

SOUTH AFRICA / JUDGMENT

M v S (A294/2015) [2015] ZAGPPHC 964 (6 November 2015)

[2015] ZAGPPHC 964

COURT

North Gauteng High Court, Pretoria

BEFORE

Riley, Hlophe

CASE / FILE NUMBER

A294/2015

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NUMBERS:

A294/2015

DATE: 6

NOVEMBER 2015

In the matter between:

L. M.

Appellant

and

THE STATE Respondent

J U D G M E N T

RILEY, AJ:

The appellant was charged in the regional court sitting at Blue Downs on two counts of sexual penetration without consent in contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. The State alleged that on or about the 22nd December 2008 at or near Kraaifontein the appellant wrongfully and intentionally committed two acts of sexual penetration in respect of the complainant his five year old biological daughter by

penetrating her vagina and her anus with his penis without her consent. It is common cause that the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997 (i.e. the so-called Minimum Sentence Act), applies in regard to sentence.

The appellant was legally represented in the court a quo up until his conviction but thereafter conducted his own defence. Despite his plea of not guilty which essentially amounted to a bare denial of the allegations, the appellant was convicted on both counts on 28 February 2014. On 1 April 2014 appellant was sentenced to imprisonment for life on each of the counts. The present appeal is against sentence only.

The appellant's counsel Mr Solomons submitted that the trial court had erred in its finding that there were no substantial and compelling circumstances present justifying the imposition of a lesser sentence than the prescribed minimum sentence. He submitted further that the trial court had erred by not attaching sufficient weight to the fact that the appellant was a first

offender, that he had spent a lengthy period of time in custody before the finalisation of the case, by failing to have regard to the appellant's prospects of rehabilitation, by overemphasising the seriousness of the offence and the interests of the community.

In counsel for the State's heads of argument it is submitted that the trial court did not err in its finding that substantial and compelling circumstances did not exist and that in any event considering the circumstances under which the offences were committed

and the injuries suffered by the victim, that it could not be contended that the sentence was shockingly inappropriate.

What requires to be determined by this Court is whether the trial court was correct to have found that there were no substantial and compelling circumstances present in this case that justified a lesser sentence than the minimum prescribed sentence in terms of the Act.

It is trite law that the imposition of sentence is pre-eminently within the discretion of the trial court. In general, an appellate court can only interfere with the sentence imposed by the trial court if one or more of the recognised grounds justifying interference on appeal has been shown to exist, for example the sentence is disturbingly inappropriate, so totally out of proportion to the magnitude of the offence, sufficiently disparate, vitiated by misdirection showing that the trial court exercised its discretion

unreasonably or, is otherwise such that no reasonable court could have imposed it. See in this regard *S v Dyantyi* 2011(1) SACR 540 at 543 (I-J).

It is however also accepted that the circumstances in which an appellate court will interfere with the exercise of such discretion are circumscribed. In dealing with the approach to be followed in appeals against a sentence in terms of the minimum sentence

legislation Bosiello JA stated the following in *S v PB* 2013(2) SACR 533 (SCA) at para 20:

“What then is the correct approach by a court on appeal against a sentence imposed in terms of the Act? Can the appellate court interfere with such a sentence imposed by the trial court’s exercising its discretion properly, simply because it is not the sentence which it would have imposed or that it finds shocking? The approach to an appeal on sentence imposed in terms of the Act, should in my view, be different to an approach to other sentences imposed under the ordinary sentencing regime. This, in my view, is so because the minimum sentences to be imposed are ordained by the Act. They cannot be departed from lightly or for flimsy reasons. It follows therefore that a proper enquiry on appeal is whether the facts which were considered by the sentencing court are substantial and compelling, or not.”

