

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A238/2012

DATE: 10 AUGUST 2012

5 In the matter between:

ABRAHAM DAVIDS Appellant

and

THE STATE Respondent

10

J U D G M E N T

DAVIS, J

The appellant was charged with a count of rape in terms of
15 Section 3 Act 32/2007. It appears that on 26 September 2009
in Caledon the appellant had sexually assaulted a six year old
girl by inserting his penis into her vagina and accordingly was
charged with rape. He was arrested on the day of the incident
and he then remained in custody for the duration of the trial
20 which amounted to some 19 months as an awaiting trial
prisoner.

Although he pleaded not guilty to the charge, he was convicted
on 23 February 2011 and sentenced to life imprisonment. By
25 way of petition the matter has come to this Court on
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appeal in respect of sentence.

The appellant's argument against the imposition of the life sentence essentially turns on two factors. Firstly the injuries
5 which were sustained by the complainant were relatively mild for a vicious sexual assault of this kind, that it could have been worse. Further, as I have already noted, he had spent 19 months in prison prior to conviction.

10 The Magistrate in a careful analysis of the considerations which justified the imposition of life imprisonment said the following and it is worth repeating:

15 "The circumstances were such that you lived in the same house or next door with family to where the complainant, because she is a family member, there had been a party. A birthday party and you had excused yourself, went next door where the complainant was lying sleeping with an adult in the
20 room. You then picked her up off the bed, took her to a bed consciously, took a bottle of Vaseline to assist you in having sexual intercourse with this child and it was her screams and cries for help that alerted the rest of the family next door who broke
25 the door down and assisted her. Blood was found

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on the sheets which would indicate that the complainant was injured although this is not reflected in the medical report which I found strange."

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The magistrate then went on to make the following observation which again is worthy of repetition:

10 "Now rape of a child is an appalling and perverse abuse of male power. It is a cancer in our society. A cancer that needs to be rooted out and a pandemic of rape specifically in this province is also reflective of the kind of society where our children have to grow up. It is a society which has
15 been weakened by the abuse of liquor which is not a mitigating factor because this is the direct cause of much of the crime relating to women and children in this province."

20 The magistrate observed that the appellant was not a first offender. He had been convicted for crimes of dishonesty and more significantly, for the purposes of this analysis, had previously been convicted for a sexual offence, being the common law offence of indecent assault where from October
25 2007 he had been sent for three years imprisonment, half of

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which was suspended for five years. Indeed as pointed out by the State the present crime of rape was committed by the appellant after he had recently served a term of imprisonment for a sexual offence and was still serving the suspended
5 portion of his sentence.

There is also a victim impact report, from Captain Golding which the Court had the benefit of examining prior to sentence being imposed. A few observations from that report are also
10 helpful in this appeal Captain Golding notes:

“Die onderwyseres van Gesmine Michaels.. het verduidelik dat Gesmine ‘n baie stil en teruggetrokke kind in die klas is. Sy het ook erge
15 konsentrasie probleme en pas moeilik aan by die skool.”

Captain Golding then observes:

20 “Gesmine Michaels is blootgestel aan seksuele mishandeling en haar Konstitusionele regte en baie ander regte van die kind is geskend. Die kind se lewe is nie net fisies bedreig nie maar die
25 psigologiese impak van die misdaad sal permanente effekte op Gesmine se lewe hê.”

Captain Golding concludes:

5 "Die gemeenskap, families en verkragtingslagoffers
insluitend Gesmine Michaels se regte word
daaglik aan bande gelê vanweë geweldsmisdade.
Die veiligheid van vroue en kinders is prioriteit vir
wetstoepassers. Tog verbreek so baie oortreders
die wet en ontnem kinders van hulle vele basiese
10 regte. Die gemeenskap verwag optrede teenoor
persone wie die reg, die wet oortree."

