

IN THE HIGH COURT OF SOUTH AFRICA



GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: A195/2016

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHER JUDGES: NO
- (3) REVISED:

In the appeal of:

NAIDOO, NIVIAN

Appellant

and

THE STATE

Respondent

Coram: WEPENER J et VUMA AJ

Heard: 3 August 2017

Delivered: 3 August 2017

Summary: Appeal: Sentence. The test on appeal regarding the imposition of sentence. A court of appeal will not lightly interfere sentence imposed by a court of first instance and so avoid eroding the discretion exercised by the court of first instance.

JUDGMENT

WEPENER J:

[1] The appellant petitioned for leave to appeal against his conviction and sentence on a charge of contravening s 3 of the Criminal Law Sexual Offences and Related Matters Amendment Act¹ for raping the complainant, a fifteen year old person. Due to the latter fact, the provisions of s 51(1) of the Criminal Law Amendment Act 105 of 1997 (the Minimum Sentence Regime Act⁰) became applicable. Upon conviction the appellant stood to receive life imprisonment unless the court found substantial and compelling circumstances to exist which could allow for a deviation from the minimum sentence of life imprisonment. This, the court a quo did find to exist and imposed a lesser sentence of fifteen years imprisonment.

[2] The appellant was granted leave to appeal the sentence imposed by the regional magistrate pursuant to a petition in terms of s 309C of the Criminal Procedure Act.² Leave to appeal his conviction was refused, both by the High Court pursuant to the petition and the Supreme Court of Appeal, pursuant to an application for special leave to appeal.

[3] Thus, the only issue before this court is the question of sentence imposed on the appellant. Much is said in the heads of argument about the age of the complainant ie that the appellant was unaware that she was under the age of sixteen years. But this is not an issue before this court. The appellant has been convicted of the rape of the complainant, who at the time, was under the age of sixteen years. That factual finding

¹ Act 32 2007.

² Act 51 of 1977.

forms part of the conviction of the appellant and triggers the imposition of a minimum sentence, save if substantial and compelling circumstances are found to have existed. The argument surrounding the appellant's knowledge of the age of the complainant can consequently only be canvassed during proceedings regarding conviction, the latter which includes the fact that the complainant was under sixteen years of age. In the circumstances, the argument that the State did not prove that the appellant was aware that the complainant was under the age of sixteen years is misplaced in proceedings regarding sentence.

[4] There is no cross-appeal in this matter and I can see no reason to disturb the magistrate's finding that substantial and compelling reasons existed regarding the imposition of sentence. No argument against that finding was advanced. The submission by counsel for the appellant that the complainant's previous sexual relationship is relevant in support of the argument that the appellant believed that she was older, must also fail for the same reason. In any event, s 51(3)(aA)(i) of the Minimum Sentence Regime Act³ specifically excludes previous sexual history as a substantial and compelling circumstance justifying a lesser sentence. The gravamen of the appellant's argument is the fact that he did not have knowledge of her being under the age of sixteen. This fact, as I have indicated, cannot be raised in proceedings regarding sentence when the conviction is based on the very fact that the complainant was indeed under that age of sixteen years. It must, consequently, be accepted that the conviction stands and that the appellant's knowledge of the age of the complainant is implicit in the conviction. In these circumstances reliance on the absence of knowledge for purposes of sentence is an anomaly that cannot be countenanced.

[5] The only question then is whether, by imposing a sentence of fifteen years imprisonment having found the existence of substantial and compelling reasons in order not to impose imprisonment for life, the learned magistrate's decision is open to attack.

[6] The enquiry regarding the imposition of sentence on appeal is not whether the sentence was right or wrong but whether the court acted reasonably or properly in the

³ Supra.

exercise of its discretion.⁴ Whether the trial court exercised its discretion reasonably depends on whether considering all the circumstances of the case the trial court could have reasonably imposed the sentence, which it did.⁵

[7] In addition, a court of appeal will interfere with a sentence of a trial court in a case where the sentence imposed was disturbingly inappropriate or when the court, when imposing the sentence, committed a misdirection.⁶ Since *S v Rabie*⁷ it has consistently been held that the discretion to impose a sentence is pre-eminently that of the court imposing the sentence and that an appeal court should be careful not to erode such a discretion. The test then, is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate.⁸

[9] In *S v Salzwedel*⁹ the Supreme Court of Appeal held that an appeal court can only interfere with a sentence of a trial court in a case where the sentence is disturbingly inappropriate or totally out of proportion to the gravity or magnitude of the offence, or sufficiently disparate, or vitiated by misdirection of a nature which shows that the trial court did not exercise its discretion reasonably.

[10] Save for the question of the age of the complainant, which relates to the conviction, the appellant advanced one other ground on appeal. Counsel for the appellant submitted that the trial court overemphasised the fact that the appellant showed no remorse. However, I am of the view that the magistrate evenly balanced all the factors referred to by him and that the question of the absence of remorse was not overemphasised at all. Indeed, the question of remorse could only play a proper role if the appellant had, but which he had not, shown remorse for his conduct. In this regard it was held in *S v Matyityi*¹⁰ by Ponnann JA as follows:

‘Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only be come from an appreciation and acknowledgement of the extent of

⁴ *S v Obisi* 2005 (2) SACR 350 (W) para 8.

