

SOUTH AFRICA / JUDGMENT

Radiau v S (AS577/2016) [2017] ZAGPPHC 469 (30 June 2017)

[2017] ZAGPPHC 469

COURT

North Gauteng High Court, Pretoria

BEFORE

Brenner, Teffo

CASE / FILE NUMBER

AS577/2016

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HIGH

COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

30/06/2017

Case

number: AS577/ 2016

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

REVISED

Date

of hearing: 8 May 2017

Date

of judgment: 30 June 2017

In

the matter between: PAULOS
 RADIAU Appellant
 and
 THE
 STATE Respondent

JUDGMENT

IN APPEAL

BRENNER, AJ

[1] This is an appeal against sentence, imposed on the appellant, Paulos Radiau ("Radiau"), on 27 June 2014, by the Regional Court of Merafong, Oberholzer. Radiau had pleaded guilty to one count of kidnapping and one count of rape, of Slbonglle Julia L ("L"), which occurred between 6 and 7 August 2012, in Khutsong, Carletonville.

[2] L did not testify and her birth certificate was not introduced into evidence. However, the Form J88 dated 7 August 2012 reflects her age as 5 years, while Radiau's section 112 guilty plea admits her age as 6 years at the time of the offences. It is lamentable that the State omitted to produce her birth certificate which would have clarified matters. Radiau was born on 1 January 1987, which meant that he was 25 years of age when the offences were committed.

[3] Radiau was legally represented throughout the proceedings. Following his guilty plea, the Form J88 and the DNA affidavit In terms of section 212 of the Criminal Procedure Act, 51 of 1977, were handed in to Court, with no objection from the defence. Following his conviction and during the prosecutor's address on sentence, a report dated 22 November 2012, from the Teddy Bear Clinic ("the TBC") was handed in, in terms of section 213, with no objection. The main purpose of the TBC report was to establish the need for an intermediary if Radiau pleaded not guilty.

[4] Radiau was convicted on the counts of kidnapping and rape. He was sentenced to 10 years' imprisonment on the kidnapping charge and life imprisonment on the count of rape, with the sentences to run concurrently.

[5] Radiau enjoyed an automatic right of appeal against his life sentence. There were two main grounds of appeal.

[6] Firstly, it was alleged that Radiau was not made aware of the applicability of section 51(1) of the Criminal Law Amendment Act, 105 of 1997 ("the CLAA"), which prescribes a minimum sentence of life imprisonment for rape of a child under the age of 16 years. It was argued that there was no proper reference to this section in the charge sheet and the trial Court failed to draw his attention to its provisions and the ramifications thereof.

[7] Secondly, it was argued that the trial Court erred in concluding that there were no substantial and compelling circumstances to justify deviation from the minimum sentence. It was averred that, accordingly, the sentence was shockingly harsh and inappropriate.

[8] The charge sheet on the rape count reads, at its preface:

"That the accuse (sic) is/are guilty of the crime of contravening the provisions of Section 3 read with Sections 1,55,56(1),57,58,59,60 and 61 of the Criminal-Law Amendment Act (Sexual Offences and Related 'Matters)32 of 2007 read with provisions of Section 256,257 and 281 of the Criminal Law Amendment Act 105 of 1997, as amended as well as section 92(2) and 94 of the Criminal Procedure Act 51 of 1977

IN THAT on or about BETWEEN 6-7 and at or near KHUTSONG in the Regional Division of GAUTENG the said accused did unlawfully and intentionally commit an act of sexual penetration, with a female person to wit, S L (6 YEARS) by HAVING SEXUAL INTERCOURSE without her consent."

[9] The contents of Radiau's guilty plea dated 27 June 2014 are significant to the issues in casu and are quoted verbatim below:

"I the undersigned

Paulos·Radiau

Do hereby make this statement freely, voluntarily and without any undue Influence and I declare as follows:

1.

I am the accused in this matter and I understand the charges brought against me.

