

SOUTH AFRICA / JUDGMENT

Dondashe v S (CA&R40/2017) [2017] ZAE CGHC 91 (22 August 2017)

[2017] ZAE CGHC 91

COURT

Eastern Cape High Court, Grahamstown

BEFORE

G H Bloem, A da Silva

CASE / FILE NUMBER

CA&R40/2017

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

CASE

NO. CA & R 40/2017

In

the matter between:

DUMISANI
DONDASHE
Appellant
and
THE
STATE
Respondent
APPEAL

JUDGMENT

Bloem J.

- [1] The appellant was charged in the magistrate's court at Port Elizabeth with one count of kidnapping and two counts of rape.

Despite his plea of not guilty he was convicted on all those counts. He was sentenced to two years' imprisonment on the count of kidnapping and twenty years' imprisonment on the counts of rape, they having been taken together for purposes of sentence. With the leave of this court the appellant appeals only against the sentence of twenty years' imprisonment.

[2] The facts found proven by the magistrate are that on 1 August 2015, when the appellant was 23 years old, he unlawfully and intentionally

deprived the complainant, who was 22 years old at the time, of her freedom of movement by taking her from a fence near a farm to nearby bushes. He did so by threatening her with a knife. In the bushes he raped her vaginally. When he was done he stood up. She also stood up and dressed herself. The appellant then told her to undress, which she did. He then raped her again.

[3] The test to be applied in the case of an appeal against sentence was set out as follows in *S v Rabie*[1]:

"1. In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal -

- (a) should be guided by the principle that punishment is "pre-eminently a matter for the discretion of the trial Court"; and
 - (b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been "judicially and properly exercised".
2. The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate.

[4] The word "misdirection" in the context of an appeal against sentence was examined in *S v Pillay*[2] where Trollip JA stated the following:

"Now the word "misdirection" in the present context simply means an error committed by the Court in determining or applying the facts for assessing the appropriate sentence. As the essential inquiry in an appeal against sentence, however, is not whether the sentence was right or wrong, but whether the Court in imposing it exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence; it 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 decision on sentence."

[5] In this case it was submitted on behalf of the appellant that the magistrate misdirected herself because she allegedly failed to properly consider the appellant's personal circumstances and by so doing overemphasised the seriousness of the offences and the interests of society. In *S v Zinn*[3] Rumpff JA set aside the sentence of fifteen years' imprisonment on appeal because the trial court committed a misdirection in that it overemphasised the nature and effect of the offences committed by the appellant and underestimated his personal circumstances. In *S v Pieters*[4] Botha JA held that the crucial

question in an appeal against sentence is whether the trial judge could reasonably have imposed the sentence which he did. If the answer to this is in the affirmative, the appeal cannot succeed.

- [6] The magistrate was informed by the appellant's attorney and took into account the appellant's age, that prior to his arrest he resided with his mother, that he was employed and earned a salary of R550.00 per week, that he was single and had no children. He left school after completing grade 11. The reason therefor was not given. The appellant is not a first offender. In 2008, 2010 and 2011 he was convicted of theft and on each occasion sentenced to a fine or imprisonment of not more than R300.00 or 30 days' imprisonment.[5]
- [7] The magistrate also took into account that rape is so serious that the Legislature has prescribed a minimum sentence. In terms of section 51 (1) as read with Part 1 of Schedule 2 of the Criminal Law Amendment Act[6] a person who has been convicted of raping his victim more than once shall be sentenced to imprisonment for life unless substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the prescribed sentence.[7] The magistrate referred to *S v Chapman*[8] where rape was described as "a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the

person of the victim" and *S v Abrahams*[9] where Cameron JA stated that "some rapes are worse than others, and the life sentence ordained by the Legislature should be reserved for cases devoid of substantial factors compelling the conclusion that such a sentence is inappropriate and unjust."

- [8] The magistrate furthermore referred to the prevalence of rape in the area of jurisdiction of that court. The prevalence is not restricted to the area of jurisdiction of the magistrate's court in Port Elizabeth. Rape is prevalent in the Eastern Cape and, judging by the law reports, the country as well. From the victim impact report it is apparent that, after the rape, the complainant is reluctant to leave her house because she would not want to come across the appellant as she is afraid of him. Prior to the rape the complainant worked for a day or two per week as a domestic worker on a farm. She was unemployed after the rape because of her fear to leave her home. The magistrate found that, although the rape had some negative impact on the complainant, "it cannot be said that the rape has had a very serious and damaging effect on her" and that there "is no evidence to the effect that, as a result of this rape, she lost her trust in mankind and has developed a great sense of anger and hostility towards men".
- [9] Save for the above, the contents of the victim impact report is not very helpful. It deals only with the complainant's fear to leave her home and that she was rendered unemployed by the rape. It did not deal with the complainant's background or intellectual capacity, the physical or psychological injuries sustained by the complainant as a result of the rape neither did it deal with professional treatment, if any, received by the complainant and her response to such treatment. The absence of a proper victim impact report makes it difficult to appreciate

on what factual basis the magistrate made the two above findings. The fact that the victim impact report did not properly deal with the effect of the rape on the complainant does not mean that those offences did not have “a very serious and damaging effect on her” or that those offences did not make her angry or hostile towards men.

- [10] The appellant escaped the prescribed sentence of life imprisonment being imposed on him because the magistrate found that such a sentence would be disproportionate to the circumstances under which and the consequences of the offences that he committed. In this regard she said the following:

“And having considered the accused’s personal circumstances and having properly balanced them against the offence committed, the interests of society, and also having taken into consideration the victim impact report, the sentence of life imprisonment would be disproportionate to the gravity of the rape committed by the accused.”

- [11] The magistrate found that the imposition of life sentence would be disproportionate to the circumstances under which the complainant was raped, if weighed against the appellant’s personal circumstances and the interests of society. The submission on

behalf of the appellant that the magistrate underemphasised the appellant’s personal circumstances has no merit. It is apparent from the judgment that it was because of a consideration of, amongst other things, the appellant’s personal circumstances

that the magistrate came to the conclusion that the prescribed sentence of life imprisonment would be disproportionate to the offences.

- [12] Although it might be argued by some that the appellant was fortunate that he was sentenced to only twenty years’ imprisonment, I do not believe that that sentence warrants interference by this court. That sentence is substantial. With the passage of time it will make the appellant appreciate the gravity of the offences and it will provide proper protection for members of society against the appellant. In the circumstances, the appeal against sentence must fail.

- [13] In the result, the appeal against sentence is dismissed.

G H BLOEM

Judge of the High Court

da Silva AJ,

I agree

A DA SILVA

Acting Judge of the High Court

For the appellant:

Adv H Charles of the Grahamstown Justice Centre, Grahamstown.

For the state:

Adv D Els of the office of the Deputy Director of Public Prosecutions, Grahamstown.

Date of hearing:

16 August 2017

Date of delivery of the judgment:

22 August 2017

[1] S v Rabie 1975

(4) SA 855 (A) at 857D-E.

[2] S v Pillay 1977

(4) SA 531 (A) at 535D-G.

[3] S v Zinn 1969 (2) SA 537 (A) at 540F.

[4] S v Pieters 1987 (3) SA 717 (A) at 734E.

[5] On 26 February 2009 the entire fine of R900.00 or 90 days' imprisonment was suspended for four years on condition that the

appellant not be convicted of theft or attempted theft committed during the period of suspension.

[6] Criminal Law Amendment Act, 1997 (Act No. 105 of 1997).

[7] Section 51 (3) of the Criminal Law Amendment Act.

[9] S v Abrahams 2002 (1) SACR 116 (SCA) at 127d.

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