



**IN THE HIGH COURT OF SOUTH AFRICA**  
**(GAUTENG HIGH COURT, PRETORIA)**

Case no: A274/2016

|       |                                                       |
|-------|-------------------------------------------------------|
| (1)   | REPORTABLE: <del>YES</del> <u>NO</u>                  |
| (2)   | OF INTEREST TO OTHER JUDGES: <del>YES</del> <u>NO</u> |
| (3)   | REVISED.                                              |
| ..... | .....                                                 |
| DATE  | SIGNATURE                                             |

14/12/2016

In the matter between:

**PETRUS JOHANNES CHARL ENSLIN**

Appellant

and

**THE STATE**

Respondent

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**JUDGMENT**

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**MAGARDIE AJ**

1. This is an appeal against sentence imposed by the Pretoria North Regional Court. The leave to appeal having been refused by the court *a quo*, the appellant was granted leave to appeal against sentence after petitioning this court.
2. The appellant in this matter, a 39 year old male, was arraigned before the Pretoria North Regional Court on the following charges:
  - 2.1 Count 1 – contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, read with the provisions of section 1, 55, 56(1), 57, 58, 59, 60 and 61; and further read with sections 92(2), 94, 256, 257 and 281 of the Criminal Procedure Act 51 of 1977; and further read with the provisions of sections 51, and 52 and schedule 2 of the Criminal Law Amendment Act, 105 of 1997 (as amended).
  - 2.2 Count 2 - contravention of section 5(1) read with sections 1, 56(1), 57, 58, 59, 60 and 61 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, as amended and read further with sections 92(2) and 94 of the Criminal Procedure Act 51 of 1977, as amended.

- 2.3 Count 3 - contravention of section 18(2) read with sections 1, 19(a)(b), and/or (c), 56, 57, 58, 59, 60 and 61 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 and read further with sections 92(2) and 94 of the Criminal Procedure Act 51 of 1977.
- 2.4 Count 4 - contravention of section 21(3) read with sections 1, 56, 57, 58, 59, 60 and 61 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 and read further with sections 92(2) and 94 of the Criminal Procedure Act 51 of 1977.
3. In summary, the charges against the appellant were that, between January 2011 to October 2013, and at Kameeldrif, the appellant unlawfully and intentionally committed the acts of sexual penetration without the consent of the complainant; unlawfully and intentionally sexually assaulted the complainant; unlawfully and intentionally sexually groomed the complainant; unlawfully and intentionally compelled or caused the complainant to witness sexual acts and/or masturbation. At the time of commission of these offences, the complainant was aged between 14 and 17 years.
4. The appellant was legally represented throughout the proceedings. The appellant pleaded guilty to counts 2, 3 and 4. The count of rape related to only one incident, which occurred when the complainant was 17 years of age.

5. It is apposite to mention that the appellant is the stepfather of the complainant. The appellant began living together with the complainant's mother when the complainant was 9 years old.
6. On 05 November 2014, after the appellant pleaded guilty, the court *a quo* convicted the appellant on all 4 counts. After conviction, the court *a quo* commissioned pre-sentencing reports. Although the appellant was considered to be a good candidate for correctional supervision, the court *a quo* was of the view that imprisonment would be an appropriate sentence under the circumstances. On 24 July 2015, the appellant was sentenced as follows:
  - 6.1 In respect of count 1, the appellant was sentenced to 8 years imprisonment.
  - 6.2 In respect of count 2, the appellant was sentenced to 5 years imprisonment.
  - 6.3 In respect of count 3, the appellant was sentenced to 5 years imprisonment. The court *a quo* ordered that the sentences in counts 2 and 3 must run concurrently.
  - 6.4 In respect of count 4, the appellant was sentenced to 5 years imprisonment.

- 6.5 The appellant was declared unfit to possess a firearm in terms of the provisions of section 103(1) of the Firearms Control Act 60 of 2000.
- 6.6 The court *a quo* also made an order in terms of section 50(2)(a) of Act 32 of 2007, as amended, that the appellant's name be entered into the register of sexual offenders and that he be declared unfit to work with children as envisaged in the provisions of section 120(4) of Act 38 of 2005, as amended.
7. The appellant made application for leave to appeal against sentence before the court *a quo*. However, the application for leave to appeal was dismissed. On 20 August 2015, the appellant petitioned this Court for leave to appeal against sentence. On 22 February 2016, Janse Van Nieuwenhuizen J and Basson J granted the appellant leave to appeal against sentence.
8. The appellant has been in custody, having been incarcerated more than 15 month ago, serving his sentence.
9. In mitigation of sentence, it was submitted that the appellant handed himself over to the police and made a full declaration. The appellant pleaded guilty to the charges proffered against him and has shown remorse. In this regard, the appellant has also verbalised his remorse towards third parties as well as the complainant when he addressed a letter to her. During the commission of the crime of rape, the appellant was under the influence of alcohol. This occurred once and when the complainant was aged 17. The complainant showed no

resistance. The complainant did not sustain injuries during the commission of the rape and that the appellant penetrated the complainant's vagina with his finger. The appellant underwent therapy sessions and a rehabilitation program and did not wait for the court to order him to do so. The appellant was assisting the complainant financially in that he bought her a vehicle, is paying for her medical aid and vehicle insurance. The appellant is the sole breadwinner and, in terms of the divorce settlement, he had to pay maintenance of R6 000.00 for the complainant's mother and R8 000.00 for the maintenance of 2 minor children.

