REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

19/5/2016

A48/2015

CASE NO: ~~A557/2015~~

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: YES

19/5/2016 .....

DATE SIGNATURE

In the matter between:

MARTIN MOORE **APPELLANT**

and

STATE **RESPONDENT**

J U D G M E N T

KUBUSHI, J

INTRODUCTION

[1] The appellant was charged and found guilty with contravening the provisions of s 5 of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32 of 2007 ("the Act"), read with s 1, 56 (1), 57, 58, 59, 60 and 69 thereof, in that on or about December 2012 the appellant unlawfully and intentionally sexually violated the complainant by touching and playing with his private parts several times. This happened without the consent of the complainant – in any way, the complainant was ten (10) years of age then, and was incapable of consenting to the sexual act.[1]

[2] The appellant pleaded guilty as charged and tendered a plea explanation which was read into the record and accepted by the prosecution.

[3] Before the appellant was sentenced, the respondent introduced the following reports into evidence:

3.1 the pre-sentencing report. The probation officer who compiled this report considered two sentence options, namely, sentence in terms of s 276 (1) *(i)* and s 276 (1) *(h)* of the *Criminal Procedure Act* and submitted that the sentence in terms of s 276 (1) *(i)* of the *Criminal Procedure Act* would be appropriate in the circumstances of this case. However, in evidence before the trial court, the probation officer conceded that the s 276 (1) *(h)* sentence would be appropriate as well.

[1] See section 57 (1) of the Act.

3.2 the correctional report in terms of s 276 (1) *(a)* of the *Criminal Procedure Act*. The report recommended that the appellant be sentenced in terms of s 276 (1) *(h)* of the *Criminal Procedure Act* to correctional supervision on certain terms and conditions; and

3.3 two victim impact reports dated 10 October 2014 and 17 November 2014, respectively. The second report was compiled after the appellant offered to pay for the counselling expenses of the complainant, but the father refused to accept the offer.

[4] The probation officer who compiled the victim impact report was called to give evidence on behalf of the complainant. It was revealed in his evidence that prior to the commission of this offence the complainant had been exposed to alcohol abuse, poor living conditions and neglect when he was staying with his mother. This evidence was corroborated by the evidence of, Mrs Botha, a medical practitioner (health care nurse) who testified that the complainant was not properly looked after and that the mother exposed him to begging in the streets for food and money and also confirmed the complainant's exposure to alcohol. The complainant's father, who was also called to give evidence conceded that at least a portion of the behavioural problems suffered by the complainant, can be blamed on the poor upbringing whilst staying with his mother.

[5] The appellant was, consequently, sentenced to ten (10) years imprisonment of which five (5) years imprisonment was suspended for five (5) years, on condition that the appellant is not convicted of contravention of s 3 (rape) or s 5 (sexual assault) of the Act, committed during the period of suspension. In terms of s 103 of the *Firearms Act* 60 of 2000 the appellant was declared unfit to possess a firearm. In terms of s 50 (2) A of the Act the name of the appellant was to be included in the National Register for Sexual Offenders. In terms of s 120 of the Children's Act 38 of 2005 the appellant was found unsuitable to work with children.

[6] The appellant applied and was granted leave to appeal the sentence by the trial court. He is before us appealing the sentence of imprisonment imposed on him.

[7] The appellant was granted bail by the trial court. He is out on bail awaiting the outcome of this appeal.

[8] At the commencement of the hearing there was an application for condonation for the late filing of the appellant's heads of argument. There being no objection, the application was granted.

SUBMISSIONS BY COUNSEL

[9] In argument before us, the appellant's counsel submits that the trial court imposed an inappropriate and harsh sentence.

9.1 According to counsel, the trial court did not consider the following factors properly:

9.1.1 the age of the appellant and the fact that the appellant will turn fifty nine (59) years old this year;

9.1.2 that the appellant was contributing positively to the economy – he has been employed in the mines for over twenty (20) years;

9.1.3 that the appellant is a suitable candidate for rehabilitation outside prison - he pleaded guilty and showed remorse, which is the first step to rehabilitation; the recommendation by the probation officer states that the appellant requires life skill programs; retribution was overemphasised and sight was lost of the possibility of rehabilitation outside prison and that prospects of rehabilitation are excellent; and

9.1.4 that rape and sexual assault are different and should be treated differently. There is no minimum sentence for sexual assault but it is only a schedule 1 offence.

9.2 The submission is, further, that the trial court misdirected itself by emphasising the following:

9.2.1 the previous conviction of the appellant. The argument is that the appellant's previous conviction is an isolated incident – for twenty six (26) years he has not been found in contravention – besides the previous offence is no longer an offence in South

Africa and should, therefore, not be considered for purposes of the present sentence; and

9.2.2 the impact of the offence on the complainant. The submission is that the consequences set out in the victim impact report cannot all be attributed to this incident only. Much as the appellant does not dispute that the complainant is a troubled child, there is however, no evidence that the attempted commission of the suicide was the direct result of the offence in question – the respondent did not call a psychologist to give evidence in that respect.

