

SOUTH AFRICA / JUDGMENT

S v L.C (CA 168/08) [2009] ZAECHGC 9 (19 March 2009)

[2009] ZAECHGC 9**COURT**

Eastern Cape High Court, Grahamstown

BEFORE

Jones, Pillay, Van der Byl

CASE / FILE NUMBER

CA 168/08

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Policy**FORM A****FILING SHEET FOR****EASTERN CAPE HIGH COURT JUDGMENT****ECJ:****PARTIES:**L[...]
C[...]
And
THE
STATE**Registrar:**CA
168/08**Magistrate:**

High

Court:EASTERN
CAPE HIGH COURT, GRAHAMSTOWN
DATE**HEARD:**09/02/09
DATE**DELIVERED:**

19/03/09

JUDGE(S): JONES
J, PILLAY J, VAN DER BYL AJ
LEGAL
REPRESENTATIVES –

Appearances: for

the Appellant(s):

ADV: D. P. Geldenhuys
for

the Respondent(s):

ADV: N. C. Turner
Instructing

attorneys: for

the Appellant(s): GRAHAMSTOWN
JUSTICE CENTRE
for

the Respondent(s): DIRECTOR
OF PUBLIC PROSECUTION (GHT)
CASE
INFORMATION –
(a)

Nature of proceedings : APPEAL
THE HIGH COURT OF
SOUTH AFRICA
In the Eastern Cape
Division
Grahamstown
CA 168/08
Not reportable
In
the matter between
L[...]
C[...]
Appellant
And
THE
STATE
Respondent
Coram JONES, PILLAY JJ
and VAN DER BYL AJ
Summary
Sentence – life imprisonment –
appeal – rape of a mentally impaired, mute, imbecile woman,
aged 24 but with a
mental age of 2 or 3 years, by a rapist who knew
that he was HIV positive at the time of the offence – the trial
court's

finding was upheld that the sentence of life imprisonment was compulsory in terms of section 51(1) because there were no substantial and compelling circumstances present to justify the imposition of a lesser sentence in terms of section 51(3).

JUDGMENT

PILLAY J

This is an appeal against sentence, leave of the trial court having been granted to the full bench.

The appellant was convicted of the rape of a mentally retarded and mentally ill woman at a time when the appellant had been diagnosed with the human immune-deficiency virus (HIV), making the provisions of section 51(1) of the Criminal Law Amendment Act, No. 105 of 1997 (the Act) applicable. He was thereafter sentenced to life imprisonment, the court having found that no substantial and compelling circumstances as envisaged in Section 51(3) of the Act could be found and hence that the prescribed sentence had to be imposed.

The appellant was 40 years old at the time of the offence and was regarded as a first offender because his single previous conviction was for a different kind of offence. He was previously married and is the father of a 26 year old daughter. He was employed at the Aliwal North Clinic earning at the rate of R150.00 per week.

The victim of the rape was described as a mute imbecile who also suffered from a mental illness. She was physically 24 years old at the time but, by reason of being mentally retarded, she was substantially younger than that. She was considered to have a mental age of 2 to 3 years. She was incapable of looking after herself or defending herself. Furthermore, while she may not be totally incapable of making sounds such as grunts, she is mute in the sense of being quite unable to communicate other than by means of signs or gestures, such as striking her head. The evidence suggests that the appellant and the complainant were related. They knew each other well and the complainant was comfortable in his company. By all accounts, she trusted him.

In the absence of any reasonable explanation, it would seem that it is because of the relationship of trust between them that she accompanied the appellant to the place where the rape occurred. It is clear that the appellant persuaded the complainant, being a person with a stark mental disability, to remove her underwear or to allow him to do so prior to his engaging in sexual intercourse with her.

Section 51(1) of the Act prescribes a sentence of life imprisonment on any person convicted of any offence referred to in Part 1 of Schedule 2 thereof. The offence of which the Appellant was convicted is one that falls therein. Indeed it qualifies in two respects. Firstly because the complainant is a person who is mentally disabled and secondly, because the appellant committed the offence when he knew that he was infected with HIV. It was common cause at the trial that the complainant is not capable of consenting to sexual intercourse and that the Appellant was

aware of this. He lured her from a place where others would have seen what was happening to a place where detection of him engaging in sexual intercourse with her was reduced.

The complainant was incapable of giving evidence. The trial court received evidence from Dr. Matolonguvo to the effect that vaginal penetration of the complainant had occurred. This is supported by forensic evidence, which links the appellant to the act of sexual intercourse with the complainant by way of DNA evidence following examination of specimens obtained from vaginal swabs and genetic material found on the complainant's underwear. All this evidence is brought together by the uncontested evidence of Motheri Sephaka, the complainant's brother. He testified that he found the appellant on top of the complainant. Both were naked or semi-naked from the waist downwards with the appellant making movements indicative of sexual intercourse. The appellant did not testify. The evidence proved his guilt beyond any shadow of doubt.

