

SOUTH AFRICA / JUDGMENT

Arries v S (CA&R55/17) [2017]

ZANCHC 57 (15 September 2017)

[2017] ZANCHC 57

COURT

Northern Cape High Court, Kimberley

BEFORE

Tlaletsi, Lever

CASE / FILE NUMBER

CA&R 55/17

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HIGH
COURT OF SOUTH AFRICA
[NORTHERN
CAPE HIGH COURT, KIMBERLEY]
Case
No: CA&R 55/17
In

the matter between:

DANIEL
ARRIES
Appellant
V
THE
STATE Respondent

Heard:

14 August 2017

Delivered:

15 September 2017

Coram:

Tlaletsi AJP et Lever AJ
APPEAL

JUDGMENT

Tlaletsi AJP

- [1] The appellant was convicted in the regional court, Carnavon on a charge of rape in contravention of section 3 of Act 32 of 2007 on 02 August 2016. The victim is a person who is mentally disabled as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, read with Part 1 of Schedule 2 as envisaged by section 51(1) of the Criminal Law Amendment Act 105 of 1997 (the Act). The rape further involved the infliction of grievous bodily harm.
- [2] Having found no substantial and compelling circumstances as envisaged in section 51(3)(a) of the Act, the appellant was sentenced to imprisonment for life. The appellant is appealing against his sentence of life imprisonment.
- [3] The ground of appeal relied upon by the appellant is that the trial court erred in not finding that there existed substantial and compelling circumstances which would justify the imposition of a lesser sentence than the prescribed sentence of life imprisonment.

For a better understanding of the issue, a brief factual background that led to appellant's conviction and sentence is apposite.

- [4] The complainant, aged 27 years old at the time, was described by Dr Piotrowski, a Specialist Psychiatrist, as someone with impaired

cognitive development in early childhood with prominent speech defect. Her ability to understand, think verbalise her thoughts is impaired. Her ability to appreciate the nature and reasonable foreseeable consequences of a sexual act is restricted. Although she was aged 27 years, she behaved and functioned like a child aged 7-9 years.

- [5] Dr Pitorowski's evidence was corroborated by Mrs Viviers who lived with the complaint for the past eight years. She testified that the victim could do nothing for herself. She has to rely on them for decisions and instructions to do basic things such as washing herself and what to wear. She always plays with her own seven year old daughter and her friends. She does not keep the company of older people unless specifically called to join them. Ms Viviers confirmed that the appellant knew the complainant and was fully aware of her condition as he had been to her house on several occasions. Although this aspect was initially disputed by the appellant, he later admitted in cross-examination that he knew her and understood her condition.
- [6] The complainant was on 28 June 2014 at a tavern in Carnavon where she partook in consumption of alcohol. The appellant was also at the same tavern but was not in the company of the complainant. He also had some alcohol to consume. Later, the complainant left for her home. On her way in an open veld, she was approached by the appellant who offered her some alcohol and invited her to accompany him. He also requested her to have

sexual intercourse with him. She refused. He then attacked her by kicking her on the eye and lips and threw her onto the ground. He struck her with a stone on her hip. He pinned her on the ground, undressed her and had non-consensual sexual intercourse with her.

[7] Although the appellant's version in the court a quo was that he had consensual intercourse with the victim, his version was rejected as false and was convicted as charged.

[8] Appellant's personal circumstances are as follows: He was 25 years old, not married and had no dependants. He attended school until standard 8 and worked on a farm earning R1800-00 per month. Regarding his criminal record he had two relevant previous

convictions of Assault with intent to cause grievous bodily harm and robbery committed on 3 March 2010 and 24 July 2010 respectively. For the assault he was sentenced to a fine of R3000-00 or 6 months imprisonment which was wholly suspended for 5 years on some conditions. For the robbery he was sentenced to 12 months imprisonment. On 21 October 2013 he was convicted of possession of dagga and was cautioned and discharged.

[9] Mr Van Tonder, who appeared on behalf of the appellant before us, contended that although not much can be said about the appellant's

personal circumstances being favourable, he submitted that the particular facts of the case amounts to substantial and compelling

circumstances. He submitted that this is a case where both parties had been to a tavern and had consumed alcohol.

