

SOUTH AFRICA / JUDGMENT

J.R.M v S (CA54.2020) [2024]

ZANWHC 263 (21 October 2024)

[2024] ZANWHC 263**COURT**

North West High Court, Mafikeng

BEFORE

R D Hendricks, A H Petersen

CASE / FILE NUMBER

CA54.2020

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Policy**IN THE HIGH COURT OF****SOUTH AFRICA****NORTH WEST DIVISION,****MAHIKENG****CASE NO: CA 54/2020****REGIONAL****MAGISTRATES CASE NO: RC2/41/19****Reportable:**

YES / NO

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to Judges: YES / NO

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to Magistrates: YES / NO

Circulate

to Regional Magistrates: YES / NO

In

the matter between:	J[...] R[...] M[...] Appellant and THE STATE Respondent
CORAM:	HENDRICKS JP et PETERSEN J DATE OF HEARING : 01 DECEMBER 2023 DATE OF JUDGMENT : 21 OCTOBER 2024 FOR RESPONDENT : ADV. TLATSANA
Delivered:	This judgment was handed down electronically by circulation to the parties' representatives via email. The date and time for hand-down is deemed to be 15h00 on 21 October 2024. ORDER Resultantly,
the following order is made:	(i) The appeal against the sentence is upheld. (ii) The sentence is set aside and
replaced with the following sentence:	"Fifteen years imprisonment." (iii) The sentence is antedated to 12 March 2020. (iv) The consequential orders in terms of section 103 (1) of the Firearms Control Act and section 50(2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, are otherwise confirmed.

JUDGMENT**THE COURT**

- [1] The appellant, Mr. J[...] R[...] M[...], was convicted of attempted rape in contravention of section 55(a) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (as amended) on 12 March 2020 and sentenced to life imprisonment by the Regional Court, Klerksdorp. By virtue of the sentence of life imprisonment imposed by the Regional Court, the appellant enjoyed an automatic right of appeal.
- [2] The appeal which lies against conviction and sentence was enrolled on 01 December 2023, as part of an appeals project aimed at eradicating the backlog of criminal appeals in the North West Division. The scribe D Joubert AJ failed to deliver a judgment for more than 10 months. The delay in delivering a judgment defeated the very purpose of the appeals project which was to eradicate the backlog as a matter of urgency. The delay is indeed regretted. This judgment was consequently scribed by the Judge President and Petersen J, at the earliest opportunity following failed attempts to get the scribe to pen the judgment. This appeal is adjudicated on the papers filed as permitted in terms of section 19
- (1) (a) of the Superior Courts Act 10 of 2013 and conceded to by counsel for the respondent (State).
- [3] The facts of the matter may be succinctly summarized as follows. On the evening of 27 September 2018, the appellant arrived at the house of his half-sister to pay her a visit. As the evening progressed and due to the lateness of the hour, his sister told him to sleep over. The following morning, he was to leave early to collect his social grant (SASSA) pay-out. Since his sister's
- house was a colloquial shack (shanty) which consisted of a single room, the sleeping area was separated from the kitchen area by a curtain. The appellant slept in the kitchen area with the two daughters (the complainant and her sibling) of his half-sister. His half-sister, her boyfriend and son slept in the bedroom area.
- [4] During the course of the night the complainant's mother was awoken by the sound of noises in the kitchen area where the appellant and her two daughters were sleeping. She rose from her bed to inspect the noises using the torch of her cell phone to illuminate where the appellant and her daughters were sleeping. She observed that the sleeping arrangement had changed. When the appellant and her daughters went to bed, her daughters were sleeping at the foot end of the appellant. She, upon inspection of the noises, now found the complainant who was the eldest of the two daughters, sleeping on the side of the appellant, next to him. The younger daughter was still sleeping in the original position. The top half of the bodies of the appellant and the complainant were half-naked.

[5] She picked up the complainant and carried her to the bedroom area where she inspected the complainant's private parts as she suspected that the complainant had been sexually violated by the appellant. She also proceeded to move her other daughter to the bedroom area. She was awoken by the appellant at 03h00 when he was leaving, rather than 06h00 as he had initially indicated, when he requested her to lock the door. Later that morning, she made a report to her neighbour and took the complainant, who was then seven years old, to a doctor. A medical examination was conducted on the complainant, by the doctor.

