

SOUTH AFRICA / JUDGMENT

L.T v S (CA&R286/2016) [2017] ZAECHGC 43 (22 March 2017)

[2017] ZAECHGC 43

COURT

Eastern Cape High Court, Grahamstown

BEFORE

G H Bloem, N G Beshe

CASE / FILE NUMBER

CA&R286/2016

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IN THE

HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

CASE

NO. CA & R 286/2016

In the

matter between:

L.

T.

Appellant

and

THE

STATE

Respondent

JUDGMENT

Bloem J.

- [1] The appellant was one of three accused who were charged in the regional court, Port Elizabeth with rape in contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act[1] and aiding, abetting, inducing, instigating, instructing, commanding, counselling or procuring each other to commit a sexual offence in contravention of section 55 (c) of the above Act. Despite his plea of not guilty the appellant was convicted on both counts. He was sentenced to ten years' imprisonment on count one and five years' imprisonment on count two. The appellant applied to the magistrate for leave to appeal against sentence which was refused. He now appeals against his sentence with the leave of this court.
- [2] The facts on which the appellant were convicted are that at approximately 23h30 on 3 November 2007 and at Kwazakele, Port Elizabeth A. C., the complainant, was walking home when she came across the appellant and four others. She was accompanied by a friend, N.. Another friend, A., stood at the corner of the street, not far from the appellant and N.. The five persons demanded her cellphone. One of them held a knife against her neck while the appellant pointed a firearm at her. A. shouted that the complainant and N. should run away. N. managed to run away. The complainant was not so fortunate. Two of the five men ran away.
- [3] The other three, inclusive of the appellant, dragged the complainant to a dilapidated house. There she was told to undress or she might be killed. She refused to undress. The appellant took off her pair of trousers while the other two (accused 1 and 3 in the court a quo) were holding her arms. The appellant inserted his penis into her vagina and had sexual intercourse with her against her will and without her consent. Accused 1 was holding one of the complainant's arms while accused 3 was holding the other. After the appellant was done accused 1 also raped the complainant. While he was raping the complainant, the appellant told accused 3 to undress and have sexual intercourse with the complainant. After accused 1 was done accused 3 also had sexual intercourse with the complainant. Neither the appellant nor accused 1 held the complainant while accused 3 had sexual intercourse with her. It was while accused 3 had sexual intercourse with the complainant that the police and members of the community arrived on the scene. Accused 3 was arrested but the appellant and accused 1 managed to run away. The complainant and accused 3 were taken to the police station. While there the police arrived with the appellant and accused 1. The appellant was correctly convicted as charged.

- [4] Regarding the sentence, Mr Geldenhuys, counsel for the appellant, did not submit that the sentence imposed on each count was shockingly harsh. His submission was that the cumulative effect of the sentences rendered the sentence so inappropriately harsh and disproportionate that it entitles this court to interfere. Ms Obermeyer, counsel for the state, submitted that, because of the serious nature of the offences of which the appellant was convicted, the cumulative effect of the sentence was appropriate.
- [5] Rape is indeed a serious offence. In this case, like all rape cases, the appellant violated the complainant's bodily integrity against her will. She will in all probability live with the thought of having been violated for the rest of her life. Rape is very prevalent within the area of the trial court and this court. Rape is one of those offences for which the Legislature has ordained minimum sentences. In terms of section 51 (6) of the Criminal Law Amendment Act[2] section 51, which provides for discretionary sentences for certain serious offences, does not apply to the appellant because he was 17 years old at the time of the commission of the offences. What aggravates the rape in the present matter is that the complainant was 14 years old when she was raped, she was threatened with a firearm and a knife and she was raped by three males. A contravention of section 55 (c) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act is also serious. The appellant instructed accused 3, also 14 years old at the time, to undress and have sexual intercourse with the complainant. Accused 3 might not have had sexual intercourse with the complainant had the appellant not instructed him to do so.
- [6] The appellant was 17 years old and a first offender when he committed the two offences. He was brought up by a single parent. He left school in grade 8. He is single and does not have a child. He spent approximately two years in custody before the commencement of the trial.
- [7] Members of society expect courts to impose not lenient sentences on rapists, especially when their victims are children, lest the administration of justice may fall into disrepute and members of society take the law into their own hands.[3]
- [8] Sentencing is pre-eminently a matter for the discretion of the trial court. The power of a court of appeal to interfere with sentences imposed by lower courts is circumscribed. In this regard Khampepe J said in *S v Bogaards*[4] that a court of appeal can interfere with sentences only:
- "...where there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it."*
- [9] In this case the magistrate did not, in the course of the judgment on sentence, order that the sentence on count 2 run concurrently with the sentence imposed on count 1.[5] The attorney for accused 1 then enquired from the magistrate whether he meant that the sentences imposed on accused 1 and the appellant were to run concurrently whereafter the magistrate respondent: "Definitely not. I specifically left that out. So they are to effectively serve fifteen years. In any event if they appeal it may be reduced or if it is set aside." The

