

IN THE HIGH COURT OF SOUTH AFRICA, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

AR 499/10

In the matter between:

DONAVAN CLIVE CURRIN

APPELLANT

v

THE STATE

RESPONDENT

JUDGMENT

Date of Hearing: 29 May 2012

Date of Judgment: 01 August 2012

Edited: 7 August 2012

[1] Two children, the complainant aged six years and his friend of seven years, were the only eyewitnesses who testified to the rape by the appellant who was convicted and sentenced to life imprisonment. This appeal is against both conviction and sentence.

[2] The state alleged that on 13 July 2009 near Empangeni in KwaZulu-Natal, the appellant was in his room with the complainant and other children who were watching films on television. The appellant was on the bed. The children were sitting on the floor. He grabbed the unsuspecting complainant and pulled him by his arm. Crying out, the complainant resisted. His friend, the second state witness, and another child pulled the complainant's legs to save him from the appellant. The appellant told them to 'voetsek'. He pushed the complainant's head down to suck his penis. He asked the complainant whether he liked that. The complainant replied that he did not. He went out to spit the thing that came out of the appellant's penis, which was 'not visible'.

[3] The second state witness reported the incident to family members. Shortly thereafter, the complainant's mother heard another parent calling the complainant. When the complainant returned she asked him why he had been called. From his response she realised that something was wrong. She asked him whether he had been naughty. He denied this. She went outside to the tap where she learnt of his encounter with the appellant from other children. She summoned the complainant. In the presence of the other

children she asked him whether he had been sucking the appellant's penis. When he denied doing so she asked why the children would lie. Then he admitted that the appellant had forcefully pulled him. He demonstrated his experience by sucking up and down on his finger. His mother, who was the third state witness, reported the matter to the police.

[4] The appellant's defence was a bare denial. He admitted entertaining the children in his room. He speculated that his fiancée's sister wanted him to vacate the room he shared with his fiancée because the sister had previously occupied the room which she had given up for him and his fiancée.

[5] On appeal, the appellant relied mainly on the contradictions between the two child witnesses. The trial court found that there were contradictions but correctly discounted them as immaterial. The contradictions related amongst other things to what the appellant wore, who was present and when the children left the room.

[6] The variances could have been a natural consequence of the loss of memory of the children over nine months since the incident. Another explanation could be that their evidence was not clarified. However, as an appellate court with the benefit of a transcript of the evidence, what appeared as contradictions to the trial court might not necessarily be so. The children might have observed different things at different stages of the incident. If they had been questioned further the apparent contradictions might have been clarified.

[7] With regard to what the appellant wore, the complainant testified that the appellant wore green and black sleeping shorts which did not have a button and that the appellant took out his penis through the 'holes your feet go through'. His witness testified that the appellant wore pants with a zip and a button and that his penis came out through the fly of the shorts. It appears from the record that at this point the witness demonstrated how the appellant took out his penis from the sleep shorts and rubbed it up and down. It is not clear whether the masturbation occurred on that day or on another occasion; the second witness might have been confusing the two occasions. The complainant did not testify about the masturbation. Either he did not notice it

if it happened on the same occasion; he might have forgotten about it; or, it might have happened on another occasion. All of these possibilities are reasonable alternatives to inferring that the difference in their evidence is a consequence of their mendacity.

[8] Regarding the variances as to whether the second state witness saw the appellant's penis and the complainant sucking it, the complainant's evidence was that the children left the room after the appellant told them to 'voetsek'. The second state witness's evidence was that they remained in the room and left with the complainant. This does not necessarily suggest that the state witnesses were mendacious. As the complainant was traumatised by having his head forced downwards to suck the appellant's penis he could hardly be expected to observe what everyone else in the room was doing at the time. He might have assumed that the other children had left the room when they were told to 'voetsek'.

[9] As to the colour of the appellant's shorts, it was put to the second state witness that the complainant testified that the shorts had no zip or button. As unusual as it is for boxer shorts to have a zip and button, the second state witness insisted that the appellant had sewn 'it' himself and that the complainant did not see the shorts clearly. Whether 'it' referred to the button, the zip or the shorts is not clear. He also insisted that the shorts were blue with cartoon pictures on it, not striped green and black. When alerted to this contradiction with the complainant's evidence, the second state witness responded that the complainant who was younger than him did not know colours.

[10] In this regard the isiZulu word for blue and green is 'Luhlaza'. Clarification for what isiZulu word was used could have explained the apparent contradiction about the colours. Further clarification as to whether the second state witness had in mind one or two separate incidents could also have explained the differences in the description of the shorts.