[6] Doctor Tenenbaum, a medical officer, employed as the Head of the Emergency Unit at Tshepong Hospital testified he found no signs of injuries outside the genital area of the child. On further examination of the genital area, he found that there was bruising in the posterior fourchette and the hymen, which points to sexual violation. He therefore concluded that the child had been raped. On the issue of penetration, he testified that if an adult person commits an act of penetration on a 7 year' old child, as in casu, the injuries will be much bigger than those he described in the medical report (J88), which he did not find. The injuries he observed

were consistent with an attempt to insert, for example, a finger or a penis, which did not go in. The injuries could be consistent with attempted penile penetration. Under cross examination, he testified that he does not think that there was penetration.

[7] As a result of the evidence of the doctor, the appellant was ultimately convicted of attempted rape instead of rape as proffered against the appellant.

[8] In the Notice of Appeal, the conviction is assailed on the following grounds:

"1. The court did not take into consideration the contradictions inherent in the state case.

2. The court erred in finding that the complainant testified in a satisfactory manner.
3. That the evidence of State witnesses can be criticized on matters of detail only, whereas the evidence was contradictory in material respects.
4. In convicting the appellant, the court erred in failing to properly analyze or evaluate the evidence of the State witnesses.
5. The court therefore erred in finding that the State had proved the guilt of the appellant beyond a reasonable doubt.

6. In convicting the appellant, the court further erred in the following respects:

6.1 Rejecting the evidence of the appellant as not being reasonable possibly true.

6.2 Finding that the contradictions inherent in the defence case were material.

6.3 Accepting the evidence of the State witnesses and rejecting the version of the appellant."

[9] The sentence is assailed on the following grounds:

“1. The Learned Regional Magistrate found that there were no compelling and substantial circumstances present:

1.1 The appellant humbly submits that his age may be taken into account as comprising possible compelling and substantial circumstances.

2. The appellant humbly submits that the term of life imprisonment over emphasizes the public interest and negates the personal circumstances of the appellant.

2.1 It is out of proportion to the totality of the accepted facts in this matter;

2.2 The sentence handed down by the Learned Magistrate leaves no room for the appellant to be rehabilitated and reintegrated back into

society as he is still a young man and over emphasizes the retribution element of sentencing.”

[10] In Annexure “A” to the chargesheet (J15), the charge is formulated as follows:

“THE STATE VERSUS

J[...] R[...] M[...]

RAPE

THAT the accused is/are guilty of the crime of contravening the provisions of Section 3 read with Sections 1, 56(1), 57, 58, 59, 60 and 61 of the Sexual Offences Act 32/2007 — RAPE (read with the provisions of Sections 51(1) and Schedule 2 of the Criminal Law Amendment Act 105 of 1997, as amended) as well as read with the provisions of Section 94 of Act 51 of 1977

IN THAT on or about the 27th day of September 2018 and at or near Kanana in the Regional Division of NORTH WEST the said accused did unlawfully and intentionally commit an act of sexual penetration with the complainant to wit, A[...] N[...] N[...] by inserting his penis into or beyond the genital organs of the said complainant without the consent of the said complainant.

*Section 51(1) and Schedule 2 of the Criminal Law Amendment Act 105 of 1997, as amended is applicable as: the said Complainant was born on 29 November 2011.

* Delete if not applicable.

Definition of Section 3

‘Any person ("A") who unlawfully and intentionally commits an act of sexual penetration with a complainant ("B"), without the consent of B, is guilty of the offence of rape.’”

[11] In concluding his judgment on the merits, the Regional Magistrate stated:

“But because the accused is charged with rape however due to the unsatisfactory, I mean comments by the doctor which is a bit contradictory in one breath he says there was rape and also the injuries there and so on. But at the same time he could not come out clearly if there was a penetration. Penetration is the one, in fact the elements of rape no penetration no Rape.

THEREFORE AT MOST THE ACCUSED IS FOUND GUILTY OF ATTEMPTED RAPE.”

[12] The Regional Magistrate in convicting the appellant, did not state that the provisions of section 55 of the Criminal Law Sexual Offences and Related Matters) Amendment Act 32 of 2007 (SORMA) applies. Instead, reference to the provisions of SORMA were made for the first in the judgment on sentence when the appellant was sentenced to life imprisonment.

[13] In imposing the sentence of life imprisonment, the Regional Magistrate said:

“I am aware that of course with regard to the offence I have convicted you with there is no prescribed minimum sentence, but in terms of Section 55 of the Sexual Offences Act number 32/2007 the Court has a discretion to impose a sentence I would have imposed have you been convicted of raping the child.

