

IN THE HIGH COURT OF LESOTHO

In the matter between:

REX

VS

TŚOTLEHO THULO

SENTENCE

Coram: Hon. Hlajoane J
Date Heard: 11th December, 2013.
Date of Judgment: 12th February, 2014.

Summary

On sentence on a charge of rape by the accused on his five year old daughter on 31st March, 2013 after having been tested HIV Positive in 2008 and already undergoing treatment – Drunkness only considered as a mitigating factor and not to negate intention – Sentenced to 25 years imprisonment.

Annotations

Statutes

1. **Sexual Offences Act 3 of 2003**
2. **Criminal Procedure and Evidence Act 9 of 1981**

Books

Cases

1. **S v Zinn 1969 (2) S.A 535 at 540**
2. **S v Rubie 1975 (4) S.A 855 at 862**
3. **S v C 1996 (2) SACR 181 at 186**

[1] The accused was charged and convicted before the Mohale's Hoek Magistrate's Court on the 10th May, 2013 with contravening **section 8 (1) read with section 2 (d), (i) and section 32 (a) (vii) of the Sexual Offences Act¹** (the Act).

[2] The matter was committed to this Court for sentencing in terms of **section 31 (2) of the Act read with section 293 (1) of the Criminal Procedure and Evidence Act²**.

¹ Sexual Offences Act 3 of 2003

² Criminal Procedure and Evidence Act 9 of 1981

[3] The Magistrate sent this matter to this Court for sentence as he felt that appropriate sentence to the offence charged was well beyond his jurisdiction. The relevant section being **section 32 (a) (vii)** which reads:

“(a) In a case of a first conviction where a person is infected with the immunodeficiency virus and at the time of the commission of the offence the person had knowledge or reasonable suspicion of the infection, to the death penalty.”

[4] The crown in argument has asked that since the accused when he so committed the Sexual Offence on his child already knew of his status having tested HIV Positive in 2008, before the complainant was even born, that accused be sentenced to death.

[5] The defence on the other hand argued that the state of mind of the accused when he committed the offence must not be overlooked. The accused and his wife and the complainant were from a feast on that fateful day, and were both drunk. The wife must have been more drunk, as the evidence showed she fell on her way home and that gave the husband ample chance to have rushed home with the child where on arrival started having sex with his 5 year old daughter.

- [6] **Section 8 (i) of the Act** is about committing a sexual act with a child, thus constituting an offence. Child for purposes of this Act under Part III being a person below the age of 16 years and for purposes of Part IV being a person below the age of 18 years.
- [7] It was argued on behalf of the accused that the trial Court erred in coming to the conclusion that the accused had the intention to commit the offence. It was argued that since the accused and his family were from a feast where they had been drinking it could not be said therefore that he intended to commit the crime as drunkenness can nullify intention.
- [8] In response the crown submitted that the penal section does not deal with the question of intention but possibility of infection. That there was no need even to consider whether or not a condom was used, but what remained as a fact was that accused knew of his HIV status.
- [9] The defence again pointed out that the exact age of the child has not been established and that the accused was not on his arrest, as required under the Act, subjected to compulsory testing.

[10] The crown responded by referring to the record of proceedings from the trial Court page 2 thereof, where the facts outlined showed that the mother of the child was going to say the complainant was five years old. On the question of not having subjected the accused to some compulsory testing the record show the handing in of an envelope with a report from the doctor about accused HIV status from 2008 to date of the hearing of the matter.

[11] The accused may have imbibed in intoxicating beverages when he committed the offence, but his moral blameworthiness would not affect what he did. The offence still remains a sexual offence on a 5 year old.

[12] When the facts of what happened were narrated in Court the accused did not say he could not remember what happened. Which means as he was doing the act drunk as might have been, he was aware of what he was going. Also looking at the manner he conducted himself in the commission of the offence, realizing that his wife was staggering and falling several times, he did not try to assist her but hurried home with the child where he raped her.

[13] In offences similar to the present the Courts have to demonstrate their displeasure through sentences imposed. The crown has cited

relevant cases which tend to show that consideration has to be made on the type of crime committed, the offender and the interest of society, see **S v Zinn**³.

[14] In **S v Rubie**⁴ it was said that:-

“Punishment should fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to particular circumstances.”

[15] **S v Sondla**⁵,

“that sentences should be exemplary to others and should also be able to deter others from committing the same offence.”

[16] The Court in **S v C**⁶ described rape as a fate far worse than total loss of life in these words,

“A rapist does not murder victim he destroys her self-respect and destroys her feeling of physical and mental integrity and security. His monstrous deed often haunts his victim and subjects her to mental torment for the rest of her life, a fate far worse than loss of life.”

³ S v Zinn 1969 (2) S.A 532 at 540

⁴ S v Rubie 1975 (4) S.A. 855 at 862

⁵ S v Sondla 1992 (2) SAA 613 at 862

⁶ S v C 1996 (2) SACR 181 at 186

[17] As shown earlier on, the accused has committed this shameful act on his own child, a minor of only 5 years old. Normally, a child would be looking up to his / her parents for care and protection but in our case the complainant was subjected to abuse by her own father, and worse who was HIV Positive and was quite aware of his status.

[18] The crown has urged the Court to proceed in accordance with **section 31 (a) (vii) of the Act.**

[19] The accused was well aware of his status as he had been under treatment from 2008 to date according to the medical report. Also that the medical report that the doctor prepared after examining the child clearly showed and confirmed the rape by showing that the hymen was absent and showed bruises of the vulva.

[20] The fact that the accused had on that day taken liquor would not work for him to negate intention; it would only work for him to escape the rope as an extenuating factor. Because each case has its peculiar circumstances surrounding it, the circumstances of this case merit taking drunkenness as an extenuation.

May the accused please stand.

[21] The appropriate sentence under the circumstances of this case will be;

Accused is sentenced to a period of thirty-five (35) years imprisonment.

A. M. HLAJOANE
JUDGE

For Crown: Mr Thaba

For Accused: Mr Kometsi

