

SOUTH AFRICA / JUDGMENT

## S v Harker (CC10/2019) [2020] ZAWCHC 43 (21 May 2020)

[2020] ZAWCHC 43

COURT

Western Cape High Court, Cape Town

BEFORE

Wille

CASE / FILE NUMBER

CC10/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

Case

No: CC10/2019

In

the matter between:

THE  
STATE  
and  
HERMAN  
HARKER

CORAM:

Wille, J  
DATE  
OF ARGUMENT: 13th of May 2020  
DATE  
OF SENTENCE: 21st  
of May 2020

**JUDGMENT****ON SENTENCE**

WILLE, J:

**INTRODUCTION**

[1] Sentencing often requires more thought and consideration than is traditionally given to this very difficult process. Sentencing involves a very delicate balancing act, taking into account, inter alia, the seriousness of the offences perpetrated by the offender, the offender's personal circumstances and the vested interests of society. This is often referred to as the triad in Zinn[1]. The imposing of sentence on an offender, therefore of necessity, requires an objective analysis and evaluation of a number of

difficult factors.

[2] A balanced approach to sentencing must always be adopted, with reference to the specific facts of each case. Deterrence and rehabilitation are important factors that fall to be considered in evaluating the appropriate sentence to be imposed upon an offender. At the same time, a court must be mindful of the crimes upon which the offender stands convicted.

[3] Every crime that has been committed has its own set of facts and factors, that aggravate or mitigate that specific crime. By way of example, when violent crime is committed, the degree and extent of the violence used, coupled with the cruelty of the attack must be taken into consideration. This, in turn, must again be considered in the correct context, taking into account, inter alia, the character of the victim.

[4] The - after effects

- of a crime must also be taken into account, particularly so when the offender's actions have a ripple effect on the victims in the immediate community. In this case, this is a particularly important consideration.

[5] A morally unacceptable motive may also be an aggravating factor in connection with any sentence to be imposed. So too, the apparent

'vulnerability' of the victim of a crime may also 'weigh-in' as an aggravating factor, worthy of consideration.

**THE NATURE OF THE CRIMES**

[6] The offender has been convicted of fifteen counts of rape, two counts of sexual assault and four counts of abduction. The fifteen

convictions of rape, all fall squarely within the provisions of the minimum sentencing regime and carry with them a minimum sentence of life imprisonment.[2] It goes without saying that these are all very serious crimes. I have to find substantial and compelling circumstances in order to deviate from the minimum sentencing regime.[3] Most of the victims, as set out in my judgment on conviction, suffered emotionally and psychologically and still so suffer. The lives of these victims have been changed for the worst, and to some extent, forever.

#### THE INTERESTS OF SOCIETY

- [7] Crimes in general, but especially against woman offend against the aspirations and ethos of all South Africans. Some of the victims in this case were very young woman and were a soft target for the offender. The youngest victim was nine years old.
- [8] Not only do crimes against woman in this country amount to a serious invasion of the dignity of the victims, but these crimes do not contribute towards our claims that we live in a civilized society. However, at the same time;

‘the object of sentencing is not to satisfy public opinion, but to serve the public interest’[4]

- [9] The sentence to be imposed upon the offender, in these circumstances, must accordingly in some measure reflect a censure to this conduct and behaviour.

#### THE PERSONAL CIRCUMSTANCES OF THE OFFENDER

- [10] The relevant personal circumstances of the offender do not, in my view, in any manner come to his assistance. He is (66) years old, married and has dependents. He has an unfortunate lengthy list of previous convictions and has served considerable time having been incarcerated for a variety of different offences. Notably, he has a number of previous convictions for the crime of impersonating a police officer.
- [11] His record shows that he has several previous convictions for rape and at least two of these previous offences, involved the rape of a minor.[5] The offender was released on parole during September 2006 and was subject to parole supervision until August 2007. He was adopted. His biological mother never made any attempts to get to know him until he started looking for her. He has never met his biological father.
- [12] Whilst he was an awaiting trial prisoner in this matter, his son, suffering from depression, committed suicide. It is also alleged that the apartment in which his ex-wife and his late son lived, has since been torched.

