
SOUTH AFRICA / JUDGMENT

Metsing v S (A94/16) [2017] ZAGPPHC 226 (18 May 2017) [2017] ZAGPPHC 226

COURT

North Gauteng High Court, Pretoria

BEFORE

Khumalo, Holland-Müter

CASE / FILE NUMBER

A94/16

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IN THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: A94/16

18/5/2017

Reportable: No

Of interest to other judges: No

Revised.

J M METSING APPELLANT

and

STATE RESPONDENT

JUDGMENT

KHUMALO J

Introduction

- [1] The Appellant is with leave of this court appealing against a 15 year imprisonment sentence that was imposed on him by the Regional Court, Potchefstroom on 7 December 2010, following his conviction on a charge of indecent assault.
- [2] The victim was a 14 year old boy, G N ("the complainant"). According to the record the charge against the Appellant was that he, on 20 October 2007 near Kokosi in Fochville, unlawfully and intentionally committed assault of an indecent nature by inserting his penis in the complainant's anus.
- [3] The Appellant, a sangoma was duly represented during the trial and pleaded not guilty to the charge. He exercised his right to remain silent in terms of s 35 (3) (h) of the Constitution of the Republic of South Africa, 1996 ("the Constitution"). He therefore did not offer a statement in explanation of his plea.

Background

- [4] The Appellant was convicted on the following salient facts: On 20 October 2007, the complainant was walking in the street with his three friends, B, B and T when they encountered the Appellant. Appellant addressed the complainant and told him that he (the complainant) has a problem. He told the Complainant to come to his house, he will sort out his problem. He gave the complainant his home address. Later that day the complainant and his friends went to Appellant's house and he was not at home. When they went back again Appellant was at home but he refused to talk to complainant in front of his friends. He told the friends to leave. The complainant was left alone with the Appellant.
- [5] The Appellant instructed the complainant to go inside the bedroom and take off his pants and underwear. He cut a little bit of his (complainant's) pubic-hair and a bit of his nails and put them in a paper. He burnt the paper, filling the whole bedroom with smoke. Appellant told him that he (Appellant) was now speaking to the forefathers and asked if he believed anything he was telling him. When the complainant confirmed that he believed him, Appellant took out a condom and put it on his (Appellant's) penis. He thereafter penetrated the complainant's anus with his penis and made up and down movements. Appellant penetrated him twice. Whilst Appellant was still doing that they heard complainant's parents knocking at the door. Appellant told him to hide under the bed. He then told the complainant's parents that complainant was not there. The complainant's father found the complainant under the bed. The parents were threatened with a sjambok by the Appellant when the police arrived. The complainant did not tell the police what had happened. He only told his parents later when they were at home. The parents called the police again whereupon the Appellant was arrested. The complainant was taken to hospital for a medical examination.

- [6] The complainant said he did not agree to what the Appellant was doing to him but was scared to say anything. He reckoned that the complainant used medicine to overpower him and he was not only very scared but also shocked.
- [7] The complainant's friends also said they were scared and they fetched the complainant's parents after the Appellant lied to them and told them that the complainant has left his house, when they later came back to his house to look for the complainant. They had also peeped through the window and saw Appellant in the blankets with the complainant making up and down movements. The complainant's father also saw through the window, the Appellant in bed with the complainant. Only one as to the rest of the complainant's friends gave a different version of what happened. The one was not there when the other two boys went back to Appellant's house. He testified that the complainant was interested in his wristband and he (complainant) went to the Appellant's house to ask him for one.
- [8] The J88 medical report on the examination done to the complainant noted the conclusion to be that the examiner "could not confirm anal penetration and no injuries noted on genitalia.
- [9] In his testimony Appellant had denied the alleged encounter with the complainant that happened in the street that day. He testified that the complainant came to his house and asked him for an arm or wrist band. In his work as a sangoma he gives out armbands to young men for potency and strength. He did not want to give the band to the complainant because his parents have not been to consult with him. He said he went to a party later that day and came back at about 22h00. He found the complainant hiding in a drum in his room. complainant asked to hide in his room from his parents who wanted to give him a hiding for not sleeping at home the previous day. That is when there was a knock of his parents at the door. The complainant asked to hide under the bed. His father found him there. The police subsequently also arrived and the complainant never said anything about the assault. The complainant's father is the one who accused him of trying to make his son gay. He said he has thick curtains on his windows and nobody from outside or inside could see through them.
- [10] Following this evidence the trial court accepted the complainant's evidence and rejected that of the Appellant. That was so after the learned magistrate had given a full account of the evidence of all the witnesses. The state was found to have proven Appellant's guilt beyond reasonable doubt and Appellant found guilty as charged. He was sentenced to 15 years imprisonment.

Grounds of Appeal

- [11] The Appellant is appealing his sentence alleging that it is shockingly harsh and inappropriate as a result of the sentencing

court committing the following misdirection:

- [11.1] refusing to obtain a correctional sentence report;

[11.2] failing to hand down a balanced sentence by overemphasising the seriousness of the offence and the interest of society, resulting in the under- emphasising of the personal circumstances.

[11.3] not considering any other sentencing option other than direct imprisonment in terms of s 276 (1) (b) of Act 51 of 1977.

[11.4] not taking the Appellant's personal circumstances into account in determining an appropriate sentence, being clear from the record that he never referred to the personal circumstances of the Appellant when he handed down the sentence.