2.

COUNT 1

I plead guilty to the charge of Kidnapping in that or u on 6-7 August 2012 and at or near Khutsong (sic), Carletonville in the Regional

Division of Gauteng I did unlawfully and intentionally deprive S L, 6 years old of her freedom of movement by taking her by force and against her will to his place of residence.

COUNT 2

I plead guilty to charge of contravening the provisions of section 3 read with Section 1 ,55,56(1),57,58,59,60 and 61 of the Criminal Law Amendment (Sexual Offences and Related Matters) 32 of 2007 read with Section 256,257 and 281 of the Criminal Procedure Act 51 of 1977; the provisions of sections 51 and 5 and Schedule 2 of the Criminal Law Amendment Act 105 of 1997, as amended as well as section 92(2) and 94 of the Criminal Procedure Act 105 of 1977 in that between 6-7 August 2012 and at or near Khutsong in the regional Division of Gauteng I did

unlawfully and Intentionally commit an act of penetration with a female person to wit, S L (6 years old) by having sexual intercourse with her without her consent.

3.

On the day in question I was with Maureen at a certain drinking place In Sonderwater. We consumed 5 cots (sic) of black label beer and 5 cartoons (sic) of home-made pineapple beer. After drinking we went to Maureen's

parental home where we found the victim playing outside the yard. Maureen and I went to the house but I did not enter the house, only Maureen did. She took a while inside the house. I then decided to go out. As I was getting out of the yard the victim asked me to buy sweets for her. It was not the first time she sees me because I'm used to going to that section with Maureen.

I then walked with her to the market where I bought her sweets. She then said she is going with me and asked if I will bring her back and I said 'yes'. We walked to my residential place In Extension 4. When we got there I opened the shack and made food for us and we ate. After that she asked me to take her home and I said I will take her after, I then told her to undress herself and she did. She took off her trouser, I told her to take off her panty and she did. I then laid her down on the mattress. I took off my trouser and underwear and I penetrated the victim with my penis and raped her once without a condom.

After that I didn't take her home, we both slept. In the morning I took the victim to her section. I bought her some sweets and snacks and left at the beginning of Skopas section. A few days later I was arrested for these offences.

4.

At the time I committed these offences I knew and understood that my actions were wrongful and unlawful and punishable by the law. I also knew and acknowledge that I had no right to kidnap and rape the victim on that particular day.

I further admit that the victim was a 6 year old child and when she left with me she believed that I will immediately bring her back and when she requested me to bring her back I didn't and she was forced to remain in my shack against her will.

5.

I plead guilty to the charges as a sign of remorse and I ask the court to have (sic) on me."

[101] The charges were put to Radiau at inception of the hearing on 27 June 2014 without mention of the CLAA, or any of its sections. Radiau's plea was read into the record. After Radiau confirmed it, the Court, without further ado, stated:

"COURT: Then the Court will then convict you on both counts on grounds of admissions."

[11] L was examined on 7 August 2012 at 0 25 by a medical doctor who completed the Form J88. The form describes a 5 year old child who had reported a sexual assault the previous night after she had gone missing. The doctor found no external Injuries on the body but the vaginal and anal areas were inflamed and red and the hymen was perforated. The clitoris, urethral orifice and labia majora were inflamed. The conclusion was that of a history of sexual assault.

[12] The DNA report from the forensics department of the SAPS confirmed a match between a sample taken from Radiau and a swab taken from L.

[13] Radiau had one previous conviction of house braking with intent to steal and theft, committed on 10 October 2009, for which he was convicted on 26 November 2009, and received a sentence of 3 years' imprisonment of which 1 year was suspended.

[14] In this case, he was arrested circa August 2012, and remained in custody pending trial for about 1 year and 11 months. Radiau's legal representative confirmed that he had decided to plead .guilty after receiving the DNA results. He was 27 years of age at the hearing date, was a Lesotho citizen, had achieved a standard 7 education, was unmarried, and had a son of 13 who lived with his mother in Lesotho.

