

SOUTH AFRICA / JUDGMENT

Olivier v S (A268/12) [2015]

ZAWCHC 19 (26 February 2015)

[2015] ZAWCHC 19

COURT

Western Cape High Court, Cape Town

BEFORE

Rogers, Dolamo

CASE / FILE NUMBER

A268/12

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THE

HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

Case

No: A268/12

Trial

Court Case No: OSH25/2011

In

the matter between:

DONOVAN

OLIVIER.....APPELLANT

And

THE

STATE.....RESPONDENT

Coram:

ROGERS & DOLAMO JJ

Heard:

20 FEBRUARY 2015

Delivered:

26 FEBRUARY 2015

JUDGMENT

ROGERS J (DOLAMO J concurring):

[1] The appellant was the second accused in the court quo, the first accused being Clive Coerecius. They were charged on three counts: the rape of a 19-year-old woman, M[...] M[...] (count 1), assaulting the latter's boyfriend, P[...] F[...],

with intent to cause grievous bodily harm (count 2); and assaulting M[...] with intent to cause grievous bodily harm (count 3).

[2] The incident giving rise to these charges occurred on 23 December 2010. Both accused pleaded not guilty. In regard to the rape charge, their defence was that M[...] consented to sexual intercourse. Their evidence to this effect was rejected and on 15 June 2011 they were convicted on all three counts. On 28 June 2011 they were sentenced to life imprisonment. The magistrate took the three counts together for purposes of sentence. The sentence of life imprisonment was imposed pursuant to s 51(1) of the Criminal Law Amendment Act 105 of 1997 on the grounds that the rape was committed by more than one person and in the execution or furtherance of a common purpose and on the basis that there were no substantial and compelling circumstances to depart from the prescribed minimum sentence.

[3] The appellant appeals to this court against sentence. In terms of s 309(1) of the Criminal Procedure Act 51 of 1977 (as amended, with effect from 1 April 2010, by s 10 of Act 42 of 2013) the appeal is pursued as of right, no leave having been required.

[4] The appellant's co-accused also appealed against sentence. On 16 March 2012 this court (per Allie J, with Mantame J concurring) found that the magistrate had erred in taking the three counts together for purposes of sentence. The sentence of life imprisonment on count 1 was confirmed. The sentences on counts 2 and 3 were set aside and replaced with sentences of seven and ten years' imprisonment respectively, to run concurrently with the life sentence. See *S v Coerecius* [2012] ZAWCHC 72.

[5] It is regrettable that the appeals were not heard together but nothing can be done about that now.

[6] The facts giving rise to the convictions are briefly the following. On the early evening of Thursday 23 December 2010 M[...] and her boyfriend F[...] were walking home along a dirt road. The two accused confronted them. Coerecius restrained F[...] with a knife while the appellant grabbed M[...], pulled down her underwear and raped her. She was struggling and crying. The appellant punched her in the face. She testified that he had 'two rounds' with her. He ejaculated. In the meanwhile, Coerecius

had struck F[...] on the head with his knife. When the appellant was finished raping M[...], Coerecius proceeded to rape her while the appellant, who was also armed with a knife, threatened F[...]. Coerecius also ejaculated. He kicked M[...]. They threatened to kill M[...] and F[...] and then told them to leave. However, a short time later they again confronted M[...] and F[...] on the tar road. They grabbed M[...] and dragged her face down along the road. They eventually let them go. M[...] and F[...] made a prompt first report to F[...]’s mother.

