

SOUTH AFRICA / JUDGMENT

Ruiters v S (A125/2022) [2024] ZAWCHC 166; 2024 (2) SACR 570 (WCC) (18 June 2024) [2024] ZAWCHC 166

COURT

Western Cape High Court, Cape Town

BEFORE

Le Grange, Cloete, Bremridge

CASE / FILE NUMBER

A125/2022

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FLYNOTES:

CRIMINAL

– Sentence – Rape –

Previous offences – Trial

court sentencing appellant as third offender – Taking into
account previous common law rape conviction –

No reason for

legislature to view previous conviction of rape in terms of the
common law any differently than previous conviction
of rape interms of section 3 of the Criminal Law (Sexual Offences and
Related Matters) Amendment Act 32 of 2007 – Court
disagreeing with findings in S

v Jacobs 2015

(2) SACR 370 (WCC) – Appellant's previous common law
convictions for rape should be taken into account – Appeal
dismissed.

REPORTABLE

IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

CASE

NO: A125/2022

In

the matter between: HOGAN
RUITERS
Appellant
and
THE
STATE
Respondent

Coram: Le Grange ADJP et Cloete J et Bremridge AJ

Heard: 14 June 2024
Delivered
electronically: 18 June
2024

JUDGMENT

CLOETE J et BREMRIDGE AJ (LE GRANGE ADJP concurring):

- [1] This is an appeal with leave of the trial court (sitting at Themba lethu) against the sentence imposed on the appellant following his conviction on one count of rape of a 19 year old girl committed on 3 February 2019. He was acquitted on a second count of rape arising from the same incident.
- [2] The appellant was charged with contravening s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act[1] to which I will refer as the “Sexual Offences Act”, read with s 51(1) and Schedule 2 of the Criminal Law Amendment Act[2] (the so-called “minimum sentence legislation”). The charge thus attracted a minimum sentence of life imprisonment (subject to s 51(3), viz. a finding of substantial and compelling circumstances such as to justify a deviation from the prescribed minimum). He was however convicted of contravening s 3 of the Sexual Offences Act read with s 51(2)(b) of the minimum sentence legislation for a reason not apparent from the record.
- [3] Accordingly at the time of being sentenced on 26 August 2020, if the appellant was a first offender for rape the minimum sentence would be 10 years direct imprisonment; if a second offender, 15 years; and if a third or subsequent offender, 20 years direct imprisonment (again subject to s 51(3)). The trial court sentenced him as a third offender to 20 years imprisonment.
- [4] The central issue in this appeal is whether or not the appellant should have been sentenced as a third offender. He has 11 previous convictions spanning the period 14 January 1993 to 25 July 2008, of which two were for rape, coincidentally the first and last prior to the present one. During sentencing proceedings in the trial court, counsel for the appellant relied on S v Jacobs,[3] a decision of two Judges in this Division handed down on 10 December 2014, in which it was held that, principally for two reasons, the appellant should be sentenced as a first offender for rape. The first reason was that upon a literal interpretation of a previous

iteration of s 271A(b) of the Criminal Procedure Act,[4] a prior conviction for attempted rape automatically fell away after 10 years had elapsed. In the present case s 271A does not apply since the appellant was convicted after 14 January 1993 of various other offences contemplated in Schedule 1 of the Criminal Procedure Act within the subsequent 10 year period. The second reason was that a previous rape conviction was in terms of the common law and not the Sexual Offences Act. As far as the second reason goes, essentially the same argument was advanced on the appellant's behalf in this appeal.

[5] Despite being bound by Jacobs the trial court declined to follow it. The learned magistrate reasoned that he:

‘... does not agree with that assertion that the common law rape previous convictions of an accused should not be considered for purposes of sentence in terms of Act 105 of 1997. If the court might refer to what I have said, is that the wording of the provision of

section 51(2), namely, and I quote:

“Notwithstanding any other law, but subject to sub-section 3 it clearly indicates that this provision take preference above any other legal provision pertaining to sentencing.”

