FORM A

FILING SHEET FOR EASTERN CAPE JUDGMENT

W B
vs
THE STATE

CASE NUMBER: CA 352/2006

DATE ARGUED: 6 February 2007

DATE DELIVERED: 8 February 2007

JUDGE(S): Pickering J, Froneman J, Plasket J

LEGAL REPRESENTATIVES:
Appearances*:*
for the Appellant(s): Adv. E. Threron
for the Respondent(s): Adv. L. Williams

Instructing attorneys*:*
Applicant(s)/Appellant(s):
Respondent(s):

CASE INFORMATION:

- *Nature of proceedings*: APPEAL
- *Topic*:
- Keywords:

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION)

CASE NO: CA 352/2006
DATE DELIVERED:

In the matter between

W B **Appellant**

And

THE STATE **Respondent**

JUDGMENT

PICKERING J:

Appellant was convicted of rape in the Regional Court, Humansdorp, pursuant to his plea of guilty. As the complainant, who was appellant's daughter, was only 6 years of age at the time of the incident, the sentencing provisions of Act no 105 of 1977 applied and appellant was committed for sentence in the High Court. The matter came before Maqubela AJ who found that no substantial and compelling circumstances such as to justify the imposition of a lesser sentence than the prescribed minimum sentence of life imprisonment were present. He accordingly imposed that sentence upon appellant. Appellant now appeals with the requisite leave of the Court *a quo* to the Full Bench of this Division.

Appellant is a married man who is 34 years of age. He and his wife have two children, namely complainant who was born on 28 July 1997 and another daughter who was born during 2001.

In his statement in explanation of his plea in terms of s 112(2) of Act 51 of 1977 appellant set out the circumstances which culminated in the rape of complainant. This statement was accepted by the State. It appears therefrom that on the day in question, 29 December 2004, appellant was at home with his children at St. Francis Bay. His wife was away at her place of work. Appellant was lying in bed when he was joined by complainant who lay

next to him and tickled his back. Appellant became sexually aroused and told complainant to take off her panties. He then put her on top of him and placed his erect penis between her thighs. As he approached orgasm, however, he penetrated complainant's vargina with his penis.

It is common cause that later the same day complainant reported the incident to her mother. Complainant was then taken for a medical examination to a doctor who, however, referred her to a certain Dr. Pheffer for an examination under anaesthetic. According to Dr. Pheffer's report of this examination, as contained on form J88, complainant's hymen was not intact and there was mild vaginal bleeding. The labia minora were oedematous.

A pre-sentence report compiled by a probation officer was handed into Court by consent. It appears from this report that prior to the incident appellant had a marriage which was "characterised by mutual respect and happiness". Appellant, who is described as being of "pleasant disposition", was very much a family man who enjoyed staying at home performing chores around the house or visiting friends. He also enjoyed watching television and rugby. He did not smoke or drink alcohol.

The incident came as a terrible shock to appellant's family and friends more especially as appellant was regarded by them as "a caring and loving father and husband." According to the probation officer the complainant, who created the impression of being nervous and shy, appeared to be traumatised by the incident. She was unable to speak freely about it and in the opinion of the probation officer required psychological treatment. The probation officer stated further that appellant took full responsibility for his actions, appreciated the gravity of the offence committed by him and was genuinely remorseful.

Prior to his arrest appellant was employed at Port St. Francis Harbour earning a wage of R600 per week.

In finding that there were no substantial and compelling circumstances Maqubela AJ emphasised, correctly with respect, the shocking nature of the

act perpetrated by appellant upon his 6 year old daughter. Appellant's actions were indeed abhorrent, perverted and unnatural. It is almost impossible to imagine how he, as a father, could have become sexually aroused by his young daughter's playful tickling of his back or why, having become so aroused, he did not immediately walk away instead of giving way to what could have been no more than animal lust.

As was stated by Cameron JA in S v Abrahams 2002 (1) SACR 116 (SCA) at 125c-d:

> "*[T]he fact that family rape generally also involves incest … grievously complicates its damaging effects. At common law incest is still a crime. Deep social and religious inhibitions surround it and stigma attends it. What is grievous about incestuous rape is that it exploits and perverts the very bonds of love and trust that the family relation is meant to nurture.*"

On the other hand, weighty mitigating features exist to which Maqubela AJ, with respect, appears to have accorded very little weight. These include the fact that appellant, who was up and until the time of the incident a useful sober-minded member of society with a happy family life, acted entirely and inexplicably out of character. Furthermore, appellant acted on the spur of the moment and did not go out of his way to prey upon his daughter as was the case in S v Abrahams, *supra*. There is, too, the fact that, as was stated in S v Abrahams *supra* at 126H, the complainant "*apart from the ultimate intrusion and violation that are the essence of rape, was not physically injured*."

The principles applicable to an appeal against sentence in a matter such as the present are set out in S v Malgas 2001 (1) SACR 469 (SCA) where Marais JA stated as follows at 478d-g:

> "*A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence*

arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate Court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate Court is at large. However, even in the absence of material misdirection, an appellate Court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate Court would have imposed had it been the trial court is so marked that it can properly be described as 'shocking*',* 'startling*'* *or* 'disturbingly inappropriate*'. It must be emphasised that in the latter situation the appellate Court is not at large in the sense in which it is at large in the former. In the latter situation it may not substitute a sentence which it thinks appropriate merely because it does not accord with a sentence imposed by the trial Court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned. No such limitation exists in the former situation.*"

At 481 a-d the learned Judge of Appeal stated with regard to the meaning of "*substantial and compelling circumstances*":

"*The greater the sense of unease a court feels about the imposition of a prescribed sentence, the greater its anxiety will be that it may be perpetrating an injustice. Once a court reaches the point where unease has hardened into a conviction that an injustice will be done, that can only be because it is satisfied that the circumstances of the particular case render the prescribed sentence unjust or, as some might prefer to put it, disproportionate to the crime, the criminal and the legitimate needs of society. If that is the result of a consideration of the circumstances the court is entitled to characterise them as substantial*

> *and compelling and such as to justify the imposition of a lesser sentence."*

See too S v Fatyi 2001 (1) SACR 485 (SCA) where the following was stated at 488 f-g:

> "*Where the Court is convinced, on a consideration of all the circumstances, that an injustice will be done if the minimum sentence is imposed, it is entitled to characterise the circumstances as substantial and compelling.*"

In my view, having regard to the personal circumstances of the appellant it is clear that he is capable of rehabilitation. I am furthermore of the view in all the circumstances of the case that the application of the prescribed minimum sentence would be unjust and that such sentence would be disproportionate to the crime, the criminal and the needs of society. Such being the case I am satisfied that substantial and compelling circumstances do exist such as to justify the imposition of a lesser sentence. Despite this finding it is clear that a lengthy term of imprisonment is called for. The assessment of what the Court considers to be an appropriate sentence is always a difficult matter and this particular case is no exception. I have weighed up the various factors pertinent to sentence and have had regard to sentences imposed in matters such as S v Abrahams *supra*.

Having done so I am of the view that an appropriate sentence would be one of 15 years imprisonment.

Accordingly the appeal succeeds. The sentence is set aside and substituted by a sentence of 15 years imprisonment ante-dated to 16 August 2006.

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J.D. PICKERING
JUDGE OF THE HIGH COURT

I agree,

_____
J.C. FRONEMAN
JUDGE OF THE HIGH COURT

I agree,

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C. PLASKET
JUDGE OF THE HIGH COURT