In the unreported judgment of *Tafeni v S* 282-15 [2015] ZAWCHC 15] (handed down on 16 October 2015), Binns-Ward J in dealing with the question whether substantial and compelling circumstances are present in a particular case or not, stated that:

“The existence of such circumstances will generally be present when the case is one in which the sentencing court should feel a sense of unease amounting to a conviction that the ‘prescribed sentence [would be] unjust or, as some might prefer to put it, disproportionate to the crime, the criminal and the legitimate needs of society. If that is the result of a consideration of the circumstances, the court is entitled to characterise them as substantial and compelling and such as to justify the imposition of a lesser sentence. See S v Malgas 2001(1) SACR 469 (SCA), S v Vilakazi 2009(1) SACR 552 (SCA) 2012(6) SA 353.”

I now turn to consider whether the court a quo was correct to have found that there were no substantial and compelling circumstances in this case that justified a lesser sentence than the minimum prescribed in terms of the Act.

According to the evidence the appellant’s personal circumstances can be summarised as follows: The appellant was born in the Eastern Cape and left school after completing grade 11, for financial reasons. He met his wife in 1997. Two children were born from the marriage. In the year 2000 he moved to the Western Cape and was employed as a labourer and seems to have done subcontracting work in the building trade. At the time of sentence he was not in fixed employment and was doing casual work in the building trade. The appellant is a first offender and was 29 years old at the time of the commission of the offence. It is further common cause that the appellant was in custody from the date of his arrest on 25 January 2011 until the imposition of sentence on 1 April 2014.

In the present matter the defenceless five year old complainant was left in the care of the appellant, her biological father, whilst her mother went to work. Whilst his wife was at work, the appellant brutally raped his daughter vaginally and per anum. When her mother arrived at home earlier than usual she found her daughter naked and bleeding in the house with the appellant.

The appellant tried to prevent his wife from calling for help and notifying the community, by holding her mouth closed. He was however arrested shortly thereafter. Dr D M Andrews testified that he examined the complainant on 22 December 2008 at Karl Bremer Hospital and found her vagina to be bloody with multiple fresh tears in the walls of the vagina. Because of the amount of

bleeding he was unable to assess the depth of the injuries and whether or not surgery was required. He referred the complainant to Dr Arnold at Tygerberg Hospital to be assessed and treated under general anaesthesia.

In his evidence Dr Arnold confirmed that due to the seriousness of the complainant's injuries she could only be examined under

anaesthesia. He testified that he found the following injuries on examination of the complainant's vagina. A deep vaginal tear 1.5 centimetres long into the vagina with total disruption of the hymen posteriorly and extending for 1 centimetre

long into the anterior part of the perineal body. A laceration on the left side of the vaginal wall plus/minus 1 centimetre deep and 3 centimetres long extending for most of the left lateral aspect of the vagina into the left postero lateral aspect of the vagina fourchette just beneath the cervix.

The following injuries were present on examination of the anus: a 0.5 centimetre long minor laceration on the inside of the anus.

Minor (plus/minus 3 centimetre) lacerations at seven o'clock through the thickness of the skin situated half a centimetre below the dentate line (i.e. below the level of the sphincter). The large posterior vaginal wall tears with disruption of the hymen, anterior perineal body and deep vaginal penetration to the cervix with profuse mucosal bleeding, required surgery of the posterior vaginal wall and perineal body. The complainant required suturing in two layers to re-approximate the tissue.

The complainant was hospitalised for eight days whilst undergoing treatment and anti-retroviral prophylaxis was administered for 28 days. Dr Arnold testified that the complainant would have been in pain as a result of the nature and extent of the injuries she suffered and medication was administered to relieve the pain. The complainant was also required to have follow-up medical treatment at the local clinic. In his view the physical injuries to the tissues in the perineum tended to heal quite well. He was however unable to say whether the complainant would experience problems with a future vaginal delivery because of the increased scar tissue as a result of the injuries she suffered during the rape.

According to a victim impact report dated 9 July 2013 the complainant was still suffering nightmares as a result of the rape and also feared the appellant. I have no doubt that the complainant will continue to bear the scars of this rape whether it be emotionally or otherwise for the rest of her life. I accordingly agree with the trial magistrate's finding that "n meer ernstige verkrachting is werklik moeilik denkbaar".

