

SOUTH AFRICA / JUDGMENT

Erasmus v S (A31/2020) [2023] ZAGPPHC 662 (7 August 2023)

[2023] ZAGPPHC 662**COURT**

North Gauteng High Court, Pretoria

BEFORE

Millar, Barit

CASE / FILE NUMBER

A31/2020

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA****(GAUTENG DIVISION,****PRETORIA DIVISION)****CASE NO: A31/2020****(1)****REPORTABLE: NO.****(2)****OF INTEREST TO OTHER JUDGES: NO.****(3)****REVISED.****DATE: 7 AUGUST 2023****SIGNATURE:**

In

the matter between:

ERASMUS,
MARIUS ADRIAAN
Appellant
and
THE
STATE
Respondent

Coram: Millar
J et Barit AJ
Heard

on: 22
May 2023

Delivered: 7
August 2023 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the CaseLines system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 10H00 on 7 August 2023.

Summary: Criminal law and procedure – Appeal against conviction and the imposition of 2 life sentences for rape of minor stepdaughter –
no basis upon which to interfere with conviction – no substantial or compelling circumstances shown to justify deviation from minimum prescribed sentences – Appeals against both conviction and sentence dismissed.
ORDER
On
appeal from: The
Regional Court for Ekurhuleni South held at Tsakane.
It

is ordered: [1]
The appeal against the conviction on counts 1 and 2 is dismissed.
[2]
The appeal against sentence on counts 1 and 2 is dismissed.

JUDGMENT

MILLAR J (BARIT AJ CONCURRING)

[1] On 10 July 2019, the appellant, a 31-year-old man was convicted in the Regional Court held at Tsakane of two counts of rape of his minor 13-year-old stepdaughter. On 2 October 2019 he was sentenced to life imprisonment on both counts.[1]

[2] The appeal before this court is against both conviction and sentence. The right to appeal is automatic in terms of s 309B read together with the proviso to s 309(1) of the Criminal Procedure Act,[2] by virtue of the imposition of the sentence of life imprisonment.

THE EVIDENCE

- [3] The evidence led at the trial was that of the complainant - the minor - as well as her mother, her aunt and two police officers. The appellant also testified. It is apposite to state at this juncture that the defence of the appellant was a bare denial that he had committed the offences with which he was charged.
- [4] During 2012, when the minor was about 12 or 13 years of age, the incidents which formed the subject of the complaint occurred between the minor and the appellant.
- [5] The first incident occurred whilst the family lived in Sundra. In the early hours of the morning, after the minor had woken up to go to the bathroom and was on her way back to her room, the appellant (who had been making a fire in the living room), advised her to return to her room and remove her pyjama pants. She did this and testified that the appellant had then followed her to her room and unsuccessfully tried to penetrate her twice. She never informed her mother of this occurrence.
- [6] Sometime later the family relocated to Brakpan. The minor testified that the appellant's approaches to her did not start immediately but only when both the appellant and her mother began abusing alcohol and drugs. When the appellant sent her mother to the Spar to make purchases and he was alone with her, he would smear vaseline or butter onto her genitalia and then try to penetrate her. He kept trying until he eventually succeeded.
- [7] The minor testified that she never told her mother or anyone else about these incidents as she realized that he was too strong for her to resist him and furthermore the appellant had threatened to burn down her grandmother's house, starve her disabled brother and kill both her and her mother if she did.
- [8] Later, while still living in Brakpan and due to changed economic circumstances the family were forced to occupy only one bedroom of the house while other people moved in as well. There were two bunk beds in this room – the bottom bunk bed was occupied by the appellant and his wife and the minor occupied the top bunk bed. One evening the minor heard her parents having intercourse and the appellant asking her mother if he could please “finish with” the minor. Her mother did not initially agree but due to his insistence and persistence, her mother had then told the minor to lie on the bed with the appellant. The appellant had her mother rub lubricant on the minor's genitalia whereafter he penetrated her.
- [9] The family thereafter moved to a guesthouse owned by a man called “Jannie”. Whilst at this guesthouse, the appellant and her mother engaged in sexual intercourse whilst watching a pornographic film and the appellant then called the minor to him and had sex with her.
- [10] The minor testified that the appellant forced her to steal money from Jannie and would beat her with a broomstick if she refused to do this. The appellant forced her to use drugs with him and her mother and she would be under the influence of these whilst he had sexual intercourse with her.

