

SOUTH AFRICA / JUDGMENT

J.P.A v S (CA&R80/2007) [2016] ZANCHC 6; 2017 (2) SACR 143 (NCK) (12 August 2016) [2016] ZANCHC 6

COURT

Northern Cape High Court, Kimberley

BEFORE

Kgomo JP, Olivier J, Erasmus AJ

CASE / FILE NUMBER

CA&R80/2007

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IN

**THE HIGH COURT OF SOUTH AFRICA
(Northern
Cape High Court, Kimberley)**

Reportable:

YES

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to Judges: YES

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to Magistrates: NO

Circulate

to Regional Magistrates: YES

CASE

NO: CA&R80/2007

DATE

HEARD: 25/07/2016

DATE

DELIVERED: 12/08/2016

In

the matter between: J.
P.
A.
Appellant
and
THE
STATE
Respondent

Coram: Kgomo
JP et
Olivier
J et
Erasmus AJ

JUDGMENT

Olivier J

[1.] After the withdrawal of another charge the appellant, Mr J. P. A., appeared in the Regional Court, Springbok, on one count of rape on 22 November

2006. It was alleged that he had over a period of time “between 2002 and 2/9/2004” raped the 12 year old complainant.

[2.] The charge referred to the provisions of section 51(2) of the Criminal Law Amendment Act[1] (“the Act”) which prescribed sentences of 10 years, 15 years and 20 years imprisonment for respectively first, second and third rape offenders as contemplated in Part III of Schedule 2 to the Act. It appears, however, that the appellant had prior to pleading to the charge been informed that, if convicted, he would be facing a sentence of life imprisonment “due to the fact that the person you are alleged to have raped is a ... 12 year old girl”.

[3.] The appellant pleaded not guilty, but in explanation of his plea he admitted that he had on 2 September 2004 indecently assaulted

the complainant by undressing her and touching her private parts. He denied, however, having ever had sexual intercourse with her.

[4.] The appellant was, however, subsequently convicted on the basis of findings that he had in 2004, and on a farm where he had been

working, raped the complainant on three occasions and that, on 2 September 2004 and in Port Nolloth, had again undressed the

complainant with the intent of having sexual intercourse with her.

[5.] The appellant had been approximately 56 years old at the time of the crimes and was 59 years old when the matter was referred to the High Court for sentencing[2].

[6.] The court a quo confirmed the conviction. Having found a prescribed sentence of life imprisonment to be applicable on two grounds, viz the fact that the complainant had been under the age of 16 years and the fact that the appellant had raped the complainant more than once[3], and having found no substantial and compelling circumstances justifying a lesser sentence, sentenced the appellant to life imprisonment, but subsequently granted him leave to appeal against the sentence.

[7.] The delays between the imposition of sentence in March 2008 and the grant of leave to appeal in 2010 and the further delays in finalizing the appeal are regrettable. It appears that part of the proceedings in the court a quo could not be transcribed and had to be reconstructed, but that would not in itself explain such delays. The appellant had been legally represented when leave to appeal was granted and his legal representative, as well as the prosecuting authority, should have monitored the prosecution of the appeal and the proper compilation of the record. Such delays could in certain cases compromise the right to appeal and the consideration of sentence on appeal[4]. In the present case the appellant has, however, been serving his sentence of life imprisonment pending the appeal, and could not realistically have expected any sentence other than long term imprisonment in the event of a successful appeal.

[8.] The complainant, who had been 12 years old at the time of the incidents, was the daughter of the appellant and Ms B, with whom the appellant had been living as husband and wife for more than 20 years. They, as well as the complainant's two sisters and one brother, had been living in Port Nolloth. From time to time the appellant worked on farms in the vicinity, and the rapes occurred when the complainant and Ms B spent a school holiday with the appellant on such a farm.

[9.] The facts which the Regional Magistrate had found to have been proven and on the basis of which the court a quo imposed sentence were, very briefly, that the rapes had occurred when the appellant had followed the complainant to where she had been herding sheep (sometimes after the appellant had sent her there). When they were out of sight the appellant would, despite the complainant's pleas and protests, insist that she undress and would then have sexual intercourse with her by penetrating her vaginally.

[10.] In the process the complainant was robbed of her virginity and, when Ms B once noticed blood on her clothes and confronted the appellant, he admitted to having had sexual intercourse with the complainant and promised never to do so again. This promise was not kept and the appellant even on occasion, and to ensure the silence of the complainant, threatened that he would kill her mother.