10. Although the appellant and the complainant's mother divorced in May 2015, the complainant's mother moved back to stay with the appellant and their two minor children. The appellant employs 40 people at Blymoedig Kliniek.
11. It was also submitted that the court *a quo* failed to consider the fact that the appellant voluntarily enrolled for a rehabilitation program; that, during the commission of all the incidents, the appellant was under the influence of alcohol which, it was argued, decreased his moral blameworthiness. It was further submitted that the court *a quo* failed to consider the effect that imprisonment would have on the appellant's minor children and that there was no violence involved in the commission of the crime of rape and that the complainant did not sustain any injuries.
12. It is undeniable that sexual assault and violation of women and children have become commonplace in our society. Sexual assault on children is devastating and leaves an indelible mark in the psychological upbringing of a child; it is even

more so when such offences are committed within the household by a father who is naturally entrusted with the protection of his children.

13. There is no denying that sentencing falls primarily within the discretion of the trial court. When deciding on an appropriate sentence, it is trite that a court is required to strike a balance between the interest of society; the seriousness of the offence and the personal circumstances of the accused.<sup>1</sup> The appeal court may only interfere with the sentence when it is demonstrated that the trial court has not properly and reasonably exercised its discretion in imposing sentence. The court of appeal is also entitled to interfere with sentence if same is disturbingly inappropriate and so totally out of proportion to the offence or vitiated by misdirection showing that the trial court exercised its discretion unreasonably.<sup>2</sup> The approach of the triad consisting of the crime, the offender and the interest of society was enunciated in **S v Zinn**.<sup>3</sup>
14. In addressing sentence one must also be mindful of the principles as set out in **S v Rabie**<sup>4</sup>:

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

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<sup>1</sup> S v Rabie 1975 (4) SA 855 (A) at 862G-H.

<sup>2</sup> S v Pillay 1977 (4) SA 531 (A) at 535E-G, S v Ncheche 2005 (2) SACR 386 W, S v Salzwedel & Others 1999 (2) SACR 586 SCA.

<sup>3</sup> 1969 (2) SA 537 (A) at 540G.

<sup>4</sup> 1975 (4) SA 855 (A) at 862G-H:

15. In **S v Smith** it was held that:

*"Courts must guard against an over-eager imposition of exemplary sentence and must not over-emphasise the gravity of the offence and the interest of the community at the expense of the interest of the personal circumstances of the particular offender."*<sup>5</sup>

16. In **S v R**<sup>6</sup> Kriegler J, as he then was, said that by introducing correctional supervision, the Legislature had provided a method of imposing finely tuned sentences without resorting to imprisonment with all its known disadvantages for both the prisoner and the broader community. At 220 G-H he observed that:

*"Ons strafftoemeting het egter nou 'n heel nuwe fase betree. Korrektiewe toesig is weliswaar 'n as nog-onbeproeftde vonnisopsie maar dit blyk reeds uit die magtigende wetgewing dat dit groot potensiaal inhou. Wat veral tref, is die veelsoortigheid daarvan. By nadere ondersoek word dit duidelik dat die benaming "korrektiewe toesig" nie soseer 'n vonnis beskryf nie maar 'n versamelnaam is vir 'n wye verskeidenheid maatreëls waarvan die enkele gemeenskaplike kenmerk is dat hulle buite die gevangenis toegepas word."*

17. In **S v Samuels**<sup>7</sup>, Ponnann JA pointed out that:

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<sup>5</sup> 2002 (2) SACR 488 (C) at 490H-J.

<sup>6</sup> 1998 (1) SACR 209 (A)

<sup>7</sup> 2011(1) SACR 9 (SCA) para 9-10.

*"An enlightened and just penal policy requires consideration of a broad range of sentencing options from which an appropriate option can be selected that best fits the unique circumstances of the case before the court. It is trite that the determination of an appropriate sentence requires that proper regard be had to the well-known triad of the crime, the offender and the interests of society. After all, any sentence must be individualised and each matter must be dealt with on its own peculiar facts. It must also in fitting cases be tempered with mercy. Circumstances vary and punishment must ultimately fit the true seriousness of the crime. The interests of society are never well served by too harsh or too lenient a sentence. A balance has to be struck."*

18. The sentencing courts cannot apply the one-size fits all approach when sentencing offenders. Ordinarily, a distinction should be made between those offenders who ought to be removed from society and those who, although deserving of punishment, should not. With appropriate conditions, correctional supervision is undoubtedly an appropriate and severe punishment, even for persons convicted of serious offences.
  
