

SOUTH AFRICA / JUDGMENT

Stuurman v S (CA&R115/16) [2017] ZANCHC 62 (24 October 2017)

[2017] ZANCHC 62

COURT

Northern Cape High Court, Kimberley

BEFORE

Tlaletsi, Lever

CASE / FILE NUMBER

CA&R 115/16

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HIGH
COURT OF SOUTH AFRICA
[NORTHERN
CAPE HIGH COURT, KIMBERLEY]
Case
No: CA&R 115/16
In

the matter between:

SAM
STUURMAN
Appellant
V
THE
STATE
Respondent

Heard:

14 August 2017

Delivered:

24 October 2017

Coram:

Tlaletsi AJP et Lever AJ

JUDGMENT

ON APPEAL

Tlaletsi AJP

- [1] Mr Sam Stuurman (the appellant) was convicted on his plea of guilty by the Regional Court, De Aar on 26 September 2013 on a charge of Rape, and was sentenced to life imprisonment in terms of s 51(1)(a) of Act 105 of 1997 (the Act).
- [2] The notice of appeal was filed on 15 March 2017. It is way out of time and is accompanied by an application for condonation for the late filing of the notice of appeal. The condonation application as well as the appeal are opposed by the State (the respondent).
- [3] The explanation for the lengthy delay of 3 years and 6 months by the appellant is simply that after the conclusion of his trial he tried several times "to appeal" by writing letters to court without any response. He also did not have the financial means to engage the services of a legal representative

to pursue an appeal on his behalf as he was already serving his sentence. The explanation is not persuasive. He has not attached

copies or any other form of proof of the alleged correspondence to the court. Neither dates nor particulars of the correspondence are provided. I shall nevertheless continue to consider whether the appeal itself has reasonable prospects of success. I have no doubt that the matter is of importance to the appellant because of the nature of the sentence imposed, and that it is in the interests of justice that the matter be finalised without further delay. Furthermore, the appellant has an automatic right of appeal, which should nevertheless be exercised within a reasonable time.[1]

- [4] The only ground upon which the sentence of life imprisonment is challenged is that the trial court misdirected itself in finding that there were no substantial and compelling circumstances justifying a departure from imposing the prescribed sentence of life imprisonment. Mr Fourie, appearing for the appellant submitted that the facts of this matter are not of such a nature that they call for the imposition of life imprisonment, and that the sentence is in any case harsh.
- [5] First, the personal circumstances of the appellant. He was 39 years old, single and having a 6 month old son who resided with his mother. He was at the time of his arrest employed as a farm worker with a monthly income of R2000-00. He had been in custody pending the finalisation of his trial for 18 months. Importantly, he was a first offender.
- [6] The victim was a 9 year old child known to the appellant. On the day of the incident the appellant met the victim with two other girls walking in the same direction as the appellant. He joined them. As they were walking through the veld the other two girls took a different direction to their homes. The appellant asked the victim to have "sex" with him. She asked

him what that was. He told her to take her clothes off. She refused. He grabbed her and forcefully undressed her. He then had non-consensual sexual intercourse with her. He admitted that he was fully aware that she was less than 16 years old and that she grew up around him.

- [7] The victim's mother was living in Hopetown and her father had recently passed away. She was living with her aunt in De Aar when the incident happened. She was well looked after by her aunt. She had just started attending school and was placed in grade 1 due to her advanced age. She had to abandon her schooling after the incident to move to Hopetown after her rape ordeal. According to the aunt the incident had a traumatic effect on her such that she had stopped playing with her friends and felt insecure among male persons. The aunt mentioned further that she started to experience nightmares in her sleep after the incident. She was undergoing psychological treatment and was also placed on medication. In my view, this is a case in which the state should have secured a report by a social scientist/psychologist on the impact of the offence on the victim rather than relying solely on the say so of her aunt, who testified in general terms and was not living with the complainant in Hopetown. There must be a causal link between her observation of the complainant and the offence established.
- [8] The report by an authorized Medical Practitioner which was admitted in to evidence recorded the following about the complainant: with regard to the clinical findings there were no physical injuries and scratch marks. Her feet here dusty with an old injury. The hymen at 12mm horizontal and 13mm vertical, with old injuries; peri-vaginal tear and red (fresh-trauma), - no bleeding. The gynaecological examination revealed that the urethral had a tear and that the orifice had no bleeding, the labia majora (askeiding negatief), para-urethral folds had a tear and was red, and labia "minora- extern".
- [9] The following conclusions are recorded: that the patient was previously sexually molested hence the presence of old injuries of the hymen, Perinea! was torn implying a trauma in the past 24 hours. According to the complainant's history the medical practitioner

recorded that the patient had previously been sexually molested by the appellant who also had sexual contacts with several other

children. Unfortunately, this remark was not followed-up by the police or the prosecution during the trial. The allegation cannot,

for the purposes of this appeal be relied upon since it was not clarified. It however remains a concern that a child of her age finds herself in such an unfortunate situation of being sexually active.

