

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO:

A489/2005

DATE:

23 MAY 2008

5 In the matter between:

WELCOME LETLABIKA

Appellant

and

THE STATE:

Respondent

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J U D G M E N T

ZONDI, J.:

[1] The appellant was on 15 September 2002 convicted by
15 the Bellville Regional Court of attempted rape. It was
alleged in the charge sheet that on or about 23 April
2001 he unlawfully and intentionally attempted to rape a
three year old girl. The appellant was sentenced to 15
years' imprisonment. With the leave of the Court *a quo*
20 he now appeals to this Court against sentence only.

[2] The evidence which formed the basis of the appellant's
conviction and sentence was to the following effect. Mr
Truter testified that at about 18:15 on the evening of 23
25 April 2001, having arrived home and climbed out of his

car, he heard what sounded like a baby crying in the Port Jackson bushes next to his house. He immediately crossed the road and through the bushes he saw a man kneeling over and straddling a small child who was lying on the ground crying. The witness immediately shouted at the man, asking him what he was doing. The man jumped up and fled. The witness gave chase and caught him some 100 metres away from the crime scene.

10 [3] Ms Truter, who was with Mr Truter at the time, confirmed that Mr Truter had crossed the road to investigate what sounded like a baby crying. She testified that after hearing Mr Truter shouting and chasing someone, she walked across the road in the direction from where Mr Truter was shouting. On arrival at the bushes she stumbled upon a child, a three year old girl, standing up crying, with her panties around her ankles. She approached the child, reassured her and comforted her. She removed the child out of the bushes to a nearby road where she waited for the arrival of the police. The appellant was subsequently arrested by the police.

[4] Before sentencing the appellant to 15 years' imprisonment, the magistrate took into account the fact that the appellant was a first offender, 30 years old, that

he had two minor children of nine and 14 years old respectively, that he was employed and that he had spent about 18 months in prison awaiting the matter to be finalised.

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[5] The attack on the sentence is based on the grounds that the magistrate erred in over-emphasising the seriousness of the offence and the needs of society, not attaching sufficient weight to the personal circumstances of the appellant and that a sentence of 15 years' imprisonment is so shockingly inappropriate that no reasonable Court would impose it.

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[6] It is trite law that punishment is pre-eminently a matter for the discretion of a trial court and that the appeal court would be slow to interfere with that discretion unless that discretion was not judicially and properly exercised. The question is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate. However, not every misdirection will justify the court of appeal's interference with the sentence. The misdirection must be a material one and a misdirection would be material if the trial court misconstrued the facts, failed to take cognisance of factors that should have been taken into account or it has

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under-emphasised the accused's personal circumstances in relation to other relevant factors.

5 [7] Returning to the matter *in casu*, the question here is whether the magistrate committed any misdirection in his evaluation of an appropriate sentence. It is true that the magistrate referred to the appellant's personal circumstances but he did not attach any weight to such factors. There is no doubt about the seriousness of the offence and the fact that it induces a strong moral indignation. The fact that the appellant was only convicted of attempted rape appears to have escaped the magistrate's mind.

15 [8] The accused before him was the accused convicted of attempted rape. The magistrate was correct in imposing a heavy sentence for the offence but in imposing a sentence he had to bear in mind that he was dealing with an attempted rape. In failing to have regard to that fact as well as the fact that the appellant was a first offender who was employed and had dependents, the magistrate misdirected himself. The appellant has a prospect of rehabilitation, as Ms Fitzpatrick argued, and the magistrate was wrong in imposing a sentence which only

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emphasised the retributive and preventative aspects of punishment.

[9] In the circumstances, this Court sitting as a Court of appeal, is entitled to interfere with the sentence imposed by the magistrate. Having regard to the seriousness of the offence and the interests of the community a sentence of 15 years' imprisonment is appropriate but I would suspend a portion of it in the light of the appellant's personal circumstances.

[10] In the circumstances I make the following order:

1. The appeal against sentence succeeds. The sentence of 15 years' imprisonment is set aside and substituted with the following:

"1.1 The accused is sentenced to 15 years' imprisonment, three years of which are suspended for five years on condition that during the period of suspension the accused is not convicted or rape, indecent assault or the statutory offences under the provision of section 14 of the Sexual Offences Act of 1957;

1.2 the sentence is antedated to 11 September 2002.



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ZONDI, J

VAN REENEN, J. I agree and it is so ordered.

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VAN REENEN, J