Rev/Case No: 42/14- CR:50/14

IN THE HIGH COURT OF LESOTHO

In the Matter Between:

Rex

V

RATHAKHOLI RATHAKHOLI

SENTENCE ON AUTOMATIC REVIEW

Coram : Hon N. Majara J

Date : 26th July 2014

Summary

Review of sentence on automatic review – accused having repeatedly raped his minor daughter for a period of three years - child falling

pregnant – accused given prescribed minimum sentence of 10 years imprisonment – court a quo not stating factors it took into consideration - relevant factors to take into account - the nature and seriousness of the criminal act itself – the interest of society - relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence - the culpability of the offender – sentence altered to 20 years imprisonment.

ANNOTATIONS

STATUTES

1. Sexual Offences Act No.3 of 2003

CASES

1. S v Vilakazi 2009 (1) SACR 552 (SCA)
2. S v Malaga 2001 (1) SACR 469 (SCA)
3. R v Leteba CRI/S/001/2013
4. R v S Masitha CRI/526/2013

[1] This matter came before me on automatic review after the accused was convicted of rape it having been alleged that he had unlawful sexual intercourse with his 17 year old daughter resulting in her falling pregnant. The accused pleaded guilty to the charge admitted the evidence outlined by the prosecution.

[2] The brief facts are that after the accused's wife passed away in 2010 the complainant who was 14 years old at that time, developed nightmares and epilepsy which caused her to be fearful at night. As a result she requested her father the accused, to let her sleep with him as they lived in a single roomed house. It is only then that she would manage to sleep peacefully without the nightmares.

[3] During one night she woke up to find her father caressing her in an unusual manner. He then pulled down her panties and had sexual intercourse with her. He threatened her not to tell anyone about the incident. The accused did this on several occasions and after the complainant stopped going to his bed, he would go to where she was sleeping and have sexual intercourse with her. PW1 did not tell anyone as she was afraid of her father. This took place from the year 2010 to 2014.

[4] During the month of February 2014 a neighbor met the complainant and noticed that she was pregnant. She called her to her house and examined her. Upon realizing that she was indeed pregnant the neighbor asked her who was responsible and the complainant told her it was the accused. The neighbor went to report the matter to the headman who in turn called the accused and asked him about the pregnancy. The accused admitted that he had been having sexual intercourse with his daughter. The headman then handed the accused over to the police.

[5] The accused admitted the facts that were outlined by the prosecution and in mitigation of sentence he expressed remorse and sought the Court's leniency on the ground that he is the sole bread winner for all his kids.

[6] The trial Court sentenced him to imprisonment for ten (10) years without the option of a fine, the minimum prescribed in the **Sexual Offences Act.**[1] In handing down the sentence, the Court a quo did not state which factors it took into consideration in terms of what appears on the record of proceedings in that having recorded the plea in mitigation it simply ordered as follows:-

Sentence : 10 years, no fine.

[7] It is against this background that this Court feels duty bound to evaluate whether the sentence that was handed down is just given the particular facts of this case. In doing so, I am largely guided by the principles that were espoused in the by the Supreme Court of Appeal in the South African case of **S v Vilakazi** [2] which have been consistently applied in our jurisdiction.

[8] In that case, although the Court was dealing with the issue of the severity of the sentence that was imposed, the same principles apply mutatis mutandis where the sentence imposed is found to be too lenient

[1] Act No. 3 of 2003
[2] 2009 (1) SACR 552 (SCA)

given the relevant circumstances. Thus in **Vilakazi (supra),** in quoting with approval the relevant parts of the remarks that were enunciated in the earlier case of **R v Malgas**[3]**,** Nugent JA stated as follows:-

> *"…it is incumbent upon a court in every case, before it imposes a prescribed sentence, to assess, upon a consideration of all the circumstances of the particular case, whether the prescribed sentence is indeed proportionate to the particular offence. The Constitutional Court made it clear that what is meant by the "offence" in that context (and that is the sense in which I will use the term throughout this judgment unless the context indicates otherwise)*
>
> *"consists of all factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence and the culpability of the offender."*
>
> *…That was also made clear in Malgas, which said that the relevant provision in the Act vests the sentencing court with the power, indeed the obligation, to consider whether the particular circumstances of the case require a different sentence to be imposed. And a different sentence must be imposed if the court is satisfied that substantial and compelling circumstances exist which "justify" … it….*
>
> *On each one of the grounds that I have referred to the court below materially misdirected itself and the sentence that it imposed cannot stand, which means that we must ourselves evaluate whether life imprisonment is indeed a proportionate sentence, in accordance with the approach that was laid sown in Malgas.*
>
> *If the sentencing court on consideration of the circumstances of the particular case is satisfied that they*

[3] 2001 (1) SACR 469 (SCA)

render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done in imposing that sentence it is entitled to impose a lesser sentence.'

[9] Coming back to the present case, I have already shown that the accused herein had unlawful sexual intercourse with his daughter since she was a at a very tender age of 14 years until he impregnated her three years later. It is my view that his actions were not only heinous but they bore very unfortunate fruits of bringing into this world a child born of an incestuous, abusive, shameful and criminal conduct. Thus his actions do not only have a bearing on his daughter but on the unborn child as well.

[10] Society and the Courts have decried the high incidence of sexual abuse especially on young vulnerable children who in recent times are more often that not abused by their fathers, brother, uncles, family friends or someone they look up to for protection.

[11] Thus, as I stated in a similar case of **R v Leteba** [4], these type of actions have devastating effects on the young children who make up the highest percentage of victim of sexual offending. In this regard I further stated as follows:-

"It is also quite disturbing that the accused herein is a relative of the very young child. As it has repeatedly been stated in previous similar cases, the child looked up to him as

[4] CRI/S/001/2013 (unreported)

a protector rather than the villain. It is indeed a sad fact that instead of diminishing, this phenomenon is gaining momentum and has become so wide spread that it now forms part of the daily news reports not only in Lesotho but in other countries as well. It is a grave cause for serious concern and certainly needs to be discouraged at all costs. One way is by the Courts marking their displeasure by imposing serious punishments that properly reflect the gravity thereof."

[12] I have already shown that the court a quo meted out the prescribed minimum sentence of 10 years imprisonment. However, in the light of the principles that I have referred to above and the compelling circumstances of this case, it is my view that the prescribed sentence is disproportionate to the crime committed in this case which took place for lengthy period, resulting in the young girl falling pregnant. It does necessitate this Court's intervention.

[13] Further, the courts have prescribed much higher sentences in similar cases and it is only fair that there should be some form of uniformity in all. For example, in another case that was brought before me for review at the same time as the present one, *to wit,* **R v Sebeso Masitha CRI/526/13,** the accused was sentenced to imprisonment for a period of fifteen years yet his offence was of a lesser degree than the present one by way of comparison.

[14] It is also worthy to note that in the **Leteba case, (supra)** I sentenced the accused to imprisonment for a period of twenty (20) years

without the option of a fine after he was convicted for a similar offence in that he had had unlawful sexual intercourse with a young girl of seven (7) years on two occasions who was also a relative of his.

[15] *In casu*, the offence was done repeatedly, and it ended in very unpalatable and devastating results. Considering all these factors, I am of the opinion that this case justifies that I fetter with the sentence and impose a higher one as it would be more appropriate in my view.

[16] On the basis of all these reasons, I order that the sentence of the accused be set aside and be substituted with the following:

The accused is sentenced to a period of twenty (20) years imprisonment.

Accordingly, the court a quo is directed to immediately have the accused brought before it to be informed of this alteration to his sentence.

N. MAJARA
JUDGE