[10] The approach of the appellate court to appeals against sentences imposed in terms of the Act was set out by the Supreme Court of Appeal in *S v PB*[2] namely, that the approach should be different to an approach to the sentence imposed under the ordinary sentencing regime. The proper inquiry on appeal is whether the facts which were considered by the sentencing court are indeed substantial and compelling or not.[3]

[11] The test is therefore not whether the sentencing court misdirected itself but that it erred or was wrong in finding that substantial and compelling circumstances are present or absent. Furthermore, the appellate court is not limited to the factors

considered by the sentencing court to reach its conclusion but is at large to consider all other relevant factors that have been properly placed before the court. (*S v GK*)[4] .

[12] A comparative analysis of previous cases when considering what an appropriate sentence would be in a particular

case before the court is a practice that has been followed over the years. Such trends remain a useful guide to the

sentencing court, particularly lower courts. However, it must be understood that a sentencing court cannot slavishly follow the

previous trends in similar cases without carefully analysing the circumstances of the case at hand.

[13] I found the facts and circumstances in *S v SMM*[5] (*supra*) relevant to the appeal under consideration. The case involved a rape of a 13 year-old girl by her uncle, the appellant. She had been sent to visit him for assistance with a school entrance application. The appellant was 47 years of age at the time of sentencing. He was a taxi driver earning R1000-00 per week. His wife was employed and earned R1200-00 per months. They had four children all of whom depended on their parents for financial support. The appellant had one previous conviction of assault with intend to do grievous bodily harm, for which he was sentenced to a fine of R500-00 or three months imprisonment. He was sentenced to life imprisonment by the trial court.

[14] On appeal, the Supreme Court of Appeal noted that the appellant disputed the rape despite there being incontrovertible DNA evidence that his semen was found on the complainant's panties. This fact was considered to be a further victimisation of the child as he sought to make her a liar. It was also found to show lack of remorse on the appellant's part. The Supreme Court of Appeal held further that there was no evidence that the child suffered any ongoing trauma, over and above the trauma that she would inevitably have experienced as a result of what had happened. A further aggravating factor considered by the Supreme Court of Appeal was the fact that the appellant abused his position of trust and instead of helping the child with her application forms, he used the opportunity to violate her.

[15] The Supreme Court of Appeal held among others, that this was not the most severe form of rape and that the appellant withdrew when he realised that the child was crying. Relevant and applicable to this appeal, the Supreme Court of Appeal had the following to say regarding the offence, its prevalence and how it had been treated by the courts:

"[17] It is necessary to reiterate a few self-evident realities. First, rape is undeniably a degrading, humiliating and brutal invasion of a person's most intimate, private space. The very act itself, even absent any accompanying violent assault inflicted by the perpetrator, is a violent and traumatic infringement of a person's fundamental right to be free from all forms of violence and not to be treated in a cruel, inhumane or degrading way. In *S v Vilakazi* Nugent JA referred to the study done by Rachel Jewkes and Naeema Abrahams on the epidemiology of rape which concluded on the available evidence that 'women's right to give or withhold consent to sexual intercourse is one of the most commonly violated of all human rights in South Africa'.

[18] The second self-evident truth (albeit somewhat contentious) is that there are categories of severity of rape. This observation does not in any way whatsoever detract from the important remarks in the preceding paragraph. This court held in *S v Abrahams* that 'some rapes are worse than others, and the life sentence ordained by the Legislature should be reserved for cases devoid of substantial factors compelling the conclusion that such a sentence is inappropriate and unjust'. The advent of minimum sentence legislation has not changed the centrality of proportionality in sentencing. In *Vilakazi* Nugent JA cautioned against the danger of heaping 'excessive punishment ... on the relatively few who are convicted in retribution for the crimes of those who escape or in the despairing hope that it will arrest the scourge'. He also pointed to the vast disparity between the ordinary minimum sentence for rape (10 years' imprisonment) and the one statutorily prescribed for rape of a girl under the age of 16 years (life imprisonment) and the startling incongruities which may result.

The judgment also sets out the dramatic effect that the minimum sentencing legislation has had in sentencing, most importantly that

statistics show that inmates serving sentences of life imprisonment have increased more than ninefold from 1998 to 2008. And he

reiterated that even in the context of minimum sentencing legislation the importance of assessing each case on its own peculiar facts and circumstances and the need for proportionality must never be overlooked. Nugent JA expressed it as follows:

'It is clear from the terms in which the [determinative] test was framed in *Ma/gas* and endorsed in *Dodo* that it is incumbent upon a court in every case, before it imposes a prescribed sentence, to assess, upon a consideration of all the circumstances of the particular case, whether the prescribed sentence is indeed proportionate to the particular offence.'

