

SOUTH AFRICA / JUDGMENT

Botha v The State (546/2021) [2022] ZASCA 87 (8 June 2022)

[2022] ZASCA 87

COURT

Supreme Court of Appeal

BEFORE

Molemela, Carelse, Hughes, Meyer, Salie-Hlophe

CASE / FILE NUMBER

546/2021

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 546/2021

In the matter between:

FREDERICK CORNELIUS BOTHA

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: Botha v The State (546/2021) [2022] ZASCA 87 (08 June 2022)

Coram: MOLEMELA, CARELSE and HUGHES JJA, and MEYER and SALIE-HLOPHE AJJA

Heard: 13 May 2022

Delivered: 08 June 2022

Summary: Criminal law and procedure - sentence – special leave cumulative effect totalling 36 years' imprisonment

- where appellant convicted of similar multiple offences: circumstances in which an appeal court will interfere: cumulative effect of sentences in this case does not induce a sense of shock- interference not warranted

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Van der Schyff J with Maritz AJ sitting as a court of appeal)

The appeal against the sentences imposed is dismissed.

Carelse JA (Molemela and Hughes JJA, Meyer and Salie-Hlophe AJJA concurring):

Introduction

[1] At issue in this appeal is whether the cumulative effect of a sentence of 36 years' imprisonment imposed by the Gauteng Division of the High Court, Pretoria (the high court) for a range of sexual offences, is shockingly or disturbingly inappropriate: pertinently, whether this Court should interfere with the sentences imposed by making an order in terms of s 280 of the Criminal Procedure Act 51 of 1977 (CPA).[1] This appeal brings into sharp focus the serving of concurrent sentences. The rationale for such orders is that a sentencing court

should be mindful of the cumulative (and sometimes harsh) impact of sentences where an offender has been convicted of multiple offences.

Background

Facts

- [2] The appellant was convicted in the regional court (Pretoria) on the following charges: three counts of indecent assault in contravention of s 14(1) of the Sexual Offences Act 23 of 1957 against a boy under the age 16 years;[2] six counts of sexual assault in contravention of s 5(1) of the Criminal Law (Sexual Offences And Related Matters) Amendment Act 32 of 2007 - thus committing an act of sexual violation against a boy under the age of 16;[3] and three counts of rape
- thus committing sexual penetration in contravention of s 3 of Act 32 of 2007 against a boy under the age of 16.[4] The appellant was sentenced to three terms of life imprisonment for his convictions of rape, three years' imprisonment for each conviction of indecent assault, and five years' imprisonment for each conviction of sexual assault.
- [3] In terms of s 309(1)(a) of the CPA,[5] the appellant became entitled to an automatic right of appeal against both his convictions and sentences to the high court. On appeal to the high court, the convictions and sentences in respect of counts one, four, five, eight and eleven were set aside. The conviction in respect of count six (rape) was set aside and replaced with common assault. In addition, the conviction in respect of count seven (rape) was set aside and replaced with assault with intent to do grievous bodily harm.

