



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Appeal number: **A25/2022**

In the matter between:

PETRUS A DU PLESSIS

Appellant

and

THE STATE

Respondent

CORAM: VAN ZYL, J et MPAMA, AJ

HEARD ON: 25 JULY 2022

DELIVERED ON: 11 OCTOBER 2022

JUDGMENT BY: MPAMA, AJ

- [1] This matter concerns an appeal against sentence. The appellant was charged in the Regional Court, sitting in Bloemfontein, with one count of sexual assault in contravention of section 5 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. In the charge it was alleged that during or about 2019 the appellant unlawfully and intentionally violated the 14-year old male complainant by *“lying behind him and pressing his penis against the complainant’s buttocks and making sexual movements and telling him to take a shower with him.”* He pleaded guilty to this charge and on 21

September 2021 he was convicted and sentenced to fifteen years imprisonment of which five years were suspended for a period of five years on condition that he is not convicted of contravening the provisions of section 5 of Act 32/2007 committed during the period of suspension.

[2] The appellant aggrieved by the sentence imposed successfully applied for leave to appeal his sentence in the trial court. In the notice of appeal filed on behalf of the appellant, the following grounds of appeal were raised:

- “(i) That the Court *a quo* did not take necessary consideration of the fact that the Appellant had pleaded guilty to the charge.
- (ii) That the Court *a quo* did not take sufficient consideration to the fact that the State agreed with the defence that an appropriate sentence under the circumstances is a term of imprisonment of not more than six years.
- (iii) That the Court *a quo* over emphasised the seriousness of the crime and the interest of the community over the personal circumstances of the appellant; the personal circumstances being that the Appellant is 62 years of age, and that he spent almost a year in custody pending finalisation of the matter.
- (iv) That the Court *a quo* over emphasised the two principles of punishment, namely deterrence and retribution over the principle of rehabilitation.
- (v) That the Court *a quo* over emphasized the fact that the appellant has previous convictions for similar offences.
- (vi) That the Court *a quo* erred by imposing fifteen years imprisonment as it is shockingly inappropriate and the appellant is effectively deprived from an opportunity to reform.”

[3] The salient facts underpinning appellant’s conviction, in brief are as follows: The appellant, a 61-year-old man was a close family friend of the complainant. The complainant, a young boy aged 14 years would normally visit the appellant’s place with his family. A close friendship developed between the appellant and the complainant. The complainant would at times visit the appellant without his family. On the date in question, he slept over at the appellant’s place. The appellant and complainant were lying on the bed when the appellant took out his penis and started rubbing it against the

complainant's buttocks. The appellant also admitted that he took a shower with the complainant and requested the complainant to wash his back. The complainant had not consented to these acts. He was convicted and sentenced by the court *a quo* as above.

- [4] Before us, the counsel for the appellant contended that the court *a quo* overemphasised the previous convictions of the appellant and that the sentence imposed is shockingly inappropriate. She further submitted that the court must interfere with the court *a quo*'s sentence as it failed to consider that the appellant had pleaded guilty to this offence and is an elderly man.

- [5] The counsel on behalf of the State conceded that the sentence imposed by the court *a quo* is shockingly inappropriate. She submitted that accused's previous convictions suggest a propensity to commit offences of this nature; nevertheless, the sentence remains harsh and shockingly inappropriate.

- [6] Both counsel agreed that the sentence of six years' imprisonment suggested by the State and the defence in the court *a quo* was not an appropriate sentence in the appellant's circumstances. They both submitted that in the event of the court considering reducing the sentence imposed, a term of imprisonment of twelve years can be imposed and a certain part of this imprisonment be suspended in order to serve as a deterrent on the appellant.

- [7] Sentencing is pre-eminently a matter for the discretion of a court *a quo*. See **S v PILLAY 1977 (4) SA 531 (A)**. In the case of **S v SALZWEDEL 1999 (2) SACR 586 (SCA)** at 591 E - F the Supreme Court of Appeal explained with reference to **S v ANDERSON 1964 (3) SA 494 (A)** at 495 G - H when an appeal court will interfere with sentence:

"The Court of Appeal, after careful consideration of all the relevant circumstances as to the nature of the offence committed and the person of the accused, will determine what it thinks the proper sentence ought to be and if the difference between that sentence and the sentence actually imposed is so great that the inference can be made that the trial court acted unreasonably, and therefore improperly, the Court of appeal will alter the sentence."