[15] The report of the TBC which reflects an interview with L conducted In September 2012 states.

"In the encounter with the therapist S. (sic) presented as confident and outspoken child. When she was relating to traumatic event she exhibited· emotions of fear and betrayal. She was distressed and showed emotions of anger. In regard to relieving (sic) the experience in court she was overwhelmed."

[16] We revert to the first main ground of appeal concerning the omission of the State to mention the provisions of section 51(1) of the CLAA in the charge sheet and the omission of the trial Court to draw Radiau's attention to same.

[17] Three recent decisions of the Supreme Court of Appeal and a recent judgment of the Constitutional Court have dealt with similar

situations.

[18] In *S v Kolea* 2013 (1) SACR 409 SCA. The appellant, who had pleaded not guilty, was convicted in the regional court on one count of rape of an adult woman who testified that she had been raped more than once by the appellant and a co-perpetrator who was never arrested. On referral to the High Court for sentencing, he received 15 years' imprisonment. On appeal to the full bench his conviction was confirmed and his sentence increased to life imprisonment.

[19] On further appeal, the issue hinged on the fact that the charge sheet had referred to section 51(2) Instead of section 51(1) of the CLAA. While section 51(2) provided for a minimum sentence of 10 years for first offenders, section 51(1) prescribed life Imprisonment. The appeal was dismissed.

[20] The Court held at paragraph 14:

"During the entire process, up to the time the full court dismissed the appellant's appeal against conviction, upheld the respondent's

cross-appeal, and imposed life imprisonment on the appellant in terms of s 51(1) of the Act, there was never any complaint by the appellant that he was in any way prejudiced in the conduct of the proceedings. Furthermore, he pleaded not guilty to the charge and fully participated in the trial. In the end, he was convicted in accordance with the evidence that was led in relation to the charge of rape. It has not been demonstrated that the appellant would have acted differently, had the mistake not been made in the charge-sheet."

[21] Albeit that the offences were not the same, a different outcome prevailed In S v Machonqo 2014 JDR 2472 SCA. In the case, the appellant, after pleading not guilty, was convicted of murder and sentenced to life imprisonment, and robbery with aggravating circumstances, and sentenced to 20 years.

[22] On appeal to the SCA, the life sentence was reduced to 25 years and the robbery sentence to 15 years, and the sentences were ordered to run concurrently.

[23] The main ground of appeal was that the trial Court erred in relying on section 51(1) of the CLAA in sentencing because there was no mention in the indictment of this section nor did the trial Court warn the appellant of its applicability. At paragraph 14:

"It is not in dispute that the trial court erred and misdirected itself in respect of the sentence as the appellant had not been forewarned of the applicability of the Minimum Sentence Act. It is also not in dispute that the full court erred in its approach by using the incorrect test when sentencing the appellant afresh. These series of misdirections place the court at large to consider the sentence as if it had not been considered before. "

[24] The case of S v Tshoga 2017(1) SACR 420 SCA dealt with the rape of a 10 year old female. There was no mention of section 51(1) of the CLAA at the plea proceedings nor during the trial. The section was raised perfunctorily by the trial Court following conviction when the matter was referred to the High Court for sentencing.

[25] The appellant was 28, and pleaded not guilty. He was engaged to the victim's aunt. He had one child. He had spent twelve months awaiting trial. He continued to maintain his innocence, showed a lack of remorse. He had a previous conviction of rape. The complainant had been subjected to the humiliation of walking home with her upper body naked. She had been throttled and threatened with death if she disclosed the rape. The sentence of life imprisonment was confirmed.