- [11] The minor also testified about a sexual assault by Jannie. She said he had initially asked for sexual intercourse which she refused, and she then gave him “hand jobs” in return for money. It was her evidence that she had been instructed to do this by the appellant. The minor explained that she did not always give Jannie hand jobs but would steal the money and then give the money to her parents some 10 to 20 minutes after telling them she had given Jannie the hand job for money.
- [12] While staying at the guesthouse, the minor informed her aunt, Ms M[...] E[...] v[...] d[...] M[...] of what had occurred. After this, the appellant did not rape her again. Her aunt reported the matter to the authorities and whilst the minor was at school, the police arrived to speak to her. The minor made a report to the police officer and a teacher and was then taken to a hospital where a doctor conducted an examination of her.
- [13] When the minor was confronted on her different statements regarding Jannie, she admitted she lied to the police. She also admitted to lying to the doctor who had examined her for purposes of completing the J88 medical report by telling him she had had sex with her boyfriend. In each instance she explained that she had done so because she was scared.
- [14] The minor’s aunt testified that she and her husband had lived with the minor and her family at the same guesthouse in Brakpan. One day, during 2012 the minor had run to her whilst she was utilizing the outside toilet and informed her that her mother had ordered her to “suck the private parts” of the appellant the evening before and that she had done it because her mother had instructed her to do it. Whilst relaying this to her aunt, the appellant had shouted to her mother to retrieve the minor as he did not want her speaking to the aunt.
- [15] She testified that she went to the SAPS to report to them on what the minor had told her. She also testified that she had personally witnessed the appellant and his wife lying in bed with the minor watching a pornographic film and saw the minor fondling the appellant’s genitalia. She told her sister to do something about it and the minor was told to move away from the appellant, but the minor continued to kiss and tickle the appellant. She also said that her sister had told her that the appellant had insisted that both the minor’s and her mother’s pubic hair be shaven. She witnessed the owner of the guesthouse fondling the minor while they were sitting behind his desk. She also said that the minor told her that when the appellant wanted sex with her mother that she would tell him to go to the minor if she was not in the mood.
- [16] The minor’s mother testified that she is the biological mother of the minor and that the appellant is the minor’s stepfather. She recalled that whilst they resided in Sundra she awoke one evening to find the bedroom door locked from the outside and when she enquired from the appellant why, he informed her that he did not want to wake her up whilst he made a fire in the living room. She said that a few nights after that, the appellant came into the bedroom dragging the minor by her hair and holding a knife to her neck. He ordered her to get lubricant and rub it onto his private parts and onto the minor. After this incident the

appellant raped the minor several times whilst they lived in Sundra.

- [17] She testified about her and the appellants alcohol and drug abuse and that while they were doing so the appellant had called the minor to join them. She said that she had begged the appellant to stop what he was doing with the minor but that he had refused and had also threatened to kill her if she ever tried to leave him or told anyone what he was doing.
- [18] When the family moved to Brakpan, they stayed in a guesthouse. Her sister and her husband also stayed at the same guesthouse. She testified that she had urged the minor to tell someone at school. It was only after the minor reported the incident to her aunt that the police arrived.
- [19] Ms. Govender, a police officer who went to interview the minor at her school testified that the principal refused to let her speak to the minor and insisted that the Family Violence Unit first be called. Warrant Officer Duister of this unit was called to the school. Whilst waiting for Warrant Officer Duister, she had spoken briefly with the minor who said she had never seen her mother or stepfather naked and that they had done nothing to her.
- [20] Warrant Officer Duister of the Family Violence Child Protection and Sexual Offences Unit testified that she attended at the school where the minor informed her that her stepfather used to touch her private parts and her breasts but did not mention the intercourse.
- [21] The appellant testified that he never raped the minor. He testified that he had asked his wife for a divorce on 28 May 2014 and believed this to be the reason behind them implicating him on rape charges. His evidence was that the minor had many boyfriends and that he had tried to guide her albeit unsuccessfully.
- [22] He testified that he had a long and troubled relationship with his sister-in-law (the minor's aunt) and labelled her as "his enemy". He said that she had wanted to marry him but that he had instead chosen her sister, and that this had angered her to the extent that she lied in court.