[11.] When Ms B became aware of the last rape she left the farm and took the complainant with her. It appears that they then returned to where they had been living in Port Nolloth.

[12.] Approximately two weeks later, on 2 September 2004, the appellant showed up in Port Nolloth and had the complainant called home under false pretences. When she arrived there with friends, the appellant put the friends out of the house and proceeded to partially undress the complainant and himself. He was on the point of again raping the complainant when Ms B came into the room. He then pretended to have been looking for his tobacco and pretended that the complainant had undressed herself and that he did know why.

[13.] The appellant then left, but was shortly thereafter arrested. That was the end of the relationship between the appellant and Ms B, and the complainant never saw the appellant again after that.

[14.] It appears that a social worker, Ms L E Swartbooi, had prepared a victim report on the complainant on 10 December 2004. Although the report itself does for some reason not form part of the record, its contents were read into the record by Ms Swartbooi in her evidence.

[15.] From that it appears that the complainant and her siblings had grown up in unstable circumstances, with both the appellant and Ms B having abused alcohol and drugs. The complainant had been experiencing problems with her concentration, but after these events she finally left school in grade 4, because she felt ashamed and did not know how she would explain to people at the school what had happened to her. She never ventured far from home, out of fear of coming across the appellant, and she feared that the same thing might happen to her sisters. She in fact felt unsafe even at home, and spent most of her time at the neighbours. She was depressed and had withdrawn herself from other people.

[16.] The complainant was later placed in a children's home. According to Ms Swartbooi's evidence (apparently sometime

during 2007) she had received feedback from a clinical psychologist and from the supervising social worker to the effect that the

depression and post-traumatic stress initially experienced by the complainant because of these events had improved and that the

complainant had been making good progress.

[17.] The grounds of appeal are:

17.1 that a sentence of life imprisonment is disproportionate to the personal circumstances of the appellant and to the crimes committed by him;

17.2 that the appellant had not applied any violence during the incidents and that the complainant had not suffered serious or permanent physical injuries and that this, together with the fact that the appellant's list of previous convictions did not include previous convictions involving sexual misconduct, and with the exception of one minor previous conviction of assault also not really of violence, indicated that the appellant did not have a tendency to commit crimes of a violent or sexual nature;

17.3 that the appellant had, despite his low level of education, always worked and had always provided for his family from his limited income and that this, together with the absence of a tendency towards this type of crime, indicated a potential for rehabilitation;

17.4 that the appellant had shown remorse by at least admitting to having indecently assaulted the complainant;

17.5 that the appellant had spent approximately 2 years in custody awaiting trial;

17.6 that the advanced age of the appellant at the time of sentencing had militated against a sentence of life imprisonment; and

17.7 that the court a quo had misdirected itself in finding that a prescribed sentence of life imprisonment was also applicable on the basis of the appellant having raped the complainant more than once.

[18.] The provision, in paragraph (a)(i) of the section pertaining to rape in Part I of Schedule 2, read with section 51(1) of the Act, for a prescribed sentence of life imprisonment in “circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice” was interpreted in *Mtimkulu v S*[5] to require that the accused must in fact have been charged with having raped the victim more than once.

[19.] The charge in the present matter did not pertinently allege more than one rape and, even if it had, it appears from the record that the appellant had never been informed that a finding that more than one rape had occurred could in itself result in a prescribed sentence of life imprisonment.

[20.] There is no indication that the appellant was prejudiced by the fact that the court a quo had nevertheless found that a prescribed sentence of life imprisonment had also on this basis been applicable. It would in any event have been applicable because of the age of the complainant, and of this fact the appellant had been informed.

There is no indication that, had the appellant been advised of the possibility that such a sentence could, in addition, become

applicable upon a finding that he had raped the complainant more than once, might have pleaded differently or that he might have altered his version or his defence.

[21.] The test to be applied by a court on appeal against findings regarding substantial and compelling circumstances as envisaged in section 51(3) of the Act, is to consider whether such circumstances had been duly considered by the sentencing court[6].

[22.] That the appellant had always financially provided for his family would certainly have been a favourable personal factor, as would the absence of previous convictions involving violence or sexual misconduct (especially at the age of the appellant). On the other hand, the appellant had no less than 11 previous convictions, ranging over a period of more than 20 years, including convictions of housebreaking and theft, escaping and stock theft, which arguably indicated a propensity to commit crimes in general and a disrespect for the law.

[23.] In the absence of information regarding the nature and value of the stolen goods involved in those thefts the argument by appellant's

counsel, Mr Nel, that appellant had, in view of his indigent circumstances, probably stolen out of need, amounts to no more than

conjecture.

