THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable
Case No.: 637/2015

In the matter between:

ROBERT ANTHONY JOHN HEWITT **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Hewitt v The State* (637/2015) [2016] ZASCA 100 (9 June 2016)

Coram: Maya DP, Tshiqi and Seriti JJA

Heard: 3 May 2016

Delivered: 9 June 2016

Summary: Sentence **–** appeal against imposition of effective sentence of six years' imprisonment upon 75 years old offender for rape and indecent assault of young girls - crimes committed three decades ago — appeal dismissed.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Bam J sitting as court of first instance)

The appeal is dismissed.

JUDGMENT

Maya DP (Tshiqi and Seriti JJA concurring):

[1] This is an appeal against sentence with the leave of the Gauteng Division of the High Court, Pretoria (Bam J). The appellant, a retired world renowned champion tennis player and instructor, was convicted on two counts of rape of two girls aged about 12 and 13 years (the first and second complainants) and one count of indecent assault of a 17 year old girl (the third complainant). The rape offences were committed in the early 1980s and the offence in relation to count 3 in 1994. It would take the long arm of the law three decades to catch the appellant as he was only convicted in March 2015 at the age of 75 years. He was sentenced to undergo eight years' imprisonment in respect of each of the rape counts and two years' imprisonment for indecent assault. The sentences were ordered to run concurrently. Two years of each of the rape sentences were suspended for a period of two years on condition that the appellant pays a collective sum of R100 000 to the Department of Justice and Constitutional Development to be utilised to further the department's campaign against the abuse of women and children. He was therefore sentenced to undergo an effective period of six years' imprisonment.

[2] The manner in which the offences were committed is set out comprehensively in the judgment of the court a quo and need not be repeated in fine detail. Suffice it to say that the appellant took his chances with the complainants, who were his tennis students, mainly during coaching sessions. He would make lewd comments to the children, peek under their skirts, rub his erect penis against them, fondle their breasts and stick his tongue in their mouths and expose his naked body to them. He wrote love letters to the second complainant whom he also forced to perform oral sex on him and proceeded to rape during a tennis tournament at the Sun City Hotel in Rustenburg. He raped the first complainant at the premises of a tennis club house in Boksburg on an afternoon scheduled for a tennis lesson. Unfortunately when she reported the incident to her mother with whom she had a bad relationship, the latter dismissed it out of hand and that was the end of the matter.

[3] The second complainant's ordeal was fortuitously discovered shortly after the appellant raped her when she disclosed it to her sister, who promptly told their parents that the appellant had kissed her and put his tongue in her mouth. The second complainant then revealed everything and a charge was consequently laid with the police in Johannesburg. The matter was, however, aborted because the Attorney General took the view that the case fell outside his jurisdiction as the alleged offence was committed in the former Republic of Bophuthatswana. The lawyers engaged by the second complainant's father were also concerned that she would never withstand cross-examination by the appellant's lawyers if the matter went on trial.

[4] The third complainant's suffering ended after she endured the molestation over a number of years. She finally confided in her mother after the appellant shockingly told her that 'rape is enjoyable in all cases' and that if he raped her she should 'just lie down and enjoy it'. The whole truth tumbled out and her father promptly reported the appellant to the South African Tennis Association. The appellant was then forced to resign from the Eastern Transvaal Tennis Association. But no charge was laid with the police because the lawyer consulted by the third complainant's family advised that it would be difficult to prove the offence in court as there were no witnesses and it would rest solely on her word. So it was that the appellant evaded justice until 2015.