9.3 According to the appellant, the trial court should have sentenced him in terms of s 276 (1) *(h)* (correctional supervision) of the *Criminal Procedure Act*, which supports all the purposes of punishment. The trial court considered the pre-sentencing report but misdirected itself by failing to follow the recommendation of the probation officer to apply s 276 (1) *(h)* of the *Criminal Procedure Act* or at the very least s 276 (1) *(i)* thereof should have been made applicable. Long term imprisonment will break the appellant rather than rehabilitate him, so the argument goes.

[10] In response thereto, the respondent's counsel implores us not to interfere with the sentence but dismiss the appeal. According to counsel, the trial court considered the seriousness of the crime in that the appellant repeated the offence on several

occasions. The sentence imposed will serve to protect the complainant and other children. The offence of rape and sexual assault on children of the complainant's age should not be taken lightly, so it is argued.

THE ISSUE

[11] The issue before us is whether the sentence imposed by the trial court is an inappropriate and harsh sentence and should be interfered with by this court. Put differently, the issue is whether the trial court erred in imposing a custodial sentence rather than that of correctional supervision (non-custodial) in terms of s 276 (1) *(h)* of the *Criminal Procedure Act.*

THE LAW

[12] Section 5 (1) of the Act provides that a person who unlawfully and intentionally sexually violates a complainant without the consent of such a complainant, is guilty of the offence of sexual assault.

[13] In terms of s 56A (1) of the Act, a court shall, if that or another court has convicted a person of an offence in terms of this Act; and a penalty is not prescribed in respect of that offence in terms of this Act or by any other Act, impose a sentence, as provided for in s 276 of the *Criminal Procedure Act*, which that court considers appropriate and which is within that court's penal jurisdiction.

[14] It is common cause that there is no penalty prescribed, in this Act or by any other Act, in respect of the offence stipulated in s 5 (1) of the Act. As such, the trial court was at large to impose, at its discretion, any sentence within its penal jurisdiction. It, as a result meted out the sentence it did.

AD SENTENCE

[15] It is trite that a court of appeal does not have to ameliorate the sentence of the trial court. It is the trial court which has the discretion, and, the court of appeal cannot interfere unless the discretion was judicially exercised, that is to say, unless the sentence is vitiated by irregularity or misdirection or is severe that no reasonable court could have imposed it. In this latter regard, an accepted test is whether the sentence induces a sense of shock, that is to say, if there is a striking disparity between the sentence passed and that which a court of appeal would have imposed. It should, therefore, be recognised that appellate jurisdiction to interfere with punishment is not discretionary but, on the contrary, is very limited.[2]

[16] The trial court in a lengthy judgment on sentence gave proper consideration to all the evidence and factors presented by the parties in court. The evidence included the evidence of the probation officers and the medical practitioner as contained in their respective reports handed in court and the oral evidence presented. The trial court took into account the fact that all the probation officers were in agreement that the appellant qualifies for correctional supervision, but, was of the opinion that

[2] See S v De Jager 1965 (2) SA 616 (A) at 269.

correctional supervision as a sentence was not appropriate under the circumstances of this case and that a custodial sentence will be most suitable.

[17] It imposed the custodial sentence having considered, correctly so, all the traditional factors usually considered when sentence is passed, that is, the nature and gravity of the offence, the societal needs of the community and the personal circumstances of the offender in mitigation and in aggravation of sentence.

[18] As regards the nature and seriousness of the offence, the trial court considered that the offence of which the appellant was convicted of was very serious particularly because the complainant was only ten (10) years old when he was molested and the negative impact that the crime had on him.

[19] The appellant's personal circumstances are as follows: he was 57 years old at the time of sentencing, divorced with no dependant, save for the three persons currently residing in his house who it is said he helps out of the goodness of his heart; he has been employed as a plumber in the mine for a period of more than twenty (20) years; he pays maintenance to his ex-wife; he pleaded guilty; although rejected by the complainant's father, the appellant offered to pay for the complainant's counselling.

[20] In aggravation the trial court considered the following factors: a child of ten (10) years was involved; the prevalence of the offence; the seriousness of the offence and the impact thereof; the offence impacted negatively on the complainant; at the time of the commission of this offence the complainant was already vulnerable and a child in difficult circumstances, with a mother who was abusing alcohol, with a step-father not fully supporting him, the family did not have a proper place to stay, he was taken out of school and made to beg on the streets, being under these dire circumstances the complainant lands in the appellant's house and the appellant on the pretext of his kindness took advantage of the circumstances of the child to violate him; the offence was not done once, but on several occasions; the appellant groomed the child for his own purposes – money was offered, so that he could silence the child; the appellant was not a first offender and had been convicted previously of a similar offence, although this offence happened some twenty six (26) years ago, underage youngsters were also involved; the appellant's actions was the last straw that finally broke the complainant and he attempted suicide; the complainant is receiving counselling and will require same for a long time to come; the crime does not affect the complainant only, it will also have a negative impact on the appellant's ex-wife, the three young men he is taking care of, his employer and the complainant's father.

