IN THE HIGH COURT OF SOUTH AFRICA
[WESTERN CAPE HIGH COURT, CAPE TOWN]

CASE NO: A360/12

GEORGE PETERS Appellant

v

THE STATE Respondent

JUDGMENT DELIVERED ON 11 FEBRUARY 2013

FORTUIN, J:

INTRODUCTION

[1] On 13 September 2011 the appellant, the 31-year old George Peters, was charged with 3 counts of rape in the Parow Regional Court. The complainant in this matter was a 16-year old girl. He pleaded not guilty and had legal representation. He was convicted on all three counts on 23 November 2011 and sentenced to 20 (twenty) years direct imprisonment on 30 November 2011, after the court *a quo* found substantial and compelling circumstances to be present.

[2] The appellant's sentence reads as follows:

'U word gevonnis tot 20 (twintig) jaar direkte gevangenisstraf.'

[3] The appellant now appeals against the sentence only.

[4] A court of appeal will not interfere with a sentence merely because it would not have imposed the same sentence. The fact that the appellant might find the sentence to be severe is also not sufficient ground to interfere with it.

[5] The appellant was charged with rape in terms of the Criminal Law Amendment Act (Sexual Offences and Related Matters), Act 32 of 2007. In terms of this legislation, "rape" is defined as:

> *"3.* ***Rape*** *– any person ('A') who unlawfully and intentionally commits an act of sexual penetration with a complainant ('B'), without the consent of B, is guilty of the offence of rape."*

[6] The Criminal Law Amendment Act 32 of 2007 defines "rape" as in para [5] above and "sexual penetration" as follows:

> *"1 (k) ...*
>
> ***'Sexual penetration'*** *includes any act which causes penetration to any extent whatsoever by –*
>
> *(a) the genital organs of one person into or beyond the genital organs, anus, or mouth of another person;*
>
> *(b) any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or*
>
> *(c) the genital organs of an animal, into or beyond the mouth of another person,*
>
> *and* ***'sexually penetrates'*** *has a corresponding meaning; ..."*

[7] It is common cause that the three offences of which the appellant was convicted attract a minimum sentence of life imprisonment where no substantial and compelling circumstances are found.

[8] Even though this appeal is only against sentence, during oral argument counsel was asked to file supplementary heads regarding the correctness of the convictions in this case, specifically whether the crimes might have constituted one single incident of rape or three separate and distinct incidences of rape, resulting in a duplication of convictions.

[9] It is trite that the rule against duplicating of convictions is to prevent the accused being punished more severally than is justified where he is convicted of more than one offence arising out of the same transaction. Two tests have been formulated over time in our law. The single intent test and the same evidence test. These tests were applied in cases before the implementation of Act 32 of 2007. The cases cited by the respondent in its Supplementary Heads of Argument are not on point, as it deals with multiple counts of rape by more than one accused. In this regards see **S v Gaseb and others** 2001 (1) SACR 438 (NmS); **S v Kimberley and another** 2004 (2) SACR 38 (E).

[10] In order to determine whether the convictions were sound or not, it is necessary to analyse the evidence in this matter. In *casu* the appellant sexually penetrated the complainant without her consent. The evidence of the complainant in this regard was as follows:

> *"En hy sê vir my ek het drie opsies. Hy sê vir my ek kan hom 'n* blow-job *gee, of hy kan vir my voor – van voor af, of hy kan vir my agter in my anus.*
>
> ...
>
> *En hy druk sy penis agter in my anus. En so het dit vir 'n lang tydjie aangegaan ... Toe sê hy vir my ek moet omdraai en dan moet ek sy penis in my mond druk ... Ek het sy penis gesuig ... En hy het bo-op my gelê en hy het weer eens sy penis in my anus gedruk. En soos hy besig is met my, sê hy vir my as hy nou klaar is met my dan gaan hy my doodmaak ... en hy staan toe weer op en hy sê ek moet weer buk. En soos hy – en hy druk weer sy penis in my mond. En soos hy besig is met my, druk hy sy hand binne-in my vagina ..."*

[11] The State treated these five acts as forming the subject of three charges of rape. It is clear from the complainant's evidence that there were a number of rapes committed, i.e. two sexual penetrations in the anus, two sexual penetrations in the mouth and one sexual penetration in the vagina.

[12] The first two convictions justified the imposition of life imprisonment, because she was raped more than once in both instances, whilst the third conviction justifies the imposition of 10 (ten) years' imprisonment, because it was a single rape and the appellant was a first offender. In our view appellant was not prejudiced by this manner of charging.

[13] In my view, the court *a quo* did not err in convicting the appellant of three counts of rape and I would not interfere with such conviction..

[14] The sentence of twenty years imprisonment is, in my view, not shockingly inappropriate. Counts 1 and 2 fall under Part I of Schedule II of the Minimum Sentence Act, whilst count 3 falls under Part III of Schedule II of the Minimum Sentence Act. The prescribed minimum sentences for these counts were, therefore, life imprisonment on counts 1 and 2 respectively, and 10 years imprisonment on count 3. In *casu* the court *a quo* found substantial and compelling circumstances to be present in the fact that the appellant was employed before his arrest, he is a first offender and has been in prison since his arrest, that he apologised to the complainant and her family, that there was a chance that the appellant could be rehabilitated, and accordingly did not impose the minimum sentence of life imprisonment.

[15] I am in agreement with the court *a quo* that substantial and compelling circumstances were present. I also agree with the overall effect of the sentence imposed by the magistrate.

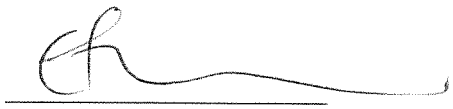
[16] Although the magistrate did not state it in terms, it appears from her sentence that she took all three convictions together for sentence. This she was entitled to do although it is not desirable. See Terblanche *Guide to Sentencing in South Africa* 2nd ed 182.

[17] It seems to me, however, that for the sake of clarity, the following phrase should be added at the end of the wording of the appellant's sentence: "... *op al drie aanklagte saamgeneem vir vonnis.*" Subject to this amendment I would confirm the sentence imposed by the magistrate.

[18] In the circumstances I would make the following order:

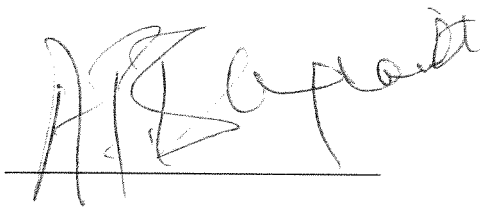
Appellant is sentenced to 20 (twenty) years' imprisonment on all three charges taken together for purposes of sentence.

It is ordered that this sentence is antedated to 30 November 2011 being the date on which the appellant was sentenced in the regional court.



FORTUIN, J

I agree, and it is so ordered.



BLIGNAULT, J