

SOUTH AFRICA / JUDGMENT

De Wee v S (CA&R135/2016) [2016] ZAECHGC 152 (20 October 2016)

[2016] ZAECHGC 152

COURT

Eastern Cape High Court, Grahamstown

BEFORE

J M Roberson, G H Bloem

CASE / FILE NUMBER

CA&R135/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

CASE NO CA&R135/2016

DATE HEARD: 12/10/2016

DATE DELIVERED:

20/10/2016

In

the matter between

LUWAYNE

DE

WEE APPELLANT

and

THE

STATE RESPONDENT

JUDGMENT

ROBERSON J:-

- [1] The appellant was convicted in the Regional Court, after pleading guilty, of rape in contravention of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. He was sentenced to life imprisonment. The appellant now appeals against this sentence, exercising his automatic right of appeal in terms of s 309 (1) (a) of the Criminal Procedure Act 51 of 1977.

[2] The appellant was tried together with Juame Thorne, who pleaded guilty to two counts of rape of the same complainant. The counts were treated as one for the purpose of sentence and Thorne was also sentenced to life imprisonment.

[3] The appellant faced a prescribed minimum sentence of life imprisonment on two grounds: the complainant was raped more

than once by a co-perpetrator and she was raped by more than one person in the execution or furtherance of a common purpose or

conspiracy. (Section 51 (1) of the Criminal Law Amendment Act 105 of 1997 read with Part I (a) (i) and (ii) of Schedule 2.) In imposing life imprisonment, the magistrate found that there were no substantial and compelling circumstances justifying a lesser sentence, as provided for in s 51 (3) of Act 105 of 1997.

[4] The factual basis of the appellant's plea of guilty was contained in his statement in terms of s 112 (2) of Act 51 of 1977. On the morning of 14 June 2015 the appellant and Thorne smoked dagga. While they were fishing in the Tsitsikamma National Park they heard someone approaching and hid in the bushes because they thought it was people from the Parks Board. They then saw that it was a woman (the complainant) who was jogging and they decided to tackle her ("om haar plat te duik") and see if she had any money. As the complainant ran past them they jumped out of the bushes and grabbed hold of her. They searched her but she did not have any money. They then decided to rape her and took off her jogging trousers. She was not wearing underclothing. The complainant asked that both of them should not be present and Thorne walked away. The appellant then stood behind the complainant and tried to have intercourse with her from behind. The complainant said "why there" and the appellant realised that he had anally penetrated her. He withdrew his penis and tried to have intercourse with her again but was not successful because she struggled. The complainant asked him to let her go before Thorne returned but he said that he could not do so because Thorne might do something to him. Thorne then returned. The appellant acknowledged that he associated himself with the actions of Thorne.

[5] According to Thorne's s 112 (2) statement, after the appellant had raped the complainant, Thorne first inserted his penis into the complainant's mouth and forced her to suck his penis for about two minutes. Thereafter he got her to stand and bend over forwards, and had vaginal sexual intercourse with her from behind.

[6] The appellant was 25 years old at the time of the offence. He was in a relationship with the mother of two of his three minor children and was the sole breadwinner of the family, whom he maintained. He was employed at the time and earned R2 500 per month. In his address on sentence, the appellant's attorney said that the appellant was shocked at what he had done and was remorseful. He had taken the court into his confidence and pleaded guilty. He had co-operated with the police and had indicated from the start that he was remorseful and intended to plead guilty, with the result that no further investigation was required. He had, so it was submitted, spared the complainant the trauma of having to

testify at a trial and spared the State the expense of a trial. The complainant had described the appellant as the “gentle” one of the two. The appellant, so it was submitted, had played a more passive role and had withdrawn from penetrating the complainant anally when she complained. It was further submitted on his behalf that he had smoked dagga that day; that he had no previous convictions for a sexual offence or an offence involving violence; that no weapon was used and there was no threat of violence; that the offence was not planned; and that it was not in his nature to commit such an offence.

- [7] The appellant had three previous convictions: housebreaking with intent to steal and theft committed in 2005; possession of dagga committed in 2012; and possession of dagga committed in 2013.
- [8] The complainant was a 47 year old American citizen who was working in Johannesburg in terms of a four year contract. She is a high school counsellor. She and her husband and two sons aged 11 and 13 years were on holiday in the Storms River area at the time of the offences. In his address on sentence, the prosecutor stated that the complainant had given a very good description of the two men who had raped her and they were arrested that evening. The prosecutor agreed that after their arrest they admitted what they had done and said that thereafter they had both made confessions in which they admitted everything which they had done. According to the prosecutor, he was told by their previous legal representative that both of them wanted the case to be heard as soon as possible and that both of them had expressed remorse.
- [9] The prosecutor stated that when the complainant arrived at the guesthouse after her ordeal, her hair was wet and she was covered in mud. The report of the doctor who examined her revealed that there was bruising and tears of the posterior fourchette and superficial lacerations on her lower legs.
- [10] A letter from the complainant, written to the investigating officer just over a week after she was raped, was handed in by agreement. It read as follows (some spelling corrected):

“Hello Detective,

I [MJ] was raped by two men on Sunday – June 14th along the Dolphin Trail in the Tsitsikamma National Park.