- [4] The high court sentenced the appellant as follows: three years' imprisonment for each of the two indecent assault convictions;[6] five years' imprisonment for the conviction of assault; [7] 10 years' imprisonment for the conviction of assault with intent to cause grievous bodily harm;[8] and five years' imprisonment for each of the three convictions of sexual assault.[9] The high court ordered that the sentences imposed should not run concurrently without providing any reasons. Accordingly, the cumulative effective sentence imposed was 36 years' imprisonment which was antedated to the date of sentencing by the trial court (9 October 2017).
- [5] A summary of the relevant evidence led at the trial is as follows: Over a period of five years, the appellant sexually abused the complainant, a minor boy. The sexual abuse started when the complainant was only six years old. Because the complainant's parents were employed during the school holidays, he would be sent to his paternal grandmother's house, where the appellant, who lived with the complainant's paternal grandmother, offered to take care of him when his paternal grandmother was at work. It was mostly during these times when the complainant's paternal grandmother was at work that the appellant started to groom the complainant, which eventually led to the sexual abuse of the complainant. In April 2012, the complainant found the courage to report to his mother that he had been repeatedly sexually abused by the appellant.
- [6] Most of the incidents of sexual abuse took place in the sitting room whilst the complainant was watching television. The complainant gave a graphic and chilling account of the sexual abuse. At first, the appellant instructed the complainant to touch the appellant's private parts, and in turn, the appellant would do the same to him. There were times when the appellant instructed the complainant to insert his penis into the complainant's mouth. The complainant conceded that the appellant penetrated him anally once and was uncertain whether this occurred in 2007 or 2008. The complainant described the act of penetration as follows: '... in and out, he moved forwards and backwards ...' and his description of the other forms of sexual abuse amounts to masturbation. In addition, the appellant instructed him to have sexual intercourse with other children whilst the appellant watched them. The complainant's mother took him to a psychologist after she discovered that the complainant had been involved in sexual acts with other children. The appellant threatened the complainant that if he were to tell anyone, the appellant would tell his parents that he was engaging in sexual activity with other children.
- [7] Throughout cross-examination the complainant repeatedly stated that he had been afraid to tell his parents what the appellant had been doing to him because the appellant had threatened to kill his paternal grandmother and his parents. In about 2011, the complainant's mother had another child. The appellant told the complainant that his intention was that as soon as his younger sibling turned a year old, the appellant would sexually abuse his younger sibling as well. This threat caused the complainant to tell his parents that the appellant had been sexually abusing him over a five-year period. The medical doctor testified that the minor complainant suffered trauma to the foreskin of his

penis due to sexual assault, and as a result had to undergo a circumcision. The appellant was arrested, and, as I have outlined in the introductory part of this judgment, subsequently convicted and sentenced.

[8] In *S v Malgas*,^[10] Marais JA provides guidance as to when an appellate court can interfere with a sentence:

‘... A court exercising appellate jurisdiction cannot, in the absence of a material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate court is at large. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as “shocking”, “startling” or “disturbingly inappropriate”.’

[9] A guiding principle in sentencing is that all sentences must be proportionate to the seriousness of the offence. Sentences can be appealed if it is believed that the sentence is disproportionate to the crime committed or unfairly imposed.^[11] In *S v Sadler*,^[12] the court held that:

‘...it is important to emphasise that for interference to be justified, it is not enough to conclude that one’s own choice

of penalty would have been an appropriate penalty. Something more is required; one must conclude that one’s own choice of penalty is the appropriate penalty and that the penalty chosen by the trial court is not. Sentencing appropriately is one of the more difficult tasks which faces courts and it is not surprising that honest differences of opinion will frequently exist. However, the hierarchical structure of our courts is such that where such differences exist it is the view of the appellate court which must prevail.’

[10] It is well within a trial court’s discretion to determine the type and severity of a sentence on a case by case basis. In determining an appropriate sentence, three guiding principles must be considered, collectively. These principles are known as the ‘triad of Zinn’ and include the gravity of the offence, the circumstances of the offender, and public interest.

[11] The trial court took into account two reports, a victim impact report and a pre-sentencing report, which were compiled on behalf of the complainant and the appellant respectively. The complainant’s father informed the probation officer that after laying charges against the appellant, he would drive past their home and swear at them. It was also reported that the appellant once bumped the complainant with his vehicle when the complainant walked

home from the shops. As a result, the complainant's family decided to move to another house. The appellant denied this, but, on the probabilities, there was no reason for the complainant's family to relocate if the appellant had not harassed them. The complainant had experienced nightmares, panic attacks, struggled to sleep and suffered from depression as a result of the psychological trauma he had suffered due to the sexual abuse. The complainant continues to have therapy, if and when it is necessary. The probation officer found the complainant to have a lack of self-esteem which caused him to become withdrawn, and in turn his peers took advantage by bullying him.

[12] The trial court had regard to the triad of factors and also warned itself to balance them.

