

SOUTH AFRICA / JUDGMENT

M v S (A66/2015) [2015] ZAFSHC 165 (3 September 2015)

[2015] ZAFSHC 165**COURT**

Free State High Court, Bloemfontein

BEFORE

Van Zyl, Mokoena

CASE / FILE NUMBER

A66/2015

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Policy**IN THE HIGH COURT****OF SOUTH AFRICA****FREE STATE****DIVISION, BLOEMFONTEIN****Appeal number:** A66/2015

In the Appeal between: T.
M.
Appellant
and
THE
STATE
Respondent

CORAM: VAN
ZYL, J et MOKOENA, AJ
HEARD

ON: 27
JULY 2015

JUDGMENT

BY: MOKOENA, AJ

DELIVERED ON: 3 SEPTEMBER 2015

[1] The Appellant, an adult male aged 21 years, was arraigned in the regional Court sitting in Hertzogville on 3 (three) counts of rape (contravention of section 3 of Act 32 of 2007 read with the provisions of section 51(1) and (2) of the Criminal Law Amendment Act, No. 105 of 1997 as amended). He pleaded not guilty on all counts but after evidence was heard, he was found guilty on counts 1 and 2 and not guilty on count 3. He was sentenced to 6 (six) years imprisonment on count 1 and 15 (fifteen) years imprisonment on count

2. In respect of count 2 the court found that he raped the victim more than once. He now appeals against his conviction

and sentence with the leave of the trial court.

[2] The appellant was legally represented during trial. The facts leading to his conviction are as follows:

AD count 1

On 4 December 2010 at about 20h20 M. M. was from church when the appellant took her at knife point to the stadium and had sex with her without her consent. The appellant stabbed her in the thigh and buttocks for resisting to go with him to the stadium. She was seeing the appellant for the first time on the day in question.

AD count 2

On 5 February 2011 at about 01h30 M. P. M. had just left the tavern when the Appellant took her to the stadium at knife point where he raped her once. After this rape he forced her to go with him to his home where he raped her twice. She was seeing the appellant for the first time on the day in question.

[3] At the hearing of this appeal, Mr Bontes appearing for the Appellant correctly submitted that the convictions are in order and that the trial court did not misdirect itself in convicting the appellant. In his heads of argument counsel for appellant referred this court to what was stated in *S v Ntuli* 2003

(1) SACR 613 (W) para [4]:

“There are, of course, limitations to the content of counsel’s argument. Counsel may not misrepresent the facts or the law. At a minimum, however, counsel is required to uphold the interest of his or her client without fear of the consequences. There may be occasions when it is proper to make concessions. Seldom, if ever, will there be a case in which no useful submission at all can be advanced in a client’s favour.”

- [4] Regarding sentence in respect of count 1, Mr Bontes submitted that the 6 (six) years imprisonment is in order and that the sentencing court did not misdirect itself in sentencing the appellant.
- [5] Regarding sentence in respect of count 2, the main ground of appeal is that the sentencing court misdirected itself in sentencing the appellant in terms of section 51 of the Criminal Law Amendment Act 105 of 1997 by virtue of the fact that at the time the crime was committed the appellant was only 17 years of age and therefore section 51 was not applicable to him.
- [6] Section 51 of the Act to the extent relevant provides:
- “(1) Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part I of schedule 2 to imprisonment for life.*
- (2) ...
- (3) (a) If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence: Provided that if a regional court imposes a lesser sentence in respect of an offence referred to Part 1 of schedule 2, it shall have jurisdiction for a period not exceeding 30 years.
- (4) ...
- (5) ...
- (6) This section does not apply in respect of an accused person who was under the age of 18 years at the time of the commission of an offence contemplated in subsection (1) or (2).
- [7] It was submitted on behalf of the appellant that the sentence imposed by the trial court was inappropriate and should be set aside and replaced by a sentence that utilises the provisions of the Child Justice Act 75 of 2008.
- [8] It is trite that sentencing is primarily the discretion of the sentencing court. The sentences may be interfered with on appeal only if the sentencing court misdirected itself, or if the sentence is shockingly inappropriate.
- [9] The main question is whether sentencing the appellant in terms of section 51 of Act 105 of 1977 where appellant was only 17 years age at the time of committing the crimes constitutes a misdirection.