[24.] Although the complainant testified that she had later heard that the appellant had used drugs and that he had been drunk, she was apparently referring to the appellant's condition at the time of his arrest. There was absolutely no evidence or suggestion that the appellant had been under the influence of liquor or drugs when he committed the acts of rape or on 2 September 2004.

[25.] The absence of violence and the fact that no serious or permanent physical injuries had been caused would normally be a mitigating

factor[7], but here it should be weighed up against the fact that the appellant, as the biological father of the complainant and the adult person in whose house she had grown up, had abused his position of trust and had in fact used it to manipulate the complainant to subject herself, without having to apply any violence[8]. The threat to kill the complainant's mother should also not be lost sight of.

[26.] There is no merit in the submission that the appellant had, through admitting to indecent assault, shown a measure of remorse. The

admission that he had undressed complainant on 2 September 2004 pertained only to the events of that day. In making that admission the appellant chose not to disclose that he had in fact on that occasion also partially undressed himself.

[27.] The events on the farm were denied and the complainant was forced to relive them in her evidence and in cross-examination[9]. The appellant's later version, that he had merely inserted his penis between the complainant's legs and not in her vagina, was not revealed in his plea explanation, but only in cross-examination of the complainant.

[28.] There was therefore no sign of remorse and "Whilst lack of remorse is not an aggravating circumstance, it would have redounded in the appellant's favour if he had shown some appreciation of and contrition for the devastation he caused." [10].

[29.] Although it appears that time spent in custody awaiting trial have been taken into account by courts in circumstances where the prescribed sentence was life imprisonment[11], it should then at least be considered in the context of life imprisonment (and not a determinate period of imprisonment) being the prescribed sentence[12].

[30.] This brings me to the issue of the age of the appellant at the time of sentence. In his heads of argument Mr Nel referred to *S v Barendse*[13] and to *S v Dumba*[14] in support of the submission that the appellant's age should have been considered as a mitigating factor. Reference was also made to the provisions of section 73 of the Correctional Services Act[15] and it was submitted that, depending on the manner of interpretation and application of those provisions, the appellant would become

eligible for parole no sooner than the age of 74 and possibly only when reaching the age of 84.

[31.] In my view the Barendse case is distinguishable from the present one. In that case the age of the appellant was held to be relevant in determining the (determinate) period of imprisonment to be imposed in circumstances where it had already been found that there were substantial and compelling circumstances which justified a lesser sentence than the prescribed (indeterminate) sentence of life imprisonment.

Neither the sentencing nor the appeal court made a finding that the advanced age of that appellant had in fact been a mitigating factor which constituted or contributed to substantial and compelling circumstances justifying a deviation from the prescribed sentence of life imprisonment. This had also not been the issue in the cases of *S v HN*[16] and *S v Heller*[17], referred to by that court on appeal.

[32.] In the Dumba case the existence of substantial and compelling circumstances justifying a lesser sentence than life imprisonment, which had apparently been the applicable prescribed sentence, was conceded by counsel for the prosecution and the issue now being considered was not debated.

[33.] In *Hewitt v The State*[18] reference was also made to the Heller case, and to *S v Munyai and Others*[19], as cases where "courts have considered oldness as a mitigating factor"[20]. None of these cases concerned a prescribed sentence of life imprisonment, and the issue was therefore not whether the fact that an accused of advanced age might spend the rest of his or her life behind bars if life imprisonment is imposed could be a mitigating factor which could constitute or contribute to substantial and compelling circumstances justifying a lesser and determinate sentence.

[34.] In *S v Jibiliza*[21] it was considered that a determinate sentence of 25 years imprisonment and one of life imprisonment would in the circumstances

of that case have had more or less the same practical effect, having regard to the fact that the appellant in that matter had by then (having initially been sentenced to death) “been well into his thirties”. Once again, the issue had not been whether, in circumstances where an indeterminate sentence like life imprisonment was prescribed, advanced age could be considered to be a mitigating factor.

[35.] In *S v Martin*[22] precisely this issue (albeit not in the context of a prescribed sentence) was considered and it was held[23] that a “Life sentence imposed upon a lively man of 30 imposes a much longer and harsher sentence than the nominally identical sentence imposed on a man of 65 who has lost interest in everything around him”.

[36.] A sentence of life imprisonment must, from the viewpoint of the courts, be seen as exactly that – imprisonment for the rest of the natural life of the offender[24]. That must also be assumed to have been the intention of the legislature in enacting section 51(1) of the Act[25].