[21] Although the appellant pleaded guilty the trial court did not accept the plea as an indication of remorse because he did not take one of the probation officers in his confidence and accept to him that he violated the complainant. According to the trial court the appellant did not fully acknowledge the impact and consequences of his actions. As such the trial court doubted that the appellant was genuine in his

remorse. It as such opted for the custodial sentence instead of the sentence of correctional supervision.

[22] The appellant submits that the trial court erred in imposing the sentence it imposed to the exclusion of a sentence of correctional supervision.

[23] In terms of s 276 (1) *(h)* of the *Criminal Procedure Act* 51 of 1977, correctional supervision is one of the sentences which may be passed upon a person convicted of an offence.

[24] It is trite that, save for where there is a mandatory minimum sentence as provided for in Act 105 of 1997, the option of imposing correctional supervision is available to a court in respect of any offence even the so called serious offences. It goes without saying that it was open to the trial court to impose such a sentence.

[25] Correctional supervision is defined in s 1 of the *Criminal Procedure Act* as a community based sentence. The court in *S v R* [3], a judgment which is hailed as the leading case on correctional supervision defines correctional supervision as a form of punishment an offender serves in the community, and during which the offender is not incarcerated in a prison at any time, subject to such conditions as the court may prescribe. It is executed through a wide range of measures which include house

[3] 1993 (1) SACR 209 (A)

arrest, monitoring, community service, employment and rehabilitation programmes. Such measures are aimed at the offender's training, rehabilitation and improvement.

[26] The question, however, is whether such a sentence is appropriate in the circumstances of this case.

[27] From the aforesaid it is evident that the trial court found the appellant not a suitable candidate for rehabilitation and as such it opted in favour of imposing a custodial sentence. The trial court's findings and the sentence it imposed are in my view correct.

[28] It is held that one of the strengths of correctional supervision is that it rehabilitates the offender in the community without the negative impact of prison and destruction of the family. It is geared to punish and rehabilitate the offender within the community leaving his or her work and domestic routines intact, and without the negative influences of prison.[4]

[29] The chances of rehabilitation, for a person who does not have remorse, are said to be very slim. To fully rehabilitate, one must be remorseful and acknowledge what he or she did.

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[4] See S v E 1992 (2) SACR 625 (A) at 633a – b.

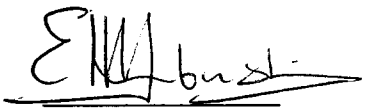
[30] I am in agreement with the view held by the trial court that the appellant is not a candidate for rehabilitation. His plea of guilt is, to me, not because of remorse but self-pity. He pleaded guilty because he had no other option. He failed to place one of the probation officers in his confidence but lied to him by saying he only touched the complainant's knee. Yet he knows he has molested the child, touched his penis and played with it. He did not do this only once, but the evidence is that he did it repeatedly on many occasions. This conduct does not demonstrate genuine remorse.

[31] I am of the view that this is not an offence that occurred by chance. One can infer from the record the skilful manner in which the appellant prays on youngsters. He portrays to the public a picture of a kind person who goes out of his way to assist people out of the goodness of his heart. He, by false pretences invites the complainant's family to come and stay with him, this also out of the goodness of his heart. He lures the boy and gains his trust and repeatedly violates him. The complainant being vulnerable and a child with difficulties, a fact which is well known to the appellant, is unable to cry out for help. Money is given in order to silence him further.

[32] I do not buy the argument by the appellant's counsel that because the appellant has not offended for over twenty six years makes him a perfect candidate for rehabilitation. The indication of this previous conviction to me is that the appellant preys on youngsters. That previous conviction involved youngsters, even in this instance, a young man of ten (10) years is involved.

[33] I fully agree with the trial court that this is one case where imprisonment is appropriate and the effective sentence imposed *per* conviction cannot be said to be shockingly inappropriate.

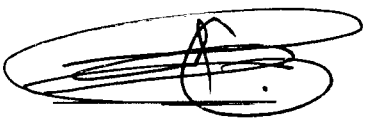
[34] In the premises the appeal stands to be dismissed.



E.M.KUBUSHI

JUDGE OF THE HIGH COURT

I concur and it is so ordered



T.A.N MAKHUBELE

JUDGE OF THE HIGH COURT

Appearances:

On behalf of the appellant:	Adv. R GISSING Instructed by: **PRETORIA JUSTICE CENTRE** 2nd Floor FNB Building 206 Church Street PRETORIA 0001
On behalf of the respondent:	Adv. C PRUIS Instructed by: **DIRECTOR OF PUBLIC PROSECUTIONS** Presidential Building 28 Church Square PRETORIA 0001