I have been asked to write a letter to speak to how this event has affected me since its occurrence just over a week ago. It’s a bit surreal at the moment. Before the incident we were always cautious living in Johannesburg. We followed all the guidelines the school set for us and was aware that bad things can happen. Now that we had a very bad thing happen to one of us we feel that our time in South Africa may just be one more year – rather than the 4 more years we had on our work contract. This is both sad for me as well as my children since they have friendships and feel comfortable and connected here. Thus, changing long range plans and feeling it’s not our “home” is a very sad fact to process.

Yes it will be hard for me to go for jogs alone. Running has been part of my life since my early days and I have been fortunate to make several USA teams and run races and compete in several countries. It's been a way to see the world and get to know others that love the sport. At the moment I am thinking treadmills, yoga and group-runs will need to fill that void. What these men did by taking away all our right to explore trails and God's Nature is a shame – fishing illegally understandable – showing no concern or compassion for another human leaves me feeling confused and a person that will have trouble trusting anyone again.

The physical rape itself has left me feeling dirty, embarrassed and weak. Having to take HIV drugs and not being able to be with my husband over concerns of passing on the sickness – is a huge change and uncomfortable place in our lives. If I do turn out to be HIV positive – I am not sure how I will cope. The medicine makes you ill and the next 28 days will be filled with anxiety – I will not know my blood is good until January 2016.

My boys 11 and 13 have had to deal with the situation without all the facts. It destroyed our holiday and I am waiting to find out if all the facts get out how they will cope with having a mom that was raped. My husband is not doing well and dealing with his anger and guilt is more than I currently can cope with.

Also the press has been horrible putting out information and facts that pretty much tell the whole community that I work in that I was raped – this is something that has made me avoid people I know and will be a hurdle once I return to work.

You asked me to write how this changed my life and currently this is what I can say.”

[11] In his judgment on sentence, the magistrate paid heed to what was said in *S v Malgas* 2001 (1) SACR 469 (SCA) at para [25]:

“Courts are required to approach the imposition of sentence conscious that the legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.

Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts.

The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender,

undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation,

and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded.”

- [12] In deciding whether or not there were substantial and compelling circumstances, the magistrate took into account the various factors which had been placed on record on behalf of the appellant. In particular he was of the view that it had not been shown that the dagga had affected the appellant's conduct. He took into account the plea of guilty, but also took into account the prosecutor's submission that the appellant probably had little choice but to plead guilty. With regard to the submission that no weapon was used, he referred to the doctor's note in his report that the complainant had said she had been threatened with a knife. However, this fact was not included in the guilty plea accepted by the State and the magistrate viewed this aspect as a grey area. With regard to the submission that the offences were not planned, the magistrate referred to the prosecutor's submission that the appellant and Thorne had had enough time to reconsider their decision. With regard to the submission that the offence was not in the appellant's nature, the magistrate was of the view that it was important that the appellant was the first person to rape the complainant and had taken the lead.
- [13] As far as the offence was concerned, the magistrate took into account its cowardly nature, the helplessness of the complainant and the humiliation she must have suffered. He further had regard to the contents of her letter and the fact that it is not just a victim who suffers, but also the victim's family.
- [14] The magistrate also referred to the notoriously high incidence of the offence of rape and to the fact that the seriousness of such an offence and its consequences were well known.
- [15] The magistrate concluded, after considering the personal circumstances of the appellant, the seriousness of the offence and
- the interests of society, that there were no substantial and compelling circumstances.
- [16] In *Malgas* (supra) the court dealt with the test for interference by an appeal court with the sentence imposed by the trial court at para [12] as follows:

"A court exercising appellate jurisdiction cannot, in the absence of 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". It must be emphasised that in the latter situation the appellate court is not at large in the sense in which it is at large in the former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that

sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned. No such limitation exists in the former situation.”

[17] On appeal it was submitted that the magistrate erred in not finding the existence of substantial and compelling circumstances, and that the sentence was disproportionately heavy. I can find no material misdirection in the magistrate’s judgment on sentence. He considered every relevant factor and accorded it its due weight. Nor does the sentence strike me as

disproportionately heavy. The Legislature saw fit to prescribe life imprisonment for rape in these particular circumstances.

The complainant was at the mercy of two men. They could have let her go when they found she had no money. They chose rather to rape her. She was raped three times. The appellant was the first to rape her. He could have desisted at any stage. When Thorne walked away, the appellant could have let the complainant escape. When he ceased raping her anally he was not deterred from trying again. He was therefore determined to put the plan into operation. When the complainant asked him to let her go before Thorne returned, he put his own safety before hers, knowing that his co-perpetrator was going to rape the complainant as well. The letter from the complainant to the investigating officer expresses the deep and wide effects of her ordeal. In all the circumstances of the case, a sentence of life imprisonment was indeed appropriate.

[18] The appeal is dismissed.

J M ROBERSON

JUDGE OF THE HIGH COURT

BLOEM J:-

I agree

G H BLOEM

Appearances:

For the Appellant: Ms M N Mazibukwana, instructed by Grahamstown Justice Centre

For the Respondent: Adv D Els, Director of Public Prosecutions, Grahamstown

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