#### THE SUBMISSIONS ON BEHALF OF THE STATE

[13] Mr Julius, filed a number of victim impact reports in support of his submissions on sentence. The victims indicated that they were badly affected and traumatized by the crimes perpetrated upon them, in that they felt that 'life was no longer worth living'. The victims all suffered from shock, fear, grief, stress and embarrassment. They are all attempting to receive mental and

psychological treatment which is also causing financial hardship to them and their families. Professional counselling is also limited in view of their poor socio-economic circumstances. Some of the victims are struggling academically and are generally fearful of engaging in any relationships with men.

[14] It is submitted that the offender continued with his - crime spree

- until he was arrested and that had he not been arrested, then in that event, more victims would have fallen prey to his criminal

behaviour. Further, it is emphasised that the offender threatened his victims and their families with death and instilled real fear in them. It is correct that a number of victims testified that the offender threatened them with death if they in any manner reported his actions. Further it is correct that the offender threatened to cause harm to the family members of his victims, if they preferred charges against him.

[15] Further, it is advanced that there are no substantial and compelling circumstances present which permit the court to deviate from the ordained prescribed minimum sentences and that the offender should be sentenced to life imprisonment in respect of each and every conviction of rape. Further, that I impose upon the offender a period of direct imprisonment in respect of the other offences upon which he stands convicted.

#### THE SUBMISSIONS ON BEHALF OF THE OFFENDER

[16] It is submitted that a balanced approach must be adopted as prisons are - grim and hellish

- places. It is conceded that moral justification dictates that this offender deserves to be punished. However, it is advanced that punishment must also not be seen as revenge, although some would justify revenge in these circumstances. It is so, that prison conditions in our country are particularly dire and prisoners experience extreme overcrowding, including poor ventilation, lack of natural light, inadequate ablution facilities, lack of sanitation and privacy, insufficient supervision and poor healthcare provision.

[17] In terms of section 73(1)(b) of the Correctional Services Act,[6] a person sentenced to life imprisonment, theoretically remains in prison for the rest of his or her natural life. But, if a prisoner

sentenced to life imprisonment is already an elderly person, then the possibility of parole is almost always present. Life imprisonment is in practice, regarded as a sentence of (25) years of imprisonment.

[18] The parole provisions that are relevant may be summarized as follows;

‘A person sentenced to life imprisonment may not be placed on parole until he or she has served at least twenty five (25) years of the sentence; but such a prisoner may, on reaching the age of sixty five (65) years, be placed on parole after he has served at least fifteen (15) years of the sentence’ [7]

[19] It is accordingly advanced on behalf of the offender, that on an optimistic assumption that he may reach an age of (81) years, after

(15) years, he could be considered to be released on parole. Therefore, it is argued, that it does not matter at all, whether the sum total of the sentences imposed by this court, exceeds the effective sentences that have been expressed to be desirable.

[20] This, therefore could mean, that the - practical effect - of imposing (15) life terms upon the offender in this case, would only be to the benefit of the public’s yearning for retribution, prevention and deterrence for this type of crime.

#### DISCUSSION

[21] In my view, the offender has not exhibited true remorse for his actions. He did not show - genuine remorse

- at any stage during the proceedings for his criminal behaviour. To be fair to the offender, I must to comment on one of the charges

preferred against him.

[22] In this case, where he was linked positively by DNA evidence, for the rape of a nine year old girl, he stated that he must

- take his punishment

- and requested the court to show mercy on him. Despite consideration, I am unable to find any redeeming factors in favour of the offender, in mitigation of sentence. I find only aggravating factors. The victims were all from strained socio-economic backgrounds, were poor and young. They were stalked by the offender and in some cases, this, under the pretext of him being an ‘educator’.

[23] I am expected to depart from the prescribed minimum sentence regime in the event that I am able to - find and identify

- substantial and compelling circumstances to justify such a departure, to the benefit of the offender.