These are important observations. They are significantly
15 because, when a Court determines sentence, it effectively
takes four sets of considerations into account: It begins with
the offender; As has been pointed out, in this case the
offender did suffer the problem of some 19 months of being
incarcerated prior to being convicted. That is a disturbing
20 phenomenon which confronts our Courts on a daily basis,
namely that people await trial for very lengthy periods under
very parlous circumstances where, to a large degree, their
dignity and probably other Constitutional rights are impaired.

25 But as noted in the exchange with counsel, Courts still have to

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weigh up other considerations in determining the appropriate sentence.

In this case the crime is a most heinous one. There is
5 something truly disturbing (I am not entirely sure that the
English language captures the horror of this properly) about
children of six years old being subjected to rape. One can
only postulate what kind of mind a person must possess in
order to assault a small innocent child in this most vicious
10 fashion. The crime is so serious and, although there may be
different acts which justify the conviction of rape, when it
comes to the rape of a child this act has to be placed at the
really extreme end of this most vicious form of crime.

15 Further, the community, as the magistrate has already noted,
are entitled to protection; entitled to know that courts take
these crimes very seriously; entitled to know that the Courts
give content to the minimum sentence legislation which was
passed by a democratically elected Parliament.

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But like the offender, the victim also has rights. As Captain
Golding has noted in the report, this victim's rights were
horribly infringed to, the extent that one can only speculate
about the trauma that such a small child will now encounter
25 arguably for the rest of her life. A sentence cannot give that

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innocence back to this child. A sentence cannot restore to the child the tranquillity, the joy and her youth. It can however say to the victim: the best we can do in the circumstances of this case is to understand the enormity of that which was
5 perpetrated on you.

With those remarks and the background which I have already sketched, it is appropriate to acknowledge that appellant's counsel had referred to the approach which appeal Courts
10 should adopt in these circumstances.

By way of reference to S v Van de Venter 2011 (1) SACR 238 (SCA) at 243 which we affirmed the earlier approach in S v Malgas 2001 (1) SACR 469 (SCA):

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"A Court exercising appellant jurisdiction cannot in the absence of material misdirection by the Trial Court approach the question of sentence as if it were the Trial Court and then substitute the sentence around it simply because it prefers it. To do so would be to usurp the sentencing discretion of the Trial Court... However even in the absence of material misdirection an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity

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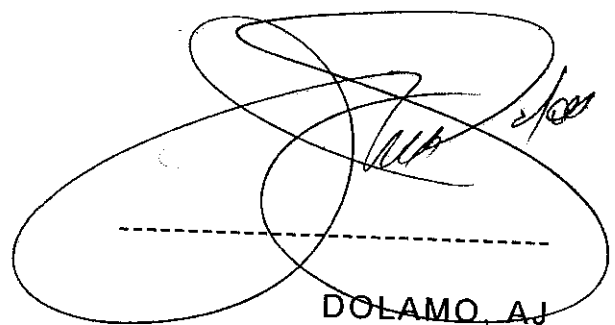
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between the sentence of the trial court and the sentence which appellate court would have imposed had it been the trial court is so marked that it can properly described as shocking, startling and disturbingly inappropriate."

For the reasons I think have already set out by way of the description of the crime and the proper approach that must be adopted in sentencing, I do not consider in this particular case that there was any material misdirection by the Magistrate. There is no basis for concluding in this case that the sentence of life imprisonment is either shocking, startling or disturbingly inappropriate.

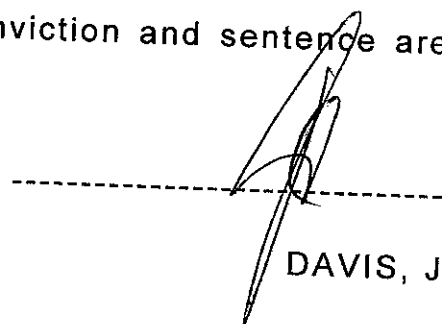
In the result I would **DISMISS THE APPEAL AND CONFIRM THE SENTENCE.**

I concur.



DOLAMO, A.J.

The appeal is dismissed and the conviction and sentence are hereby confirmed.



DAVIS, J

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