IN TERMS OF SECTION 51 (1) OF ACT 105/1997 READ WITH SECTION 55 OF ACT 32/2007 THE ACCUSED IS SENTENCED TO LIFE IMPRISONMENT.

Two, the accused is declared unfit to possess a firearm in terms of Section 103 of Act 60/2000.

Lastly it is ordered in terms of Section 50 subsection 2 of Act 32/2007 that the particulars of the accused person be entered into the National Register of Sex Offenders.”

(emphasis added)

[14] The sentence of life imprisonment constitutes a material misdirection as demonstrated below. Section 55 of SORMA provides that:

“55 Attempt, conspiracy, incitement or inducing another person to commit sexual offence

Any person who-

- (a) attempts;
- (b) conspires with any other person; or
- (c) aids, abets, induces, incites, instigates, instructs, commands, counsels or procures another person,

to commit a sexual offence in terms of this Act, is guilty of an offence and may be liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.”

[15] The approach to sentence by the Regional Magistrate appears to resonate with the sentiments expressed in *S v Silo* 2016 (2) SACR 259 (WCC) at paragraphs 27 to 31, where the following is stated:

“[27] On a plain reading and interpretation of Part I – Part IV of Schedule 2 of the Criminal Law (Sentencing) Amendment Act 105 of 1997 (“Minimum Sentencing Act”), no provision is made for the imposition of a prescribed sentence for attempted rape in contravention of s55 of SORMA.

This issue was raised by the parties in argument and the court was initially also under such impression. It was further argued that the Regional Magistrate may have misdirected herself in applying and considering the provisions of the Minimum Sentencing Act.

Section 55 of SORMA, however, states that any person who 1) attempts, conspires, or aids, abets, induces, incites, instigates, instructs, commands, counsels or procures another person, to commit a sexual offence in terms of this Act, is guilty of an offence and may be liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.” (OWN EMPHASIS)

In this particular case, the offence the Appellant had been convicted of was an attempt to commit a rape in terms of s3 of SORMA.

[28] On a basic understanding of the provisions of s55 relating to sentence, it seeks to give power to a court to impose the same punishment on a person convicted of attempting to commit any of the offences as mentioned in SORMA as would be imposed on a person convicted of actually committing that offence.

[29] The types of punishment a court can impose are set out in s276 of the Criminal Procedure Act.

Such punishment in the case of a Magistrate or Regional Court is subject to the limits imposed on its jurisdiction as set out in s92(1)(a) of the Magistrate’s Court Act 32 of 1994. This power to impose a sentence is however subject to the provisions of any other law, which can either be any statute which prescribes a specific sentence or the Minimum Sentencing Act.

In my view, that would be the same punishment to which such an offender would be liable to undergo; either in terms of a court’s sentencing powers or in terms of the provisions of s276 of the CPA. See *Director of Public Prosecutions, Western Cape v Prins and Others* 2012

(2) SACR 183 (SCA).

[30] The Minimum Sentencing Act does not make express provision for the imposition of a prescribed sentence in any of Part I – IV of Schedule 2 in the sentencing of an attempt to commit any of the listed offences. However, SORMA prescribes that an offender may be liable upon conviction of an attempt to commit rape in terms of s3 or s4 to a punishment which such offender would have been subjected to if such offender had actually committed such an offence. In this particular case, the prosecution revealed in the charge sheet that it would be relying on the provisions of the Minimum Sentencing Act, and in particular the provisions of Part III of Schedule 2, which prescribes a sentence of 10 years imprisonment unless of course the court finds that there are substantial and compelling circumstances to deviate from such a prescribed sentence.

[31] Therefore is no doubt in my mind that the Regional Magistrate was correct in applying the provisions of the Minimum Sentencing Act...”

[16] Subsequent to decision in *Silo* and after sentence was imposed in *casu*, the Constitutional Court judgment in *Economic Freedom Fighters and Another v Minister of Justice and Correctional Services and Another* (CCT201/19) [2020] ZACC 25; 2021 (2) BCLR 118 (CC); 2021 (2) SA 1 (CC); 2021 (1) SACR 387 (CC) (27 November 2020), the majority judgment dealt with section 18(2)(b) of the Riotous Assemblies Act 17 of 1956, a similar sanction to section 55 of SORMA, as follows:

“[25] The High Court declared that part of section 18(2)(b) of the Riotous Assemblies Act that deals with sanction constitutionally invalid. This was on the basis that it compels a court to impose the same sentence on the person inciting others to commit a crime, as on the person who actually committed the crime.