[24] It must be emphasized that my point of departure in connection with the imposition of an appropriate sentence upon the offender is not a blind application of these provisions, but rather a balancing exercise with specific reference to the triad in Zinn.

[25] In addition, I am obliged to keep in the forefront of my mind that a

- specified sentence - has been prescribed by law as the sentence that should be regarded as ordinarily appropriate in these circumstances.

[26] In my view, there are no facts which are either - substantial and compelling

- to the benefit of the offender, when objectively evaluated against the manner in which the crimes were committed, or alternatively, why the crimes were committed. Further, some of the defences offered up by the offender in this connection, bear further scrutiny. These are the defences of 'consent'.

He advanced that he was in a relationship with some of his victims and that he enjoyed consensual sexual intercourse with them. This is certainly not a mitigating factor in favour of the offender. I find this to be - aggravating

- to the detriment of the offender.

[27] I accept that the socio-economic circumstances of the offender were not ideal and that absent from his childhood life, was a good role model. While this is generally a factor that may be taken into account when imposing sentence, I do not find the mere existence of this position to be of sufficient weight to qualify as substantive and compelling, in these particular circumstances.

[28] When an offender has been incarcerated as an awaiting trial prisoner for a long period of time, this may be taken into account when an appropriate sentence is imposed. On a strict interpretation of the law, this does not amount to a 'substantive and compelling circumstance', but that having been said, nothing prevents this court, to take into account the period that the offender has been incarcerated, pending his or her trial, for the purpose of imposing the appropriate sentence. In the present matter, it is so, that the offender has been an awaiting trial prisoner for a long period of time since his arrest. However, the arrest of the offender, in this case, effectively brought an end to his criminal activity. I have taken all these factors into account in order to attempt to achieve a sentence, which I believe to be proportionate in the circumstances.

[29] I find favour with the submissions advanced by Mr Julius to the effect that public interest must be properly served in the sentencing of this particular offender, taking into account the nature of the crimes and the effects thereof, upon these vulnerable victims.

## ORDER

[30] In the result, the order issued out in connection with the sentences imposed upon the offender, is as follows:

1. That in connection with count (1), the crime of abduction, the offender is sentenced to (5) years direct imprisonment.

2. That in connection with the crimes of rape in counts (2) and (3) of the indictment, the offender is sentenced to life imprisonment on each count.
3. That in connection with the crimes of rape in counts (4) and (5) of the indictment, the offender is sentenced to life imprisonment on each count.
4. That in connection with the crimes of sexual assault in counts (6) and (7) of the indictment (taken together for the purposes of sentence), the offender is sentenced to (10) years direct imprisonment.
5. That in connection with the crime of abduction in count (8) of the indictment, the offender is sentenced to (5) years direct imprisonment.
6. That in connection with the crime of rape in counts (9), (10), (11), (12),  
(13) and (14) of the indictment, the offender is sentenced to life imprisonment on each count.
7. That in connection with crime of abduction in count (15) of the indictment, the offender is sentenced to (5) years direct imprisonment.
8. That in connection with the crimes of rape as set out in counts (16) and  
(17) of the indictment, the offender is sentenced to life imprisonment on each count.
9. That in connection with the crime of abduction as set out in count (18) of the indictment, the offender is sentenced to (5) years direct imprisonment.
10. That in connection with the crimes of rape as set out in counts (19), (20) and (21) of the indictment, the offender is sentenced to life imprisonment on each count.

(In summary, the offender is sentenced to (15) terms of life imprisonment and to (30) years of direct imprisonment)

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WILLE, J

[1] S v Zinn 1969 (2) SA 537 (A)

[2] Section 51(1) of Act 105 of 1977 - read with Part 1 of Schedule 2

[3] S v Malgas 2001 (2) SA 1222 (SCA)

[4] S v Mhlakaza and Another 1997 (1) SACR 515, p 518

[5] It is noted that the last of these offences was committed a very long time ago

[6] Act 111 of 1998 (the Act)

[7] S 73(6)(b)(iv) of the Act.

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