⁵ *S v Obisi* para 7.

⁶ *S v Salzwedel and Another* 1999 (2) SACR 585 (SCA) para 10.

⁷ 1975 (4) SA 855 (A) at 865B-C.

⁸ *S v Rabie* at 857D-F.

⁹ *Salzwedel* at 591g.

¹⁰ 2011 (1) SACR 40 (SCA) at 47a-d.

one's error. Whether the offender is sincerely remorseful, and not simply feeling sorry for himself at having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in court, that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined.'

[11] I am of the view that the appellant failed to show that the regional magistrate misdirected himself or that any irregularity occurred or that the sentence is disturbingly inappropriate. In *S v Chapman*¹¹, Mahomed CJ remarked as follows:

'Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim.

The rights to dignity, to privacy and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilisation.

Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives.'

In *S v Kearns*,¹² Jajbhay J said as follows:

'A rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault, it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim; a rapist degrades the very soul of the helpless female. The physical scar may heal, but the mental scar will always remain. When a woman is ravished, what is not merely physical injury, but the deep sense of some deathless shame. It is violation with violence of the private person of a woman. This constitutes an outrage by all means. By the very nature of the offence it is an obnoxious act of the highest order.'

¹¹ 1997 (2) SACR 3 (SCA) at 5a-c.

¹² 2009 (2) SACR 684 (GSJ) at 690g-h.

In *S v Chuir and Another*,¹³ Mudau AJ (as he then was) remarked as follows:

‘However, the seriousness of the offences and in particular the prevalence of rape perpetrated against women and children are a scourge in our country, which warrants a long term of imprisonment. Not only is rape a serious offence, its seriousness is exacerbated by its alarming incidence. This country is reported to have some of the highest incidents of alarming incidence. This country is reported to have some of the highest incidents of rape in the world.’

In *S v Jackson*,¹⁴ Olivier JA remarked as follows about rape:

‘Few things may be more difficult and humiliating for a woman than to cry rape; she is often, within certain communities, considered to have lost her credibility; she may be seen as unchaste and unworthy of respect; her community may turn their back on her; she has to undergo the most harrowing cross-examination in court, where the intimate details of the crime are traversed ad nauseam; she (but not the accused) may be required to reveal her previous sexual history; she may disqualify herself in the marriage market, and many husbands turn their backs on a “soiled” wife.’

In *S v Swartz and Another*,¹⁵ Davis J (as he then was) remarked as follows:

‘The sentence of this court should shout to the community at large that rape is unacceptable and that there is no basis upon which a first offender gets a “free” rape (by virtue of a light sentence) and that only recidivists can expect an appropriately heavy sentence. In summary, the sentence must take full account of the nature of the offence. It must look carefully at the moral blameworthiness, while confirming the community values of dignity, equality and freedom in our society; in this way the Courts can contribute to ensuring that women should benefit equally from a society based on those values. This latter promise is particularly important in a society in which male power and the abuse thereof has so perverted our communal life and threatens to make a mockery of our promise of gender equality.’

In *S v Ncheche*,¹⁶ Goldstein J remarked as follows:

¹³ 2012 (2) SACR 391 (GSJ) 394a-b.

¹⁴ 1998 (1) SACR 470 (SCA) at 475f.

¹⁵ 1999 (2) SACR 380 (C) at 387h-j.

‘Rape is an appalling and utterly outrageous crime, gaining nothing of any worth for the perpetrator and inflicting and horrific suffering and outrage on the victim and her family. It threatens every woman, and particularly the poor and vulnerable. In our country, it occurs far too frequently and is currently aggravated by the grave risk of the transmission of the Aids. A woman’s body is sacrosanct and anyone who violates it does so at his peril and our Legislature, and the community at large, correctly expect our courts to punish rapists severely.’

In *S v Seedat*,¹⁷ Mavundla J said:

‘Rape is undoubtedly a serious crime which violates the dignity, security, freedom and wellbeing of the victim. The wave of rape cases is not abating but on the increase. It is a crime which calls for long imprisonment.’

[12] These passages taken into proper consideration underline the fact that the regional magistrate exercised his discretion properly when considering the appropriate sentence and I am of the view that a sentence of fifteen years imprisonment is in accordance with the reasoning in the passages referred to.

[13] In all the circumstances, I am of the view that the appellant has failed to show that the magistrate exercised his discretion in a manner which warrants interference by this court.

[14] In all the circumstances the appeal is dismissed.

Wepener J

¹⁶ 2005 (2) SACR 386 (W) at 395h-i.

¹⁷ 2015 (2) SACR 612 (GP) at 625a.

I agree.

Vuma AJ

Counsel for Appellant: GL Trent

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