IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

[*REPORTABLE*]
Case No: A59/15

In the matter between:

MOSES SILO **Appellant**

vs

THE STATE **Respondent**

JUDGMENT: 22 MARCH 2016

HENNEY J

Introduction

[1] The appellant was convicted in the Regional Court sitting at Parow on two charges, namely contravening section 55 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 ("SORMA") and theft, committed on 24 February 2012 at Bellville.

[2] In respect of the first charge, it was alleged that the appellant attempted to sexually penetrate the complainant by pushing her into a room; pulling on her gown and panties and telling her that he wanted to have sexual intercourse with her; he further told her that if she refuses, he will fetch a knife and kill her. In respect of the second charge, it was alleged that he stole a wrist watch which was in the lawful possession of the complainant.

[3] He pleaded not guilty to both charges and denied the allegations in respect of the first charge. In respect of the second charge, he gave an explanation of plea in terms of section 115 of the Criminal Procedure Act 51 of 1977 ("the CPA"). He admitted that he had the watch of the complainant in his possession at the time of his arrest but denied that he stole it from her, and said that the complainant gave him the watch.

[4] With leave of the court *a quo* the appellant appealed his conviction and sentence.

[5] Grounds of Appeal

The appellant's main attack against the conviction is not so much whether the Regional Magistrate was correct in accepting the evidence of the complainant, i.e. that the appellant had attacked her, but rather whether the evidence is enough to have sustained a conviction of attempted sexual penetration in contravention of s55 of SORMA.

There is no appeal lodged against the theft conviction.

The appellant further submits that the sentence of 6 years imprisonment is excessively harsh and induces a sense of shock.

The Facts

[6] The complainant on the morning of 20 April 2012 went to a petrol filling station, situated opposite the flat where she lived with her husband, to meet a customer. It was approximately 8:00am in the morning. She was dressed in her pajamas and a gown. While she was doing business with the customer, the appellant approached her and showed an interest in what she was doing.

[7] He wanted to see the goods she was selling. She proceeded to the building in which her flat was situated and opened the gate leading to the said building with a remote control. The items she sold were in the boot of her car and she told the appellant to wait at the car. She proceeded to go up to her flat to fetch the keys of the car to show him the goods she was selling. After finding the keys and as she was about to leave, she found the appellant standing at the door of the flat. He pushed her back into the flat and closed the door behind him. This is a one bedroom flat. He further pushed her back into the bedroom and onto the bed; slapped her and said that he wanted to have sexual intercourse with her.

[8] Further, he instructed her to take off her gown and panties, which she did. He proceeded to assault her and she screamed. They wrestled. He choked her and went to the kitchen to fetch a knife. When this happened, she jumped out of her bedroom window and onto the ground outside. A male person of Nigerian descent came to help her and she reported to him that there is someone in the flat who wanted to rape her. She could later not identify this person as he is unknown to her.

[9] The appellant was later found hiding. He was brought to her and she identified him. The complainant was taken to hospital and hospitalized for 3 weeks. She sustained a fracture to her left ankle as well as a fracture to her spine at the L3 position according to her J88 form handed in as an exhibit, as a result of the fall/jump from her flat.

[10] This appeal turns on the following issues:

1. Whether the Regional Magistrate was correct in convicting the appellant on contravention of s55 of SORMA.

2. Whether the sentence imposed was disproportionate.

[11] Evaluation

It needs to be mentioned that even though the appellant did not take this issue with the factual findings of the Regional Magistrate, I am satisfied that the court *a quo* did not misdirect itself when it found that the complainant was an honest and reliable witness.

The Regional Magistrate was also correct to dismiss the appellant's version as not being reasonably possibly true.

[12] Before dealing with the question whether the Regional Magistrate was correct in convicting the appellant on contravention of s55 of SORMA, it would be appropriate to look at the provisions of this section. The provisions read as follows:

> "*Any person who-*
>
> *(a) attempts;*
>
> *(b) conspires with any other person; or*
>
> *(c) aids, abets, induces, incites, instigates, instructs, commands, counsels or procures another person,*
>
> *to commit a sexual offence in terms of this Act, is guilty of an offence and may be liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable*."

[13] The court a quo found that the appellant attempted to commit a contravention of section 3 of SORMA, in that, he unlawfully and intentionally attempted to commit an act of sexual penetration without the consent of the complainant.