The court must have regard to the purpose and objectives of the Sexual Offences Act. If one had regard to the purpose thereof, as it is threefold, among others, it is to give complainants or afford complainants of sexual offences the maximum and least traumatising protection the law can provide.’

[6] It was clearly not open to the magistrate to depart from judicial precedent by which he was bound. This on its own constitutes a material misdirection entitling this court to interfere. The question then arises whether Jacobs is still good law and, if so, whether we agree with it.

[7] In Jacobs the court found that in light of s 68(1)(b) of the Sexual Offences Act (which came into effect on 16 December 2007) the common law offence of rape ‘does not exist anymore’.

[5] In our view the import of s 68(1)(b) is not to do away with the offence of rape itself but rather to subsume it into the expanded

definition of rape contained in s 3 of that Act. The import of s 68(1)(b) is to repeal the narrow and restrictive common law definition of rape and the consequences arising from the common law by virtue of that narrow definition.

[8] The appellant's first previous conviction for rape on 14 January 1993 was strictly in terms of the common law. As to the second previous conviction for rape on 25 July 2008, the appellant's list of previous convictions reflects that it pertains to an offence committed on 20 November 2005. In other words that offence predated the Sexual Offences Act but the conviction occurred after the commencement of that Act; and s 69(1)

thereof provides that ‘[a]ll criminal proceedings relating to the common law crimes referred to in section 68(1)(b) which were instituted prior to the commencement of this Act and which are not concluded before... [its]... commencement must be continued and concluded in all respects as if

this Act had not been passed'. The appellant's second previous conviction for rape would thus also, on the available evidence, have been one under the common law. For the first conviction he was sentenced to corporal punishment (6 lashes) and placed under a probation officer's supervision; and for the second he was sentenced to 15 years direct imprisonment.

[9] The appellant's argument is that since both previous convictions were in terms of the common law they cannot be considered for purposes of the minimum sentence legislation. This legislation was, subsequent to Jacobs, amended by the Criminal and Related Matters Amendment Act[6] on 5 August 2022 (the "Amendment Act"). In its preamble it is stated that one of the purposes is to amend the minimum

sentence legislation 'so as to further regulate sentences in respect of offences that have been committed against vulnerable persons'. In the Amendment Act the offence of rape in Part III of Schedule 2 was deleted and such an offence has now, in terms of s 16 of the Amendment Act, been shifted to Part II of Schedule 2.

[10] The effect is that the minimum sentences to be imposed in respect of a conviction for rape are now respectively 15 years for a first offender, 20 years for a second offender; and 25 years direct imprisonment for a third or subsequent offender for 'Rape or compelled rape as contemplated in section 3 or 4 of the... [Sexual Offences Act]...respectively, in circumstances other than those referred to in Part I' (our emphasis). What is absent however from Part II of Schedule 2 is the removal of the distinction between a previous conviction for rape in terms of the common law and one in terms of the Sexual Offences Act.

[11] In contradistinction, s 15 of the Amendment Act, which amended Part I of Schedule 2, specifically dispenses with that distinction. It is convenient to quote from s 15:

'(c) by the substitution for paragraphs (a), (b) and (c) of the offence "Rape as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007" of the following paragraphs:

"(a) when committed—

(i) in the circumstances where the accused is convicted of the offence of rape and evidence adduced at the trial of the accused proves that the victim was also raped by—

(aa) any co-perpetrator or accomplice; or

(bb) a person, who was compelled by any co-perpetrator or accomplice, to rape the victim, as contemplated in section 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007,

irrespective of whether or not the co-perpetrator or accomplice has been convicted of, or has been charged with, or is standing trial in respect of, the offence in question;

(ii) in the circumstances where the accused is convicted of the offence of rape on the basis that the accused acted in the execution or furtherance of a common purpose or conspiracy and evidence adduced at the trial of the accused proves that the victim was raped by more than one person who acted in the execution or furtherance of a common purpose or conspiracy to rape the victim, irrespective of whether or not any other person who so acted in the execution or furtherance of a common purpose or conspiracy has been convicted of, or has been charged with, or is standing trial in respect of, the offence in question;

(iii) by the accused who—

(aa) has previously been convicted of the offence of rape or compelled rape; or

(bb) has been convicted by the trial court of two or more offences of rape or the offences of rape and compelled rape, irrespective of—

(aaa) whether the rape of which the accused has so been convicted constitutes a common law or statutory offence;

(bbb) the date of the commission of any such offence of which the accused has so been convicted; ...'