[12] It is an established principle of our criminal law that sentencing is pre-eminently within the trial court's province and the appeal courts warned not to be eager to interfere with the discretion, unless there is evidence of the court's failure to exercise the discretion properly and judiciously.

[13] The appeal court must therefore ascertain if there are genuine grounds of appeal that satisfactorily point at failure by the trial court to exercise its discretion properly and judiciously and in line with the established and valid principles governing sentencing to justify interference.

[14] Instances in which interference by the appeal court was found to be justified were explained in *S v De Jager and Another* 1965 (2) SA 616 (A) at 628H-629B and in *S v Salzwedel* 1999 (2) SACR 586 (SCA) as follows:

"An appeal court is entitled to interfere with a sentence imposed by a trial court in a case where the sentence is 'disturbingly inappropriate', or totally out of proportion to the gravity or magnitude of the offence, or sufficiently disparate, or vitiated by misdirections of a nature which shows that the trial court did not exercise its discretion

reasonably." (my emphasis)

[15] In determining an appropriate sentence the Zinn triad, that is, the crime committed, the blameworthiness of the offender and the interest of society is to be considered; see *S v Zinn* 1969 (20 SA 537 (A)). The court must exercise a balancing act of the three factors whilst at the same time having due regard to the purpose of punishment which is as important as the triad, being deterrence, rehabilitation, retribution and prevention; see *S v AM* 2014

(1) SACR 48 (FB) at [15].

[16] Whether a court should consider alternative sentencing options rather than direct imprisonment will depend on whether such sentence would be proper and proportionate to the gravity of the offence; see *S v Mngoma* 2009 (1) SACR 435 E, the nature and circumstances of the offender and the interest of society. The Zinn triad being one of the prime consideration in exercising the discretion; see *S v Maswathupa* 2012 (1) SACR 259 (SAC) at [8]. In some instances the interest of society might outweigh the circumstances of the accused.

[17] A probation officer's report is not required to determine the antecedent question whether correctional supervision is an appropriate sentence at all, and therefore no reason for an appeal court to interfere where the trial court, having regard to the circumstances of the case, decided that correctional supervision was not an appropriate sentence and that it was for that reason not calling for a report before imposing sentence; see *S v L* 1998 (SACR 463 (SCA)).

[18] If the court is of the view that a correctional supervision sentence would be inappropriate or improper its reasons can be articulated in its judgment on sentencing to respond to any contention raised. Mr Coetzer, Respondent's counsel correctly argued that taking into account the seriousness of the offence, the magistrate was evidently of the view that he would not sentence the Appellant to correctional supervision.

[19] In sentencing the Appellant the court a quo mentioned that the Appellant as a sangoma was shown (from the circumstances surrounding

the commission of this offence) to have been held in high regard or trust by the boys and probably the community. Moreover that he has abused such trust and used his position of influence to commit this hideous crime. He took advantage of the fact that the Complainant seemed to believe him when he told him that he (Complainant) had a problem and also that Appellant will be able to help him. The court regarded that to be very serious or an aggravating factor that Appellant would use his practice to lure his victim. The age of the victim being another aggravating circumstance. The learned magistrate correctly found these factors, inter alia, to be weightier and that the correctional supervision sentence would have been totally inappropriate under the circumstance.

[20] Furthermore, contrary to Appellant's contention, the trial court did take into account the Appellant's personal circumstances as was presented by his legal representative. The learned magistrate stipulated in his judgment that it takes into account Appellant's

circumstances but is not going to detail them again. The learned magistrate then took into account his personal standing and balanced

it against the seriousness of the offence and the interest of society to decide upon an appropriate sentence. Therefore the alleged

misdirection of the court having not taken into account Appellant's personal circumstances due to failure to list them is imaginery

rather than factual; see *S v Holder* 1979 (2) SA 70.

[21] In respect of the interest of society the court mentioned the fact that offences of that kind are not abating and the courts are daily and throughout the year undated with the prosecution of such cases. It was therefore important that the sentence reflect that the need for safety and protection of society from such a menace, has been considered. It also had to reflect the indignation towards the commission of serious crimes against children and other

vulnerable members of society. An assault of that nature, whether called in any other name, rape or indecent assault is abhorrent and by any measure a despicable, inhuman act and amount to indignity, cruelty that nobody young or old, male or female should ever have to experience or be subjected to. The fact that such a crime is not abating strengthens the need for effective sanctions against it; see *S v X* 1996 (2) SACR 288 (W) at 286c-d.

[22] As a result when considering sentence the court a quo was correct to regard the circumstances of this case to justify a harsher sentence. It was appropriately pointed out by Mr Coetzer that if the Appellant had committed the offence two months later, he could have been convicted of rape in contravention of s 3 of Act 32 of 2007 and would have faced a minimum sentence of life imprisonment in terms of s 51

(1) of Act 105 of 1997 since the Complainant was under the age of 16 years.

[23] We find the sentence of 15 years imposed by the court a quo to be in proportion with the gravity of the offence and the interest of society that outweighs Appellant's personal circumstances. The sentence therefore constitutes a sentence that is proper and

proportionate to the Appellant's circumstances.

[24] We therefore do not find it necessary to interfere with the sentence of 15 years imprisonment imposed by the trial court.

[25] Under the circumstances, it is therefore ordered, that:

[1] The Appeal against sentence is dismissed.

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

I concur

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