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REPUBLIC OF SOUTH AFRICA



**THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, PRETORIA**

Case Number: **A40/2013**

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

14/12/2017

DATE

SIGNATURE

In the matter between:

MORNE GROBLER

Appellant

and

THE STATE

Respondent

[1] **Summary:** The SCA set aside the sentence handed down by this Court on appeal to it (of 10 years 5 of which were conditionally suspended for rape of a child and other related offences under the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 1997), on the basis that this Court committed an error in law by imputing consent to a child below the age of 12 and considering this imputation in its sentence. It remitted the matter back to this Court for consideration of the sentence afresh. On such reconsideration, this Court imposed a life sentence for rape of a child under the age of 16 years.

ORDER

1. On count 1 the appellant is sentenced to life imprisonment;
2. Counts 2 ,3, 4, 5, and 7 are taken together for the purposes of sentencing and the appellant is sentenced on these counts to 10 years imprisonment;
3. All such sentences will be calculated to run from 03 June 201

JUDGMENT

FISHER J (MUNZHELELE AJ CONCURRING):

INTRODUCTION

[2] This is the reconsideration of sentence handed down by this Court (Preller J and Kganyago AJ) on appeal of a decision of the Regional Court Limpopo in relation to both conviction and sentence of the appellant, Mr Grobler.

[3] The reconsideration of the sentence in this case is pursuant to the remittal by of the SCA (per Petse JA - Lewis and Mathopo JJA and Gorven and Mbatha AJJA concurring) of the sentence to this court following a successful appeal by the State in the matter of *Director of Public Prosecutions, Gauteng v Grobler*¹ (on the basis that the imputation of consent to a child below the age of 12 and the consideration of this imputation in the sentencing of the appellant, was a matter of law).

[4] The appellant was arraigned in the Regional Court on the following seven charges:

- (a) three counts of rape in contravention of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 1997 (the Sexual Offences Act); (counts 1 to 3);
- (b) using a child for child pornography in contravention of s 20(1) of the Sexual Offences Act (count 4);
- (c) exposing, displaying or causing the exposure or displaying of pornography to a child in contravention of s 19(a) of the Sexual Offences Act (count 5);
- (d) sexual grooming of a child in contravention of s 18(2)(a) of the Act (count 6); and
- (e) possession of a film or publication containing child pornography in contravention of s 27(1)(a)(i) of the Films and Publications Act 65 of 1996 (the Films Act) (count 7).

[5] He pleaded not guilty to all seven counts.

¹ [2017] ZASCA 82 (2 June 2017)

BACKGROUND

[6] The appellant and the complainant's mother married each other during September 2006 when the complainant was about 7 years old. The allegations against the appellant were that, on various occasions during 2009, when the complainant was about 10 years old, the appellant penetrated the complainant's vagina, anus, and mouth with his penis and that he took photographs of these sexual acts with his cellular phone thus creating pornographic material, and transferred and stored these on the family computer. It was also alleged that he had shown the complainant pornographic images of him and her mother having sex and that he sexually groomed the complainant. At the time when this occurred, the complainant, and her younger brother, lived with the appellant and their mother at the Air Force Base in [...]. The complainant and her brother were children from a previous relationship of their mother.

[7] All of the offences were alleged to have been committed during the period September to November 2009 at the family home on various occasions when the complainant's mother was not at home.

[8] At the conclusion of the trial, the appellant was convicted on counts 1, 2, 3, 4, 5, and 7, but was acquitted on count 6.

[9] After hearing both the defence and the State on mitigation and aggravation of sentence, the regional magistrate sentenced the appellant as follows:

- (a) in terms of s 513, of the Criminal Law Amendment Act 105 of 1997 (the CLA Act) to life imprisonment on each of the three rape counts.
- (b) The three remaining counts (counts 4, 5 and 7) were treated as one for purposes of sentence and a sentence of 10 years imprisonment was imposed.

[10] In addition, the regional magistrate directed that the appellant's particulars be recorded in the sexual offences register in accordance with s 50(2)(a)4 of the Sexual Offences Act.