[11] On the material issues, the two children corroborated each other perfectly. Both confirmed that the appellant forcefully pulled the complainant and made him suck his penis against the complainant's will; the complainant

cried, resisted and spat out something outside.

[12] To reject the state's case and accept the appellant's version the court must find as a reasonable possibility that the adult members of the family of the appellant's fiancée manipulated the two children in the neighbourhood, who were not even members of that family, to lie that the appellant raped the complainant for the purpose of evicting the appellant from his accommodation. That any child could be manipulated to lie about a sensitive, embarrassing and sexual complaint is hard enough. To manipulate two children to corroborate each other would require considerable tutoring and rehearsal. No parents would allow their children to participate in such a bizarre conspiracy. None of the state witnesses, in particular the mother, were cross-examined about whether they had even discussed the evidence amongst themselves before testifying, let alone conspired to charge him falsely.

[13] The alleged purpose of the conspiracy is farfetched. Although the appellant bears no onus of proving the conspiracy, he has to present a credible defence to successfully resist a *prima facie* case against him. The appellant led no evidence to support his speculation as to why the children might be willing to lie against him when he was kind enough to entertain them with his films. He failed to cross-examine the state witnesses about whether his fiancée's sister wanted to eject him. Although he put his speculation to the state witnesses he did not cross-examine them to test the veracity of his version. His version was also tenuous. He was unsure as to which of the two sisters of his fiancée wanted to eject him. His doubt emerged only when he was under cross-examination. It was then that he elaborated for the first time that his suspicions were aroused when he saw the two sisters talking to 'these kids'. He later changed his version to the 'one kid', that is one of the three children who came to court. Incredulously, he could not recall whether that child had testified. Other than 'feeling' that something was not right about the sisters talking to the children, he proffered no better explanation as to why the children would implicate him falsely.

[14] This is clearly a case which calls for a common sense approach to assessing credibility. Trawling through the state's case to nitpick

contradictions in the evidence of two child witnesses is not the way the cautionary rule should apply to the evidence of child witnesses. Victims of sexual offences, especially young children have difficulty speaking about their sensitive, humiliating experiences. Consequently, the offences often never come to light or do so only many years later.¹ In fact, it is remarkable that the two children remembered as much as they did to testify eight months later about the complainant's ordeal. That they were able to do so tends to support the finding that it must have been a memorable event, unpleasant as it was.

[15] In the circumstances I find that the trial court correctly convicted the appellant.

[16] As for the sentence, the minimum sentence of life imprisonment was applied once the trial court found no substantial and compelling circumstances. In mitigation, the court considered that the appellant had no relevant previous convictions. He was 37 years. He had adopted his fiancée's daughter of nine years. He was temporarily employed as a panel beater. In rejecting these considerations as substantial and compelling the trial court applied the decisions in *S v Chapman* 1997 (3) SA 341 (SCA) at 345C – D and *S v E* 1992 (2) SACR 625 (A). The age of the complainant counted as an aggravating factor. So did the fact that the appellant committed the offence in the presence of other young children. The trial court correctly inferred that given the seriousness of rape on a child it is unrealistic to suppose that there would be no psychological harm. Quantifying this harm was not possible in this case in the absence of evidence. Referring to the constitutional rights of children in section 28 in the Bill of Rights, the trial court concluded that this was precisely the kind of matter the legislature had in mind for the imposition of life imprisonment.

[17] Section 51 of Act 105 of 1997 (the Minimum Sentence legislation) came into effect from 31 December 2007.² Section 53 expressed the intention of the legislature in enacting s 51 as increasing the severity of sentences for specified offences, for an initial period of two years, extended if necessary by

¹ *R v Smolinski* [2004] EWCA Crim 1270.

² Criminal Law (Sentencing) Amendment Act 38 of 2007 (commencement date 31 December 2007)

one year at a time.³ Since then it has been extended periodically until the Amendment Act⁴ rendered it permanent.

[18] The purpose of the legislation was not only to control the disparity in sentences which had been imposed in the past⁵ but also to bring down such crimes sharply,⁶ prevent them and protect their victims.⁷ In 2001 the Supreme Court of Appeal (SCA) anticipated in *S v Malgas* 2001 (1) SACR 469 (SCA) at 481I that the crimes for which minimum sentences were prescribed would elicit a 'severe, standardised and consistent response from the courts' unless there were 'truly convincing reasons for a different response'.⁸ Notwithstanding this exhortation sentencing continued to vary widely.