It is trite law that each case must be decided on its own merits and that sentence must always be individualised. Punishment must always fit the crime, the criminal and the circumstances of the case. It is also accepted that sentencing should always be considered and passed dispassionately, objectively and upon a careful consideration of all relevant factors. Accordingly courts must strive to arrive at a sentence which is just and fair to both the victim and the perpetrator, have regard to the nature of the crime and take account of the interests of society.

Considering the charges that the appellant has been convicted of it is appropriate at this stage to refer to what was stated by Majiedt JA in *S v SMM* 2013(2) SACR 292 at 297 at 14 in respect of the rape of young children:

“Our country is plainly facing a crisis of epidemic proportions in respect of rape particularly of young children. The rape statistics induce a sense of shock and disbelief. The concomitant violence in many rape incidents engenders resentment, anger and outrage. Government has introduced various programmes to stem the tide, but the sexual abuse of particularly women and children continue unabated. In S v RO I referred to this extremely worrying social malaise, to the latest statistics at that time in respect of the sexual abuse of children and also to the disturbingly increasing phenomenon of sexual abuse within the family context. If anything, the picture looks even gloomier now, three years down the line. The public is rightly outraged by this rampant scourge. There is consequently increasing pressure on our courts to impose harsher sentences primarily, as far as the public is concerned, to exact retribution and to deter further criminal conduct.”

I reconcile myself with the views of the learned judge of appeal and may add that the rape of children continues unabated notwithstanding

the harsher sentences imposed by our courts. It is accepted that life imprisonment is the most severe sentence which a court can impose and that the question whether it is an appropriate sentence, particularly in respect of its proportionality to the particular

circumstances of a case requires careful consideration. I am also mindful that our SCA has in a number of cases held that some rapes are worse than others and that the life sentence ordained by the legislature should be reserved for cases devoid of substantial factors compelling the conclusion that such a sentence is inappropriate and unjust. See *S v Abrahams* 2002(1) SACR 116 (SCA). Abrahams was followed in *S v Mahomotsa* 2002(2) SACR 435 (SCA) and *S v Nkomo* 2007(2) SACR 198 (SCA).

In my view the present case falls in the category of what I would describe as the most worst rapes and thus constitutes serious crime where the personal circumstances of the offender will necessarily recede into the background. See *S v Vilakazi* (supra). The appellant showed absolutely no remorse. Notwithstanding the overwhelming evidence against him he persisted in denying that he raped his daughter. Mr Solomons has contended that he admitted to the rape albeit belatedly in the application for leave to appeal. The rape by the appellant on his young defenceless daughter, who looked to him for protection and love, was brutal, callous and senseless and must in the circumstances attract the harshest penalty which the legislature recognised and endorsed when it implemented the Criminal Law Amendment Act.

Our courts have however also consistently held that where a court has to impose a sentence for multiple offences as in the present matter, the court has to seek an appropriate sentence for the offences taken together. When dealing with multiple offences, a court must not lose sight of the fact that the aggregate penalty must not be unduly severe. See *S v Mabundu* 2013(3) SACR 161 (SCA). In the present matter the evidence shows that the vaginal and anal rapes are inextricably linked in terms of locality, time, protagonist and importantly the fact that they were committed with one common intent. See *S v Mokela* 2012(1) SACR 431 (SCA) at para [11].

In my view the trial magistrate erred as he did not give proper consideration to the fact that the rapes are inextricably linked as set out hereinbefore. Considering the principles herein- before referred to, I am satisfied that this is an appropriate case for counts 1 and 2 to be taken together for the purpose of sentence and treated as one. In the result I propose the following order:

1. The appeal against sentence is upheld.
2. The sentence imposed on count 1 and 2 are set aside and replaced with the following:
Counts 1 and 2 are taken together for the purpose of sentence and the appellant is sentenced to life imprisonment.

RILEY, AJ

I fully agree, that is the order of Court.

HLOPHE, JP

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