[5] After the appellant's conviction extensive evidence described in minute detail in the court a quo's judgment concerning his personal circumstances, especially his failing health and the devastating effect of the trial on his family's social life, was led. In addition to his advanced age, he is a first offender and a family man married for 50 years. He has two adult children and several grandchildren. He endured a barrage of anonymous hate mail and hostility from members of the public and the media when he attended the trial. He suffers various ailments including osteoarthritis resulting from his many years of sporting activity for which he has had surgery; progressive coronary artery disease for which he receives medication and treatment; peptic ulcer disease and dysfunctional colon for which he is on chronic medication. According to his cardiologist (Dr J du Toit), he needs 'to be watched carefully'. And in the opinion of his gastroenterologist (Dr J Garisch) he 'requires access to the required expertise in order to have regular check-ups and adjustments made to his medication and treatment [but] there have been no compelling surgical issues to date'. A synopsis of his physical health prepared by Dr R Barnard was that 'he has numerous medical conditions that currently contribute to the fragility of his age' which 'are fairly well controlled, as long as he regularly attends the follow-ups booked' with his doctors.

[6] In a thorough and carefully reasoned judgment, the court a quo lamented the lengthy delay before the matter was brought to justice, which rendered sentencing even more difficult, and it painstakingly weighed all the above factors and the various sentencing options. The court then concluded that a non-custodial sentence would not serve the interests of justice in the circumstances. But it relented upon application for leave to appeal and took the view that the unusual time lapse and the appellant's age and health issues could perhaps persuade another court otherwise.

[7] The gravamen of the appellant's submissions in argument before us was that the sentences are startlingly inappropriate. It was contended that the court a quo overemphasized the seriousness of the offences at the expense of the appellant's personal circumstances having regard to his advanced age and ill health and that he 'only vaginally penetrated the [rape] complainants once' and has not repeated the offences. But his counsel grudgingly conceded that a non-custodial sentence (which was initially sought on the basis that the shame and stigma of a rape conviction and being stripped of his sports honours was sufficient punishment for someone of the appellant's stature as an international sports star)[1] would be inappropriate. He proposed a sentence of correctional supervision under s 276(1)(*i*) of the Criminal Procedure Act 51 of 1977.[2]

[8] It is a trite principle of our law that the imposition of sentence is the prerogative

[1] He was further suspended from the American Tennis Hall of Fame and became an outcast in the South African tennis community.

[2] In terms of which, subject to the provisions of that Act and any other law and of the common law, a person convicted of an offence may be sentenced to imprisonment from which such a person may be placed under correctional supervision in the discretion of the Commissioner of Correctional Services.

of the trial court.[3] An appellate court may not interfere with this discretion merely because it would have imposed a different sentence. In other words, it is not enough to conclude that its own choice of penalty would have been *an* appropriate penalty. Something more is required; it must conclude that its own choice of penalty is the appropriate penalty and that the penalty chosen by the trial court is not.[4] Thus, the appellate court must be satisfied that the trial court committed a misdirection of such a nature, degree and seriousness that shows that it did not exercise its sentencing discretion at all or exercised it improperly or unreasonably when imposing it.[5] So, interference is justified only where there exists a 'striking' or 'startling' or 'disturbing' disparity between the trial court's sentence and that which the appellate court would have imposed. And in such instances the trial court's discretion is regarded as having been unreasonably exercised.[6]

[9] It is against this backdrop that the question whether the court a quo exercised its sentencing discretion improperly or unreasonably in the circumstances of this case must be determined. Our courts have, in countless cases of this nature, consistently expressed society's abhorrence of sexual offences, which once earned South Africa the shameful title of being the rape capital of the world,[7] and the devastating effect they have on victims and society itself. The courts have aptly described rape as 'a