19. When regard is had to the seriousness of the offences and the circumstances under which they were committed, the factors submitted in mitigation of the offence as well as the personal circumstances of the appellant and the interest of the community, I am of the view that the court *a quo* failed to exercise its discretion judicially in imposing the sentence of imprisonment. It is curious as to why the court *a quo* commissioned the pre-sentence reports if it had no

intention to consider same. Had the court *a quo* formed the view that correctional supervision was not an appropriate sentence, it should have given sufficient reasons for the rejection of same.

20. I am inclined to agree with the submissions of the appellant's counsel that the sentences imposed by the court *a quo* is severe and consequently disproportionate when regard is had to the circumstances under which the offences at issue herein were committed. However, this should not be understood to be downplaying the seriousness of the offences. As already stated, sexual assault and the violation of women and children are indeed very serious.

21. I am not swayed that, given the circumstances traversed above, the court *a quo* exercised its discretion judicially. I am further of the view that the sentences imposed by the court *a quo* strikes one with a sense of shock and leads to the conclusion that it is shockingly disproportionate to the offences of which the appellant was convicted, when regard is also had to the circumstances of the offences. Accordingly, as the court of appeal, I am entitled to interfere with the sentences imposed by the court *a quo*. I am of the view that correctional supervision is an appropriate sentence.

22. In the result, the following order is made:

22.1 The appeal against sentence on counts 1, 2, 3 and 4 is upheld.

22.2 The sentence imposed by the trial court is set aside and substituted by the following sentence:

22.3 Count 1:

The accused is sentenced to correctional supervision for a period of three (3) years in terms of section 271(1)(h) of the Criminal Procedure Act, 51 of 1977 as amended, on the following conditions:

22.3.1 That the accused be placed under house arrest to such an extent that he can be controlled and therefore, as far as possible, not be of any danger to the community, provided that, depending on his behaviour, the conditions of the house arrest can be relieved to some extent, but the house arrest will apply for the duration of the sentence from 15h30pm to 6h30am on workdays and from 12h00pm to 6h30am on days when he is not working; provided that house arrest will not be applicable during the following period:

- (i) Community service
- (ii) Therapeutic services
- (iii) Church services

22.3.2 That the accused will perform 16 hours community service for every month of sentence to comply with the community's

expectations in terms of retribution and compensation of the crimes with the provision that a part (maximum a third) could be suspended if he gives his co-operation and if his behaviour justifies it. Furthermore, that the Commissioner of Correctional Services may give him 1 hour additional community service for every hour that he fails to do community service. The community service will consist of cleaning at Baviaanspoort Correctional Services and the services shall be performed on Saturdays between 8h00am and 16h00pm.

22.3.3 That the accused will subject himself to treatment programmes as determined by the Commissioner, which are applicable to his specific needs and programmes with the aim of rehabilitating the accused and to better prepare him to accept his responsibilities as a member of the community. Such relates to:

- (i) Alcohol Programmes
- (ii) Self-image Programmes
- (iii) Behaviour conduct relating to self-conduct programmes
- (iv) Programmes for sexual offenders

22.3.4 That the accused may not change his residential address or work address without prior notification to the Commissioner.

22.3.5 That the accused shall for the full duration of the sentence, refrain from the use/abuse of alcohol or drugs, other than prescribed by a medical practitioner.

22.3.6 To control and discourage chemical dependency, the accused shall declare himself to be willing to undergo tests at his own cost, if at all possible.

22.3.7 That the accused shall subject himself to the monitoring agency by the Commissioner and shall comply with all reasonable directives issued by the Commissioner regarding the execution and administration of his sentence.

22.4 Counts 2, 3 and 4:

These counts are taken together for purposes of sentencing in terms of section 280 of the Criminal Procedures Act 51 of 1977, as amended. The accused is sentenced to six (6) years imprisonment, suspended for a period of five (5) years on condition that the accused is not convicted for contravention of sections 3, 5(1), 18(2)(a) and 21(3) of Act 32 of 2007 committed during the period of suspension.

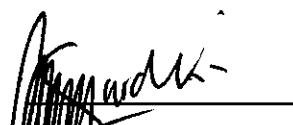
22.5 In terms of section 282 of Act 51 of 1977 the sentence imposed on counts 1, 2, 3 and 4 is antedated to 24 July 2015.

22.6 The accused must be released from custody and must report to the Correctional Supervisor, M S August at Community Corrections Pretoria North within 24 hours after his release from custody.

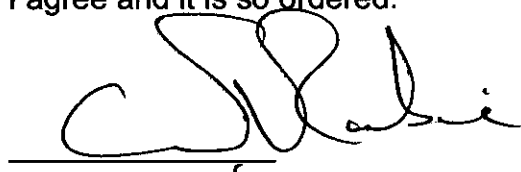
22.7 The declaration that, in terms of section 103(1) of Act 60 of 2000 the accused is declared unfit to possess a firearm, remains intact.

22.8 The declaration that, in terms of section 50(2)(a) of Act 32 of 2007, the name of the accused must be entered into the register for sex offenders, remains intact.

22.9 The declaration that, in terms of section 120(4) of Act 38 of 2005 the accused is declared unfit to work with children, remains intact.

  
MAGARDIE AJ

I agree and it is so ordered.



RABIE J