- [19] Life imprisonment is the most severe sentence which a court can impose. It endures for the length of the natural life of the offender, although release is nonetheless provided for in the Correctional Services Act 111 of 1998. Whether it is an appropriate sentence, particularly in respect of its proportionality to the particular circumstances of a case, requires careful consideration. A minimum sentence prescribed by law which, in the circumstances of a particular case, would be unjustly disproportionate to the offence, the offender and the interests of society, would justify the imposition of a lesser sentence than the one prescribed by law. As I will presently show, the instant case falls into this category. This is evident from the approach adopted by this court to sentencing in cases of this kind."[6]
- [16] The Supreme Court of Appeal further expressed its displeasure in the conduct of the prosecution by the fact that there was no attempt by the state to place evidence regarding the effect of the rape before court for example, by way of a victim impact report, despite the fact that the court had emphasised its importance in *S v Vilakazi* [7]. A sentence of life imprisonment was set aside and replaced with a sentence of 15 years imprisonment.
- [17] Reverting to this appeal the trial court considered the seriousness of the offence and its prevalence, the effect of the offence on the victim, the interests of society and the personal circumstances of the appellant. The Court concluded that considering these facts there are no substantial and compelling circumstances justifying a departure from the prescribed sentence of life imprisonment
- [18] Some of the aggravating features of this case are that the victim was known to the appellant. The appellant knew that she was a child under the age of
16. Instead of protecting her to reach her home safely, he decided to sexually molest her. The fact that the innocent child did not even know what "sex" is, did not deter the appellant.

[19]

It is common cause that the appellant initially denied that he had raped the victim. It was only after the forensic DNA investigation and analysis that linked him to having had sexual intercourse with the child that he pleaded guilty. His plea of guilty may therefore not necessarily serve as a sign of remorse on his part, but that the state case was very strong against him. Further, it may not have required of him to use excessive force as minimal force may have been sufficient to overpower his young victim. However, it

remains a fact that the complainant did not suffer any physical injuries other than those associated with non-consensual intercourse,

involving a child.

- [20] I am mindful that the fact that the complainant did not suffer serious physical injuries should not be regarded as a substantial and compelling circumstance.[8] However, such a factor should be considered along with other relevant factors to arrive at the

conclusion

whether there are substantial and compelling circumstances or not and also to determine a just and proportionate sentence.[9] This aspect was not considered by the trial court.

[21] In my view, the fact that the appellant is a first offender who may be rehabilitated, that the rape was not accompanied by serious physical injuries and appellant's further personal circumstances, renders a sentence of life imprisonment disproportionate to the offence. The rape itself is of course a serious offence, but it is not one of the most severe forms of rape that the courts have had to deal with[10]. In my view the trial court failed to accord sufficient weight to the factors I have just referred to. The trial court over emphasised the seriousness of the offence and the interests of society to the detriment of the appellant's personal circumstances and the circumstances of the case. These factors, therefore, rank as substantial and compelling circumstances. This Court is therefore obliged to set the sentence imposed by the trial court aside and replace it with a fresh sentence.

[22] The appellant has been convicted of a serious offence. Its gravity justifies the imposition of lengthy imprisonment term. Such term should take into account the interests of society and also be blended with a measure of mercy. The appellant had been in custody for a period of 18 months at the time of sentencing. To date, he has already served a period of about 5 years and six months in detention. To ameliorate the effect of the sentence on him it is appropriate that the sentence to be imposed be antedated to the 26 September 2013.

[23] In the result the following order is made.

1. The appeal against the sentence of life imprisonment is upheld and the sentence imposed by the Regional Court is set aside and replaced with the following:

"The accused is sentenced to 16 years imprisonment. "

2. The sentence is antedated to 26 September 2013.

L. P TLALETSI

ACTING JUDGE PRESIDENT

Northern Cape High Court, Kimberley

I concur.

L. VER ACTING JUDGE

Counsel:

For the Apoplicant: A. Van Tonder

Instructed by:

Legal Aid Board SA, Kimberley

For the Respondent: A. Van Heerden

Instructed by:

Director of Public Prosecutions, Northern Cape

- [1] Section 51(1)(a) of Act 105 of 1997.
- [2] S v PB 2013
- (2) SACR 533 (SCA)
- [3] S v SMM 2013
- (2) SACR 292 (SCA)
- [4] S v GK 2013
- (2) SACR 505 (WCC) para [7].
- [5] S v SMM 2013
- (2) SACR 292 (SCA).
- [6] S v SMM (supra) at 299-300.
- [7] S v Vilakazi [2008] ZASCA 87; 2009
- (1) SACR 522 (SCA); 2012 (6) SA 353; [2008] 4 All SA 396) at paras 56-57.
- [8] Section 51(3) (aA)(II) of the Act.
- [9] S v Nkawu 2009 (2) SACR 402 (ECG); S v MM (supra) para 26.
- [10] S v Abrahams (supra)

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