

IN THE HIGH COURT OF THE REPUBLIC OF SOUTH AFRICA

NORTH GAUTENG, PRETORIA

13/06/2012

CASE NO A443/2011

In the matter of	DATE FROM WHICH LETTER IS NOT APPLICABLE	
	(1) REPORTABLE: YES/NO	
BAFANA FANI MATWA	(2) OF INTEREST TO OTHER JUDGES: YES/NO	APPELLANT
vs	(3) REVISED	
THE STATE	13/06/12	RESPONDENT

JUDGMENT

BAM AJ.

1. The appellant, aged 30, was convicted in the regional court Vereeniging on a charge of rape in contravention of the provisions of section 3 of the Criminal Law Amendment Act (Sexual Offences and Related Matters), Act 32 of 2007, of a female person, seven years of age, and sentenced to life imprisonment. Leave to appeal against only the sentence was granted by the trial court. Hence this appeal.
2. The trial commenced on 13 January 2011. The appellant was represented by an attorney at the trial. He pleaded not guilty and denied the allegations in the charge sheet but admitted, formally, that the complainant was aged seven years at the time the crime was committed on 1 August 2010. The trial was partly heard on the said day and then postponed to 17 February 2011. On the latter day, after having admitted the forensic DNA evidence, the appellant then altered his plea to one of guilty to the charge. He further admitted that the provisions of the act on minimum sentences had been explained to him.
3. Act 32 of 2007 repealed the “common law offence of rape and replacing it with a new expanded statutory offence of rape, applicable to all forms of sexual penetration without consent, irrespective of gender. See preamble to Act 32 of 2007.

4. Sections 3 and 4 of Act 32 of 2007 creating the expanded statutory offences read as follows.

“3. Rape -- Any person (“A”) who unlawfully and intentionally commits an act of sexual penetration with complainant (“B”), without the consent of B, is guilty of the offence of rape.

4. Compelled rape. —Any person (“a”) who unlawfully and intentionally compels a third person (“C”), without the consent of C, to commit an act of sexual penetration with a complainant (“B”), without the consent of B, is guilty of the offence of compelled rape.”

5. There is no provision in Act 32 of 2007 providing for the nature of punishment of the mentioned offences.

6. However, pertaining to the minimum penalty for these offences, section 51(1) of the Criminal Law Amendment Act, No 105 of 1997, provides as follows.

“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 1 of Schedule 2 to imprisonment for life.”

The relevant offences provided for in Part 1 of Schedule 2 include the following:

“Rape as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 –

(b) Where the victim –

(i) is a person under the age of 16 years;”

“Compelled rape as contemplated in section 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007—

(b) Where the victim --

(i) is a person under the age of 16 years.”

7. 6.1 It is further of importance to bear in mind that section 276 of the Criminal Procedure Act provides for punishment of a person convicted of an offence in the following terms:

Section 276(1):

"Subject to the provisions of this Act and any other law and of the common law, the following sentences may be passed upon a person convicted of an offence, namely –"

The section proceeds to provide for a variety of punishments, including direct imprisonment, a fine etc.

- 6.2 From the words used by the legislature in this section, it appears, in my opinion, that whenever a crime is created by any Act of Parliament, and no provision is specifically made for punishment of that crime, a court may impose sentence in terms of the provisions of this section.

6.3 Where, however, no provision is made in any act creating a crime, for a specific penalty, the penal jurisdiction of any lower court will be subject to the provisions of the Magistrate's Court Act no 32 of 1944, providing for the maximum penal jurisdiction of the specific court.

8. The problem regarding the principle *nulla poena sine lege*, arising from the fact that no penal provision is provided for in Act 32 of 2007 pertaining to certain offences, was in depth considered and ruled upon in the matter of **Director of Public Prosecutions, Western Cape v Arnold Prins**, Case number A134/08, Western Cape High Court. That court concluded that due to the lack of a penal provision in the Act in question, the charge of contravening the provisions of section 5(1) of the said Act did not disclose an offence. It was however stated in the said case that the offences in terms of section 3 and 4 of the said Act were not affected in that they are dealt with by section 51 of Act 105 of 1997. The issues in that matter came to the attention of the Supreme Court of Appeal. A date for the hearing of the matter in the latter Court has now been allocated by the Honorable President of that Court.
9. Whilst the reasoning of the full bench of the Western Cape High Court is respected, it appears that the provisions of section 276 of the Criminal Procedure Act, to what I have alluded above, were not considered in the **Prins** case. I am of the humble opinion that if the provisions of section 276 of the Criminal Procedure Act are taken into account, this Court is entitled to find that a penal provision pertaining to a contravention of the provisions of section 3 and 4 of Act no 32 of 2007 is also provided for in the provisions of that section.

10. Mr Malende, appearing for the appellant, submitted that the regional court did not have jurisdiction to impose a life sentence in this matter in view of the fact that no punishment is provided for in Act 32 of 2007. For the reasons set out above, I do not agree.

