THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 533/2017

In the matter between:

DIRECTOR OF PUBLIC PROSECUTIONS, GRAHAMSTOWN **APPELLANT**

and

MZUKISI PELI **RESPONDENT**

Neutral citation: *Director of Public Prosecutions, Grahamstown v Mzukisi Peli* (533/2017) [2018] ZASCA 40 (28 March 2018)

Coram: Swain and Mbha JJA and Hughes AJA

Heard: 16 February 2018

Delivered: 28 March 2018

Summary: Criminal Procedure Act 51 of 1977 - Section 316B - appeal by State – rape of 6 year old boy – sentence imposed of 10 years imprisonment of which 4 years suspended – shockingly and disturbingly lenient – no substantial and compelling circumstances present – sentence of life imprisonment substituted.

ORDER

On appeal from: Eastern Cape Division, Grahamstown (Tilana-Mabece AJ sitting as court of first instance):

1. The appeal against sentence succeeds.
2. The sentence imposed by the court below in respect of the conviction of rape is set aside and is substituted by the following:

‘a) In respect of the conviction of rape the accused is sentenced to imprisonment for life.

b) The sentence is antedated to 23 March 2017.’

JUDGMENT

Hughes AJA (Swain JA and Mbha JA concurring):

[1] Mr Mzukisi Peli, the respondent, pleaded guilty in the Eastern Cape Division, Grahamstown (the High Court), to a charge of rape in contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the Act) before Tilana-Mabece AJ. He was convicted and sentenced on 23 March 2017. In terms of section 51(1) read with Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 (the Minimum Sentence Act) the prescribed minimum sentence to be imposed was that of life imprisonment. However, the High Court found substantial and compelling circumstances justifying the imposition of a lesser sentence and instead sentenced the respondent to ten years imprisonment, of which four years were suspended on condition that he was not found guilty of the same offence during the period of suspension.

[2] Dissatisfied with the sentence imposed, the appellant, the Director of Public Prosecutions (the DPP), with the leave of the High Court, filed a notice of appeal in terms of section 316B of the Criminal Procedure Act 51 of 1977 (the CPA). This section reads:

'(1) Subject to subsection (2), the attorney-general [DPP] may appeal to the Appellate Division [Supreme Court of Appeal] against a sentence imposed upon an accused in a criminal case in a superior court.'

In this court the DPP contends that the sentence of six years imprisonment for the rape of a six year old child is shocking, startling and disturbingly inappropriate and that the High Court erred in finding that there were substantial and compelling circumstances which justified the imposition of a lesser sentence than that of life imprisonment. The DPP asserts that this finding constitutes a misdirection on the part of the High Court which justifies this court's interference.

[3] Briefly, the facts giving rise to the plea of guilty are as follows: On 2 April 2012 the complainant, a six year old boy, whilst in the company of his four year old friend was on the way to the shop when they came across the respondent. The respondent, then 24 years of age, verbally threatened and compelled them to follow him, and the boys complied. He took them to a secluded spot where he physically assaulted them with an open palm. He instructed the complainant to remove his trousers and lie on his stomach. Thereafter he raped the complainant anally. After the ordeal, they all left the secluded spot and parted ways in an open field close to the road.

[4] On the same day of the rape, the complainant was medically examined. It was noted on the J88 that his underwear was soiled with blood and faeces, whilst his T-shirt was soiled with blood. His mental health and emotional status was recorded as: 'crying, withdrawn, grimacing when walking'. It was further recorded that the injuries he sustained were consistent with forceful handling and there were signs of anal penetration. The clinical findings documented were:

'Left eye redness with peri-orbital swelling. Swollen left aspect of upper lip. (f) 3cm area (rt) anterior upper thigh with bruising and associated abrasions. (lt) buttock abrasion and associated bruising.'

[5] Some four years later the respondent was eventually arrested for this offence. In his section 112(2) statement, that details the facts upon which he pleaded guilty, he states that the day after the rape took place, he 'felt bad' about what he had done, so he went back to the area to look for the boys to apologise. However, he was not successful in finding them and he attributes his conduct on the day of the rape to his excessive consumption of alcohol. However, in his plea he clarifies that although he was heavily under the influence of alcohol, he could appreciate the wrongfulness of his conduct at the time of the offence.

[6] The High Court relied on the following factors placed before it cumulatively as constituting substantial and compelling circumstances to justify the sentence it imposed. It reasoned that the respondent was a young first offender under the influence of alcohol when he committed the offence, which in itself was not shocking and lacked brutality. Further, that he had indicated his remorse by pleading guilty and had spent almost a year in prison awaiting his trial.