Because of the trial court's findings that the complainant was raped more than once, *inter alia*, it imposed three life sentences. On appeal to the high court, the rape convictions and sentences were set aside. The remaining convictions and sentences were confirmed on the basis that the individual sentences imposed by the trial court ' . . . are not shockingly inappropriate, given the age of the complainant being . . . between 6 and 11 years old when so abhorrently and repeatedly abused by the appellant'.

[13] The appellant has one previous conviction from 1991, for malicious damage to property. For the purposes of sentence, he was treated as a first offender, which is the only mitigating factor present. Counsel for the appellant submitted that the probation officer opined that the appellant was not a fixated child molester. There is no factual basis for this opinion. Counsel for the appellant correctly conceded that the ongoing sexual abuse of the complainant constituted not only

serious crimes, but also heinous crimes. The appellant was born on 5 August 1968. At the time of sentencing, he was 49 years old. He had a successful panel beating business that he lost due to his incarceration. Prior to his relationship with the complainant's

grandmother, which ended after she was made aware of the sexual abuse, the appellant was married for 14 years and raised two step

children with his ex-wife. The appellant is engaged to be married. Counsel for the appellant submitted that he had no history of

previous sexual offences.

[14] The aggravating factors are numerous. The sexual abuse took place over a period of five years. The complainant was only six years old when he was first violated. The appellant gave no indication that he was going to stop his deviant behaviour. The complainant had to undergo surgery because the foreskin of his penis was injured as a result of the continuous sexual abuse perpetrated against him by the appellant. The complainant was groomed over a sustained period. He was threatened and manipulated to engage in sexual conduct with other children. The appellant threatened to kill the complainant's family. All these deeds and threats caused the complainant deep emotional trauma, as a result of which he suffered from depression. That he had to endure this in silence for five years of his childhood is a

serious aggravating factor.

- [15] The complainant considered the appellant to be his grandfather. The appellant was in a position of trust; it is betrayal of a high degree when a person in the position of the appellant, whom he trusted and depended on continuously harmed him. The appellant not only encouraged the complainant to have sexual intercourse with other children, but he also watched while they engaged in such sexual activities. All indications are that the appellant had no plans to stop. He told the complainant that he would sexually abuse his younger brother. If the complainant had not mustered the courage to tell his parents. I shudder to think what could have happened. It was submitted on behalf of the appellant that the cumulative effect of the sentences should

be taken into account to come to a more balanced sentence that would serve the potential of rehabilitating the appellant. Furthermore, so it was contended, the appellant is not a danger to society. I disagree. The appellant showed no remorse and through his own actions showed that he is a danger to other young children as well. Even after the appellant had been charged, he threatened and intimidated the complainant and his family.

- [16] The nub of the submissions on behalf of the appellant was that the sentences were disproportionate to the crime. The various acts of sexual abuse occurred at the grandmother's house, over a period of five years and were therefore not acts that could be considered to be part of a single transaction. The appellant has shown no remorse for his behaviour. He did not plead guilty and apologise for his deeds, instead he levelled various threats at the complainant and his family. He, in fact, influenced the complainant to have sexual intercourse with other children. Unfortunately, we do not know what impact this has had on the other children.

- [17] The high court did not give reasons for its order that the sentences should not run concurrently. Despite this, it is clear that the appellant had no intention of stopping. He had every intention of continuing with his deviant behaviour. Cases dealing with sexual abuse of the vulnerable are a plague in this country and continue unabated. The heinous crimes committed in this case, viewed in their totality, are of a serious kind and nature. Too often, psychological harm is downplayed and not viewed in the same light as physical harm.

- [18] The aggravating factors far outweigh the mitigating factors in this case. The individual sentences were not severe. The gravity of the offences and the scourge of such offences on helpless and vulnerable children cannot be downplayed and the effect of these crimes cannot be understated. The impact on the family structure and community, as well as the psychological harm and adverse emotional impact on the child, are well known. A concurrence of the sentences was not possible on account of the abominable conduct of the appellant.[13] We accept that a sentence of 36 years' imprisonment is severe, but the facts of this case are such that a sentence of 36 years' imprisonment is not shockingly disproportionate to the crime. The high court did not exercise its discretion unreasonably. There is no reason to interfere with the sentences imposed.

