14/2/2018

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

14/2/2018
DATE

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SIGNATURE

CASE NO: A495/16

In the matter between:

JOHANNES NCENGENI NKOMO

and

THE STATE

JUDGMENT

Introduction

1. This is an appeal in terms of section 309(1)(a) read with section 309B(1)(a) of the Criminal Procedure Act 51 of 1977 as amended wherein the Appellant was convicted by a Regional Court at Sebokeng on a charge of rape of a female person aged 7 years at the time when the offence was committed.

2. The Appellant was convicted and sentenced to life imprisonment on 16 April 2008. This Appeal is against sentence only.

Background

3. The facts of this case can be summarised as follows. On 18 March 2007, the accused requested the victim, a 7 year old girl to accompany him to the veld to fetch a radio that he had earlier seen in that vicinity. The victim was at the time in the company of her friends playing a game with stones along the street. The accused is an uncle to the victim and as such the victim found nothing untoward to accompany him.

4. On arrival in the veld the accused started strangling the victim, took off her underwear and raped her. She was thereafter given 50 cents and instructed not to talk about the incident or otherwise she will be killed. The victim left the scene after the incident and went straight home where she reported the incident to her mother who then called the police which led to the arrest of the accused. The mother confirmed the evidence of the victim and stated further that the victim was

crying when she arrived home. The victim was later taken to hospital for medical examination.

5. The accused made admissions in terms of section 220 of the Criminal Procedure Act admitting the age and identity of the victim, the report completed by a medical practitioner (J88) during examination of the victim as well as the DNA analysis results. The J88 confirmed forceful vaginal penetration together with lacerations to the victim's private part. The DNA analysis confirmed the body fluids of the accused on the panty of the victim.

6. The accused denied that he raped the victim and suggested that he was being framed.

Issues to be determined

7. The issue to be determined by the Court is the appropriateness of the sentence of life imprisonment imposed in terms of the Criminal Law Amendment Act 105 of 1997 (Minimum Sentencing Act) in view of the charge laid against the Appellant. It is apposite at this stage to quote the charge that was faced by the Appellant as per the charge sheet:

"That the accused is guilty of the offence of RAPE (read with section 51(2), 52(2), 52A and 52B of the Criminal Law Amendment Act 105/1997) in that upon or about 18/03/2007 and at or near Vlakfontein the said accused did unlawfully and

intentionally had sexual intercourse with a female person to wit ... [who was] 7 years old without her consent."

8. It was argued on behalf of Appellant that since the charge was formulated based on section 51(2) of Act 105 of 1997, the Regional Court, as a creature of statute, did not have jurisdiction to sentence the Appellant in terms of section 51(1).

9. Sections 51(1) provides as follows:

"51. Discretionary minimum sentences for certain serious offences

(1) Notwithstanding any other law, but subject to subsections (3) and (6), a Regional Court or a High Court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life."

10. Whereas section 51(2 reads:

"(2) Notwithstanding any other law but subject to subsection (3) and (6), a Regional Court or a High Court shall sentence a person who has been convicted of an offence referred to in-

(a) Part II of Schedule 2, in the case of-

(i) a first offender, to imprisonment for a period not less than 15 years;

(ii) ..."

11. Part I of Schedule 2 specifically provides, among others, for an offence of rape where the victim is a person under the age of 16 years.

12. Whilst the age of the victim was not placed in dispute, the argument on behalf of Appellant is that the charge against him was formulated in terms of section 51(2) which then required the court *a quo* to sentence Appellant to a minimum sentence of 15 years as a first offender.

13. It is worth noting that sections 52A and 52B as inserted by section 35 of Act 62 of 2000 and repealed by section 2 of Act 38 of 2007[1] but these provisions still appeared on the charge sheet.