[10] The real and only issue in this appeal is whether the court a quo erred in not finding that the facts put forward by the appellant

amounted to substantial and compelling circumstances justifying a sentence other than life imprisonment. That being the case, it is important to consider what

powers this Court has in an appeal limited to the issue of the presence or otherwise, of substantial and compelling circumstances.

[11] In *S v PB* [1] the Supreme Court of Appeal expressed itself on the correct approach by a court on appeal as follows:

"[20] What then is the correct approach by a court on appeal against a sentence imposed in terms of the Act? Can the appellate court interfere with such a sentence imposed by the trial court's exercising its discretion properly, simply because it is not the sentence which it would have imposed or that it finds shocking? The approach to an appeal on sentence imposed in terms of the Act should, in my view, be different to an approach to other sentences imposed under the ordinary sentencing regime. This, in my view, is so because the minimum sentences to be imposed are ordained by the Act. They cannot be departed from lightly or for flimsy reasons. It follows therefore that a proper enquiry on appeal is whether the facts which were considered by the sentencing court are substantial and compelling, or not."

- [12] My understanding of what the Supreme Court of Appeal is directing is that the court of appeal is required to make an inquiry itself by considering whether the facts considered by the sentencing court were indeed substantial or compelling. In my view in undertaking this exercise, the appellate court should not limit itself to the facts raised by the sentencing court when it arrived at its conclusion. The approach should be to determine whether on a proper consideration of all the facts and circumstances of the case, substantial and compelling circumstances are present or not.[2] The inquiry is that of correctness.
- [13] In determining whether circumstances in a particular case are substantial and compelling, a court is required to assess the "ultimate impact of all the circumstances relevant to sentencing measured against the composite yardstick ('substantial and compelling') and must be such as cumulatively justify a departure from the standardised response that the legislature has ordained." [3]
- [14] A comparative analysis of previous cases in which substantial and compelling circumstances were found to exist or not, is a useful guide to a sentencing court. However, the remarks by the Supreme Court of Appeal in *S v PB* (supra) are instructive. The Supreme Court Appeal warned that:

"[16] What then is the value of such a comparative analysis of previous cases. Can this trend, if it can be called that, qualify to be elevated to the status of a precedent which is intended to bind all the courts which have to consider sentence whilst sentencing an accused who has been convicted of rape read with s 51(1) of the Act? Is a court expected, without proper consideration of the peculiar facts of this case, to slavishly follow the so-called trend not to impose life imprisonment for rape? By doing so, a court would be acting improperly and abdicating its duty and discretion to consider sentence untrammelled by sentences imposed by another court, albeit in a similar case. It follows in my view that such a sentence would be appealable on the basis that the sentencing court either failed to exercise its sentencing discretion properly or at all. Commenting on the utility of such a comparative approach Marais JA in *S v Malgas* 2001 (1) SACR 469 (SCA) (2001

(2) SA 1222; [2001] 3 All SA 220)

para 21 said the following:

'It would be foolish of course, to refuse to acknowledge that there is an abiding reality which cannot be wished away, namely, an

understandable tendency for a court to use, even if only as a starting point, past sentencing patterns as a provisional standard for comparison when deciding whether a prescribed sentence should be regarded as unjust. To attempt to deny a court the right to have any regard whatsoever to past sentencing patterns when deciding whether a prescribed sentence is in the circumstances of a particular case manifestly unjust is tantamount to expecting someone who has not been allowed to see the colour blue to appreciate and gauge the extent to which the colour dark blue differs from it. As long as it is appreciated that the mere existence of some discrepancy between

them cannot be the sole criteria and something more than that is needed to justify departure, no great harm will be done.'

[17] Van den Heever JA put it more succinctly in *S v D* 1995

(1) SACR 259 (A) at 260e when she stated that: 'I agree that decided cases on sentence provide guidelines not straight jackets.' I also agree with this correct approach.'^[4]

[15] To summarise, the Supreme Court of Appeal warns that findings in prior cases should not be elevated to the status of binding

precedents or benchmarks. It is the legal principles applicable in those cases that should be understood and carefully applied to the facts of a case at hand and not how the principle was applied in those cases. This is fundamental because each case has to be decided on its peculiar circumstances.