[14] The question to consider is whether the conduct of the appellant, coupled with the requisite intention, constitutes an attempt to commit an offence in contravention of s3 of SORMA. It would therefore be useful to once again look at the principles and law relating to the attempt to commit an offence which would be applicable in this case.

In the leading authority on this point, *Watermeyer C.J.* in *Rex v Schoombie 1945 AD 541* at *545-6* held:[1]

> *"Attempts seem to fall naturally into two classes: (a) Those in which the wrongdoer, intending to commit a crime, has done everything which he set out to do but has failed in his purpose either through lack of skill, or of foresight, or through the existence of some unexpected obstacle, or otherwise, (b) those in which the wrongdoer has not completed all that he set out to do, because the completion of his unlawful acts has been prevented by the intervention of some outside agency."*

[15] In *S v Du Plessis 1981 (3) SA 382 (A)* at 399A-B it was held that the problem with cases where the wrongdoer has not completed all that he set out to do, either because he was prevented from doing so or where he desisted, is to draw a line between conduct constituting mere acts of preparation and conduct amounting to actual attempt.[2]

[16] This means that the conduct should not be mere acts of preparation to commit the offence but such conduct should at least have reached the commencement of the execution of the intended crime, also known as "the commencement of consummation". However, according to *Snyman*[3]*,* the disadvantage of this test is its vagueness, and is of the view, that each factual situation is different and the test applied to one set of facts is no criterion in a different factual situation. I agree.

In *S v Agliotti 2011(2) SACR 437 (GSJ) at para 10* the court held:

> "*[...] A person is guilty of attempting to commit a crime if, he/she intending to do so, unlawfully engages in conduct that is not merely preparatory but has also reached*

[1] See J Burchell *Principles of Criminal Law* (4thed 2014) at 535.
[2] See also S v Laurence 1975 (4) SA 825 (A).
[3] CR Snyman *Criminal Law* (6thed 2014) at 279.

> *at least the commencement of the execution of the intended crime. A person is equally guilty of attempting to commit a crime even though the commission of the crime is impossible, if it would have been possible in the factual circumstances which he/she believes exist or will exist at the relevant time. A person will also be guilty of an attempt even when he/she voluntarily withdraws from its commission after his/her conduct has reached the commencement of the execution of the intended crime. The stage of commencement of execution is also called the stage of consummation. Once this stage is reached, 'attempt' at a crime is complete."*

[17] In *R v Schoombie* (supra) the court grappled with the question as to the precise moment the consummation can be said to have commenced and said there is a fine line between the "*end of the beginning and the beginning of the end of a crime or of defining in exact terms what is meant its consummation*". (EMPHASIS ADDED)

The court further held at 547:

> *"There are, however, certain general considerations which may legitimately be regarded as of assistance in the solution of the problem. One of these is that the question whether or not a man's wrongful conduct should, in law, be regarded as criminal or innocent should not depend entirely upon the time at which an event happens, when such time may be largely determined by chance. Consequently, if a wrongdoer has finally made up his mind to commit a crime and has taken steps to carry out his resolution, the exact moment at which he is interrupted and prevented from fulfilling his intention should not be the sole determining factor in deciding whether or not his morally wrongful act should be regarded as a crime. Provided always that his acts have reached such a stage that it can properly be inferred that his mind was finally made up to carry through his evil purpose he deserves to be punished because, from a moral point of view, the evil character of his acts and from a social point of view the potentiality of harm in them are the same, whether such interruption takes place soon thereafter or later."*

[18] I am of the view that in applying these principles, the court has to have a pragmatic and common sense approach given the circumstances of the case at hand. The question to consider is whether these acts were mere acts of preparation or whether these acts has reached at least the commencement of the execution of the intended crime.

[19] In this particular case, the appellant committed the following acts in his attempt to commit the offence:

19.1 He entered the flat of the complainant without her consent and knowledge.

19.2 Thereafter as she was about to leave, he pushed her back into the flat and closed the door behind him.

19.3 He then pushed her onto the bed in her bedroom, despite her trying to stand up.

19.4 He assaulted her, by smacking her in her face.

19.5 When she asked him what he wanted, he made his intentions clear, by saying that he wanted to have sexual intercourse with her.