[3] *S v Pieters* 1987 (3) SA 717 (A) at 727F-H; *S v Sadler* 2000 (1) SACR 331 (SCA) at para 8; *S v Swart* 2000 (2) SACR 566 (SCA) para 21. See also, *S v L* 1998 (1) SACR 463 (SCA) at 468*f* ; *S v Blank* 1995 (1) SACR 62 (A) at 65*h-i*.
[4] *Sadler,* para10.
[5] *S v Pillay* 1977 (4) SA 531 (A) at 535E-F.
[6] *S v Snyders* 1982 (2) SA 694 (A) at 697D; *S v N* 1988 (3) SA 450 (A) at465I-J; *S v Shikunga* 465I-466A; *S v Shikunga & another* 1997 (2) SACR 470 (NmS) at 486*c-f.* See also *S v M* 1976 (3) SA 644 (A) at 649F-650A; *S v Pieters* 1987 (3) SA 717 (A) at 733E-G; *S v Petkar* 1988 (3) SA 571 (A) at 574D; 1997 (2) SACR 470 (NmSC) at 486*d.* See also *S v Abt* 1975 (3) SA 214 (A); *S v Birkenfield* 2000 (1) SACR 325 (SCA) para 8; *S v M* 1976 (3) SA 644 (A) at 649F-650A; *S v Pieters* fn 3 at 733E-G.
[7] Interpol named South Africa the 'rape capital of the world' in 2012. See D Richard Laws & William O'Donohue (eds) *Treatment of sex offenders: Strengths and weaknesses in assessment and intervention* (2016) at 327. See also SABC 'South Africa, world's rape capital: Interpol' *SABC News website,* 19 April 2012 (accessed 7 June 2016).

horrifying crime' and 'a cruel and selfish act in which the aggressor treats with utter contempt the dignity and feelings of [the] victim'[8] and as 'a very serious offence' which is 'a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim'.[9] Rape of a child, usually committed by those who believe they can get away with it and often do, is far more horrendous. As was held in *S v Jansen*,[10] it is an appalling and perverse abuse of male power which strikes a blow at the very core of our claim to be a civilised society. It is unsurprising therefore that society demands the imposition of harsh sentences which adequately reflect censure and retribution upon those who commit these monstrous offences and to deter would-be offenders.

[10] Be that as it may, however, the sentence 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.[11] This, in my view, is precisely the approach adopted by the court a quo when it determined sentence. As indicated above, the court gave due consideration to the appellant's personal circumstances particularly his advanced age, ill-health and the extraordinary lapse of time between the commission of the offences and the trial.

[11] But as the court a quo rightly acknowledged, these mitigating factors must be considered against other relevant factors of the case. Scrupulous care must be taken not to over-emphasise the appellant's personal circumstances without balancing those considerations properly against the very serious nature of the crimes committed; the

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[8] *N v T* 1994 (1) SA 862 (C) at 864G.
[9] *S v Chapman* 1997 (2) SACR 3 (SCA) at 5*b*.
[10] *S v Jansen* 1999 (2) SACR 368 (C) at 378*h*-379*a*.
[11] See, for example, *Ex parte Minister of Justice (In re R v Berger & another)* 1936 AD 334 at 341 in the judgment of Beyers JA referring to 'oordeelkundige genade en menslikheid' (ie that a penalty must be accompanied by 'judicious grace and humanity'); *S v Rabie* 1975 (4) SA 855 (A).

aggravating circumstances and the consequences for the victims and the interests of society.[12] There are serious aggravating factors in this matter. The appellant, ironically a father of a young girl himself at the material time, exploited the complainants' innocence and youth and forced them to submit to his wicked desires. He abused his position of authority and responsibility towards them and also abused the trust that their parents had placed in him when they put their young children in his care. Quite apart from the immediate physical and psychological trauma which the complainants suffered from the offences, there is also the lasting and devastating effect which the offences have had on their lives and their families.

[12] The first and second complainants, who are both divorcees, have struggled to maintain intimate relationships with men throughout their adult lives as a direct result of the rapes. According to the second complainant, her parents and sister never recovered from the incident and it has affected her children too as a result of the manner in which she is raising them. The first complainant has suffered severe depression and anxiety and has led what she termed 'a self-destructive' life. All three complainants, who were described as promising tennis players in the trial, abandoned their potential tennis careers and told how they cannot bring themselves to even watch tennis to this day because of its link to the offences. This uncontested evidence belies the appellant's contentions that the complainants were not traumatised as the rapes were neither 'brutal' nor 'callous' because the second complainant even 'boasted' about their kiss and that the first complainant suffered no injuries and had continued her training session with him after she was raped.

