The deterrent effect of the sentence.
- 6.3.5 The retributive element of sentencing.

D. FACTS

- [7] The facts briefly summarized from the appellant's plea explanation in terms of section 112(2) Act 51 of 1977 is that on the day of the incident, the appellant met the complainant who was 5 years old at the time and was playing alone. He called her and they entered the house where he took her to a bedroom, undressed her of her trouser and panty, smeared Vaseline on her vagina and inserted his penis inside her vagina. His neighbour entered and saw him and reported him to the police.

E. EVALUATION

- [8] The personal and mitigatory factors advanced by the appellant are the following:
- 8.1 The appellant was 30 years of age and not married.
 - 8.2 He had previous convictions which were more than ten years old at the time of the commission of this offence.
 - 8.3 He pleaded guilty to the offence and has shown remorse.
 - 8.4 At the time of his arrest he was an assistant to a builder and earned R350.00 per week.
 - 8.5 He contributed to household expenses.

[9] The aggravating factors are the following:

9.1 The complainant was only 5 years old when she was raped.

9.2 The appellant took advantage of a young, innocent and vulnerable child.

[10] The imposition of a suitable sentence is a matter which falls pre-eminently within the discretion of the trial court. A court of appeal will not lightly interfere with the exercise of the discretion by the trial court in imposing sentence. A court of appeal will only interfere when the sentence imposed by the trial court is vitiated by an irregularity or misdirection or when the sentence is shockingly severe, disturbingly inappropriate and totally out of proportion to the offence committed. See *S v Coetzee* 2010 (1) SACR 176 (SCA); *S v Matlala* 20013 (1) SACR 80 (SCA); *S v Kgosimore* 1999 (2) SACR 238 (SCA).

RAPE REFERRED TO IN SECTION 51(1) READ WITH PART I OF SCHEDULE 2 OF ACT 105 OF 1997

[11] The appellant is convicted of rape, which offence falls within Part (1) of schedule 2 of the Act as amended, where the minimum sentence prescribed is life imprisonment unless there are substantial and compelling circumstances present that justify the imposition of a lesser sentence.

PREVIOUS CONVICTION

[12] The appellant has several previous convictions of house breaking with intent to steal and theft which convictions are old in that the last offence was committed on the 18 June 2002. He also has one conviction on 10 December

2001 of assault with intent to do grievous bodily harm, which is a crime of violence and is a serious offence, but falls away after ten years in terms section 271 A of the Act.

REMORSE

[13] It is trite that a plea of guilty is a mitigating factor and is often treated as a sign of remorse. However, from the facts stated *supra*, the appellant was caught red handed and this could account for his plea of guilty. As the SCA in *S v Matyityi* (695/09) [2010] ZASCA 127 said "[13] Remorse was said to be manifested in him pleading guilty and apologizing, through his counsel (who did so on his behalf from the bar) to both Ms KD and Mr Cannon. It has been held, quite correctly, that a plea of guilty in the face of an open and shut case against an accused person is a neutral factor. The evidence linking the respondent to the crimes was overwhelming. In addition to the stolen items found at the home of his girlfriend, there was DNA evidence linking him to the crime scene, pointings-out made by him and his positive identification parade. There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error. Whether the offender is sincerely remorseful and not simply feeling sorry for himself or herself at having been caught is a factual question. It is to the surrounding actions of the accused rather than what he says in court that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens the genuineness of the contrition alleged to exist cannot be determined. After all, before a court finds that an accused person is genuinely remorseful, it needs to have a proper appreciation of inter alia: what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequence of those actions. There is no indication that any of this, all of which was peculiarly within the respondent's knowledge, was explored in this case".

[14] In the case of *DPP, North Gauteng v Thabethe* 2011 (2) SACR 567 (SCA) at 577G-I, the Court held that:

“[22] . . . 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, defenceless and vulnerable girls, to impose the kind of sentences which reflect the natural outrage and revulsion felt by 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.”