[19] Two months after *Malgas*, *Dodo*⁹ assured us that the minimum sentence legislation is not unconstitutional. The legislation does not deny the impartiality and independence of the judiciary¹⁰ nor does it denude the judiciary of its discretion. However, it does anticipate consistently heavier sentences.¹¹ In September 2008,¹² the SCA described the impact of the legislation thus:

'That it has indeed not been "business as usual" is reflected in the dramatic change in the profile of the prison population since the Act [the CLAA] took effect. Published figures indicate that the number of prisoners serving sentences of imprisonment between ten and 15 years increased almost three times from 1998 to 2008. Those serving sentences of life imprisonment increased over nine times.'

[20] In 2009, taking its cue from *Vilakazi* above, the CC reiterated¹³ that the legislation has a weighting effect leading to the imposition of consistently

3 Section 53(1) & (2) Criminal Law Amendment Act 105 of 1997 prior to its deletion by s 3 of Criminal Law (Sentencing) Amendment Act 38 of 2007; *S v Zitha and others* 1999 (2) SACR 404 at 409

4 Criminal Law (Sentencing) Amendment Act 38 of 2007

5 *S v Mthembu and another* case 365/98 delivered on 22 October 1998 per Leveson J (unreported) cited in *S v Zitha and others* 1999(2) SACR 404 at 408

6 *S v Zitha and others supra* at 409p7

7 *S v Matyityi* 2011 (1) 40 (SCA) para 22G

8 *Malgas v S* [2001] 3 All SA 220 (A) para 25

9 *Dodo v S* 2001 (1) SACR 594 (CC) para 41, 43, 52(1)

10 *Dodo v S supra* para 49

11 *Dodo v S* 2001 *supra* Para 18

12 *Vilakazi v S* [2008] 4 All SA 396 (SCA) para 51

13 In *[zRPz]Centre for Child Law v Minister of Justice and Constitutional Development and Others* 2009 (6) SA 632 (CC) para 19

heavier sentences.¹⁴ As to its effectiveness the CC observed:

‘One thing is beyond question: the minimum sentences have bitten hard, both in the courts’ approach to sentencing, and in outcome. More offenders have been sent to jail for longer periods.’¹⁵

[21] Taking its cue from *Dodo, Vilakazi and Malgas* the CC in *Centre for Child Law v Minister of Justice and Constitutional Development and Others*¹⁶ emphasised that

‘. . . in its very essence the minimum sentencing regime makes for tougher and longer sentences. While the hands of sentencing courts are not bound, they are at least loosely fettered.’

[22] More than 10 years after *Malgas*, the SCA, now differently constituted in *S v Matyityi*,¹⁷ reprimanded the trial court in that case and others for being willing all too frequently to deviate from the minimum sentences for the flimsiest of reasons.¹⁸ Underlying its exhortation for

‘predictable outcomes, not outcomes based on the whims of an individual judicial officer (as) foundational to the rule of law’

was its lament that

‘we still do not have a clear strategy for dealing inclusively with (the rights of victims of sexual crimes) either at a primary preventive or secondary protective level’.¹⁹

[23] Any strategy should acknowledge that rape is a world wide scourge. That courts should respond effectively to rape has been emphasised throughout the world. After surveying international law and citing several foreign cases the CC came to this conclusion in *Bothma v Els and Others* 2010 (2) SA 622 (CC). It referred to the Namibian High Court judgment in *S v M*,²⁰ which observed:

‘What once may have been unthinkable had now become a quotidian occurrence - a fact which the learned magistrate, as he did, was entitled to take judicial notice of. These crimes against the vulnerable

14 *Centre for Child Law v Minister of Justice and Constitutional Development* supra Para 17

15 *Centre for Child Law v Minister of Justice and Constitutional Development* supra Para 19

16 *Centre for Child Law v Minister of Justice and Constitutional Development* supra para 45

17 *S v Matyityi* 2011 (1) SACR 40 (SCA)

18 *S v Matyityi* supra para 19F-G, para 23C-D

19 *S v Matyityi* supra para 23F-G; para 22F-G

20 2007 (2) NR 434 (HC);

in our society evoke a sense of helplessness in the national character.¹²¹

[24] Struggling with the same scourge, the Namibian High Court resolved in *S v Rudath*²² that the courts of that country should impose deterrent sentences to discourage potential offenders. The criminal justice system should send out a clear message through effective prosecution that no entitlement existed to perpetrate rape.²³ In a similar vein the Botswana Court of Appeal lamented ‘the alarming increase in rape cases’ in *S v Montshwari*.²⁴

