

SOUTH AFRICA / JUDGMENT

Greenwood v S (CA&R 148/2012) [2015] ZAECGHC 86 (8 September 2015)

[2015] ZAECGHC 86

COURT

Eastern Cape High Court, Grahamstown

BEFORE

J M Roberson, G G Goosen

CASE / FILE NUMBER

CA&R 148/2012

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

CASE

NO: CA&R 148/2012

DATE:

08 SEPTEMBER 2015

In the matter

between

COLIN ALLAN

GREENWOOD.....APPELLANT

And

THE

STATE.....RESPONDE

NT

JUDGMENT

DATE HEARD: 12/08/2015

DATE DELIVERED: 08/09/2015

ROBERSON J:-

[1] This is an appeal against sentence. The appellant was convicted in the Regional Court, East London, after pleading not guilty, of seven offences: two of indecent assault, two of rape in contravention of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, and three of sexual assault in contravention of s 5 (1) of Act 32 of 2007. The counts were treated as one for the purpose of sentence and the appellant was sentenced to ten years'

imprisonment, four years of which were conditionally suspended for five years.

[2] The magistrate refused leave to appeal against the convictions but granted leave to appeal against the sentence. The appellant's petition to the Judge President of this court for leave to appeal his convictions was dismissed. His subsequent appeal against the dismissal of his petition was dismissed by the Supreme Court of Appeal.

[3] There were three complainants: two boys, JV and CW, and a girl TV (JV and TV are brother and sister). The charges in respect of the boys (counts 1 to

6) were identical (except for the time period) and spanned the period from about mid-2006 to January 2009 in respect of JV and about mid-2006 to June 2008 in respect of CW. The charges were split into two periods: the indecent assaults committed prior to 15 December 2007 on which date Act 32 of 2007 came into operation, and the offences committed thereafter. The offences commenced when the appellant was fourteen years old, JV was six years old, and CW was almost 8 years old. The offence committed in respect of TV (count 7) was committed during January 2009 when she was four years old. The details of the offences were as follows:

- (a) Indecent assault (both boys): on diverse occasions the appellant masturbated them and fondled their penis, performed fellatio on them, had sexual intercourse with them per anum, compelled them to masturbate him, perform fellatio on him and insert their penis into his anus.
- (b) Rape in contravention of s 3 of Act 32 of 2007 (both boys): on diverse occasions the appellant had intercourse with them per anum.
- (c) Sexual assault in contravention of s 5 (1) of Act 32 of 2007 (both boys): on diverse occasions the appellant masturbated them and fondled their penis, performed fellatio on them, and compelled them to masturbate him, perform fellatio on him and insert their penis into his anus.
- (d) Sexual assault in contravention of s 5 (1) of Act 32 of 2007 (TV): the appellant opened TV's vagina with his hands and blew on her vagina.

- [4] The appellant and the children were neighbours in East London and used to visit one another's homes. The offences took place in the appellant's room at his home, sometimes when the appellant and both boys were all together. The offences were accompanied by threats against the boys and their families. The boys believed the threats. With regard to TV, the evidence was that in the presence of JV the appellant blew on her genital area while she was naked and lying on his bed.
- [5] The offences ceased in respect of CW when he and his family moved away from the neighbourhood during June 2008, and in respect of JV when, prompted by what had happened to TV, he told his father what had been going on.
- [6] The magistrate accepted the evidence of the boys' parents about changes in their personalities and behaviour after the abuse began. These changes appear below when I deal with the evidence of Ms Karen Andrews, a clinical psychologist.
- [7] Ms Andrews interviewed JV and CW during April 2009 for three hours each, and obtained collateral information from their parents. She reported on the impact of the sexual abuse.
- [8] JV appeared to have suffered chronic psychological conflict since the age of seven years in that he admired the older appellant but disliked the abuse and the fear and guilt it caused him. Prior to the abuse he was an extroverted happy child but after it started he displayed emotional problems. He was easily frustrated, prone to angry outbursts, was moody and withdrawn, and preferred to play on his own. He struggled to fall asleep and became a comfort eater. He suffered from migraine headaches and vomiting. His symptoms were more attributable to sexual abuse than to his parents' divorce. His severe psychosomatic reaction was a strong indicator of psychological stress, highly consistent with sexual abuse and less consistent with divorce. Ms Andrews concluded from her examination that JV remained in psychological crisis. Because of his age, psychotherapy would not help him resolve the psychological burden. Psychotherapy would have to coincide with maturity, and resolution would take a long time.
- [9] According to Ms Andrews CW also admired the older and stronger appellant. This power relation together with CW's guilt and fear led to his accommodation of the abuse. CW's parents reported to Ms Andrews that prior to the abuse he was an extrovert, a leader, achievement driven, neat and tidy, and did not have a weight problem. After the abuse started his behaviour changed suddenly and drastically. He became destructive, untidy, argumentative, disobedient, and bullied his peers. This behaviour was a defence against his low self-esteem. He began to over-eat and developed a weight problem. He needed a light on in his room when going to sleep and had difficulty falling asleep on his own.
- [10] CW was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) at age three years and medication was prescribed. Ms Andrews stated that the behavioural changes after the abuse started were not attributable to ADHD but rather to sexual abuse. It was unlikely that the sudden behavioural changes, which coincided with the period of abuse, would have occurred without a clear precipitant. Urgent psychotherapy was required to limit the impact

of CW's acting-out behaviour on the development of his personality. According to Ms Andrews, sexual abuse at this age with its consequent acting out behaviour is strongly associated with future self-destructive behaviour, low self-esteem, substance and alcohol abuse, and sexual maladjustment.

