

REPUBLIC OF SOUTH AFRICA



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

CASE NO: A151/2020

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
22 April 2025 DATE  SIGNATURE	

In the matter between:

WERNER VAN ROOYEN

APPELLANT

and

THE STATE

RESPONDENT

J U D G M E N T

JOHNSON AJ (Neukircher J concurring)

[1] The Appellant, an adult male, was charged in the regional court, Pretoria of 11 sexual offences. Counts 1 – 10 were allegedly committed during 2007, and count 11 during 2009. The offences were grouped into four incidents: counts 1

– 6 were grouped into the first incident, counts 7 – 9 into the second incident, count 10 into the third incident and count 11 into the fourth incident:

1.1 count 1 is a contravention of section 24A (4) (b) of the Films and Publications Act¹ in that the appellant exhibiting any film, game or publication to the complainant, a 12-year-old boy, which contained depictions or descriptions or scenes of explicit sexually conduct.

1.2 counts 2 – 10 were contraventions of the Sexual Offences Act² ("The Act"). He allegedly contravened –

1.2.1 section 14 (1) (c) (1 count) in that he solicited or enticed the complainant to commit an indecent act by displaying his penis to the complainant (count 2);

1.2.2 section 14 (1) (b) (8 counts) in that he committed immoral or indecent acts by having oral sex with the complainant by placing his penis in the mouth of the complainant (counts 3, 4, 7 and 8), having anal sex by placing his penis in the complainant's anus (count 5); and in that the complainant masturbated the appellant's penis (count 6, 9 and 10).

1.3 count 11 is a contravention of section 16 (1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act³, in that he had consensual oral sex with the 14-year-old complainant, by taking the complainant's penis into his mouth during 2009.

[2] He was represented during the proceedings by Advocate Kilian, who also represented him in the appeal, and he pleaded not guilty to all the counts on 22 August 2012. He was however found guilty on counts 1, 3, 4, 5, 7, 8, 10 and 11, acquitted on counts 2, 6 and 9 on 14 September 2016 and sentenced on 30 March 2017 as follows:

2.1 on count 1: 3 years' imprisonment;

2.2 on counts 3, 4, 7 and 8: 18 months' imprisonment on each count;

2.3 on count 5: 5 years' imprisonment;

2.4 on count 10: 6 months' imprisonment;

¹ Act 65 of 1996

² Act 23 of 1957

³ Act 32 of 2007

2.5 on Count 11: 10 months' imprisonment;

2.6 it was ordered that the sentences on counts 10 and 11 should run concurrently with the sentence on count 8. The effective sentence is therefore 15 years' imprisonment.

[3] He applied for leave to appeal against the convictions and sentences immediately after the sentencing was concluded. The application was refused in respect of the convictions, but granted in respect on the sentences.

[4] He thereafter lodged a petition to the Judge President for leave to appeal against the convictions, which application was refused on 19 March 2020.

[5] Not satisfied with the outcome, he approached the Supreme Court of Appeal for special leave to appeal the convictions, which was also refused on 30 May 2022. As a result, this appeal is one as against sentence only.

[6] The application for leave to appeal the sentences are based on the following grounds, namely that the court:

6.1 over emphasized the elements of deterrence and retaliation;

6.2 failed to consider other available sentencing options;

6.3 over emphasized the seriousness of the offences;

6.4 failed to consider the effect of imprisonment on the appellant and other members of his family; and

6.5 failed to consider that the complainant and his mother did not require the appellant to be imprisoned.

[7] The sentencing discretion is that of the trial court and a court of appeal does not have an unfettered discretion to interfere with the sentence imposed by the trial court.⁴ Only where the discretion of the trial court was not exercised judicially or reasonably will a court of appeal be entitled to interfere.