[25] What implications flow for the strategy for dealing with rape from the survey above of the progression of minimum sentence legislation? Legislatively speaking, the end of the road has been reached with the minimum sentence legislation ensconced indefinitely in our statutes. It imposes the highest sentence permissible under our Constitution, namely life imprisonment. Therefore in speaking of strategy, the scope for intervening legislatively to toughen penal provisions is limited. Standardised sentencing imperatives also leave little room for deviation from the minimum prescribed sentence. Even after finding substantial and compelling circumstances, the sentences imposed remain high.

[26] Notwithstanding the risk of long terms of imprisonment, there are no signs that the scourge is abating. Prison populations continue to grow signalling that reporting of rape is increasing, and that policing and prosecuting of rape is also improving. However, the numbers of rape cases passing through the courts have not decreased. In most cases, offenders proffer no explanation for committing rape, not even when they plead guilty. Unless the strategy for eliminating rape uncovers the reasons why rape occurs and addresses itself to those reasons, legislative and judicial interventions will continue to treat the symptoms not the causes of rape and other sexual offences. Policy makers and other strategists might therefore turn to socio-economic factors to find sustainable solutions.

21 *Bothma v Els and others* 2010 (2) SA 622 (CC) para 57

22 [1999] NAHC 13

23 *Bothma v Els and Others* supra para 46

24 [2008] BWCA 67 *S v Kaayuka* 2005 NR 201 (HC) at 206F - I.

[27] I considered referring this case back for evidence on the prospects of rehabilitation of the appellant but decided against this option firstly because the appellant was legally represented at his trial. When he pleaded he was aware that the minimum sentence legislation applied to him. He elected to plead not guilty as was his constitutional right. However, his choice is not without consequences. Having pleaded not guilty and accordingly having denied any culpability whatsoever, pleading in mitigation would have required him to make a tactical and psychological shift to humble himself for a lenient sentence. Making that shift without a plea of guilty and genuine remorse is difficult. In any event the appellant did not request a referral of the matter back to the trial court.

[28] The starting point for an appellate court considering sentence is to determine whether the court *a quo* misdirected itself. The court might also interfere if the minimum sentence is clearly disproportionate to the crime, the criminal and the legitimate needs of society.²⁵ As recounted above, the starting point for a sentencing court in a rape case is the minimum sentence. Section 51(1) read with Schedule 2 Part 1(b)(i) prescribes life imprisonment for rape of a person under the age of 16 years, unless a court is satisfied that substantial and compelling circumstances exist to justify a lesser sentence.²⁶ In this case neither the defence nor the prosecution advanced any evidence in mitigation or aggravation. The defence's approach was astoundingly casual. Tendering nothing more than the everyday factors²⁷ is now becoming routine and typical in crimes attracting minimum sentences. With the appellate courts narrowing down what constitutes substantial and compelling circumstances, in many cases there are none.

[29] I agree with the trial court. None of the 'everyday factors'²⁸ submitted in mitigation is sufficiently weighty, either on their own or collectively, to count as substantial and compelling circumstances. In fact, the aggravating factors far outweigh any mitigation submitted for the appellant. I accordingly find that

25 *Malgas v S* [2001] 3 All SA 220 (A) para 22, 25; *S v Karolia* [2004] 3 All SA 298 (SCA) para 26, 31-32; *S v Mahomotsa* 2002 (2) SACR 435 (SCA) para 14, 17, 18, 19; *Rammoko v Director of Public Prosecutions* [2002]

26 ss 51(3)(a) Criminal Law Amendment Act 105 of 1997

27 *S v Zitha and others supra* at 411D

28 *S v Zitha and Others supra* at 411D

the trial court did not misdirect itself.