[16]

Considering the aggravating features of this case, the following come to the fore: The complainant was three years older than the appellant; mentally impaired, a condition that made her more vulnerable. She was known to the appellant. One would have expected the appellant to see a need to protect her because of her known vulnerability rather than to prey on her. She sustained the following injuries at the hands of the appellant: Haemotama to the right eye; bruising and a wound to the lower lip, and bruising of the left and right back. Had it not been for the fact that she was seen limping by Ms Viviers the appellant would have got away with this crime because she only reported the incident the following day when confronted by Ms Viviers. The brutal assault of the complainant was unnecessary. This goes to show how disrespectful the appellant was to the complainant.

[17] The appellant showed no remorse. He instead fabricated a false defence subjecting the mentally impaired complainant to secondary

humiliation and suffering of having to attend court and relate in detail what happened to her. An intermediary had to be used to obtain her evidence. The appellant was not prepared to take responsibility for what he had done.

[18] Sexual abuse of women is a serious problem in our country. Women in general and mentally retarded women and children in particular, are the most vulnerable members of the society that need to be protected. In *S v SMM*[5], the Supreme Court of Appeal made the following insightful remarks which are equally applicably to mentally retarded women:

"[14] Our country is plainly facing a crisis of epidemic proportions in respect of rape, particularly of young children. The rape statistics induce a sense of shock and disbelief. The concomitant violence in many rape incidents engenders resentment, anger and outrage. Government has introduced various programmes to stem the tide, but the sexual abuse of particularly women and children continues unabated. In *S v RO* I referred to this extremely worrying social malaise, to the latest statistics at that time in respect of sexual abuse of children and also to the disturbingly

increasing phenomenon of sexual abuse within the family context. If anything, the picture looks even gloomier now, three years down the line. The public is rightly outraged by this rampant scourge. There is consequently increasing pressure on our courts to impose harsher sentences primarily, as far as the public is concerned, to exact retribution and to deter further criminal conduct. It is trite that retribution is but one of the objectives of sentencing. It is also trite that in certain cases retribution will play a more prominent role than the other sentencing objectives. But one cannot only sentence to satisfy public demand for revenge - the other sentencing objectives, including rehabilitation, can never be discarded altogether, in order to attain a balanced, effective sentence. The much-quoted Zinn dictum remains the leading authority on the topic. Rumpff JA's well-known reference to the triad of factors warranting consideration in sentencing, namely the offender, the crime and the interests of society, epitomises the very essence of a balanced, effective sentence which meets all the sentencing objectives. More than 40 years ago Schreiner JA had the following to say about the balance which has to be struck:

'While the deterrent effect of punishment has remained as important as ever, it is, I think, correct to say that the retributive aspect has tended to yield ground to the aspects of prevention and correction. That is no doubt a good thing. But the element of retribution, historically important, is by no means absent from the modern approach. It is not wrong that the natural indignation of interested persons and of the community at large should receive some recognition in the sentences that Courts impose, and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands.' " [6]

[19] In my view the aggravating circumstances by far outweigh the appellant's personal circumstances and the result meet the threshold

set out in s 51(3)(a) of the Act to rank as not being substantial and compelling. The court a quo, therefore, was correct in concluding that there were no substantial and compelling circumstances justifying a departure from the prescribed sentence of life imprisonment. The appeal against sentence falls to be dismissed.

[20] In the result the following order is made:

"The appeal against sentence of life imprisonment is dismissed."

L. P TLALETSI

ACTING JUDGE PRESIDENT

Northern Cape High Court, Kimberley

I concur.

L. G LEVER

ACTING JUDGE

Counsel:

For the Applicant: Mr. A. Van Tonder

Instructed by:

Legal Aid Board SA, Kimberley

For the Respondent: Adv. A. Van Heerden

Instructed by:

Director Public Prosecutions

[1] S v PB 2013

(2) SACR 533 SCA; Phillips v The State Case No: CA&R 80/2007 Northern Cape High Court, - delivered on 12/08/2016 (unreported)

[2] See also S v GK 2013 (2) SACR 505 (WCC) para 5-7

[3] S v Malgas 2001

(1) S ACR 469 (SCA).

[4] S v PD (supra) at p 538 b-h.

[5] S v SMM 2013

(2) SACR 292 (SCA) para 14.

[6] R v Karg 1961

(1) SA 231 (A) at 236 A-B. S v Mafu 1992

(2) SACR 494 (A) at 497b-d.

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