⁴ *S v Anderson* 1964 (3) SA 494 (A) 495; *S v Whitehead* 1970 (4) SA 424 (A) 435; *S v Giannoulis* 1975 (4) SA 867 (A) 868; *S v M* 1976 (3) SA 644 (A) 648 et seq; *S v Pillay* 1977 (4) SA 531 (A); *S v Rabie* 1975 (4) SA 855 (A)

[8] The sentence will not be altered unless it is held that no reasonable man ought to have imposed such a sentence, that the sentence is totally out of proportion to the gravity or magnitude of the offence, that the sentence evokes a feeling of shock or outrage, that the sentence is grossly excessive or insufficient, that the trial judge had not exercised his discretion properly, or that it was in the interest of justice to alter it.⁵

[9] The test on appeal in relation to sentence is “*whether the court a quo misdirected itself by the sentence imposed or if there is a disparity between the sentence of the trial court and the sentence which the Appellate Court would have imposed had it been the trial court that it so marked that it can properly be described as shockingly, startling or disturbingly inappropriate*”.⁶

[10] The question is essentially whether, on a consideration of the particular facts of the case, the sentence imposed is proportionate to the offence, with reference to the nature of the offence, the interests of society and the circumstances of the offender. A court of appeal will only interfere where it is apparent that the discretion of the trial court was not exercised judicially or reasonably.

[11] In *S v Pillay*⁷ the Court held that the word “misdirection” simply means an error committed by the court in determining or applying the facts in assessing the appropriate sentence. As the essential enquiry on appeal against sentence is not whether the sentence was right or wrong, but whether the court *ta quo* exercised its discretion properly and judicially; a mere misdirection is not by itself sufficient to entitle the appeal court to interfere with the sentence. The misdirection must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the court did not exercise its discretion at all or exercised it improperly or unreasonably. Such a misdirection is usually and conveniently termed one that vitiates the court’s discretion on sentence.

⁵ *S v Fhetani* 2007 (2) SACR 590 (SCA) at [5]; *Director of Public Prosecutions, KwaZulu-Natal v P* 2006 (1) SACR 243 (SCA) 254c–f; *S v Anderson* 1964 (3) SA 494 (A) at 495D–E.

⁶ *S v Van de Venter* 2011 (1) SACR 238 (SCA) at para [14].

⁷ 1977 (4) SA 531 (A) at 535 E–F.

[12] The trial magistrate considered the personal circumstances of the appellant and weighed it against the seriousness of the offences on the under aged complainant. He gave due weight to the interest of society and in my view the judgment did not overemphasize it. In my view, the gravity of the offences in these circumstances outweighs the personal circumstances of the appellant.⁸

[13] The fact that the appellant did not use any violence or injure the complainant to achieve his aim, is not a mitigating factor in the present circumstances.⁹

[14] The appellant alleged that the trial magistrate was under the erroneous impression that he could impose a sentence of life imprisonment, hence the harsh sentence. The magistrate did state: “[y]ou are fortunate that the minimum sentence was not applicable Mr van Rooyen otherwise the Court would have been forced to send you to imprisonment for life today”.¹⁰ However, this sentence, taken out of the context of the judgment as a whole, cannot sustain an argument that the magistrate, when imposing the sentence, imposed a harsh sentence as he was of the view that a life sentence was applicable (or should have been applicable). On the contrary, the record shows that he was acutely aware of the fact that it was not applicable.

[15] It is alleged that the learned regional magistrate ignored the probation officer’s recommendation that: “Correctional supervision when coupled with appropriate conditions could be a suitably severe sentence even for serious offenders.” That is an incorrect assumption because the court in its judgment on sentence, specifically mentioned that he had taken the reports that were handed into account – this includes the correctional supervision recommendation. The reasoning that follows, sets out the magistrate’s reasons for the sentence that was imposed. It is in the circumstances also intolerable to allege that the court failed to consider the effect of imprisonment on the appellant and his family, as these are mentioned in the reports that were considered by the court at the time.

⁸ *Director of Public Prosecutions, Grahamstown v Peli* 2018 (2) SACR 1 (SCA).

⁹ *S v M* 2007(2) SACR 60 (W).

¹⁰ At p009-70 of the record.

[16] The appellant argued that it was a mitigating factor that the complainant was not forced to partake in the sexual offences, that he enjoyed it, and that he had previously experimented with sexual acts. I do not agree with this submission: the appellant knew of these facts and took advantage of the situation to satisfy his own personal sexual needs. This cannot be regarded as diminishing his moral blameworthiness. In fact, the point is that it appears clearly that he exploited the position that he was in to commit the offences. The fact that he cared for the child, is by no means a mitigating factor in the light of the frequency of the commission of the offences.