magistrate did not give reasons for his order in this regard.

[10] There is no doubt that direct imprisonment was the only appropriate form of sentence to be imposed on the appellant because he committed serious offences. Rape is by definition a violent offence. In this case a firearm and a knife were used to threaten the complainant. The appellant furthermore instructed accused 3 to undress and have sexual intercourse with the complainant against her will. She was a fourteen year old girl with virtually no known knowledge or experience of sexual activity.

[11] Despite the violent nature of the offence, I am of the view that the magistrate materially misdirected himself by ordering the sentences

to run cumulatively. These offences were committed virtually at the same time. Courts should guard against the imposition of sentences the cumulative effect of which is too harsh on an accused where the commission of offences is closely connected or similar in point of time, nature, seriousness or otherwise.[6] It should be remembered that the appellant spent approximately two years in custody before the commencement of the trial. In the circumstances of this case the imposition of an effective term of fifteen years' imprisonment on a 17 year old accused who raped a fourteen year old complainant and who instructed a fourteen year old boy to rape the complainant is disproportionately harsh and induces a sense of shock. In my view an appropriate sentence would be to order that a portion of the sentence on count 2 run concurrently with the sentence on count 1. The reason for not ordering the entire sentence on count 2 to run concurrently with the sentence on count 1 is to not minimise the serious nature of the offence of which the appellant was convicted in respect of count 2.

[12] For the above reasons the following order is made.

12.1. The appeal against sentence is upheld insofar as the sentences on counts 1 and 2 were ordered to run cumulatively.

12.2. The sentences imposed by the magistrate are set aside and replaced by the following:

"1. On count 1 (rape in contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act) the accused is sentenced to ten years' imprisonment.

2. On count 2 (instructing another person to commit a sexual offence in contravention of section 55 (c) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act) the accused is sentenced to five years' imprisonment.

3. Three years of the sentence on count 2 are to run concurrently with the sentence imposed on count 1."

12.3. The above sentences are antedated to 16 July 2015.

G H BLOEM

Judge of the High Court

Beshe J,

I agree

N G BESHE

For the appellant:

Adv D P Geldenhuys of the Grahamstown Justice Centre, Grahamstown.

For the state:

Adv H Obermeyer of the office of the Deputy Director of Public Prosecutions, Grahamstown.

Date of hearing:

15 March 2017

Date of delivery of the judgment:

22 March 2017

[1] Criminal Law (Sexual Offences and Related Matter) Amendment Act, 2007 (Act No. 32 of 2007).

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

[3] R v Karg 1961 (1) SA 231 (A) at 236B.

[4] S v Bogaards 2013

(1) SACR 1 (CC) at 14d-e.

[5] It therefore means that in terms of section 280 (2) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) the sentence on count 2 shall commence after the expiration of the sentence on count 1.

[6] S v Young 1977 (1) SA 602 (A) at 610E-H.

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