(our emphasis)

[12] Accordingly if an accused is convicted of an offence falling under s 51(1) read with Part I of Schedule 2: (a) no distinction is drawn between a previous conviction under the common law and one in terms of the Sexual Offences Act; and (b) the date of such a previous conviction is irrelevant. However the same does not appear to apply to a conviction in terms of s 51(2)(b), and if we are correct in this regard, urgent legislative intervention is necessary. In the interim we must concern ourselves with the glaring absence in the amended Part II of the words 'irrespective of... whether the rape of which the accused has so been convicted constitutes a common law or statutory offence...'. since, given what is stated above, Jacobs remains good law unless we disagree with it.

[13] In Jacobs the court pointed out that the test for implying a provision into a statute is strict. It found that given the repeal of the common law offence of rape, to import such an offence into s 51(2)(b) – as it then read – was not '...necessary... in the sense that without it effect cannot be given to the statute as it stands'. [7] However in this regard the very recent decision of the Supreme Court of Appeal in Coko [8] is instructive:

'[2] Rape is an utterly despicable, selfish and horrendous crime. It gains nothing for the perpetrator, save for fleeting gratification, and yet inflicts lasting emotional trauma and, often, physical scars on the victim. More than two decades ago, Mohamed CJ, writing for a unanimous court, aptly remarked that:

"Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim."

The rights to dignity, to privacy, and the integrity of every person are basic to the ethos of the Constitution and to any defensible

civilization.

Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquility of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives.”[9]

[3] In similar vein Nugent JA, writing for a unanimous court, in equal measure described rape in these terms:

“Rape is a repulsive crime, it was rightly described by counsel in this case as an invasion of the most private and intimate zone of a woman and strikes at the core of her personhood and dignity.”[10]

[4] In *Director of Public Prosecutions, North Gauteng v Thabethe*[11] this Court rightly noted that “rape has become a scourge or cancer that threatens to destroy both the moral and social fabric of our society.”[12]

[5] In *Tshabalala v S (Commissioner for Gender Equality and Centre for Applied Legal Studies as Amici Curiae)*; *Ntuli v S*[13] the Constitutional Court once again underscored the gravity of the crime of rape and its attendant repulsive consequences. In the same case, Khampepe J, writing separately, said that “rape is not rare, unusual and deviant. It is structural and systemic.”[14]

[6] In *Masiya v Director of Public Prosecutions Pretoria and Another (Centre for Applied Legal Studies and another as Amici Curiae)*[15] the Constitutional Court said the following of rape:

“Today rape is recognised as being less about sex and more about the expression of power through degradation and concurrent violation of the victim's dignity, bodily integrity and privacy.”[16]

Regrettably, 26 years since the decision of this Court in *Chapman*, the scourge of rape has shown no signs of abating. On the contrary, rape is not only rife but has also reached pandemic proportions. And, sadly, it is women and children, being the most vulnerable in society, who bear the brunt of this scourge. In this regard, the learned author Professor C R Snyman rightly opines in his book that non-consensual penile penetration of a woman's vagina violates the most personal of all the parts of a woman's body. And that it “infringes” her whole being and identity as a woman.[17] It is therefore little wonder that incidents of rape always evoke outrage and revulsion from the citizenry.

[7] For most women and children, in particular, the rights guaranteed everyone in the Bill of Rights, such as the right to be free from all forms of violence from either public or private sources; bodily and psychological integrity, including the right to make decisions concerning reproduction and security in and control of their bodies[18], ring hollow. Thus, it brooks no argument to the contrary that rape gratuitously violates the fundamental value of human dignity and related rights.