[17] The complainant's personal feelings towards the appellant after the incidents cannot be ignored. Although he admitted that he did not resist the conduct of the appellant and acted freely, he told the appellant at some stage on their way home, when he wanted to sexually assault him again, that he did not want to engage in such conduct any more. Nothing happened thereafter. The evidence was also that the complainant was depressed and felt shy and guilty over what had happened. In cross-examination he testified that the appellant's presence thereafter upset him and that he was not comfortable in his presence. The negative impact of the appellant's sexual assaults on the complainant, for which the appellant took no responsibility, is an aggravating factor.

[18] Given that the appellant has shown no remorse whatsoever for his conduct or the effect it had on the complainant, the argument that he can be rehabilitated cannot be accepted.

[19] It was argued that another court would have arrived at a lesser sentence than the trial court, but this is not the test. For this court to interfere with the sentence it must first find a misdirection by the learned magistrate.

[20] This court takes note of the fact that the learned magistrate took into consideration during sentencing that the appellant forced the complainant to touch his penis - this is a misdirection as there was no such evidence.

[21] Of importance is that, although the appellant faced 11 counts, the incidents were grouped into four incidents, as the offences were committed during the different incidents. Counts 1 – 6 were grouped into the first incident, counts 7 – 9 into the second incident, count 10 into the third incident and count 11 into the fourth incident.

[22] When the severity of the sentence is considered, the court must have regard to the totality of the offender's criminal conduct or behavior.¹¹

[23] A sentencing court must be aware of the extent of a cumulative effect of a sentence where an appellant is sentenced for various counts. Where the sentences were for imprisonment, a court has an obligation to consider whether the cumulative period of imprisonment is appropriate, given all the circumstances of the case or whether the “... *aggregate penalty is not too severe*”.¹² If the aggregate period of imprisonment is deemed to be too severe, a court should take “*such measures as are required*” to determine an appropriate sentence.¹³

[24] If a sentencing court fails to properly take the cumulative effect into account, it is regarded as a misdirection.¹⁴ If the eventual aggregate sentence be too severe or out of proportion to what is deserved by an offender, a court of appeal shall be entitled to intervene.¹⁵

[25] In our judgement the aggregate sentence of 14 years' imprisonment is too harsh and the appeal must succeed in part.

ORDER

[26] In the result, the following order is made:

1. The appeal against sentence on count 1 is upheld and set aside and replaced with the sentence set out in paragraph 3.1 below.

¹¹ *S v Muller* 2012 (2) SACR 545 (SCA); *S v Mthetwa* 2015 (1) SACR 302 (GP) at par 21.

¹² *S v Muller* (supra) at par 9.

¹³ *S v Mabaso* 2014 (1) SACR 299 (KZP); *S v Mafoho* 2013 (2) SACR 179 (SCA).

¹⁴ *S v WV* 2013 (1) SACR 204 (GNP) at par 45; *S v BF* 2012 (1) SACR (SCA) at par 14.

¹⁵ *S v Mthetwa* 2015 (1) SACR 302 (GP); *S Qamata* 1997 (1) SACR 479 (E) at 483.

2. The appeal against the sentences imposed on counts 3, 4, 5, 7, 10 and 11 is refused.
3. In order to mitigate the cumulative effect of the individual sentences, the sentences imposed on counts 1, 3, 4, 5, 7, 10 and 11 shall be served as follows:
 - 3.1 the sentence imposed count 1 is replaced with a sentence of 12 months' imprisonment;
 - 3.2 the sentences of 18 months per count imposed on counts 3, 4, 7 and 8 are confirmed;
 - 3.3 the sentence of 5 years' imprisonment imposed on count 5 is confirmed;
 - 3.4 the sentence of 6 months' imprisonment imposed on count 10 is confirmed;
 - 3.5 the sentence of 10 months' imprisonment imposed on count 11 is confirmed;
4. The sentences imposed on counts 10 and 11 are ordered to run concurrently with the sentences imposed on count 1, 3, 4, 7 and 8.
5. The effective sentence is consequently 6 years and 6 months' imprisonment.



JOHNSON A.J.
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION

I agree and it is so ordered



NEUKIRCHER J.

JUDGE OF THE HIGH COURT**GAUTENG DIVISION**

This judgment was prepared and authored by the Judges whose names are reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 22 April 2025.

Appearances

Counsel for appellant : Adv M Killian

Instructed by : Vermaak Beeslaar Attorneys Inc

Counsel for respondent : Adv EV Sihlangu

Instructed by : National Direction of Public Prosecutions

Date of hearing : 16 April 2025

Date of judgment : 22 April 2025