- [26] Factors which weighed with the SCA were: the appellant had had the chance on five separate occasions to raise the complaint of prejudice in relation to section 51(1) of the CLAA: in the regional court, during two sentencing procedures and during two appeals to the High Court. He was legally represented throughout the trial, during sentencing, and in both appeals. He had not been ambushed.
- [27] He had pleaded not guilty and participated fully in the trial. Eight years after the incident, in his application for leave to appeal against his conviction, he still maintained his innocence. The SCA found that he had suffered no prejudice.
- [28] The case of *S v Jaipal* 2005(1) SACR 215 CC was quoted, at paragraph 29:
- "The right of an accused to a fair trial requires fairness to the accused, as well as fairness to the public as represented by the State. It has to instil confidence in the criminal Justice system with the public, including those close to the accused, as well as those distressed by the audacity and horror of the crime."
- [29] The case of *Ndlovu v the State* (2017) ZACC 19 in the Constitutional Court, handed down on 15 June 2017, addressed the incorrect reference in the charge sheet to section 51(2) of the CLAA instead of section 51(1). Ndlovu was convicted of rape in the Phalaborwa Regional Court. He had accosted the adult complainant while she was walking home in the early hours of the morning, had assaulted her with, his fists, stones and bricks and threatened to kill her before raping her. After the rape, she escaped, naked, and covered in blood, spending 5 days in hospital for treatment to her wounded forehead, mouth and eye.
- [30] Despite this grievous bodily harm, Ndlovu was charged with rape read with section 51(2) of the CLAA. Ndlovu was convicted but thereafter
- sentenced to life imprisonment under section 51(1) of the CLAA.
- [31] The Constitutional Court, while recognising Ndlovu's right to a fair trial, found it unnecessary to consider fair trial precepts, this because the Regional Court had effectively exceeded its jurisdiction. Because Ndlovu was a first offender and was charged with rape in terms of section 51(2), the Regional Court was limited in its jurisdiction to the imposition of a maximum sentence of 15 years' imprisonment.
- [32] Ndlovu's sentence of life was reduced by the Constitutional Court to a term of 15 years, the maximum sentence of the Regional Court being appropriate owing to the vicious nature of the rape and the severity of the injuries caused to the complainant.
- [33] The Constitutional Court found that the Magistrate could and should have taken steps to ensure that Ndlovu was prosecuted in terms of the correct provision of the CLAA, that is, section 51(1), owing to the infliction of grievous bodily harm, and not section 51(2). It had the power under section 86 of the Criminal Procedure Act, 51 of 1977, to order that the charge sheet be amended. It also found that it was incumbent on prosecutors to discharge their duty to ensure that correct charges are preferred, and that, when they fail to do so, society

suffers.

[34] At paragraphs 53 and 54 of the judgment, the Court said the following:

"53. Mr Ndlovu's crime is just one instance of one of the most harrowing and malignant crimes confronting South Africa today - rape. Rape is perhaps the most horrific and dehumanising violation that a person can live through and is a crime that not only violates the mind and body of a complainant, but also one that vexes the soul. This crime is an inescapable and seemingly ever-present reality and scourge on the nation and the collective conscience of the people of South Africa.

54. Despite my finding in this matter, there is nothing before me to indicate that Mr Ndlovu's blameworthiness for this deplorable crime is in any way diminished. This is a case whether the state remissness has failed the complainant and society."

[35] In Ndlovu the appellant was charged and convicted of rape which, based on the charge sheet, fell under section 51(2), yet he was incorrectly sentenced to rape which fell under section 51(1).

[36] We revert to the instant case. Radiau was charged with the rape of a minor without reference to section 51 of the CLAA at all, whether by the prosecution in the charge sheet, or by the Regional Court at inception of or during the proceedings. He was convicted and sentenced under section 51(1) of the CLAA.

[37] In casu, apart from the trial proceedings, this appeal constituted the first opportunity afforded to Radiau to take issue with the omission to apprise him of the applicability of section 51(1) of the CLAA. The charge sheet in the record does not refer to section 51 at all.