[26] Section 172(2)(a) of the Constitution provides that “an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court”. We thus have to reflect on the constitutional correctness of the High Court order sought to be confirmed. The impugned section provides:

“(2) Any person who—

...

(b) incites, instigates, commands, or procures any other person to commit,

any offence whether at common law or against a statute or a statutory regulation, shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.”

[27] The word “liable” does not connote inescapability, compulsion or absence of judicial discretion. Its ordinary meaning is that the inciter is susceptible to the same punishment or might have the same punishment visited upon him or her as the actual perpetrator. This in effect is the meaning given to it in *Toms* (*S v Toms*; *S v Bruce* [1990] ZASCA 38; 1990

(2) SA 802 (A) at 813B-C):

“[T]he words ‘liable to’ in a provision . . . would normally denote a susceptibility to a burden of punishment and not that the burden in question is mandatory or compulsory; the actual incidence and extent must still be determined.”

[28] It is with this understanding that Snyman observed:

“Normally the inciter gets a lighter punishment than the actual perpetrator, just as someone who only attempts to commit the crime or only conspires to do so, gets a lighter punishment than the actual perpetrator. . . . However there may be cases in which a court may decide that the inciter deserves a heavy punishment, such as where the evidence reveals that she was the [mastermind] behind a whole criminal scheme.”

[29] And it follows that the declaration of unconstitutionality was premised on an incorrect interpretation of section 18(2)(b). The High Court order will thus not be confirmed.”

[17] It follows axiomatically that the decision in *Economic Freedom Fighters and Another v Minister of Justice and Correctional Services and Another* applies equally to the provisions of section 55 of SORMA. In ordinary parlance, if the appellant were arraigned in the High Court, he may have been susceptible to a sentence of life imprisonment, on the basis of the inherent jurisdiction of the High Court to impose life imprisonment. And the sentence of life imprisonment in that case would still have to be considered relevant to the “...actual incidence and extent...” or otherwise stated peculiar facts of the matter and seriousness and extent of the attempted rape. The Regional Court is empowered by statute through the Criminal Law Amendment Act 105 of 1997 (CLAA) to impose life imprisonment. If the CLAA does not provide a minimum sentence for any specific offence, the Regional Court, as stated in *Silo* “...is subject to the limits imposed on its jurisdiction as set out in s92(1)(a) of the Magistrate’s Court Act 32 of 1994. This power to impose a sentence is however subject to the provisions of any other law, which can either be any statute which prescribes a specific sentence or the Minimum Sentencing Act.”

[18] Attempted rape in contravention of section 55(a) of SORMA does not attract a minimum sentence in the context of the peculiar facts

of the present matter. The Regional Magistrate was therefore constrained to the limit of his jurisdiction in section 92(1)(a) of the Magistrates Courts Act 32 of 1944. He could therefore in terms of imprisonment impose a sentence of imprisonment up to a maximum of fifteen (15) years.

[19] The Regional Magistrate having misdirected himself on sentence, this Court is at large to impose sentence afresh, within the jurisdictional limit of fifteen years imprisonment applicable to the Regional Court.

[20] The personal circumstances of the appellant are as follows. He was 38 years old at the time of sentencing in 2020; attended school to Grade 3; was not married; has no children; was unemployed; had a problem with his eyesight and was receiving a disability grant. He is not a first offender and has a relevant previous conviction of rape. He was on parole when he committed the present offence. The complainant was seven years old at the time she was violated by the appellant. He stood in a familial relationship

with the child as her uncle. He was in a position of trust, and this explains why he was allowed to share a bed with the child and her sister.

[21] The sentiments expressed in *S v Maila* (429/2022) [2023] ZASCA 3 (23 January 2023), albeit in the context of the offence of rape are equally apposite in the present matter.

[22] The personal circumstances of the appellant weighed against the offence and interests of society dictate that a fair and balanced sentence would be one of fifteen years imprisonment.

Order

[23] Resultantly, the following order is made:

- (i) The appeal against the sentence is upheld.
- (ii) The sentence is set aside and replaced with the following sentence:
- (iii) The sentence is antedated to 12 March 2020.
- (iv) The consequential orders in terms of section 103 (1) of the Firearms Control Act and section 50(2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, are otherwise confirmed.

R D HENDRICKS

JUDGE PRESIDENT OF THE HIGH COURT OF SOUTH AFRICA,

A H PETERSEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA,

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