[8] Against the foregoing backdrop, it is hardly surprising therefore that having rightly noted the prevalence of sexual offences engulfing the country, the legislature saw it fit to take decisive action and introduced legislation such as s 3 of the Criminal Law (Sexual

Offences and Related Matters) Amendment Act (the Sexual Offences Act) to curb the scourge of rape. The Sexual Offences Act abolished the common law offence of rape and instead opted for an expansive definition of the statutory crime of rape going far beyond what had hitherto constituted the common law offence of rape.’

[14] Under the common law “rape” was defined as a male having unlawful and intentional sexual intercourse with a female without her consent.[19] Section 3 of the Sexual Offences Act defines “rape” as ‘[a]ny person (“A”) who unlawfully and intentionally commits an act of sexual penetration with a complainant (“B”),

without the consent of B...’. Accordingly, for the reasons already given and as submitted by the respondent, not only did the Sexual Offences Act expand the definition of rape, as is evident from s 3 itself the very same essential elements for the common law of rape are included in the expanded statutory definition.

[15] Moreover the approach adopted by the Supreme Court of Appeal in *Coko* supports a purposive interpretation to the express wording found at the beginning of s 51(2), i.e. that ‘Notwithstanding any other law but subject to subsections (3) and (6),[20] a regional court or a High Court shall sentence a person...’. This express wording does not appear to have been considered at all in *Jacobs*. ‘Any other law’ on its plain language includes the Sexual Offences Act (even though enacted later the legislature did not, whether in the Sexual Offences Act or any other piece of legislation, consequentially amend this part of s 51(2)(b)).

[16] We agree with the sentiments expressed by W P De Villiers in his 2017 article[21] where the learned author considered the *Jacobs* decision at some length and stated:

‘The last issue that warrants examination is the restrictive interpretation by the court that the common-law offence of rape does

not qualify as a previous conviction for purposes of the application of section 51(2)(b) of the Criminal Law Amendment Act 105 of 1997.

It is submitted that the court also erred in this regard. The common-law crime of rape (“in circumstances other than those referred to in Part 1”) was included in Part III of Schedule 2 of the Criminal Law Amendment Act before the implementation of the Criminal Law (Sexual Offences

and Related Matters) Amendment Act. The conduct targeted by the common-law offence of rape did not cease to be the same abhorrent criminal conduct with the implementation of the Criminal Law (Sexual Offences and Related Matters) Amendment Act. This is underscored by the fact that the offence was taken up in section 3 of the same Act (s 3 has an expanded ambit and is included in Part III of Schedule 2 to the Criminal Law Amendment Act; see Kemp 343).

There is thus no reason for the legislature to view a previous conviction of rape in terms of the common law for purposes of section 51(2)(b) any differently than a previous conviction of rape in terms of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act.

It would also mean that someone with any number of convictions for common-law rape would remain a first offender for purposes of section 51(2)(b), but that a person with a single previous conviction in terms of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, would be treated as a second offender. Because of the wider ambit of section 3, which could, for example, include the insertion by one person of a finger into the mouth of another person (see s 3 read with the definition of “sexual penetration” in the Act), the criminal conduct could even have been of a much less

serious nature than in the instance of common-law rape where a man had sexual intercourse with a woman without her consent. Yet, if the court’s approach were to be followed, the comparatively much less serious previous transgression of section 3 would make the person a second offender for purposes of section 51(2)(b), but not the much more serious previous conviction of common-law rape. Any such result would be irrational.

Lastly, there is little doubt that the principal aim of section 51 of the Criminal Law Amendment Act 105 of 1997 was to try and deter certain serious offences including rape (see also Terblanche 44). If the court’s approach were to be followed, it would mean that section 51 has no deterrent effect to someone who had been convicted of common-law rape and who is predisposed to rape again.’

[17] Finally, in Ndlovu[22] the Supreme Court of Appeal recently reaffirmed that:

‘[66] I digress at this point to observe that both the Constitutional Court and this Court have come to accept that when an amendment of existing legislation that seeks to remedy obscurities or address cases where existing legislation fails to fully capture the purpose or the mischief that it was designed to serve or prevent in the first place, it is permissible to take a peek at the amending legislation purely as a guide to the legislature’s understanding of the purpose of the existing legislation.[23]

[67] It is as well to remember that courts are, as a general rule, enjoined to heed the constitutional injunction in s 39(2) of the Constitution when interpreting legislation, namely to “promote the spirit, purport and objects of the Bill of Rights”. Keeping that injunction at the forefront of one’s mind, there can therefore be no doubt that the interpretation espoused in this judgment is consistent with this constitutional imperative. In addition, such interpretation is consistent with the purposive approach to interpretation of statutes which

has received universal approval from both the Constitutional Court and this Court.