14. The only submission made on behalf of the State to address this point was that it was an oversight by the court *a quo* not to correct the charge sheet before judgment. The court a quo did not exercise its powers in terms of section 86 of the Criminal Procedure Act 51 of 1977 which provides that:

> *"(1) Where a charge is defective for the want of any essential averment therein, or where there appears to be any variance between the averment in a charge and the evidence adduced in proof of such averment, or where it appears that words or particulars that ought to have been inserted in the charge have been omitted therefrom, or where any words or particulars that ought to have been omitted*

[1] Criminal Law Amendment Act which came into operation on 16 December 2007

from the charge have been inserted therein, or where there is any other error in the charge, the court may, at any time before judgment, if it considers that the making of the relevant amendment will not prejudice the accused in his defence, order that the charge, whether it discloses an offence or not, be amended, so far as it is necessary, both in that part thereof where the defect, variance, omission, insertion or error occurs and in any other part thereof which it may become necessary to amend.

(2) The amendment may be made on such terms as to an adjournment of the proceedings as the court may deem fit."

15. The question to be investigated is whether it can be said that the charge sheet was defective and that same could, under the circumstances of this case, have been cured by evidence. If the answer is that the charge sheet was indeed defective, then the second question is whether the evidence during proceedings alleviated same. The Appellant will suffer obvious prejudice if, whilst the charge sheet was defective, it was not cured through evidence.

16. Section 88 of the Criminal Procedure Act[2] provides:

"Where a charge is defective for the want of an averment which is an essential ingredient of the relevant offence, the defect shall, unless

[2] Act 51 of 1977

brought to the notice of the court before judgment, be cured by evidence at the trial proving the matter which should have been averred."

17. In looking at the charge sheet, the Appellant was charged of rape of a female person aged 7 years at the time of the offence. Nowhere else within the ambit of section 51 is reference made to a victim of under the age of 16 except as contained in section 51(1).

18. The Appellant was represented during the proceedings and soon after he pleaded not guilty, the legal representative confirmed, among other things, that the Appellant was explained the provisions "...of the minimum sentence and competent verdicts". The court explained to the Appellant soon thereafter as follows:

"Just to make sure you understand the implications of the sentence applicable if [you were] to be convicted. It is a minimum prescribed [sentence]. A person being convicted of rape of a female or at this point in time when the alleged offence happened, [to a] seven year old, you will face life imprisonment. [Do] you understand this?"[3] The Appellant replied in the affirmative to this question.

20. Section 35(3) of the Constitution provides that every accused person has a right to a fair trial, which includes the right-

(a) to be informed of the charge <u>with sufficient detail</u> to answer it;
(b) ..."(my underlining).

[3] Page 14 of the record line 2

21. In my view there clearly is a deficiency in the charge sheet and it is regrettable that both the Regional Court Magistrate and the State Prosecutor did not pick this up. The question does not end there though. Another question that requires to be answered is whether this defect is fatal?[4]

22. I do not agree with the argument by Counsel by Appellant that the mere mention of section 51(2) in the charge sheet obliges the Court to convict the Appellant on that section however irrational the interpretation is. I have mentioned that the offence of rape where the victim was under the age of 16 years is only catered for under Part I of Schedule 2. The Appellant was charged with a rape of a 7 year old female and was thereafter warned of a possible life imprisonment sentence he was also specifically convicted of the rape of a 7 year female.

23. In New Clicks[5], the Constitutional Court approved the rule laid down in Venter v R, that a court may depart from the clear language of a statute where it – "would lead to absurdity so glaring that it could never have been contemplated by the legislature, or where it would lead to a result contrary to the intention of the legislature, as shown by the context or by such other considerations as the Court is justified in taking into account." In the current case before me, the State clearly used an incorrect reference to the applicable section, to wit, section 51(2) of the Criminal Law Amendment Act instead of section 51(1).