[12] *S v Salzwedel* & others 1999 (2) SACR 586 (SCA) paras 12 and 18; *S v Combrink* 2012 (1) SACR 93 (SCA) pars 22-24; *S v Sinden* 1995 (2) SACR 704 (A) at 708F-709B.

[13] Contrary to the appellant's contention that the offences were 'once-off' and 'there was no pattern of sexual abuse', the evidence established a sustained period of grooming of each complainant, which culminated in the offences committed over a period of 14 years. The fact that the second complainant laid a criminal charge with the police did not deter the appellant at all as he proceeded to commit the rape in count 1 a year and a half later and the offence in count 3 fourteen years thereafter.

[14] Much was made of the appellant's standing as a tennis icon who successfully represented his country internationally and the impropriety of imprisoning such an individual because his fall from grace (and the pain of the trial) was, in itself, sufficient punishment as he had 'already learned his lesson'. But this submission overlooks the basic tenets of our Constitution which decrees equality before the law. Our law knows no class distinctions of offenders of the proposed nature. The appellant's erstwhile celebrated status does not therefore earn him a special sentence.

[15] The appellant's poor health is certainly a matter which must be considered. And so is his advanced age. However, as the court a quo observed, he does not suffer from a terminal or incapacitating illness as he leads an active life, which includes personally and successfully running a commercial citrus farm, and is even able to drive his employees home daily. It was also not disputed that the medical treatment and care that he requires would be available in prison.[13] Regarding his age, whilst courts have considered oldness as a mitigating factor,[14] it is certainly not a bar to a sentence of imprisonment.[15]

[13] See in this regard, *S v Zinn* 1969 (2) SA 537 (A) at 542B-C.
[14] See, for example, *S v Heller* 1971 (2) SA 29 (A) at 55D; *S v Munyai & others* 1993 (1) SACR 252 (A) at 255g-256*a*.
[15] S *v Zinn* fn 13; *S v Barendse* 2010 (2) SACR 616 (ECG) at 619*b*-620*b*.

[16] When the appellant was finally brought to trial he pleaded not guilty and maintained his innocence even after his conviction. The complainants therefore had to testify in court and relive the trauma of their ordeal in the intense glare of the media and international attention. During mitigation of sentence the appellant still showed no remorse for his vile deeds. The first complainant was referred to as a 'so-called rape victim' and castigated severely for 'thriving from the case and abusing the press which conducted its own parallel trial' because she spoke publicly about the effect that the rape had on her life. Whilst lack of remorse is not an aggravating circumstance, it would have redounded in the appellant's favour if he had shown some appreciation of and contrition for the devastation he caused.

[17] It is indeed regrettable that it took so long to bring the appellant to justice. But this is not an unusual phenomenon in these types of cases. And despite the obvious difficulties posed by the delays, our courts have ably delivered just decisions.[16] I am not satisfied that the sentences imposed by the court a quo are not appropriate and that it exercised its sentencing discretion improperly. In my view, the sentences fit the criminal and the crime and fairly balance the competing interests. Although the element of rehabilitation bears little relevance here because of the appellant's age, the sentences would still serve the other important purposes of sentence, ie deterrence and retribution. This court therefore has no right to interfere. The appeal is accordingly dismissed.

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M M L MAYA
Deputy President of the Supreme Court of Appeal

[16] For example, in *Van Zijl v Hoogenhout* 2005 (2) SA 93 SCA. *S v Cornick & another* 2007 (2) SACR 115 (SCA); *Bothma v Els* 2010 (1) SACR 184 (CC);

APPEARANCES

For the Appellant:	Johann Engelbrecht SC (with I. De Beer) Instructed by: A. W JAFFER ATTORNEYS, Pretoria West
For the Respondent:	Carina Coetzee (with S. Barbaglia) Instructed by: Director of Public Prosecutions, Pretoria Director of Public Prosecutions, Bloemfontein