[11] The sentences of life imprisonment were imposed in respect of counts 1 to 3 were, in consequence of the finding by the regional magistrate that there were no substantial and compelling circumstances such as would justify a departure from the mandatory sentence.²

[12] The appellant unsuccessfully applied to the regional court for leave to appeal in terms of s 309B of the Criminal Procedure Act (the CPA). However, the appellant successfully petitioned the High Court for leave to appeal in terms of s 309C of the CPA.

[13] This Court (per Preller J) found on appeal:

- (a) In regard to count 1, the rape conviction was upheld
- (b) In regard to counts 2 and 3, the rape convictions were aside and each substituted with convictions of sexual assault in contravention of s 5(1) of the Sexual Offences Act³.
- (c) In regard to counts 4, 5, and 7, the convictions were upheld.

[14] In dealing with sentence, the Court found that the trial court had overlooked material factors in relation to the inquiry as to whether or not substantial and compelling circumstances existed, it said:

“The personal circumstances of the appellant, the fact that he is a first offender who spent 18 months in custody awaiting trial, the nature of his offence and the limited effect that it had on the complainant and the serious

² Section 51 (1) provides: ‘Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life.’

Those subsections (s 51(3)(a) and (6)) in turn provide for departures from the prescribed sentence if a court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed and where the accused was under the age of 16 years at the time of the commission of an offence (in terms of the old s 51(6)).

³ In terms of s 5(1), ‘a person (‘A’) who unlawfully and intentionally sexually violates a complainant (‘B’), without the consent of B, is guilty of the offence of sexual assault.’

consequences that his offence already had for himself, cumulatively constitute substantial and compelling circumstances that justify the imposition of a lesser sentence”.

[15] It then treated all counts (including the rape) as one for the purposes of sentence and imposed a sentence of ten years’ imprisonment, five years of which were conditionally suspended.

[16] The State (as DPP) applied for and was granted special leave to appeal against this sentence to the SCA on a point of law

[17] This appeal was then brought in terms of s 311(1)(a) which provides:

“Where the provincial or local division on appeal, whether brought by the attorney-general or other prosecutor or the person convicted, gives a decision in favour of the person convicted on a question of law, the attorney-general or other prosecutor against whom the decision is given may appeal to the Appellate Division of the Supreme Court, which shall, if it decides the matter in issue in favour of the appellant, set aside or vary the decision appealed from and, if the matter was brought before the provincial or local division in terms of-

(a) section 309(1), re-instate the conviction, sentence or order of the lower court appealed from, either in its original form or in such a modified form as the said Appellate Division may consider desirable; ...”

[18] The SCA held that the imputation of consent to a child below the age of 12 and the consideration of this imputation in the sentencing of the appellant was indeed a question of law falling within s 311 of the CPA in that s 57(1) of the Sexual Offences Act provides that a person under the age of 12 years is incapable of consenting to a sexual act.

[19] The SCA thus found that, in the interests of justice, the sentence of this Court on appeal should be set aside and that it be remitted to this Court for a proper determination of the sentence. In this regard the SCA held as follows⁴:

“Counsel were agreed that if we came to the conclusion that the appeal must succeed, as we have, it would be desirable to remit the case to the High Court for a proper determination of sentence in light of this judgment. This is, however, not expressly provided for in s 311 of the CPA. But in Attorney-General (Transvaal) v Steenkamp 1954 (1) SA 351 (A) at 357F-G, this court – in the course of dealing with the predecessor to s 311 – said that in a situation such as the present the case could be remitted as ‘it could hardly have been the intention of the legislature that, where the order of this court does not finally dispose of the issues raised in the first Court of Appeal, some of those issues must . . . be left hanging in the air’. Furthermore, having regard to the lapse of time since the imposition of sentence by the trial court, the course suggested by counsel seems to me to be eminently reasonable as the sentence will have to be considered afresh. The appellant may well have already served the whole or part of the sentence imposed by the High Court. Accordingly, whatever fresh sentence will be imposed on him, will necessarily have to take this factor into account”.