Evaluation

- [23] In evaluating the evidence of the minor, "The court should be careful not to place an old head on young shoulders, and it must take into consideration the age, knowledge, experience and, most importantly, the judgment of the child and the specific circumstances facing the child at the time of the commission of the prohibited act . . . A child's age is, obviously, not something over which the child has control and so an inquiry into whether the child could have acted differently is determined solely by the child's own subjectively assessed capacity"[3] (footnotes omitted)

[24] The evidence of the minor, aside from some inconsequential contradictions was consistent. The minor knew what the appellant had done to her and with her and was able to testify about this in some detail. In my view, her evidence was entirely consistent with her having experienced what she did. Her evidence was corroborated by her mother in material respects particularly insofar as she had herself witnessed it. The evidence of the aunt corroborated the evidence of both the minor and her mother.[4]

[25] In S v V

[5] it was held that “Whilst there is no statutory requirement that a child’s evidence must be corroborated, it has long been accepted that the evidence of children should be treated with caution and that the evidence in a particular case involving sexual misconduct may call for a cautionary approach. Such a cautionary approach is called for where reasonable grounds are suggested by the accused for suspecting that the State’s witnesses have a grudge against him, or a motive to implicate him falsely.”

[26] The attempt by the appellant to impeach the evidence of the minor, her mother, and her aunt by variously accusing the minor of “having

boyfriends” and being of promiscuous character, her mother of wanting to punish him for wanting a divorce and the aunt because she was spurned by him is simply not reasonably possibly true[6] and must be rejected.

THE CONVICTIONS

[27] On a conspectus of the evidence, the court a quo, correctly in my view concluded that:

“Yes, there were a number of contradictions pointed out during the trial and after the trial when the defence addressed the court on the merits. There were numerous contradictions both in the child's evidence as well as the evidence presented by the mother and the aunt.

But the golden thread that keeps on running through it all is the fact that this child was repeatedly but at least on the two occasions as listed in the charge sheet sexually penetrated by the accused.”

[28] The convictions on both counts of the indictment were sound and unimpeachable[7] and for this reason the appeal against the convictions must fail.

SENTENCE

[29] It is well established that in regard to the imposition of minimum sentences:

“Under constitutional dispensation it is certainly no less desirable than under common law that facts State intends to prove to increase

sentencing jurisdiction under the Act should be clearly set out in the charge-sheet - Matter is, however, one of substance and not form, and general rule cannot be laid down that charge in every case has to recite either in specific form of scheduled offence with which accused charged or facts State intends to prove to establish it – Whether accused's substantive fair trial right, including her or his ability to answer charge, has been impaired depends on vigilant examination of relevant circumstances.”[8]

[30] The enquiry is in two stages. Firstly, whether the appellant was advised of the charges he was to face and the sentence that may be imposed and secondly, whether the appellant's right to a fair trial had been impaired.

[31] The charges faced by the appellant on the charge sheet both referred to “Section 51 and Schedule 2 of The Criminal Law Amendment Act 105 of 1997” and pertinently under the heading “Penalty Clause” that upon conviction the applicable sentence was “imprisonment for life.” Furthermore, this was specifically brought to his attention at the commencement of the trial and before he pleaded.

[32] The appellant was convicted, on Counts 1 and 2 of a crime referred to in Part 1 of Schedule 2 of The Criminal Law Amendment Act[9] and the court a quo was obliged to impose the prescribed minimum sentence of life imprisonment in terms of s 51(1) of that Act, absent substantial and compelling circumstances[10].

[33] The state presented into evidence a victim impact report in which it was concluded that “..the victim suffers the impact of childhood trauma, from the rape. These include social withdrawal, poor academic achievement, sleeping

disorder, aggression, difficulty forming relationships with peers, sexual acting out and adolescent pregnancy among others. She was deprived of a normal childhood at an early age and may be a malfunctioning adult.”