24. The Court was referred to the decision of S v Ndlovu[6] where that Court held that the Regional Court does not have jurisdiction to sentence the accused to life imprisonment when he was charged in terms of section 51(2) of the Minimum Sentencing Act. It should be noted that, in that case, the court found that the charge sheet was not defective. Further, all throughout the trial, no mention was

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[4] Nedzamba v S (911/2012) [2013] ZASCA 69 (27 May 2013).
[5] Minister of Health and Another v New Clicks SA (Pty) LTD 2006 (2) SA 311 (CC).
[6] 2017 (2) SACR 305 (CC).

made of life imprisonment except during sentencing proceedings. The court *a quo* also find the accused in that matter "guilty as charged" referring to the charge sheet.

25. It is my view that the case referred to above is distinguishable from the current case where:

(a) The Regional Court Magistrate warned the accused of a possible sentence of life imprisonment at the commencement of the proceedings;

(b) The charge sheet makes specific reference to rape of a victim of 7 years of age;

(c) Evidence was led and same was not disputed.

(d) The Regional Court Magistrate found the appellant guilty of the rape of a 7 year old female.

Sentence

26. The offence committed by the Appellant is very serious. A minor of 7 years was raped. The legislature has enacted legislation to particularly raise its disdain on the kind of these offences.

27. It is trite law that sentencing falls within the discretion of the trial court and it is only in instances of a misdirection that this discretion can be tempered with.

28. In S v Pillay[7], Trollip JA remarked:

"Now the word "misdirection" in the present context simply means an error committed by the Court in determining or applying the facts for assessing the appropriate sentence. As the essential enquiry in an appeal against sentence, however, is not whether the sentence was right or wrong, but whether the Court in imposing sentence it exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence; it must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably. Such misdirection is usually and conveniently termed one that vitiates the Court's decision on sentence."

29. In addressing the Court in mitigation the following circumstances were suggested to exist to persuade the Court to shift away from imposing the minimum sentence in terms of section 51 (1) of Act 105 of 1997:

i. That the [Appellant] does not know his date of birth;
ii. He did not attend school and as a result cannot read and write;
iii. That the accused did not come from a sound family background;
iv. That he was employed at the time of commission of the offence; and,
v. That he is the only person who can assist her mother to obtain an identity document.

[7] 1977 (4) SA 531 (A) at 535 E - F

30. As already appears in paragraph 3 *supra* the Appellant raped a 7 year old minor; he is the uncle of the victim; he has broken the trust relationship that existed between the two; has traumatised the victim. These I find to be aggravating factors to the case of the accused.

31. In S v Khumalo[8] Holmes JA remarked as follows:

> *"Punishment must fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances".*

32. In determining the existence of 'substantial and compelling circumstances' the Court had the following to say in the case of S v Malgas[9]:

> *"Whatever nuances of meaning may lurk in those words, their central thrust seems obvious. The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypothesis favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously not intended to qualify as substantial compelling circumstances. Nor were marginal differences in the personal circumstances or degrees of participation of co-offenders which, but for the provisions, might have justified differentiating between them. But for the rest I can see no warrant for deducing that the legislature intended a court to exclude from consideration, ante Omnia as it were, any or all of the many factors traditionally and rightly taken into account by the courts when sentencing offenders"*

33. Having taken everything into account I do not find that the Regional Court Magistrate misdirected himself in coming to his decision and cannot but order that this appeal be dismissed.

Order

34. In the result, I would propose the following order:

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[8] 1973 (3) SA 697 A at 698.
[9] 2001 (1) SACR 469 at 477.

The Appeal is dismissed.

V.T.MTATI AJ

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

I agree and it is so ordered.

E. M. KUBUSHI J

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

HEARD ON 29 JANUARY 2018

JUDGMENT DATE

FOR THE APPELLANT: ADV L AUGUSTYN

INSTRUCTED BY: LEGAL AID SOUTH AFRICA

FOR THE RESPONDENT: ADV M.J. NETHONONDA

INSTRUCTED BY: DIRECTOR OF PUBLIC PROSECUTIONS