DISCUSSION

[20] This Court thus comes to consider the question of sentence against this background. To my mind this involves a reconsideration of the sentence imposed by this Court on appeal from the regional court, which takes into account the following:

- (a) The facts of the matter relevant to sentencing as found to be proved by the Regional Court and not rejected by this Court on appeal;
- (b) The convictions as upheld and as set aside and varied by this Court on appeal;

⁴ At para [3]

- (c) The provisions of s 309(1) of the CPA which provides that, in the normal course of the operation of such section, the order of the lower court appealed from is to be a starting point;
- (d) The legal principles that pertain to a consideration of sentence afresh in respect of each standing conviction.

The relevant facts

[21] The appellant was found to have engaged, during the period 2 to 5 September 2011, in the following conduct in relation to the complainant, his stepdaughter who was then between 10 and 11 years old :

- (a) He placed his penis against her vagina and into her labia – although never penetrated her vaginally or anally.
- (b) He placed his penis between her buttocks and against her anus;
- (c) He placed his penis in her mouth.
- (d) He photographed instances of the above conduct on his cellular telephone and downloaded the resultant pornographic images onto a computer.
- (e) He photographed the complainant naked, at least from the waist down, and posed in such a way that her anus and vagina were displayed in a pornographic manner and, again, downloaded these images onto a computer.
- (f) He touched the complainant on her vagina and anus.
- (g) He showed the complainant a pornographic DVD containing men and women engaged in explicit sexual conduct
- (h) He showed the complainant images of her mother and himself engaging in sexual activity.

[22] The conduct of the appellant occurred when the mother of the complainant was out of the house and when the complainant was thus in his care and at his disposal.

[23] The photographs of the complainant were fortuitously discovered by her mother and were then shown to a relative which ultimately led to the arrest of the appellant and the ultimate charges and convictions.

[24] The touching by the appellant of the complainant on her vagina and anus was not confined to the occasions that related to the charges but had happened on other occasions when she was alone with the appellant. In this regard she could not say on how many occasions this had occurred – but it was more than 10. The appellant told the complainant that if she told anyone of his aforesaid conduct “*there would be trouble*”. The complainant was afraid of the appellant and aware that he had power and authority over her. He would, on occasion, resort to hitting her in the course of disciplining her - and this had an impact on the way she related to him as a parental figure in her life.

[25] The appellant was represented in the Regional Court and in all the proceedings, which followed – including these. The following was placed before the court on his behalf in mitigation of sentence on 03 June 2011:

- (a) He was 35 years old at time of sentencing;
- (b) He was a first offender;
- (c) He had been in custody for 18 months prior to being sentenced;
- (d) He had been employed as a member of the South African Air Force although his rank was not mentioned;
- (e) He was stationed and resident with his family at the air force base in [...] and had been for two years at the time of the crimes in issue;
- (f) He provided for his family (which comprised the mother of the complainant, the complainant her brother) financially;
- (g) He had a good marriage relationship with the complainant’s mother;
- (h) As to his childhood:
 - i. he had been adopted at an early age;
 - ii. He was maltreated by his adoptive family;
 - iii. This included being sexually abused by an older stepsister;

- iv. He attended a boarding school where he was sexually abused by schoolmates – which abuse included him being sodomized.

[26] There appears to have been a victim impact assessment report that was not proved by either party. It was excluded from evidence. There was an inference drawn by this Court that the report was, in some way, suppressed by the regional magistrate. The suggestion made by the Court on appeal was that the regional magistrate may have been deliberately excluding evidence that may have been favourable to the appellant. The Court stated also that there was “*an inescapable inference that the prosecutor was hiding information that would have assisted the defence and that the magistrate was a knowing party to it*”. The Court went as far as to speculate that it was “*...for example not inconceivable that it may have appeared from the report that the complainant or her mother had been the instigator of the events in question, which would have been an important factor for a just decision in the case*”. I will say more on this aspect later in light of the observations of the SCA in relation to the case.