[38] Radiau's plea statement cursorily mentions sections 51 and 5 and Schedule 2 to the CLAA. But there is no indication that he was made aware of the ramifications of section 51 of the CLAA in general and section 51(1) in particular.

[39] His legal representative may have done so, but there is an equal possibility that this did not occur. Radiau has to enjoy the benefit of the doubt as a consequence.

[40] In the result, by not taking cognisance of this material omission, the trial Court misdirected itself when imposing the life sentence

and exceeded its jurisdiction.

[41] Concerning the appropriateness of the sentence in casu, for various other reasons, there are grounds to interfere.

[42] Radiau pleaded guilty from the outset and expressed remorse. It is correct that he did so only after being apprised of the outcome of the DNA report, which demonstrates a modicum of expedience. Nevertheless, he was still under no duty to plead guilty. L could

have been subjected to the further trauma of a trial.

[43] Radiau was in custody pending trial for almost 2 years. He was a first offender regarding the offences, the prior house breaking

conviction in 2009 not being relevant to the offences in casu. He as relatively young at the time, being 25 years old. It was uncontested

that he had consumed a vast quantity of alcohol on the day of the abduction and rape.

[44] He did not perpetrate serious violence on L when he raped her. Nor was there evidence that he threatened her with harm if she informed

anyone of the rape. L was very young, being 6 years of age. L appears to have trusted Radiau to agree that he would take her to the shops to buy sweets for her, as they had seen one another before. The trust was broken. The TBC report mentioned that she suffers from fear and betrayal and anger. These are sequelae which cannot be underestimated.

[45] The Form J88 records no exterior injuries on the day of her release from Radiau's control. It nevertheless proves that L's vagina was penetrated and that various areas of her vagina were inflamed. The Form J88 suggests that penetration may have occurred anally as well as vaginally.

[46] But there was only one count of rape and one admission of rape, and no further evidence adduced by the State to establish anal rape. The charge sheet reflects one count of rape and only one such count was admitted.

[47] In the final analysis, we are of the view that omission by the prosecutor of reference to section 51(1) in the charge sheet, the concomitant omission of the trial Court to order the amendment of the charge sheet, and to explain the ramifications of section 51(1), (despite the perfunctory mention of section 51 in Radiau's plea), patently impinged on his right to a fair trial.

[48] In the light of these omissions, the trial Court exceeded its sentencing jurisdiction, with the maximum sentence being 15 years'

imprisonment. These factors, coupled with the presence of substantial and compelling circumstances, as mentioned above, justify a lesser sentence than one of life imprisonment.

[49] We are constrained to record that these factors do not detract from the morally reprehensible and deplorable nature of the kidnapping and rape of a minor child.

[50] Nevertheless, a period of 15 years' imprisonment on the rape conviction is the maximum term which could have been imposed, in any

event, in the particular circumstances.

[51] There is warrant to interfere with the kidnapping sentence and reduce it to 7 year's imprisonment, the original sentence of 10 years being unduly harsh and inappropriate in the given circumstances. It will run concurrently with the rape sentence inasmuch as both offences formed part of one transaction or incident.

For the reasons stated above, the following finding is made, namely:

1. The appeal against sentence is upheld;
2. The sentence of the trial court Is set aside and replaced with the following:
 - I. The appellant is sentenced to seven years' imprisonment on the count of kidnapping, antedate to 27 June 2014, being the date of sentence;
 - II. The appellant Is sentenced to fifteen years' imprisonment on the count of rape, antedated to 2 June 2014;
 - III. The sentence on the count of kidnapping is ordered to run concurrently with the sentence on the count of rape.

T BRENNER

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

30 June 2017

I agree

J TEFFO

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

It is so ordered.

Appearances

For the Appellant:

Adv Steinberg

Instructed by:

Pretoria Justice Centre (Legal Aid SA)

Counsel for Respondent:

Adv AJ Fourie

Instructed by:

The Director of Public Prosecutions

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