- [10] If indeed it is found that a misdirection had occurred, or that a shockingly inappropriate sentence was imposed, a further question would arise whether this court should set aside the sentence and replace it with an appropriate sentence or refer the matter back to the sentencing court.
- [11] I now turn to the question whether there was misdirection.
- [12] In this case, a serious misdirection occurred in that at the time the crime was committed the accused was only 17 years of age and therefore section 51 of Act 105 of 1977 was not applicable to him.
- [13] Since it is clear that the sentencing court adopted an incorrect approach in sentencing the appellant, the next question is whether this court should set aside the sentence and replace it with an appropriate sentence or refer the matter back to the sentencing court.
- [14] In my view the misdirection is serious and it will be in the best interest of the appellant and justice for this court, being the upper guardian of the best interest of children, to set aside the sentence of the trial court and impose a fresh sentence.
- [15] This court has at its disposal the mitigating and aggravating factors which were placed before the trial court and which were sufficiently dealt with in its judgment. Accordingly, it will not be in the interest of justice to refer the matter back to the sentencing court to reconsider an appropriate sentence.
- [16] In *S v Fazzie and Others* 1964
- (4) SA 673 (A) at 684b-c the following was said:

“Where, however, the dictates of justice are such as clearly to make it appear to this Court that the trial Court ought to have had regard to certain factors and that it failed to do so, or that it ought to have assessed the value of these factors differently from what it did, then such action by the trial Court will be regarded as a misdirection on its part entitling this Court to consider the sentence afresh..”

In *Kotze v Kotze* 2003

- (3) SA 628 (I) at 630 (G) the following is said:
- “...the High Court sits as upper guardian in matters involving the best interests of the child (be it in custody matters or otherwise), and it has extremely wide powers in establishing what such best interests are. It is not bound by procedural strictures or by the limitations of the evidence presented, or contentions advanced or not advanced, by respective parties.”*
- [17] Having arrived at this conclusion, this court has to consider an appropriate sentence in the circumstances.
- [18] It was argued on behalf of the appellant that guidance be taken from the Child Justice Act in sentencing the appellant.

Section 77(4) of the Child Justice Act creates a maximum sentence of 25 years imprisonment for a child who is 14 years or older at the time of being sentenced.

[19] In my view, the correct approach to be adopted in the sentencing of the appellant is also set out in *S v Phulwane and Others* 2003

(1) SACR 631 (T) at para 8 – 9 where Bosielo J, as he then was said:

“(8) As the Director of Public Persecutions correctly pointed out, the learned magistrate failed to acknowledge the important fact that the accused herein are relatively young, with clean criminal records, who deserved a sentence based more on rehabilitation than deterrence. As the learned Cachalia J correctly remarked in S v Nkosi 2002

(1) SACR 135 (W) at 143 (b): “The fine balance that needs to be struck between society’s needs to punish crime while not overlooking the interests of a juvenile offender was emphasised by Botha JA in *S v Jansen and Another* 1975

(1) SA 425 (A) at 427 in fine – 428 (A) in the following terms:

The interest of society cannot be served by disregarding the interests of the juvenile, for a mistaken form of punishment might easily result in a person with a distorted personality being eventually returned to society.”

[20] The appellant was 17 years old at the time of committing the crime, he is a first offender, is single, passed grade 7 at school, is an orphan and thus at a young age did not have parents to give him proper guidance, he had been in custody for a period of ten months and there were no injuries sustained by the victim.

[21] I am not satisfied that a 15 (fifteen) year imprisonment for a 17 year old child with a clean record is an appropriate sentence considering that section 28

(1) (g) of the constitution states that every child has a right not to be detained except as a measure of last resort and only for the shortest appropriate period of time.

[22] The appellant has been convicted of a very serious crime of rape which is prevalent within this court’s jurisdiction. It is aggravating that the appellant has demonstrated an affinity to rape using the same modus operandi.

[23] Having considered the seriousness of the crime, the need to protect the society against this heinous crime, the relative young age of the appellant at the time of committing the crime, his need and personal circumstances, I am of the view that a 10 (ten) year imprisonment will strike a proper balance between the interests of the appellant and the legitimate expectations of society for an appropriate sentence.

[24] In the premises, I propose the following order to be made:

1. The convictions of the appellant are confirmed.

2. The sentence of 6 (six) years imposed on count 1 is confirmed.
3. The sentence of 15 (fifteen) years imposed on count 2 is set aside and replaced with a 10 (ten) year sentence of imprisonment.
4. Both the sentences of 6 (six) years imprisonment and 10 (ten) years imprisonment will run concurrently

R. MOKOENA, AJ

I concur.

VAN ZYL, J

On behalf of applicant: Adv. P. Nel

Instructed by:

Justice Centre

BLOEMFONTEIN

On behalf of respondent: Adv. L Bontes

Director: Public Prosecutions

/PC

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