- [7] At about 08h00 on Christmas morning (Saturday 25 December 2010) M[...] and F[...] were examined at Oudtshoorn Hospital by a Dr Merkel. His J88 reports were handed in by agreement without his needing to testify.
- [8] Photographs taken by the investigating officer on Tuesday 28 December 2010 were also handed in by agreement. They showed the site of the rape and M[...]’ injuries.
- [9] As to the general approach to the minimum sentencing legislation, the leading case remains *S v M[...]* 2001 (1) SACR 469 (SCA). The factors which are to be considered in determining whether substantial and compelling circumstances exist are all the factors traditionally taken into account in assessing an appropriate sentence, bearing in mind, however, that it is no longer ‘business as usual’ and that the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions. If, after considering all the relevant factors, the court has not merely a sense of unease but a conviction that injustice will be done if the prescribed sentence is imposed or (to put it differently) that the prescribed sentence would be disproportionate to the crime, the criminal and the legitimate needs of society, there will be substantial and compelling circumstances requiring the court to depart from the prescribed sentence and to impose a lesser sentence.
- [10] The statement in M[...] that no factors conventionally relevant to sentencing are excluded from consideration must now be qualified because of the insertion into s 51(3) of the Act of para (aA) (this occurred when s 51 was substituted in terms of s 1 of Act 58 of 2007). Paragraph (aA) sets out certain circumstances which, in the case of rape, shall not constitute substantial and compelling circumstances. Among these are that the complainant suffered no physical injuries. The exclusionary effect of this paragraph has been held to convey that any such circumstance on its own will not amount to substantial and compelling circumstances but that such factors may be taken into account together with others in reaching a conclusion that there are substantial and compelling circumstances: see *S v Nkawu* 2009 (2) SACR 402 (ECG) para
15. This view was recently approved by the Supreme Court of Appeal in *Mudau v S* [2012] ZASCA 56 para 26.
- [11] In upholding Coerecius’ sentence of life imprisonment, Allie J mentioned the following features. As to his personal circumstances, he was 20 at the time of the offences, had no children and was unemployed. At school he had attained grade

5. He had a previous conviction for assault. In regard to the rape itself, the surrounding circumstances included violence, coercion and humiliation. The accused had every intention of raping and assaulting M[...]. They assaulted her boyfriend, F[...], and made him endure the trauma of watching them rape his girlfriend. M[...] was seriously injured and very distraught after the incident. The two accused

lacked remorse and even laughed while F[...] was testifying about the rape. The court on appeal found no basis for interfering with the magistrate's finding that there were no substantial and compelling circumstances.

- [12] Allie J's general observations concerning the heinous nature of the rape and the accused's lack of remorse are equally applicable to the appellant. Mr Beukes, who appeared for the appellant in this court, submitted that the J88 report did not bear out the magistrate's description of M[...] facial injuries as serious; the report said only that there were two 'abrasions' on her forehead. What the magistrate said was that M[...] sustained serious injuries, that she had injuries on her face, body, eyes and arms. Dr Merkel examined M[...] two days after the incident and was probably focusing on the allegation of rape. M[...], who was regarded by the magistrate as an honest and credible witness, testified that apart from the abrasions on her face (caused

when she was dragged along the road) her face was blue from having been punched and kicked. Her arms were also blue. Photographs 4 and 5, which are among several photographs taken about five days after the incident, appear to support her description of her injuries. She also testified that she was bleeding from her private parts and suffered considerable internal pain in the immediate aftermath. This evidence was corroborated by F[...]s mother and by F[...]s evidence that there was blood on her underclothing. One can obviously conceive of a rape accompanied by more severe injuries. Nevertheless, the evidence clearly established that that rape was accompanied by considerable sexual and other physical force and violence. The incident was hugely traumatic for M[...] and F[...].

- [13] In his submissions on sentence in the court quo, the appellant's attorney placed on record that the appellant was 18 years old, had been in custody for about six months since his arrest, was unmarried, had no children, was unemployed and had only attained Standard 5 at school. He had a couple of prior convictions for drug possession.
- [14] The appellant's circumstances were thus very similar to those of Coerecius, except that he was about two years younger and had no previous conviction involving violence. I do not think the magistrate or Allie J could have been much influenced by Coerecius' previous conviction for assault. The offence in question was committed in July 2007 and Coerecius paid an admission of guilt fine of R150. It was thus of a very minor nature and would not have served to distinguish Coerecius' case from that of the appellant.
- [15] Mr Beukes understandably placed emphasis on the appellant's youthfulness. He was only 18 years and two months old at the time the offences were committed.