[30] However, is the sentence of life imprisonment proportionate to the crime, the criminal, the legitimate needs of society and the interests of the complainant? Uppermost is the protection our constitution extends to children. Section 28(2) of the Constitution provides:

“A child’s best interests are of paramount importance in every matter concerning the child”

[31] The choice of words is strong and forceful, permitting few, if any, exceptions to dilute its efficacy. *Centre for Child Law*²⁹ interpreted this to mean that the child's interests are ‘more important than anything else, but not that everything else is unimportant’. By enacting s 28(2) the Bill of Rights recognises that ‘children embody society’s hope for, and its investment in, its own future.’³⁰ This is why it requires the State to afford them special nurturance and protection. The Constitution draws this sharp distinction between children and adults not out of sentimental considerations, but for practical reasons relating to children's greater physical and psychological vulnerability. Children's bodies are generally frailer, and their ability to make choices generally more constricted than those of adults. They are less able to protect themselves, more needful of protection, and less resourceful in self-maintenance than adults.³¹

[32] A constitutional right vested in both the children and the appellant is freedom and security of person. Section 12 states:

- “(i) everyone has the right to freedom and security of the person which includes the right ...
 - c) to be free from all forms of violence from either public or private sources.
 - d) not to be tortured in any way, and...
 - e) not to be treated or punished in a cruel, inhuman or degrading way.

29 *Centre for Child Law v Minister of Justice and Constitutional Development supra* para 29

30 *Centre for Child Law v Minister of Justice and Constitutional Development supra* para 37

31 *Centre for Child Law v Minister of Justice and Constitutional Development supra* at para 26

- (ii) Everyone has the right to bodily and psychological integrity which includes the right ...
 - b) to security in and control over their body"

[33] *S v Dodo* 2001 (1) SACR 594 (SCA) obliges courts to impose sentences that are consistent with the offender's right guaranteed by section 12(1)(e) of the Constitution.³² However, the doctrine of proportionality must also apply. In the context this translates to not only the period of punishment being proportionate to the offence³³ but also that the rights of the appellant and the children being balanced against each other. On the one hand the appellant violated the s 12 rights of the children (that is, the appellant and his friends who witnessed the rape) by raping the complainant. On the other hand, the appellant's freedom should be limited only to the extent that is justifiable. The correlativity between the rights of the appellant as a convict and the rights of the children as victims is that the more reprehensible the appellant's conduct and the greater the harm to the children, the more punitive must his sentence be.

[34] In *Masiya v Director of Public Prosecutions, Pretoria*, Nkabinde J classified rape as

'the most reprehensible form of sexual assault . . . a humiliating, degrading and brutal invasion of the dignity and the person of the survivor',³⁴

Generally in the case of rape, all forms of it, and specifically in the case of child rape, it is hard to conceive of situations that would ever justify deviation from the prescribed minimum sentence without emasculating the legislation.³⁵ Circumstances that count as substantial and compelling are few. Conduct of the offender that has a positive impact on the victim, or prevents a negative impact, such as a plea of guilty, counts as examples.

[35] Oral rape is one of the vilest and most revolting forms of rape. In this case the appellant compounded the revulsion by ejaculating in the

³² *S v Dodo* supra para 40 E-F

³³ *S v Dodo* supra para 37 F-G

³⁴ *Masiya v Director of Public Prosecutions, Pretoria and Another (Centre for Applied Legal Studies and Another, Amici Curiae)* [2007 \(5\) SA 30 \(CC\)](#) para 36.

³⁵ *S v Zitha* supra at 410

complainant's mouth. His conduct manifests a mindset that rates the dignity, bodily and psychological integrity of the child as zero. Nothing can undo the horror of this indelible imprint upon the minds of the complainant and his companions who witnessed his humiliation. By his conduct the appellant diminished his own worth and dignity as a human being. He cannot expect to enjoy the respect that he deliberately denied to the complainant and his companions. The sentence the court imposes must strive to restore that loss of dignity to them. To do so, the court necessarily denies to the appellant his right to equal treatment in the way it applies s 12 to him.

[36] The appellant violated the children's rights and the right to bodily integrity of the complainant. At ages six and seven the children were especially vulnerable. Children are absolute no-go zones for sexual activity of any kind. As an adult who had a child under his care, the appellant had to know that sex in any form with children is strictly prohibited in law and morality. Not only did the appellant blemish the childhood experience of the complainant but also of his friends who witnessed his trauma and humiliation. This blemish is not only the dignity denying sexual experience but also the secondary trauma of having to testify about it. No child should have to recount as one of their childhood experiences the misfortune of having to testify in a court of law.

[37] In the absence of substantial and compelling circumstances and the existence of strong aggravating factors the sentence of life imprisonment must prevail. The sentence is also not disproportionate in the face of the appellant treading in the no-go zone of having sex with a child.

I propose that the appeal be dismissed, and the conviction and sentence be upheld.

D. Pillay J

Henriques J

I agree with the result.

It is so ordered.

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