

SOUTH AFRICA / JUDGMENT

S v Rooiberg (CC56/2014) [2015] ZAECGHC 29 (25 March 2015)

[2015] ZAECGHC 29

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Goosen

CASE / FILE NUMBER

CC56/2014

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO: CC 56/2014

In the matter between

THE STATE

And

EUGENE ROOIBERG.....Accused

SENTENCE

GOOSEN, J.

[1] The accused is a 31-year-old man who has been convicted of the rape of a four-year-old child. The conviction carries a prescribed minimum sentence of life imprisonment in terms of section 51 (1) of the Criminal Law Amendment Act, Act 105 of 1997.

[2] The rape of a child is a particularly gross offence that warrants the imposition of the severest of penalties. In this instance the victim was four years old. She was raped by a person known to her in the sanctity of her home and in circumstances when the adult who was caring for her had left the home for a short period of time. In that time the accused, knowing that the victim's

aunt was away, seized the opportunity and raped the victim both vaginally and anally.

[3] The impact on the victim is catastrophic. Ms Karin Andrews, a clinical psychologist, prepared a victim impact assessment report which was admitted by the defence and received in evidence by agreement. She records significant behavioural differences between

the victim and her twin brother. Whereas the emotional development of her twin brother has continued to develop normally, the victim experiences significant separation anxiety in relation to her mother. She also demonstrates an immature emotional sensitivity. She has, subsequent to the rape, relapsed in respect of bedwetting and is now bedwetting, on average, twice a week.

- [4] Ms Andrews describes this behaviour as meeting the criteria for the diagnosis of Enuresis In the Diagnostic and Statistical Manual for Mental Disorders (DSM IV). She describes it as an elimination disorder and is typically observed in traumatised children and is a major indicator of abnormal anxiety. Ms Andrews' conclusion is that the behavioural changes are "robust indicators of the presence of the most extreme traumatic anxiety that can be observed in children of [the victim's] age". She concludes that the victim was significantly psychologically traumatised by the rape in this case. In the light of the fact that

the victim is now merely five years of age she is unable to benefit optimally from psychotherapy as her intellectual development is immature. Until she is intellectually mature and at the age of puberty she will be unable to address her trauma in therapy. As such, she is vulnerable to the development of emotional and personality disorders. Ms Andrews points to a startling statistic that 8 out of 10 women who present with psychiatric complaints in adulthood have a history of sexual trauma in childhood.

- [5] It is apparent from this assessment that the consequences of the rape will, in all probability, result in lifelong trauma to be experienced by the victim.
- [6] In deciding on an appropriate sentence a court is required to take into account the nature and seriousness of the crime, the interests of the society and the interests of the person upon whom the sentence is to be imposed. The sentence decided upon must seek to balance these competing interests, and must meet the objects and purpose of punishment. Those include the requirement of appropriate retribution for the offence committed against the interests of the society as well as the requirement of corrective rehabilitation of the offender.
- [7] It is for this reason that sentencing courts are required to ensure that the sentence is proportionate, both in relation to the crime and its effect on the victim, and the impact of the sentence upon the criminal. This requirement of proportionality applies equally in relation the sentences prescribed by legislation (see *S v Vilakazi* 2009 (1) SACR 552 (SCA) at 560g-h and 561b, see also *S v Fatyi* 2001(1) SACR 485 (SCA) at 488f-g).
- [8] In determining whether the prescribed sentence is indeed proportionate, all of the traditional factors regarded as mitigating factors are to be considered and the court is required to assess whether there are substantial and compelling circumstances to depart from a prescribed sentence. The fact that a prescribed sentence is disproportionate is itself a basis to find that there are substantial and compelling circumstances to warrant a departure from a prescribed sentence. When this assessment is made the court is also required to take into account the legitimate interests of society as reflected in the legislation

prescribing a minimum sentence and should not for flimsy and insubstantial reasons depart from such prescribed sentence (cf. *S v Malgas* 2001 (1) SACR 469 (SCA)).

[9] As already indicated the accused is 31 years of age. He left school when he was in standard 3 i.e. Grade 5. To all intents and purposes he has no substantive formal education. It appears from the report prepared by the psychiatric panel responsible for assessing the accused in terms of section 77 and 78 of the Criminal Procedure Act, that the accused is assessed as having borderline intellectual functioning. This may indeed explain his lack of formal education and, it appears, may also account for his tendency to associate only with younger children. The accused's borderline intellectual functioning and a lack of formal education would, in my view constitute mitigating circumstances to be considered in his favour. Borderline intellectual functioning, as the term indicates, means that the accused has difficulty with learning, reasoning, abstract thinking and judgment. This incapacity, in my view, serves to reduce moral blameworthiness. In addition to his lack of a previous conviction must also be taken into account.

[10] No evidence was presented in relation to his social and economic circumstances, save that he was unemployed and earned a small amount of money undertaking casual painting and other work from time to time. He lives with his mother and grandmother.

[11] The requirement of proportionality requires that all of the interests affected by the imposition of a sentence must be carefully balanced to ensure that the sentence meets the objectives of punishment. Those are that the interests of society in protecting its most vulnerable members, particularly children, are properly vindicated. They are vindicated when the particular offender is

incarcerated for a sufficiently lengthy period to bring about protection of the society from that offender. They are also vindicated by way of deterring other offenders, under pain of punishment, from committing similar offences.

[12] The balancing exercise also requires that consideration be given to the person who is the offender and the particular circumstances of that offender. In this instance, it must be accepted that the offender is a man of limited intellect. The accused did not, in mitigation, offer any explanation for his conduct, notwithstanding the admissions made by him in relation to the commission of the offence.

[13] In my view, the accused's personal circumstances do constitute substantial and compelling circumstances. Furthermore, the question is whether life imprisonment is disproportionate. There is nothing in the evidence to suggest that the accused poses a particular danger to society. Although it was argued that his tendency to associate with young persons should raise an alarm, in my view, is speculative. The circumstances in which the offences were committed suggest that he seized upon an opportunity presented by the absence of the complainant's aunt to commit this offence. His conduct is unexplained. I am not able to infer from his conduct, however, that he necessarily poses a particular danger to society.

[14] When I take into account all of the circumstances of this case I am of the view that sentencing the accused to life imprisonment would be disproportionate and would bring about an injustice. The accused must however be sentenced to a lengthy period of imprisonment. Such a sentence would meet the interests that society has in protecting its most vulnerable members and will serve the purposes of punishment.

[15] The accused is sentenced to TWENTY (20) YEARS IMPRISONMENT.

G. GOOSEN

JUDGE OF THE HIGH COURT

25 March 2015

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