[18] We are thus compelled to respectfully disagree with the court's findings in Jacobs, and we find that the appellant's previous common law convictions for rape should be taken into account. It remains to consider whether the trial court was correct in finding there were no substantial and compelling circumstances to justify a deviation from the prescribed minimum of 20 years direct imprisonment. The record demonstrates that the appellant abused his position of trust to subject the complainant to a violent and humiliating rape which has left her severely traumatised. In addition the offence was committed while the appellant was on parole in respect of his 15 year sentence imposed for his second conviction of rape. His personal circumstances are nothing unusual and his criminal record shows a propensity for violent crimes over an extended period. There was no material misdirection by the trial court on this score and nor can the sentence imposed be described as shocking, startling

or disturbingly inappropriate. There is thus no basis for this court to interfere.

[19] We would thus propose the following order:

'The appellant's appeal against his sentence in respect of count 1 is dismissed. The conviction and sentence are confirmed.'

CLOETE J

BREMRIDGE AJ

I agree and it is so ordered.

LE GRANGE ADJP

For appellant: Ms I Levendall (Legal Aid South Africa)

For respondent: Adv E Kortje (Directorate of Public Prosecutions)

[1] No 32 of 2007.

[2] No 105 of 1997.

[3] 2015 (2) SACR 370 (WCC).

[4] No 51 of 1977.

[5] At para [58].

[6] No 12 of 2021.

[7] At para [62].

- [8] Director of Public Prosecutions Eastern Cape, *Makhanda v Coko* (Women's Legal Centre Trust, Initiative for Strategic Litigation in Africa and Commission for Gender Equality intervening as Amici Curiae) (case no 248/2022) [2024] ZASCA 59 (24 April 2024).
- [9] *S v Chapman* [1997] ZASCA 45; 1997 (3) SA 341 (SCA) (Chapman) paras [3] to [4].
- [10] *S v Vilakazi* [2008] ZASCA 87; 2009 (1) SACR 552 (SCA) para [1].
- [11] Director of Public Prosecutions, *North Gauteng v Thabethe* 2011 (2) SACR 567 (SCA).
- [12] *Ibid* para [1, 6].
- [13] *Tshabalala v S* (Commissioner for Gender Equality and Centre for Applied Legal Studies as Amici Curiae); *Ntuli v S* [2019] ZACC 48; 2020 (2) SACR 38 (CC).
- [14] *Ibid* para [76].
- [15] *Masiya v Director of Public Prosecution Pretoria and Another* (Centre for Applied Legal Studies and another as Amici Curiae)
- [2007] ZACC 9; 2007 (5) SA 30 (CC); 2007 (8) BCLR 827 (CC); 2007 (2) SACR 435 (CC) (*Masiya*).
- [16] *Ibid* para 51.
- [17] C R Snyman *Criminal Law* 5ed at 357.
- [18] See s 12 of the Constitution of the Republic of South Africa, 1996.
- [19] *S v Gaseb and Others* 2001
- (1) SACR 438 (NSC) at 451g-h.
- [20] This pertains to an offender under the age of 18 years and is not relevant in this case.
- [21] 2017 (80) THRHR.
- [22] Director of Public Prosecutions, *Kwazulu-Natal Pietermaritzburg v Ndlovu* (888/2021) [2024] ZASCA 23 (24 March 2024).
- [23] *Patel v Minister of the Interior and Another* 1955
- (2) SA 485 (A) at 493A-D; *National Education Health & Allied Workers Union (NEHAWU) v University of Cape Town and Others* 2002 ZACC 27; 2003 (2) BCLR 154; 2003 (3) SA 1 (CC) at para [66].

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