[37.] This must necessarily be the case, because such a sentence would technically empower the executive to keep the offender in custody for the rest of his or her natural life. The possibility that a sentenced offender may later be released on parole is dependent upon a statutory power and discretion which lies within the domain of the executive, and courts are therefore not entitled to take into account the possibility of such release when considering a sentence, let alone the possible timing of such release.

“Unless there is a particular purpose in having regard to the pre-parole portion of an imprisonment sentence... the Court must disregard what might or might not be decided by the administrative authorities as to parole. The court has no control over that... the function of the sentencing court is to determine the maximum term of imprisonment the convicted person may serve. In other words, the court imposes what it intends should be served and it imposes that on an assessment of all the relevant factors before it. It does not grade the duration of its sentences by reference to their conceivable pre-parole components but by reference to the fixed and finite maximum terms it considers appropriate, without any regard possible parole.”

Per Howie JA in *S v Matlala* 2003 (1) SACR 80 (SCA) para [7][26].

[38.] The “function of a court in imposing sentence is to determine the maximum period a convicted person may be imprisoned”[27] and it cannot, in my view, in doing so take into account or rely on the possibility that the offender could be released on parole after having served a specified portion of that maximum period.

[39.] The approach cannot in my view be different where the issue in a particular case is whether life imprisonment would be an appropriate

sentence. It is not for the sentencing court to try to work out how old an offender could be when (if at all) the executive decides to release him or her on parole. The fact that “a person who is 25 years old at the time of sentencing is more likely to serve a longer period of imprisonment than a person who is 60 years old at the time of sentencing” if both were to remain in prison for the rest of their natural lives, would also not justify a sentencing court to not “impose a life sentence of imprisonment where it is statutorily required”[28].

[40.] I believe that it is for this reason that the Supreme Court of Appeal in the Abrahams case, where the applicable prescribed sentence had been life imprisonment, held that the age of that appellant (53 years old at

the time of the rape and 54 years old at the time of sentence) was not a mitigating factor when it came to the issue of substantial and compelling circumstances where such a sentence was concerned[29].

[41.] In the circumstances, therefore, I am of the view that the appellant’s relatively advanced age would not have been a mitigating factor in the context of a prescribed sentence of life imprisonment and in considering whether there are substantial and compelling circumstances justifying a lesser sentence.

[42.] Counsel for the respondent, Mr Rosenberg, referred us to the cases of *S v PB*[30] and *S v MDT*[31]. In both those cases sentences of life imprisonment for the incestuous rape of the young daughters of those appellants were confirmed on appeal. Although the facts of those cases are, needless to say, not identical to those of the present case, there is sufficient similarity for the purposes of comparison and it is in my view clear that the present sentence of life imprisonment, when the circumstances of this case are compared with the facts of those two cases, cannot be said to be disproportionate to what the appellant had done or to his personal circumstances.

[43.] Unlike the appellant in the present matter, the appellant in the PB case showed remorse and had a drug addiction problem. Like the appellant in the present matter that appellant had unrelated previous convictions of crimes like theft, fraud and escaping from custody, but most importantly he also had a previous conviction of attempted rape, for which he had been sentenced to partially suspended imprisonment. There is, however, no indication in the report of that case of the type of calculated behaviour exhibited by the appellant in this case. Although that appellant had only raped the complainant once, it appears that he had twice before then performed “sexual practices” on that complainant.

[44.] The appellant in the MDT case had only raped his daughter once and there was no evidence of any other incidents of a sexual nature between them. He was 55 years old at the time of that rape, and his daughter 14 years. He was regarded as a first offender. Although there was evidence of an injury to that complainant’s private parts, there was no evidence of it having had any permanent physical effect.

[45.] In my view the facts of the present matter are, as a whole, more serious than those in any of the PB and MDT cases. The appellant in the present matter committed the rapes repeatedly over a period of time. He had ample time and opportunity to reflect and to come to his senses. The fact that Ms B had discovered what he had been doing, and the fact that he had made a promise to her not to do it again, did not stop him. Even when Ms B removed the complainant to Port Nolloth, obviously to get her away from the appellant, the appellant followed them and again attempted to have sexual intercourse with the complainant.

[46.] All of the appellant's acts were calculated. He would send the complainant to take care of the sheep and would then follow her there. In Port Nolloth he summoned the complainant home under false pretences. He then got rid of her friends, before proceeding to undress her.

