

SOUTH AFRICA / JUDGMENT

Stevens v S (CA&R 266/2014) [2015] ZAECHGC 21 (25 March 2015)

[2015] ZAECHGC 21

COURT

Eastern Cape High Court, Grahamstown

BEFORE

J W Eksteen, M Makaula

CASE / FILE NUMBER

CA&R 266/2014

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

C.A.

& R: 266/2014

Date

Heard: 18 March 2015

Date

Delivered: 25 March 2015

In

the matter between:

HILTON

STEVENS.....Appellant

and

THE

STATE.....Respondent

nt

JUDGMENT

EKSTEEN J

[1] The appellant was convicted on three counts of robbery with aggravating circumstances, one count of sexual assault, two counts of rape, one count of unlawful possession of a firearm and one count of unlawful possession of ammunition. He was sentenced to 15 years imprisonment in respect of each count of robbery, which sentences were ordered to run concurrently. In respect of the two counts of rape he was sentenced on each count to 15 years imprisonment and it was ordered that these sentences would

run concurrently with one another. For the sexual assault and for the unlawful possession of a firearm he was sentenced to 2 years imprisonment on each count and to a further 1 year for the unlawful possession of ammunition. He was accordingly sentenced to an effective term of 35 years imprisonment. He appeals against the sentences imposed.

[2] All the charges arise from a single occurrence in which the appellant and an accomplice set about to commit robbery. The appellant pleaded guilty to all the charges. The facts and circumstances relating to these events appear from the appellant's explanations for his plea of guilty as recorded in his statement in terms of section 112(2) of the Criminal Procedure Act, 51 of 1977 (herein referred to as "the CPA"). In his plea the appellant acknowledged that he understood the charges against him and admitted that on 11 May 2013 he had been present at Missionvale together with one Raymond Bosman, his accomplice. They saw the complainant in the sexual assault charge, to whom I shall refer as "OJ", together with the complainants in the rape charges, to whom I shall refer as "CS" and "LG" respectively.

[3] The appellant recorded that Bosman took out a firearm and ordered the three complainants to lie down. Whilst Bosman was holding the firearm the appellant proceeded to rob OJ of R38,00, CS of R32,00 and LG of a cellphone and a wallet containing R14,00.

[4] The appellant states that he observed as Bosman started to undress OJ and he attempted to have intercourse with her. At this stage the appellant took the firearm and ordered CS to suck his penis. This CS did. He thereafter ordered LG to do likewise. LG too complied. Thereafter he proceeded to OJ and attempted to have intercourse with her, however, she successfully resisted and the appellant was unsuccessful in his endeavour.

[5] The appellant and Bosman were arrested shortly thereafter at a Caltex garage in the vicinity and the firearm was found in the possession of Bosman whilst the cellphone was found in the possession of the appellant.

[6] After their plea of guilty certain expert ballistic reports relating to the firearm and ammunition, which support the admitted facts, were handed in in terms of the provisions of section 212 of the CPA. The facts, as set out in the appellant's plea were accepted by the prosecutor and the appellant was duly convicted on all counts.

- [7] OJ testified in aggravation. She is an adult woman aged 53 years. She is a well-respected woman in her community where she is known to care intensely for the well-being of the youth in her society. She is frequently engaged in making peace amongst fighting youngsters. She testified as to the humiliation to which she was subjected and the grief which she still feels when recalling the events. Moreover, she states that her children are ridiculed at school because of the acts committed against her.
- [8] CS also testified of the deep humiliation which he experienced during the rape at gunpoint.
- [9] The personal circumstances of the appellant were placed on record by his legal representative and are not disputed. He was 18 years old at the time of the incident and 19 at the time of the trial. He has received a very modest education and had attended school until Grade 4 only. It is not clear whether he had in fact successfully completed Grade 4. His father passed away when he was just 15 years old. At this stage his mother abandoned him and he was left to stay with his grandmother in Gelvandale, Port Elizabeth. He is a first offender.
- [10] The offences of robbery with aggravating circumstances and rape attract minimum sentences in terms of the Criminal Law Amendment Act, 105 of 1997. Such minimum sentences must be imposed unless the presiding officer is able to identify substantial and compelling circumstances which justify the imposition of a lesser sentence.
- [11] During argument prior to the imposition of sentence the appellant's legal representative argued that substantial and compelling circumstances do exist in that the appellant is a first offender of youthful age who had pleaded guilty and showed remorse for his conduct.
- [12] The magistrate in addressing this issue referred to the well-known decision in *S v Malgas* 2001 (2) SA 1222 (SCA) which sets out the approach which a court is required to adopt in assessing whether substantial and compelling circumstances can be found and exist. He thereafter referred to the Supreme Court of Appeal decision in *S v Matyityi* 2011 (1) SACR 40 (SCA). He recorded that in Matyityi's case the Supreme Court of Appeal stated:

"Courts were not free to subvert the will of the legislator by resorting to vague ill defined concepts such as relative youthfulness or other equally vague and in founded hypothesis that may appear." (sic)

- [13] Finally, still with reference to Matyityi's case the magistrate stated:

"And again the judges reiterated that the sentencing courts should not depart from the prescribed minimum sentences because of flimsy

reasons like youthfulness."

- [14] Sadly, I consider that the magistrate did not apply his mind sufficiently to the judgment of the Supreme Court of Appeal in Matyityi's case. Youth has for centuries been regarded as a mitigating factor in the assessment of sentence. Thus, Voet 48.19.7

(Gane's Translation) states:

“But sometimes it has not been considered as a crime in minors when the same act, if committed by majors, would have been liable to correction as has been more fully approved in our title in Minors below the age of twenty-five years. In the same way also it has not been thought unfair that pity for youth should sometimes induce a Judge to give a moderate punishment even in somewhat heinous offences, especially when circumstances reasonably suggest that some allowance should be made for the hazards of youth.”

- [15] The Supreme Court of Appeal in Matyityi’s case echoes these sentiments where Ponnann J states at p. 47e-48b:

“It is trite that a teenager is prima facie to be regarded as being immature and that the youthfulness of an offender will invariably be a mitigating factor, unless it appears that the viciousness of his or her deeds rules out immaturity. Although the exact extent of the mitigation will depend on all the circumstances of the case, in general a court will not punish an immature young person as severely as it would an adult. It is well established that, the younger the offender, the clearer the evidence needs to be about his or her background, education, level of intelligence and mental capacity, in order to enable a court to determine the level of maturity and therefore moral blameworthiness. The question, in the final analysis, is whether the offender’s immaturity, lack of experience, indiscretion and susceptibility to being influenced by others reduce his blameworthiness. Thus, whilst someone under the age of 18 years is to be regarded as naturally immature, the same does not hold true for an adult. In my view 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.”

- [16] In the present instance the appellant was a teenager and, in my view, must therefore be regarded as prima facie immature. The undisputed personal circumstances reveal a humble education which militates in favour of such immaturity. Moreover he had been deprived of all parental guidance at the difficult adolescent stage of his life when he was called upon to deal with the death of his father and the abandonment by his mother. I think that the circumstances in the present case reasonably suggest that some allowance should be made for the hazards of youth. The fact that the appellant is a first offender, that he has pleaded guilty and that he has thereby shown some measure of remorse are factors which fortify the conclusion in this regard.
- [17] In these circumstances the magistrate’s approach to the appellant’s youth is, to my mind, a misdirection. I consider that his youth coupled with the further considerations set out earlier constitute compelling and substantial circumstances which would render the imposition of the prescribed sentences unjust. For this reason this Court is at liberty to interfere in the sentences imposed in this case.
- [18] In any event, in the case of *S v Anderson* 1964 (3) SA 494 (A) it was pointed out that when considering an appeal on sentence, if the sentence imposed by the Court a quo differed to such an extent from the sentence which the Court of Appeal would consider to be a fitting sentence the inference can be drawn that the trial court acted unreasonably. In those

circumstances the Court of Appeal would be entitled to interfere with the sentence and to impose a sentence which it regards as being a fit sentence. This issue must be approached, however, with due regard to the fact that the sentence is pre-eminently a matter within the discretion of the trial court. The Court of Appeal will not lightly interfere on this basis with a sentence imposed by the trial court unless that sentence differs to such an extent from the sentence which the Court of Appeal considers to be a proper sentence that it warrants interference by the Court of Appeal.