11. I now turn to the salient facts of the case before us. According to the complainant she was living with her grandmother. On the day in question she visited her mother's house. In the latter's absence, whilst the complainant was in the company of other children, the appellant, a family member, whom she called Fanie, carried her to a bedroom. She tried to scream but he covered her mouth. The appellant then undressed himself and the complainant. He overpowered her when she resisted and proceeded to rape her. After she was raped her sister Ntswaki, entered the room. The appellant by then had already left the room. The complainant, who was still naked, told Ntswaki that she was raped by the appellant. The complainant did not sustain any physical injuries save for the injuries to her private parts reflected in the standard J88 form that was admitted as evidence. It was recorded in the J88 that the complainant weighed 29,3 kg and that her height was 1,16 m. Features of forced vaginal penetration were found to be present.

12. This Court's powers to interfere with the sentence of a trial court are limited. Recently the following considerations in that regard were re-stated in **S v Nkosi 2011(2) SACR 482** at 492 par [34]:
"Turning to the issue of sentence, it should be re-iterated that sentencing is pre-eminently a matter for the discretion of the trial court and that this court does not have an overriding discretion to interfere unless the sentences imposed by the court below are vitiated by irregularity or misdirection or are disturbingly inappropriate."

13. The learned regional court magistrate, after having admitted a pre-sentence report of the appellant, delivered a comprehensive and well-reasoned judgment on sentence, consisting of more than forty pages, referring to applicable case law. It would be rather difficult to add anything to the magistrate's judgment. All relevant issues were considered and discussed. I cannot do any better. I also do not deem it expedient to repeat the references to the more than sixty decided cases referred to in the judgment.

14. The learned magistrate considered all relevant aspects including the personal circumstances of the appellant. Pertaining to the effect of the personal circumstances of an accused when sentence is considered, I wish to add that those circumstances necessarily recede into the

background when sentencing in serious crimes of this nature is considered. See **S v Vilakazi 2009(1) SACR 552 SCA** at 574 par [58].

15. It was submitted on behalf of the appellant that he showed remorse when he changed his plea to guilty. However, a mere plea of guilty is not *per se* proof of remorse or contrition, it has to be substantiated by acceptable evidence, which is lacking in this matter. It should be noted that the plea of guilty was entered after the admission of the DNA evidence. The said evidence clearly linked the appellant to the crime. This evidence was overwhelming. Accordingly it was an open and shut case against the appellant. His plea of guilty is accordingly a totally neutral factor. See **S v Barnard 2004(1) SACR 191 SCA** at 197.

16. Rape of child is a very serious matter. Much has been said about this issue as referred to by the learned magistrate in his judgment. I wish to refer to but one case in that regard, quoted by the magistrate, where the learned judge succinctly put it as follows in **S v Jansen 1999 (2) SACR 368 (C)** at 378g-379B:
"Rape of a child is an appalling and perverse abuse of male power. It strikes a blow at a very core of our claim to be a civilized society."
"The community is entitled to demand that those who perform such perverse act of terror be adequately punished, and that the punishment reflect the societal censure."
"It is utterly terrifying that we live in a society where children cannot play in the streets in any safety; where children are unable to grow up in the kind of climate which they should be able to demand in any decent society, namely in freedom and without fear. In short, our children must be able to develop their lives in an atmosphere which behoves any society which aspires to be an open and democratic one based on freedom, dignity and equality, the very touchstone of our Constitution. The community is entitled to demand of the police that they bring those who subvert these minimum aspirations before the courts and that the courts, in punishing such persons, should ensure that the sentence adequately reflect the censure which society should and does demand, as well as the retribution which it is entitled to extract."

17. The psychological impact of the offence on the complainant is serious. This is a material consideration, especially in view of the fact that the complainant was only seven at the time. See **S v Matiyi 2011(1) SACR 40 SCA**. (This decision was also referred to by the magistrate.)

18. The learned magistrate found no substantial and compelling circumstances justifying a lesser sentence than the prescribed minimum. It is correct in law that a court should not, for flimsy reasons, deviate from a prescribed minimum sentence. In this matter, however, it appears that the following circumstances may well be regarded as substantial and compelling reasons justifying a lesser sentence than the prescribed life imprisonment.

- (i) The appellant was, pertaining to the nature of the crime, a first offender;
- (ii) The complainant, although she suffered serious mental anxiety, was not physically injured.

19. Accordingly, I am of the opinion that the learned magistrate should have found that a lesser sentence than the prescribed life sentence should have been imposed. I therefore suggest that the appeal against sentence should succeed and that the sentence of life imprisonment be set aside. I propose that the following sentence should substitute the life sentence:

THE ACCUSED IS SENTENCED TO 22 YEARS IMPRISONMENT.

No order is made contra the provisions of section 103 of the Firearms Control Act no 66 of 2000. The accused remains unfit to possess a firearm.

In terms of the provisions of section 282 of the Criminal Procedure Act, the sentence is antedated to 31 March 2011.



A J BAM

ACTING JUDGE OF THE HIGH COURT

I agree, and it is so ordered



T J RAUHLINGA

JUDGE OF THE HIGH COURT