The Convictions that now apply

[27] As set out above this Court on appeal:

- (a) Confirmed the conviction of rape on count 1.
- (b) Set aside the convictions of rape on counts 2 and 3;
- (c) Convicted the appellant of two counts of sexual assault in terms of the Sexual Offences Act in relation to counts 2 and 3;
- (d) Confirmed count 4 being the offence of using a child for child pornography in contravention of s 20(1) of the Sexual Offences Act;
- (e) Confirmed count 5 being the offence of exposing, displaying or causing the exposure or displaying of child pornography in contravention of s 19(a) of the Sexual Offences Act;

- (f) Confirmed count 7 being possession of a film or publication containing child pornography in contravention of s 27(1)(a)(i) of the Films and Publications Act 65 of 1996 (the Films Act) (count 7).

Sentence in the Regional Court

[28] In the regional court the convictions of rape (counts 1 to 3) were all visited with sentences of life imprisonment on the basis that the learned magistrate found that there were no substantial and compelling circumstances to justify a departure from the minimum prescribed sentence of life imprisonment.

[29] Counts 4, 5, and 7 were taken together by the magistrate, presumably because they were part of the same course of conduct. She sentences the appellant to 10 years in respect of these offences.

[30] This Court on appeal substituted two convictions of indecent assault for the rape convictions in counts 2 and 3. Thus these are sentences in respect of which there was no sentence pronounced in the regional court.

[31] As set out above, on appeal, these counts were taken together with counts 1, 4, 5, and 7 for sentencing and a sentence of 10 years with 5 years conditionally suspended was given.

Consideration of the proper sentence in respect of each conviction

[32] Generally, sentence is imposed only with regard to the factors and circumstances known at the time of sentencing⁵. This principle is particularly important when an appeal court has to consider the sentence imposed by the trial court.

⁵ See *S v Marx* 1989 (1) SA 222 (A) at 226C; *S v Immelman* 1978 (3) SA 726 (A) at 730H

[33] However, in exceptional circumstances, the court will take account of facts which came into existence only after the trial. In this case, the SCA noted that the fact that some or all of the sentence had been served as at the date of reconsideration may be a factor to be taken into account in the sentencing.

[34] It bears mention that the appellant had already served his custodial sentence as imposed by this Court by the time the SCA set aside this sentence aside. This has had the, somewhat anomalous result, that the appellant has been released notwithstanding his serious convictions. Unfortunately, neither counsel for the State nor for the appellant was able to inform me of the date of his release. The parties however agreed at the hearing that the appellant would report to the Clerk of the Court in [...] in order to continue serving the sentence imposed by the Regional Court in the interim to this court imposing sentence in relation to his convictions.

[35] I now turn to deal with each sentence which should be imposed in respect of each of the convictions.

Rape of a person under the age of 16 (count 1):

[36] The view of the regional magistrate was that, as there were no substantial and compelling circumstances, the maximum sentence of life imprisonment must apply.

[37] In *S Malgas*⁶ the Court (per Marais JA) stated that courts are required to regard the prescribed sentences as “being *generally appropriate* for crimes of the kind specified and enjoined not to depart from them unless they are satisfied that there is weighty justification for doing so”.

[38] Eight years later in *S v Vilakazi*⁷ the Court (per Nugent JA) re-emphasised that the prescribed sentence “should ordinarily *and in the absence of weighty justification*” be imposed⁸. *Vilakazi* stressed the importance of proportionality with

⁶ 2001 (1) SACR 469 (SCA)

⁷ 2009 (1) SACR 552 (SCA)

⁸ *id* at para 16

particular reference to the Constitutional Court judgment in *S v Dodo*⁹. A judgment that “reminded us . . . that punishment must always be proportionate to the deserts of the particular offender – no less but also no more...”

[39] There is no doubt that all rapes are serious but, as noted in *S v Mqikela*¹⁰ they are not all equally serious, and “the most serious are those for which the ultimate sentence [of life imprisonment] is intended”.