[8] Where the court *a quo* has failed to exercise its discretion properly and has committed a material misdirection, an appeal court will be at liberty to interfere with the sentence imposed by the trial court.

[9] The following statement by the Regional Magistrate in passing judgment on sentence cannot be overlooked:

"What however I cannot ignore is the fact that you have previous convictions which are similar to this offence and it is not one, not two, it is more than two. Five people were affected by your behaviour 10 years ago and here you are standing more it is from 2009, it is more than 11 years, 11 years you are standing before for this court for the same offence."

[10] The previous convictions of the appellant as per the SAP 69 depict that the appellant was on the 30th of November 2009 convicted of rape, 2 counts of indecent assault and two counts of sexual assault.

[11] There was no evidence presented to substantiate that there were five complainants in the previous convictions referred to in the SAP 69. There is only one CAS-NR (35/11/2008) on the SAP 69. This suggests that there might have been only one complainant affected by appellant's past conduct. Consequently, the above remarks by the Regional Magistrate in my view amount to misdirection.

[12] In addition to the aforesaid, the court *a quo* failed to take into consideration that the five previous convictions were older than ten years. Although the court *a quo* referred to the date of the previous convictions in the extract of her judgment on sentence which I quoted above, she dealt with them as though they still constituted previous convictions in the true sense of the word; while on the contrary, they did not. In this regard the following extract from **A Guide to Sentencing in South Africa**, SS Terblanche, Third Edition, p.115 at paragraph 6.8 provides, with reference to applicable case law, a useful summary of the relevant principles:

"The weight of an offender's previous convictions is influenced by the *proximity in time* of the subsequent conviction. It is generally substantially aggravating if the subsequent offence is

committed shortly after the previous one. On the other hand, a substantial period without any convictions should decrease the weight of this factor. As a general point of departure, a previous conviction more than ten years before the subsequent conviction should not be taken into consideration as an aggravating factor. This principle will, however, be negated by a chain of convictions less than ten years apart, even if the initial conviction is eventually more than ten years old. Also, some judgments have held that even previous convictions as old as 20 years can at times be taken into account. For example, the court in *S v Ntozini* held that such a previous conviction for rape was '*nevertheless in my view an aggravating feature indicative of the accused's deplorable attitude towards members of the opposite sex*'."

[13] The court *a quo* consequently also misdirected itself by having taken the aforesaid five previous convictions into consideration as though they were still applicable as previous convictions in the true sense of the word. The previously mentioned two misdirections warrant interference by this court.

[14] The offence that the appellant was convicted of is a serious offence. The victim was a 14-year old child who trusted the appellant and he breached that element of trust. In the victim impact statement, he expressed how this incident affected him; he feels ashamed and angered by this act as he respected the appellant. The appellant is a 62-year-old man. Even though the previous convictions are older than 10 years, the court cannot turn a blind eye on them as they show the appellant's propensity for committing sexual offences.

[15] The sentence should nonetheless reflect the interests of society, take into account the appellant's personal circumstances and the heinous nature of the crime committed by the appellant.

[16] The sentence imposed by the trial court is undoubtedly disturbingly harsh and vitiated by misdirection. I am of the view that the sentence imposed consequently ought to be interfered with.

[17] I would accordingly make the following order:

1. The appeal against sentence is upheld.

2. The sentence imposed by the trial court is set aside and substituted with the following sentence:
"The appellant is sentenced to twelve (12) years imprisonment of which four (04) years are suspended for a period of five (05) years on condition that the appellant is not convicted of sexual assault committed during the period of suspension."
3. The above sentence is antedated to 21 September 2021 in terms of section 282 of the Criminal Procedure Act, 51 of 1977.



P.P. L. MPAMA, AJ

I agree and it is so ordered:



C. VAN ZYL, J

On behalf of Appellant: Ms S. Kruger
Instructed by: Legal Aid South Africa
Bloemfontein

On behalf of Respondent: Adv B.G. Claassens
Instructed by: Office of the DPP
Bloemfontein