- [11] Reports were obtained for sentence purposes from Mrs A Ferreira, a chief social worker with the Department of Correctional Services, Ms P Loggenberg, a probation officer with the Department of Social Development, and Ms E Braithwaite, a counselling psychologist. These reports were compiled in 2012.
- [12] Mrs Ferreira noted in her report that the appellant did not accept responsibility for his actions, and did not show remorse. She stated that JV and CW were still suffering the consequences of the abuse. JV had benefited from psychotherapy for relaxation techniques but was still on chronic anti-anxiety medication. CW had undergone counselling but did not want to talk about the abuse and eventually ceased the counselling sessions. She concluded that the appellant was not a suitable candidate for a community based sentence.
- [13] Ms Loggenberg set out the appellant's personal circumstances in her report. He was a first offender. He grew up in a stable home. He attended school up to grade 11 and enrolled at Damelin College for grade 12, but was requested to leave. He worked for a while in 2011 and at the time of the report was working in his father's business.
- [14] Ms Loggenberg also mentioned that JV and CW were still traumatised by what had happened to them and that the appellant denied that he had committed the offences.
- [15] Ms Braithwaite was requested by the appellant's attorneys to evaluate him to determine if there were any psychological issues which would affect sentence. An interview with the appellant, the results of psychometric tests, and information provided by his parents, led Ms Braithwaite to conclude that there were areas of concern with regard to the appellant's emotional and social functioning. These areas of concern included disconnection from his feelings, low self-esteem and over-compensation, lack of insight into what he was facing, and denial.
- [16] The appellant was injured in a motor cycle accident during 2011. A report from an orthopaedic surgeon, Dr. P Olivier, revealed that he suffered a fracture of two vertebrae, and injuries to his head, shoulder, and foot. He will suffer pain in the future and will probably undergo further surgery in the distant future. His ability to perform weight bearing activities is permanently compromised and he will not be able to perform strenuous activities.
- [17] In his judgment on sentence the magistrate had regard to the so-called triad of the offender, the offence, and the interest of society, and the need not to over-emphasise one element at the expense of another. He referred to the seriousness of the offences, the period over which the abuse extended, and the appellant's exploitation, as a much older person, of the boys' young age, their trust in him, and their admiration for him. He also referred to the evidence of the parents that JV and CW suffered serious emotional trauma as a result of the abuse and

stated that the effect of the abuse would probably continue for years.

- [18] The magistrate took into account the appellant's personal circumstances and the need for an individualised sentence. He had regard to the fact that the appellant was a child when the offences were committed. He referred to the provisions of s 28 (1) (g) of the Constitution and to the following passage in *Ntaka v S* [2008] ZASCA 30 (28 March 2008) at para [45]:

"We distinguish child offenders from adults because we recognise that their crimes may stem from immature judgment, from as yet unformed character, from youthful vulnerability to error and to impulse. We recognise that imposing full moral responsibility for a misdeed might be too harsh. In that we allow them some leeway of hope and possibility."

- [19] The magistrate also took into account society's attitude to crimes of sexual violence and the need for sentences for these crimes to send a public message. A sentence which was too lenient would send out the wrong message.
- [20] The magistrate decided that a custodial sentence was the only appropriate sentence. He considered correctional supervision, but was of the view that it would not reflect the gravity of the offences. He remarked that the appellant still maintained his innocence and that correctional supervision is beneficial to offenders who confess and are remorseful. He concluded that the elements of prevention, deterrence, and retribution had to take precedence over the appellant's personal circumstances, including his young age during the time the offences were committed and after their commission. In suspending a portion of the sentence, he took into account the appellant's age, the prospect of rehabilitation and the deterrent effect of a suspended sentence.
- [21] In *S v Kgosimore* 1999 (2) SACR 238 (SCA) at para [10] Scott JA said the following with respect to an appeal court's powers to interfere with sentence:

"It is trite law that sentence is a matter for the discretion of the court burdened with the task of imposing the sentence. Various tests have been formulated as to when a Court of appeal may interfere. These include whether the reasoning of the trial court is vitiated by misdirection or whether the sentence imposed can be said to be startlingly inappropriate or to induce a sense of shock or whether there is a striking disparity between the sentence imposed and the sentence the Court of appeal would have imposed. All these formulations, however, are aimed at determining the same thing: viz whether there was a proper and reasonable exercise of the discretion bestowed upon the court imposing sentence. In the ultimate analysis this is the true inquiry."