[40] In this case, what should have been the home and sanctuary for the child was turned into a place where she found herself subject to the worst threats imaginable, and this from a man who purported to be her guardian and protector. She was subjected, not only, to fear and mental anguish over a protracted period of time, but also to degradation and humiliation of a type which struck at the very core of her developing self. Whilst she should have been nurtured and guided at this crucial stage of her young life, she was predated upon by the appellant who was opportunistic, in taking advantage of the absences of her mother from the home. She was deprived of the comfort and protection of her mother and other adults by being intimidated by the appellant into keeping his confidences. This is not the type of sexual abuse which allows escape for the victim from the perpetrator. It is domestic in nature. The victim must reside with him at close quarters and feel his constant gaze upon her and his presence around her. She must enter into the pretence of normality in the face of extreme aberration. It is apparent that the sexual abuse of the child in this case was not isolated nor was there an end in sight for her. Had the appellant not been caught, the indications are that he would have continued his abuse of her. The pornographic material made by him and his preserving thereof can only be seen in a context of his wishing to extend and enhance, for his purposes, whatever personal gratification he derived from his violations of the child. He has shown no remorse or regret and neither has he made any move to take any responsibility for his crimes. His conduct shows a large measure of planning and deviousness.

[41] This having been said, an appropriate sentence should reflect the severity of

⁹ 2001 (1) SACR 594 (CC) at para 38

¹⁰ 2010 (2) SACR 589 (ECG) at para 5

the crime, while, at the same time, giving full consideration to all the mitigating as well as the aggravating factors surrounding the person of the offender; in other words, the sentence should reflect the blameworthiness of the offender¹¹.

[42] To my mind, the personal circumstances of the appellant can be viewed as mitigating only in respect of trauma in his early life - and this must be given due consideration. There can be no doubt that his adoption at an early age by uncaring parents and the sexual abuse to which he was subjected would have had an impact on his behaviour in later life. That such trauma can result in, *inter alia*, sexual deviancy and serious interpersonal problems has been well documented in the field of forensic psychology – and I accept that this would have had some part to play in the commission of the crimes. The observation of the regional magistrate to the effect that the appellant should have sought help, although interpreted by this Court as somewhat glib, is not entirely inapposite. When one is aware that one's troubled state of mind has reached a stage where it is criminally dangerous, especially to vulnerable individuals, it is incumbent on such person to seek help and guidance. On the other hand, there is no outward indication that the appellant was dysfunctional in other aspects of his life. He held down a solid job and on his evidence and that of his wife they had a relatively good marriage. There are also no indications of debilitating substance abuse or depression. It is difficult for this court to fully appreciate the emotional and psychological deficiencies which could have caused the appellant to lapse into the type of depravity in issue. This is result of his failure to address these aspects directly or at all. This failure came about, in the main, because the appellant has opted to maintain his innocence throughout the proceedings.

[43] Whilst an offender retains the right to remain silent, even at the sentencing stage, a remorseful offender is expected to take the court into his confidence¹².

[44] In *S v Andhee*¹³ the appellant claimed his innocence and did not give evidence in mitigation of sentence. Only during his appeal did he admit his guilt, whereupon

¹¹ *S v Zinn* 1969(2) SA 537 (A) at 540 G;

¹² See *S v SMM* 2013 (2) SACR 292 (SCA) at para 27; *S v Van der Westhuizen* 1995 (1) SACR 601 (A) at 605; *DPP, North Gauteng v Thabethe*:2011 (2) SACR 567 (SCA) at para 22.

¹³ 1996 (1) SACR 419 (A) at 423.

his legal representative requested permission to present evidence in mitigation. Smalberger JA reacted to this turn of events by saying that;

“after his conviction it was open to the appellant to explain why he had left the scene of the accident without attempting to ascertain the nature and extent of the deceased’s injuries. He did not avail himself of this opportunity. Instead he persisted in his false denial that he was the driver. Having made his bed he must now lie upon it”

[45] To my mind, this approach is apposite here. It must be realised that, if any evidence in mitigation of sentence exists, there is generally only one chance to present it to court.