- [15] Young women in South Africa need to feel safe and secure in their environment. Rape is a violent crime and the statistics for rape in this country are shockingly high. Men who rape and violate innocent woman and girls deserve long term imprisonment and it is in the interest of society that the appellant is punished with a sentence that fits the offence.

- [16] In *S v Muller* (2006) ZAGPHC 51 at para 97 it is said “Research indicates that this breach of trust and exploitation of vulnerability that is involved in sexual abuse of children could have long term effects in the child experiencing problems with relationships, intimacy and sexual adjustment in adult life. Although Burchell and Milton concede that there may well be a considerable difference in the degree to which the abusive act affects the child, they acknowledge that the abuse of power or authority over the child is the source of emotional trauma and the fundamental reason for punishment.’

- [17] The complainant was only 5 years old when she was raped by the appellant who was known to her. The complainant trusted the appellant as she voluntarily accompanied him to his home. The psychological trauma that the complainant suffered and will continue to endure cannot be ignored. I am of the view that the aggravating factors in *casu* completely outweigh the mitigating factors.

- [18] When determining whether there are substantial and compelling circumstances present to deviate from the minimum sentence of life imprisonment, our courts have often expressed that the mitigating and personal circumstances of an accused should be considered. In the cases of *S v Vilakazi* 2009 (1) SACR 552 (SCA) and *S v Mahomotsa* 2002 (2) SACR 435 (SCA), the Courts held that life imprisonment should be reserved for more serious cases of rape.
- [19] The full bench of this division in the case of, *Mpande vs The State* Case no. CAF7/16 North West Hight Court 22/9/2016, where the appellant who was in a position of trust *vis-à-vis* the complainant aged 25 years raped the complainant who was a 6 year old girl. The full bench substituted the sentence of life imprisonment with a sentence of 22 years imprisonment. More recently this court in *Piet Diphoko vs The State* CA5/2016 also set aside the sentence of life imprisonment and substituted it with a sentence of 23 years imprisonment. In the Diphoko case *supra* a 27 year old male, who was a family friend raped a 9 year old girl. In the above cases, the appellants were first offenders and the court was of the view that because of the appellant's age and the fact that they were first offenders, they were suitable candidates for rehabilitation.
- [20] The purpose of sentencing is deterrence, prevention, rehabilitation, retribution and punishment. I am of the view that when considering all the mitigating facts and personal circumstances cumulatively, specifically, the appellant's age, that he was in custody from the date of his arrest, namely 13 April 2013 until he was sentenced on the 24 July 2014, the fact that he pleaded guilty and that he is a suitable candidate for rehabilitation and after serving his sentence he can be reintegrated into society and can contribute positively to the society and bearing in mind all the factors relevant when imposing an

appropriate sentence, and blending this with an element of mercy, that the trial court erred in its finding that there were no substantial and compelling circumstances to warrant a deviation from the minimum sentence of life imprisonment. In the circumstances the sentence of life imprisonment is shockingly severe. However when considering the aggravating factors mentioned *supra*, I am of the view that a long term prison sentence is warranted.

[20] Consequently the following order is made:

1. The appeal on sentence is upheld;
2. The sentence imposed by the trial court is set aside and substituted with the following:

‘25 years imprisonment’

4. The sentence is antedated to 24 July 2014.

N. GUTTA
JUDGE OF THE HIGH COURT

I agree

SAMKELO GURA
JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF HEARING : 21 OCTOBER 2016
DATE OF JUDGMENT : 08 DECEMBER 2016

COUNSEL FOR APPELLANT : ADV M.E SETUMU
COUNSEL FOR RESPONDENT : ADV MOKONE

ATTORNEYS FOR APPELLANT : LEGAL AID SOUTH AFRICA
ATTORNEYS FOR RESPONDENT : DIRECTOR OF PUBLIC PROSECUTIONS