[7] Turning to the question whether the appropriate sentence has been imposed, it is trite that this court can only interfere if the sentence imposed is vitiated by irregularity or misdirection, or is disturbingly inappropriate or creates a sense of shock. The aforesaid approach was endorsed by this court in *S v Hewitt* 2017 (1) SACR 309 (SCA) para [8] where Maya DP said:

'It is a trite principle of our law that the imposition of sentence is the prerogative of the trial court. 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. 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. 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.' (Footnotes omitted)

[8] Before us counsel for the respondent submitted that the fact that the respondent was a young first offender having consumed alcohol prior to the commission of the offence constitute substantial and compelling circumstances justifying a lesser sentence. Counsel persisted that the sentence imposed was correct and that there had been no misdirection on the part of the High Court. However, in the alternative, it was submitted on behalf of the respondent that the sentence of 20 years imprisonment initially proposed and sought at the trial be imposed instead.

[9] The fact that the respondent was a first offender and had consumed alcohol before committing the offence, which however did not affect his appreciation of the wrongfulness of his conduct at the time he committed the offence, pales into insignificance when the gravity of the offence, being the rape of a six year old child, is considered. It is trite, that for intoxication to be considered as a substantial and compelling circumstance in mitigation, it must be shown that the consumption of alcohol had impaired or affected the respondent's mental faculties or judgment and thereby diminished the respondent's moral blameworthiness: see *S v Cele* 1990 (1) SACR 251 (A) at 254*h-i* & 255*b-c;S v Makie* 1991 (2) SACR 139 (A) at 143*c-d* and *S v Eadie* 2002 (1) SACR 663 at 673*j*-674*f* together with the cases mentioned therein. That the respondent appreciated the wrongfulness of his conduct and was accordingly able to distinguish right from wrong, but nevertheless proceeded to rape the complainant, cannot on the facts of this case serve to diminish his moral blameworthiness to the extent that it may be regarded as a substantial and compelling circumstance.

[10] The submission that the appellant was remorseful is not borne out by the facts. In examining whether the respondent was truly remorseful one looks at his conduct after the offence and during the trial. The respondent failed to submit himself to the police and confess his wrong-doing. It was only after the lapse of a period of four years and when he was arrested that he confessed. His plea of guilty did not arise as a result of remorse but rather because there was overwhelming evidence against him in the form of DNA evidence linking him to the offence. In my view, the respondent's actions and conduct did not show true remorse. This is a case of regret

instead of remorse. See *S v Matyityi* 2011 (1) SACR 40 (SCA) para [13] where Ponnan JA states:

'Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error . . . In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence.'

[11] In *Hewitt* (para [9] at 313*f*-314*a*), this court pronounced that rape of a child was usually committed by those perpetrators who believed that they could get away with it. The complainant in this instance is an innocent, defenceless and vulnerable victim of the respondent's despicable and cruel act. The respondent even in addition threaten and assault the complainant to achieve his purpose. The complainant will have to live with the emotional scars and stigma of having been humiliated and violated for the rest of his life. The curse in our society of rape is considered by the courts and society alike, as deserving of severe punishment. The rape of young children is considered as being a very serious offence, especially so if the child is under the age of sixteen: see *S v Chapman* 1997 (2) SACR 3 (SCA) at 5*a*-*c*; *S v RO* 2010 (2) SACR 248 (SCA) para [15] at 256*e*-*g*. Against this backdrop, I fail to comprehend the High Court's characterisation of the rape of a six year old child as not being severe so as to induce a sense of shock (see *Hewitt* at 314*a*-*b* where the court said that the rape of a child is 'more horrendous' than other forms of rape).

[12] In conclusion, the High Court committed a serious misdirection when it unjustifiably decided that the general or neutral factors advanced in mitigation constituted substantial and compelling circumstances sufficient to impose a lesser sentence than the prescribed sentence. In my view, no substantial and compelling circumstances are present to justify the imposition of a lesser sentence than the prescribed sentence of life imprisonment. The sentence of an effective six years imprisonment imposed by the High Court is shockingly and disturbingly lenient, amounting to trivialising the offence committed by the respondent.

[13] In the result:

1. The appeal by the State against sentence succeeds.

2. The sentence imposed by the court below in respect of the conviction of rape is set aside and substituted by the following:

‘a) In respect of the conviction of rape the accused is sentenced to imprisonment for life.

b) The sentence is antedated to 23 March 2017.’

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W Hughes

Acting Judge of Appeal

APPEARANCES

For the Appellant:	H Obermeyer
Instructed by:	Director of Public Prosecutions, Grahamstown
	Director of Public Prosecutors, Bloemfontein
For the Respondent:	P W Nel
Instructed by:	Legal Aid South Africa, Grahamstown
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