- [16] Although each case must naturally turn on its own facts, in *Director of Public Prosecutions KZN v Ngcobo & Others* [2009] 4 All SA 295 (SCA) the fact that the appellants were aged between 20 and 22 at the time of the premeditated murder was not regarded, on its own or with other factors, as constituting substantial and compelling circumstances. The court said that none of them demonstrated immaturity and that there was no evidence of peer pressure. The finding of substantial and compelling circumstances by the trial court was, on appeal by the Director of Public Prosecutions for KZN, overturned and the lesser sentences imposed by the trial court were replaced with life sentences.
- [17] I may also refer to *S v Matyityi* 2011 (1) SACR 40 (SCA), another case where the Supreme Court of Appeal held that a trial court erred in deviating from the life sentence laid down in the Act. Ponnann JA, with whom the other members of the court concurred, was critical of the trial judge's use of the phrase 'relative youthfulness' without any attempt at defining what exactly that meant in respect of the particular individual. The learned Judge of Appeal said that while someone under the age of 18 years could be regarded as naturally immature the same does not hold true for an adult and that a person of 20 years or more must show by acceptable evidence that he was immature to such an extent that his immaturity can operate as a mitigating factor.
- [18] The magistrate was aware of the relative youthfulness of both the accused. In the particular circumstances of the case, he did not regard their youthfulness as a substantial and compelling circumstance to deviate from a life sentence. He pointed out that the appellant had taken a leading role in the crimes. He was the one who first grabbed M[...] and raped her. He, like Coerecius, was armed with a knife. He was able to restrain and threaten F[...], who was some years older than him. There was no suggestion in the evidence that Coerecius was the dominant personality. The magistrate, who had the opportunity of observing the appellant during the course of the trial, said that he behaved as an adult. He showed a complete lack of remorse. Along with Coerecius, he was observed to smile as F[...] described the rape. When he was shown photographs of M[...] injuries, he fobbed them off as not being serious.
- [19] Mr Beukes criticised the magistrate's failure to call for a probation officer's report, submitting that the personal information placed on record by the appellant's attorney was insufficient properly to inform the magistrate of the appellant's circumstances. It is true, as Ms Jacobs for the State pointed out, that the appellant's attorney, at the commencement of the sentencing proceedings, asked for an adjournment to discuss with his clients whether there should be a postponement to obtain a probation officer's report. Proceedings resumed about half an hour later. The attorney advised the magistrate that in the light of the circumstances of the case he did not think a probation officer's report would take matters much further. He proceeded to place his clients' personal circumstances before the court and made submissions on sentence.

[20] Nevertheless, although a pre-sentencing report is usually requested by the prosecution or defence, it is the ultimate responsibility of the presiding officer to satisfy himself of the accused's personal circumstances and that no substantial and compelling circumstances to deviate from the prescribed minimum sentence are present (see *S v Dlamini* 2000 (2) SACR 266 (T) at 268d-e; *Rammoko v Director of Public Prosecutions* 2003 (1) SACR 200 (SCA) para 14). In *S v Ravele* [2014] ZASCA 118 Mocumie AJA, in criticising the trial court's failure to obtain a pre-sentencing report, said that no court should proceed to sentence

a youthful person (in that matter, a 20-year-old) unless it has all the facts relevant to sentencing. Notions of onus of proof were inapposite; in the sentencing phase of proceedings the trial court's role was more active and inquisitorial (para 17). In the present case the magistrate knew virtually nothing about the appellant's upbringing. In *S v OZ* 2013