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

CARELSE JA

JUDGE OF APPEAL

APPEARANCES

For appellant: J Potgieter

Legal Aid South Africa, Pretoria

Legal Aid South Africa, Bloemfontein

For respondent: SD Ngobeni

Director of Public Prosecutions, Pretoria

Director of Public Prosecutions, Bloemfontein.

[1] Section 280 provides that: ‘(1) When a person is at any trial convicted of two or more offences or when a person under sentence or undergoing sentence is convicted of another offence, the court may sentence him to such several punishments for such offences or, as the case may be, to the punishment for such other offence, as the court is competent to impose. (2) Such punishments, when consisting of imprisonment, shall commence the one after the expiration, setting aside or remission of the other, in such order as the court may direct, unless the court directs that such sentences of imprisonment shall run concurrently.....’

[1] Section 280 provides that:

‘(1) When a person is at any trial convicted of two or more offences or when a person under sentence or undergoing sentence is convicted of another offence, the court may sentence him to such several punishments for such offences or, as the case may be, to the punishment for such other offence, as the court is competent to impose.

(2) Such punishments, when consisting of imprisonment, shall commence the one after the expiration, setting aside or remission of the other, in such order as the court may direct, unless the court directs that such sentences of imprisonment shall run concurrently.....’

[2] Counts one, two and three.

[3] Counts four, five, nine, ten, eleven and twelve.

[4] Counts six, seven and eight.

[5] Section 309(1)(a) provides that: ‘Subject to section 84 of the Child Justice Act, 2008 (Act No 75 of 2008), any person convicted of any offence by any lower court (including a person discharged after conviction) may, subject to leave to appeal being granted in terms of section 309B or 309C, appeal against such conviction and against any resultant sentence or order to the High Court having jurisdiction: Provided that if that person was sentenced to

imprisonment for life by a regional court under section 51(1) of the Criminal Law Amendment Act, 1997 (Act No 105 of 1997), he or she may note such an appeal without having to apply for leave in terms of section 309B: Provided further that the provisions of section 302(1)(b) shall apply in respect of a person who duly notes an appeal against a conviction, sentence or order as contemplated in section

302(1)(a).’

[5] Section 309(1)(a) provides that:

‘Subject to section 84 of the Child Justice Act, 2008 (Act No 75 of 2008), any person convicted of any offence by any lower court (including a person discharged after conviction) may, subject to leave to appeal being granted in terms of section 309B or 309C, appeal against such conviction and against any resultant sentence or order to the High Court having jurisdiction: Provided that if that person was sentenced to imprisonment for life by a regional court under section 51(1) of the Criminal Law Amendment Act, 1997 (Act No 105 of 1997), he or she may note such an appeal without having to apply for leave in terms of section 309B: Provided further that the provisions of section 302(1)(b) shall apply in respect of a person who duly notes an appeal against a conviction, sentence or order as contemplated in section

302(1)(a).’

[6] Counts two and three.

[7] Count six.

[8] Count 7.

[9] Counts 9, 10 and 12.

[10] *S v Malgas* [2001] 3 All SA 220 (A); 2001 (2) SA 1222 (SCA) para 12.

[11] For example see *S v Willemse*

[2021] ZAWCHC 92; 2022 (1) SACR 43 (WCC) para 13 citing *S v Bogaards*

[2012] ZACC 23; 2012 (12) BCLR 1261 (CC); 2013 (1) SACR 1 (CC) para 41.

[12] *S v Sadler*

[2000] ZASCA 105; 2000 SACR 331 (SCA); [2000] 2 All SA 121 (A) para 10.

[13] *Nthabalala v S* [2014] ZASCA 28 (SCA).

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