[34] In considerations of the severity of the actions of the appellant, the observations of the court in S v C [11] are pertinent:

"Rape is regarded by society as one of the most heinous of crimes, and rightly so. A rapist does not murder his victim, he murders her self-respect and destroys her feelings physically and mentally and her security. His monstrous deed often haunts his victim and subjects her to a mental torment for the rest of her life, a fate often worse than loss of life."

It must not be overlooked that the appellant is the husband of the mother of the minor, it is he who should be there to protect her. However, it is he who violated her.

[35] Were there substantial and compelling circumstances justifying the imposition of a lesser sentence?

[36] There was no evidence presented on behalf of the appellant as to the existence of substantial or compelling circumstances which would move the court a quo to consider deviation from the minimum sentence, save to place on record that the appellant was a

stepfather to 3 children, had no biological children of his own and had been denied the opportunity to attend his father's funeral during the 4 years he had been in custody. The pre-sentence report submitted in respect of the appellant concluded that a "sentence of direct imprisonment" be considered.

[37] There were no submissions made on his behalf in regard to his being declared unfit to own a firearm, other than to record he did not own one. Furthermore, there were no submissions made in regard to a declaration that he be declared unfit to work with children or that his name be included in the National Register for Sex Offenders.

[38] The court a quo found, and indeed there are no substantial and compelling reasons to depart from the minimum sentence in respect of either count 1 or count 2. Accordingly, the appeal against the sentences must also fail.

[39] In the circumstances, it is ordered:

[39.1] The appeal against the convictions on counts 1 and 2 is dismissed.

[39.2] The appeal against the sentences on counts 1 and 2 is dismissed.

A MILLAR

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

I AGREE

L BARIT

ACTING JUDGE OF THE HIGH COURT

HEARD ON: 24 MAY 2023

JUDGMENT

DELIVERED ON: 7 AUGUST 2023 COUNSEL FOR THE APPELLANT: ADV H ALBERTS
INSTRUCTED BY: LEGAL AID SA PRETORIA JUSTICE CENTRE COUNSEL FOR THE
RESPONDENT: ADV G MARITZ INSTRUCTED BY: THE STATE ATTORNEY PRETORIA REF:
SA16/2020

[1] The full sentence was: 1) On Count 01 Life Imprisonment; 2) On Count 02 Life Imprisonment; 3) In terms of section 103(1) of Act 60 of 2000 the Court made no order and the accused is therefore deemed unfit to possess a firearm; 4) In terms of section 120(4) of Act 38 of 2005 the accused was declared unfit to work with children; and 5) In terms of section 50(1) of Act 32 of 2007 it is ordered that the accused's name be included in the National Register for Sex Offenders.

[2] 51 of 1977.

- [3] Principles of Criminal Law, J Burchell, Juta & Co. Ltd, 4th Ed, 2013 at page 258 – said in the context of a consideration of the criminal capacity of children under the age of 14 but equally apposite in considering their reaction to criminal acts involving them.
- [4] See *S v S* 1995 (1) SACR 50 (ZS) at 59f-j and 60a.
- [5] 2000
- (1) SACR 453 (SCA) at 453f.
- [6] *S v T* 2005
- (2) SACR 318 (E) at 329b-c referring to *R v Mlambo* 1957 (4) SA 727 (A).
- [7] Ibid in *R v Mlambo* at 738A where Malan JA stated: "In my opinion, there is no obligation upon the Crown to close every avenue of escape which may be said to be open to the accused. It is sufficient for the Crown to produce evidence by means of which a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged."
- [8] *S v Legoa* 2003 (1) SACR 13 (SCA); see also *S v Makatu* 2006
- (2) SACR 587 (SCA); *S v Ndlovu* 2017 (2) 305 (CC); *S v Mabaso* 2014 (1) SACR 299 (KZP).
- [9] 105 of 1997.
- [10] *S v Malgas* 2001 (1) SACR 469 (SCA) at paragraph 8.
- [11] 1996
- (2) SACR 181 (C) at 186 D-F.

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