Either the discretion was properly and reasonably exercised or it was not. If it was, a Court of appeal has no power to interfere; if it was not, it is free to do so."

- [22] The chief attack on the magistrate's judgment on sentence was his finding relating to the effect of the abuse on JV and CW. It was submitted that the evidence of the parents was subjective and not of an expert nature. Reliance was placed on *S v V* 1991 (1) SACR 68 (E). In this matter the appellant had pleaded guilty to nine counts of contravening s 14 (1) (b) of the Sexual Offences Act 23 of 1957, involving indecent and immoral acts with young boys. It

appears from the judgment that the parents of the complainants testified about behavioural changes in their children prior to the arrest of the appellant. At 71g-i Mullins J said:

“It is almost impossible to determine to what extent [the complainants’] association with the appellant is responsible for any or all of these behavioural and personality changes. No doubt the parents, very understandably, are convinced that they were entirely due to the appellant’s conduct. Such conviction on their part, no matter how strong such conviction might be, is not, however, sufficient proof thereof in deciding what the appellant’s punishment should be. Behavioural and personality patterns in children are not absolute and immutable, and it is common knowledge that there are such changes during the normal growing-up process, whether this be due to approaching puberty or not. If I were one of the parents, I would no doubt feel as they do, but a judicial officer must be satisfied that the evidence establishes that appellant’s conduct caused the said changes before that factor can be taken into account as an aggravating feature in

the passing of sentence.”

- [23] The present matter is distinguishable. The evidence of the parents was accepted by the magistrate in relation to the convictions. They did not purport to testify as experts and merely testified about the behavioural changes which they as parents observed. It was the evidence of the expert, Ms Andrews, which was accepted by the magistrate, that the behavioural changes were attributable to sexual abuse. Other causes were excluded by Ms Andrews.
- [24] It was also submitted that less weight should have been accorded to Ms Andrews’ evidence because she had only interviewed the boys for three hours each and no full forensic investigation had been conducted. She was challenged during cross-examination about not obtaining collateral information from outside the family. It was put to her that if she had seen the police docket and spoken to the boys’ teachers or seen their medical records she might have discovered information which suggested that the parents were not telling the truth. She explained that she was a psychologist and not an investigator and her primary task was to assess the two children, make findings, and draw conclusions.
- [25] In my view this criticism of the value of Ms Andrews’ evidence leads nowhere. The magistrate accepted the evidence of the parents in relation to the behavioural changes. That finding related to the convictions and cannot be revisited. The magistrate accepted the evidence of Ms Andrews in relation to the convictions and that finding cannot be revisited. The total effect of the parents’ and Ms Andrews’ evidence was that the abuse by the appellant caused deep and negative changes in the boys’ behaviour and personalities. There was therefore no misdirection by the magistrate when he took into account that the boys had suffered serious emotional trauma.
- [26] It was also submitted that in view of the length of time that has passed since the offences ceased, that this court should reconsider sentence. The appellant, so it was submitted, has moved on with his life, is now working, was involved in a motor cycle accident, and has committed no further offences.

[27] In *S v Michele* 2010 (1) SACR 131 (SCA) at para [13] Leach AJA (as he then was) said:

“While an appeal court will generally only consider the facts and circumstances known when sentence was initially imposed, this court has recognised that in exceptional circumstances factors later coming to light may be taken into account on appeal where it is in the interest of justice to do so.”

[28] In the present case the appellant’s employment in his father’s business and his motor cycle accident were factors before the trial court and are therefore not new factors. The appellant was sentenced on 24 April 2012 when he was 19 years old, and this appeal was heard on 12 August 2015. The fact that since he was sentenced he has moved on with his life and not committed further offences does not in my view amount to exceptional circumstances, such as those found in *S v Michele* (supra) and *S v Karolia* 2006 (2) SACR 75 (SCA) .

[29] It is apparent from the magistrate’s judgment on sentence that he considered all the relevant factors in deciding what sentence to impose. I can find no material misdirection in his judgment. Nor do I think that the sentence is disproportionately severe. These were multiple serious offences committed, in the case of JV and CW, on young children over a substantial period, with severe consequences. The magistrate was correct when he said that correctional supervision would not reflect the gravity of the offences. In suspending a fairly substantial portion of the sentence he paid proper heed to the appellant’s age at the time of the commission of the offences and thereafter, and the prospect of rehabilitation. There are no grounds for interference.

[30] The appeal is dismissed.

J M ROBERSON

JUDGE OF THE HIGH COURT

GOOSEN J:-

I agree

G G GOOSEN

Appearances:

For the Appellant: Adv T N Price SC, instructed by Changfoot-Van Breda Attorneys, East London

For the Respondent: Adv J P J Engelbrecht, Director of Public Prosecutions, Grahamstown

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