- [19] On the facts of this matter the effective sentence which this court considers to be fitting differs so substantially from the effective sentence which has been imposed that I consider that we are entitled, and indeed obliged, to interfere with the sentence imposed.
- [20] In respect of the three counts of robbery with aggravating circumstances the prescribed sentence of 15 years was imposed by the magistrate in each case. The amounts which were robbed of the complainants are insubstantial and the substantial and compelling circumstances which find application are set out earlier herein. I do not lose sight of the fact that robbery at gunpoint is a very serious offence and that the sentence prescribed by the Legislator must necessarily serve as a point of departure in assessing an appropriate sentence. I am also alive to the fact that the appellant would in all probability have taken larger amounts if the complainant had more money in their possession. I consider in all the circumstances that a sentence of 12 years imprisonment on each count of robbery with aggravating circumstances is a fitting sentence. I agree with the magistrate that the sentences imposed in respect of these offences should run concurrently with one another.
- [21] In respect of the charges of rape the magistrate gave no consideration to the prescribed sentence, which is 10 years imprisonment on each count. Without providing any reasoned justification for doing so he imposed a sentence of 15 years imprisonment on the appellant in respect of each count. In his subsequent reasons for sentence the magistrate argues that he considered the rapes to be of such a serious nature that they justified a sentence heavier than the minimum that is prescribed. The reasons advanced are stated as follows:
- “The court has taken a view that the accused were armed with a firearm. They were more than (1) one accused. He penetrated his penis through the victims mouth. Two (2) victims were raped by the accused. One (1) old woman was sexually assaulted by the accused by rubbing his penis against her thighs. The court considered these rapes more seriously, therefore the court deemed it fit to add (5) five more years to the prescribed sentence of (10) ten years.”*
- [22] It is so that the appellant also sexually assaulted a middle aged woman, however, he has been sentenced separately for that offence. It is true also that in perpetrating the robbery the appellant acted in concert with Bosman. The admitted facts do not however suggest that Bosman played any role at all in the rapes of which the appellant has been convicted. It is so that two individuals were raped, however, he is sentenced separately for each rape. To the extent that these features may have moved the magistrate to impose a sentence heavier than the prescribed sentence I think that it constitutes a misdirection.

[23] Rape is always a very serious offence and it is for that reason that the Legislator has singled out this offence for the severe sentence prescribed. The offence in this particular case is not, however, to my mind, more serious than the average rape case which this court frequently encounters. I have held earlier that substantial and compelling circumstances do exist which justify the imposition of a lesser sentence than that prescribed by the Legislator. When due regard is had to the extenuating features discussed earlier I consider that a sentence of 7 years imprisonment would adequately serve all the objectives of punishment. Again I agree with the magistrate that these sentences should run concurrently with one another.

[24] The sentences imposed in respect of the remaining counts do not, to my mind, warrant interference. When, however, considering the cumulative effect of all the sentences the result would, in my view, still be inappropriate. This is more so as all the offences were committed in the course of a single occurrence. The possession of the firearm and the possession of ammunition go hand in hand and it would, in the context of this case be appropriate for those sentences to run concurrently. I consider that an effective sentence of 21 years imprisonment represents a fitting sentence for the events which occurred during this occurrence.

[25] In the result:

1. The sentences imposed in counts 4, 8 and 9 are confirmed.
2. The sentence imposed in count 9 is ordered to run concurrently with that imposed in count 8.
3. The sentences imposed in counts 1, 2 and 3 are set aside and substituted with a sentence of twelve (12) years imprisonment in

respect of each count.

4. The sentences on counts 1, 2 and 3 are to run concurrently with one another.
5. The sentences imposed on counts 5 and 6 are set aside and substituted with a sentence of seven (7) years imprisonment in respect of each charge.
6. The sentences imposed on counts 4, 5 and 6 are ordered to run concurrently with one another.

J W EKSTEEN

JUDGE OF THE HIGH COURT

MAKAULA J:

I agree.

M MAKALA

Appearances:

For Appellant: Adv Solani instructed by Justice Centre, Grahamstown

For Respondent: Adv Mtsila instructed by National Director of Public Prosecutions,
Grahamstown

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