[47.] The prevalence of this type of offence was quite correctly taken into account by the court a quo. In fact, in cross-examination of doctor Avila the appellant's counsel himself revealed that that court had just the week before also tried a case where a 9 year old child had been raped.

[48.] As far as the seriousness of each and every one of the incidents here is concerned, I can do no better than to refer to what was said in this regard in cases like S v Abrahams and S v PB. In the latter case Bosiello JA expressed himself as follows in this regard[32].

"It can hardly be disputed that rape of young girls by their fathers is not only scandalous; it has become prevalent as well. To all right-thinking people it is morally repugnant. It has emerged insidiously in recent times as a malignant cancer seriously

threatening the wellbeing and proper growth and development of young girls. It is an understatement to say that it qualifies to be described as a most serious threat to our social and moral fabric."

[49.] The Supreme Court of Appeal recently again labelled "child rape... (as) a national scourge that shames us as a nation"[33].

[50.] In my view, and upon a consideration of all mitigating and aggravating factors in this matter, there is no basis for interference with the sentence of life imprisonment.

[51.] In the premises the following order is made:

THE APPEAL IS DISMISSED AND THE SENTENCE OF LIFE IMPRISONMENT IS CONFIRMED.

C J OLIVIER

JUDGE

NORTHERN CAPE DIVISION

I concur.

F DIALE KGOMO

JUDGE PRESIDENT

S L ERASMUS

ACTING JUDGE

For the Appellant: Adv. V Z Nel

Legal Aid South Africa

For the Respondent: Adv J J Rosenberg

Office of the Director of Public Prosecutions

[1] 105 of 1997

[2] In terms of section 51 of the Act, prior to its amendment by the Criminal Law (Sentencing) Amendment Act, 38 of 2007.

[3] As provided for in terms of section 51(1), read with Part I of Schedule 2, of the Act, even prior to the amendment of Part I by the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007.

[4] Compare *MM v S* [2012] 2 All SA 401 (SCA); *S v Michele and Another* 2012 (1) SACR 131 (SCA) ([2010] 1 All SA 446); *S v Japhta* 2010 (1) SACR 136 (SCA) ([2010] 1 All SA 403); *S v Van Deventer and Another* 2012 (2) SACR 263 (WCC).

[5] (210/11) [2011] ZASCA 178 (29 September 2011)

[6] See *S v PB* 2013 (2) SACR 533 (SCA) para [20]; *S v GK* 2013 (2) SACR 505 (WCC) paras [3] - [8]

[7] Compare *S v Abrahams* 2002

(1) SACR 116 (SCA) para [27]

[8] Compare *S v Barendse* 2010

(2) SACR 616 (ECG) at 617(j)

[9] Compare *S v MDT* 2014 (2) SACR 630 (SCA) para [2]

[10] *Hewitt v The State* (637/2015) [2016] ZASCA 100 (9 June 2016) para [16]

[11] Compare *Director of Public Prosecutions, Kwa Zulu-Natal v Ngcobo and Others* 2009 (2) (SACR) 361 (SCA) paras [24] - [27]

[12] Compare *S v ET* 2012 (2) SACR 478 (WCC) para [18]; *S v M* 2007 (2) SACR 60 (W) paras [110] - [115]; But also compare *S v Dlamini* 2014 (1) SACR 530 (GP) para [18]

[13] See footnote 8 above.

[14] 2011 (2) SACR 5 (NCK)

- [15] 111 of 1998
- [16] See *S v Barendse*, supra, at 619f
- [17] 1971 (2) SA 29 (A) at 55C - D
- [18] See footnote 10 above
- [19] 1993 (1) SACR 252 (A)
- [20] *Hewitt v The State*, supra, para [15]
- [21] 1995 (2) SACR 677 (A)
- [22] 1996 (2) SACR 378 (W)
- [23] At 385f
- [24] Compare *S v Mhlakaza and Another* 1997 (1) SACR 515 (SCA) at 521d – e; *S v Lewatle* 2012 JR 1446 (GNP) para [9]; *S v T* 1997 (1) SACR 496 (SCA) at 498h
- [25] Compare *S v Dlamini*, supra
- [26] See also *S v Mokoena* 2009 (2) SACR 309 (SCA) para [6]
- [27] Ibid, at 313g
- [28] *S v M*, supra, para [113]
- [29] *S v Abrahams*, supra, para [27]
- [30] See footnote 6 above
- [31] 2014 (2) SACR 630 (SCA)
- [32] *S v PB*, supra, para [13]
- [33] *S v MDT*, supra, para [7]

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