The appellant contended in his plea explanation that although he is HIV positive, he was not aware of his status at the time of the alleged rape. However it is clear from the evidence, correctly accepted as true by the trial court, that he indeed knew about his condition prior to the incident.

It is on the basis as set out above that sentence had to be considered. Mr Geldenhuis who appeared on behalf of the appellant submitted that the following factors serve as substantial and compelling circumstances which allows for the imposition of a lesser sentence than what is prescribed:-

- (b) the Appellant was a 40 year old first offender;
- (c) he was to some degree intoxicated, and the offence appeared to be out of character; and
- (d) the offence does not fall within the most serious category of rape cases and on that account does not warrant the ultimate penalty.

In *S v Malgas* 2001 (1) SACR 469 (SCA) the approach to sentence in terms of the Act was set out in detail. It specifically dealt with the notion of substantial and compelling circumstances as envisaged in Section 51(3). The import of the section allows for the imposition of lesser sentences where the prescribed sentence would be an unjust sentence because it was disproportionate to the offence. In paragraph

[25] of the judgment it was stated that:

‘All factors traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is to be excluded at the outset from consideration in the sentencing process.’

Elsewhere in the same paragraph it is clearly explained that the specified sentences are not to be departed from for flimsy reason, and that the courts should not have regard to speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, or personal doubt about the policy underlying the legislation. At paragraph [22], the ‘injustice’ envisaged in section 51(3) of the Act is suggested to have its origin in a feeling of unease attendant

upon the imposition of a prescribed sentence in a particular case. Where this unease hardens into a conviction that the prescribed sentence produces an injustice because it is disproportionate to the crime, the criminal, and the legitimate needs of society, a lesser sentence is justified by the section. That situation would then necessarily lead to a finding that substantial and compelling circumstances

exist.

In *S v Fatyi* 2001 (1) SACR 485 (A), very much the same approach to section 51(3) of the Act was followed. At paragraph [5] thereof it was stated as follows:

“A court has the duty to consider all the circumstances of the case, including the many factors traditionally taken into account by courts when sentencing offenders. It follows, . . . they need not be exceptional in the sense of seldom encountered or rare, nor are they limited to those which diminish the moral guilt of the offender.”

Furthermore, if, on a general conspectus of the relevant factors considered, the sentencing officer is of the view that an injustice would eventuate upon the imposition of the prescribed sentence, that set of circumstances should be categorised as substantial and compelling as envisaged in Section 51(3) of the Act.

Counsel for the Appellant referred to *S v Mahomotsa* 2002 (2) SACR 435 at 443 – 444 in which it was stated that in assessing whether substantial and compelling circumstances exist or not, it needs to be recognised that not all rapes are equally serious and different degrees of seriousness need to be acknowledged in the meting out of punishment. In *S v Abrahams* 2002 (1) SACR 116 (SCA) at paragraph [29], it was clarified that ‘some rapes are worse than others’. The reasoning in *Mahomotsa* suggests that the ultimate sentence of life imprisonment should be reserved for the worst kind of rape. It seems to me that the aftermath of the offence, being the effect thereof on the victim, is one way to assess whether any particular rape could be categorised as falling within the ‘worst kind’ group, but I do not think that *Mahomotsa* restricted this consideration only to the ultimate effects on the victim. As was the approach in *Malgas*, all relevant factors need to be considered and the aftermath is just part of the total picture.

The aggravating factors in this matter are that the appellant raped a mentally challenged woman who was unable to defend herself or call for help. It is conceivable that she did not realise what was happening to her, though it is apparent that she did not like it. The appellant knowingly put her at risk of acquiring HIV. He did so in breach of a position of trust and he exploited this relationship of trust to lure her to a place where, he thought, he could achieve his purpose undetected.

The evidence did not suggest that the appellant was intoxicated to the degree that it diminished his ability not to give way to temptation. Furthermore, the good fortune that the complainant is not proved to have suffered any long term physical or psychological trauma, or to have contracted HIV, does not operate to reduce the moral blameworthiness of the appellant.

The learned trial judge gave full consideration to the seriousness of this offence, the interests of this offender and the legitimate interests of society. He was careful to balance the personal circumstances of the appellant and the other factors which favour him, including his observation that the appellant's conduct indeed seemed to be out of character, against the aggravating circumstances which for the most part speak for themselves. While the complainant's condition made it difficult to assess the psychological after-effects of the rape, it is beyond question from evidence of changes in her behaviour since the rape that she has suffered psychologically. The learned judge concluded that substantial and compelling circumstances cannot be said to exist. I find myself unable to fault this conclusion. He arrived at it after a thorough and detailed evaluation of all the facts and circumstances of the case, and his assessment is not vitiated by misdirection. The imposition of the prescribed sentence does not give rise to any anxiety or unease about the possibility of an unjust or disproportionate sentence. In my view life imprisonment was the only appropriate sentence.

In the result, the appeal is dismissed.

R PILLAY

Judge of the High Court

JONES J I agree.

RJW JONES

VAN DER BYL AJ I agree

PC VAN DER BYL

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Prepared on 13 October 2026 · Esheria