(2) SACR 138 (GNP), where a sentence of 25 years' imprisonment on an 18-year-old accused found guilty of raping a girl of 10 was set aside on account of the magistrate's failure properly to inform himself of the accused's personal circumstances, the court said the following (para 6):

'Currently, in my view, the best way to obtain relevant information pertaining to a youth, to enable a magistrate to structure a sentence that will best suit the needs and interests of a youth, is to obtain a report of a probation officer appointed in terms of the Probation Services Act 116 of 1991. We do not know whether the childhood of appellant was characterised by neglect, ill discipline or ineffective parenting. It is unknown whether the youth has challenges inherent in his faculties, challenges from his family set-up or challenges from the community from which he emerges. By not obtaining a probation officer's report, and any further relevant evidence to assist the magistrate to structure a sentence best suited to appellant, it was a misdirection. The misdirection resulted in the magistrate denying himself an opportunity to impose a sentence which would promote the rehabilitation of the appellant. The sentence imposed, in my view, is disproportionately harsh. It is not individualised to the appellant...'

See also *S v Trichart* 2014

(2) SACR 245 (GJ) para 10 and *S v Mugano* 2014 (2) SACR 423 (GP) paras 8-10.

[21] The appellant was facing the most severe sanction recognised in our law, life imprisonment. It is particularly important in such cases that trial courts take care to elicit the necessary information to put themselves in a position to exercise their sentencing discretion properly (*S v EN* 2014 (1) SACR 198 (SCA) para 14; *S v Ndateni* [2014] ZASCA 122 paras 17-18). The appellant had only just reached his 18th birthday. He was of an age where a measure of immaturity and poor judgement on account of youthfulness could still be expected. He had no prior convictions involving violence or for sexual offences. He had two convictions for drug possession. There was evidence that the appellant and his co-accused smoked tik on the day of the rape. A deprived upbringing may have set him on a path of drug abuse. I agree with Mr Beukes that the court simply did not have enough information to determine whether, in accordance with the M[...] test, a sentence of life-imprisonment would in all the

circumstances be disproportionate to the crime, the criminal and the legitimate needs of society and constitute an injustice.

[22] The magistrate was quite right to emphasise the heinous nature of rape general and of this rape in particular. He bemoaned the fact that no other crime came so often before his court. It is clear from the minimum sentencing legislation that the lawmaker intended courts to address various crimes, including rape, by way of firm sentences and singled out particular kinds of rape, including rape by multiple perpetrators, for the harshest sanction of life imprisonment. In regard to the latter type of rape, the lawmaker

itself has chosen not to distinguish between first, second and multiple offenders. There were a variety of aggravating circumstances

in the present case. But the heinousness of the crime and aggravating circumstances needed to be balanced against the appellant's

youthfulness, the fact that he was a first offender and his personal circumstances. Of the latter, the magistrate simply did not have enough information. In my view it was a misdirection for him not to have insisted on a pre-sentencing report.

[23] The appropriate course, in the circumstances, is to set aside the sentence and remit the matter to the court quo to reconsider sentence after obtaining a probation officer's report. It may also be appropriate for a victim impact report to be prepared.

[24] For the magistrate's guidance, I agree with Allie J's finding, in Coerecius' appeal, that the court a quo erred in taking the three counts together for purposes of sentence. The magistrate should thus impose separate sentences on counts 1, 2 and 3. And I must add that the magistrate should not assume that the sentences imposed by this court in Coerecius' appeal on counts 2 and 3 are appropriate for the appellant.

[25] In the result the following order is made: The sentence imposed by the court a quo is set aside and the matter is remitted to the court quo to reconsider sentence after obtaining a probation officer's report and after considering such further evidence and submissions as the appellant and the State wish to place before the court.

ROGERS J

DOLAMO J

APPEARANCES

For Appellant: Mr HA Beukes

Suite 404, 4th Floor

42 Keerom Street

Cape Town

For Respondent: M Jacobs

Office of the DPP

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