[46] This Court treated the failure to put the victim assessment report into evidence as a failure by the Regional Court to have reference to relevant evidence likely to favour the appellant. Victim assessment reports are generally prepared for the purposes of aggravation as opposed to mitigation. It was rightly conceded by counsel for the appellant that, under the present circumstances, the victim impact report could have no bearing on the determination of whether the prescribed sentence should be departed from. Even it were assumed that the complainant would have been found in such report to have experienced little or no trauma as a result of the offences, this would not serve to ameliorate their seriousness for the purposes of the enquiry as to whether substantial and compelling circumstances exist to depart from the prescribed sentence.

[47] The finding by this court that the failure to admit this report was a misdirection of the trial court was misguided. Indeed such finding was as a result of his own misdirection. It was no doubt brought about by the pervasive error of this Court on appeal in assuming that any supposed complicity of the child in the events could ever be relevant to the sentencing.

[48] This erroneous treatment of the report led the court to cast serious aspersions on the conduct of the prosecutor and the regional magistrate which were to the effect that they had failed in their professional duties in suppressing information in the form

of the report which could have favoured the appellant. In light of the findings of the SCA, and the course which this matter has taken it is clear that these assertions were unwarranted.

[49] In my view, the regional magistrate was correct in finding that there are no circumstances which allow for a departure from the prescribed sentence of life imprisonment and, having considered the sentence afresh as directed by the SCA, such a sentence is again imposed.

[50] The appellant has served a relatively significant period of incarceration both awaiting trial (18 months) and the time served already on sentence. Accordingly it would be proper for the sentences to run from the date of original sentencing in the regional court – being 03 June 2011.

The other counts – 2, 3, 4, 5, and 7 (of sexual assault ; using a child for child pornography ; exposing, displaying of child pornography; possession of child pornography)

[51] Where there is a close link between counts and where the elements of one are closely bound up with the elements of another, the concurrence of sentences should be considered¹⁴.

[52] While the CPA does not specifically provide for counts to be taken together for the purposes of sentencing, this is often done, mainly in cases where the various counts are essentially part of one transaction, operation, or process. The appeal court took these counts together for the purposes of sentencing – presumably for this reason. The magistrate did the same, save in relation to sentences on the convictions of rape on counts 2 and 3. In any event, given the imposition of imprisonment for life, the effect would be the same – in that any other sentence would be served concurrently with that sentence¹⁵.

¹⁴ *S v Mthetwa* 2015 (1) SACR 302 (GP) at para 22 ; *S v Mate* 2000 (1) SACR 552 (T)

¹⁵ Section 39(2)(a)(i) of the Correctional Services Act 111 of 1998.

[53] I am of the view that this Court and the Regional Court were not incorrect in taking this approach.

[54] I do however find that the suspension by this Court of the sentence of 10 years in the circumstances was shockingly inappropriate. It serves to create the impression that the crimes are trivialized. It appears that the imputation of acquiescence of the child was also a basis for the suspension of the sentence in this instance.

[55] I thus consider it a proper approach for 10 years imprisonment to be imposed in relation to these counts.

ORDER

[56] For the reasons stated in this judgment the sentence of this court on appeal having been set aside by the SCA the following sentence is imposed:

1. On count 1 the appellant is sentenced to life imprisonment;
2. Counts 2 ,3, 4, 5, and 7 are taken together for the purposes of sentencing and the appellant is sentenced on these counts to 10 years imprisonment;
3. All sentences will be calculated to run from 03 June 2011.

FISHER J

HIGH COURT JUDGE

GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree,

MUNZHELELE AJ
HIGH COURT ACTING JUDGE
GAUTENG DIVISION, PRETORIA

DATE OF HEARING: **07 December 2017**

DATE OF JUDGMENT AND ORDER: **14 December 2017**

LEGAL REPRESENTATIVES:

FOR THE APPELLANT

**H. L ALBERTS (Attorney) with
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FOR THE RESPONDENT:

**Adv J Cronje Instructed by
the DPP**