19.6 He ordered her to take off her gown and panties, which she did, but while doing this the complainant screamed and he continued to assault her to overcome her resistance. When she saw he was serious, she further resisted by kicking him. He continued with his assault by throttling her.

19.7 When he had difficulty in restraining and overpowering the complainant, he went to the kitchen to get a knife.

[20] It was during this time that the complainant, out of fear and desperation of being raped, jumped through the window of her flat which was situated on the first floor. The question that needs to be considered is whether all these actions of the appellant, together with his requisite intention, constituted an interrupted or uncompleted attempt.

[21] The appellant argued that the complainant's evidence that she was pushed into the flat, smacked, and throttled is not enough to sustain a conviction of attempted rape in contravention of s55 of SORMA. He further submits in amplification of this that the complainant did not testify that he forced himself on her; that he took off his clothes or opened her legs in an attempt to rape her. Furthermore, he argued that there was no DNA evidence which matches his, nor bruising on the upper legs/thighs of the complainant, indicating attempted rape. In the light of this, he argued that he should at the very least have been convicted of common assault.

[22] Therefore, in essence, the appellant argued that these act were mere acts of preparation. I do not agree.

It is not necessary for the State to prove that a perpetrator must have forced himself on a rape victim by lying on top of her; that he had to take off his clothes, opened her legs, that there had to be evidence of DNA which matches that of the appellant; and that there were bruises visible on the upper legs of the complainant to indicate that there was an attempted rape.

[23] Although such facts, if present in a case, would also assist a court in concluding that there was an attempted rape, it does not mean that only in cases where such facts are present an attempted rape is proven, and not in others, such as this case. In *R v B 1958 (1) SA 199 (A)* at 205 it was held that the assault of a complainant constitutes an attempted rape especially where the perpetrator was determined to have intercourse with the victim. *Schreiner JA* held at 205A:

> "*If it were established that, when a man threw a woman to the ground in order to have intercourse with her against her will, he had not yet developed an erection, but only expected to do so at a later stage, this would not prevent his assault from constituting an attempt to rape […]"*

[24] In *S v W 1976 (1) SA 1 (A)*, the court relying on the decision of *R v B* (supra), concluded that where an assault take place with the sole purpose to rape a victim such assault would constitute an attempted rape, if the victim thereafter dies. The court held at page 3 F – G, by assaulting the victim "[…] *dit is duidelik dat 'n poging tot verkragting daar gestel is nog voor die slagoffer gesterf het*."

[25] An assault, therefore, on a victim before a rape takes place is considered an act of consummation and would constitute attempted rape, if it is clear that the perpetrator inflicted such assault with the intention to rape in order to restrain or overcome the resistance of a victim. Much more than that happened in this case. The pushing of the complainant onto the bed, the assault by slapping the complainant in the face, the instruction to her that she take off her gown and panties, as well as the attempt to fetch

a knife to further threaten and restrain her, are clear acts in the commencement of the crime of rape.

[26] It was also argued that it could either be common assault or a sexual assault in contravention of s5(2) of SORMA which states:

> *"A person ('A') who unlawfully and intentionally inspires the belief in a complainant ('B') that B will be sexually violated, is guilty of the offence of sexual assault."*

Snyman[4] describes this offence as a legislative equivalent to the common law crime of common assault, when it is committed with the intent to sexually violate or assault a victim. I agree. Even though the essential elements of the crime as contemplated in s5(2) of SORMA is included in the crime of attempted rape, and may be present in this case, this is clearly a lesser offence which may be a competent verdict in terms of s161(3) of the CPA on a charge of rape in terms of s3 or 4 and attempted rape in terms of s55 of SORMA. There is however, no element lacking to prove the crime of attempted rape in this case as contemplated in s55 of SORMA. There are therefore no grounds to alter the conviction either to common assault or sexual assault under s5 of SORMA. There is no merit in the argument that the evidence or facts justifies the conviction on a lesser offence as set out above.

[4] Snyman *op cit* n 3 above at 367.

The Sentence

[27] On a plain reading and interpretation of Part I – Part IV of Schedule 2 of the Criminal Law (Sentencing) Amendment Act 105 of 1997 ("Minimum Sentencing Act"), no provision is made for the imposition of a prescribed sentence for attempted rape in contravention of s55 of SORMA.

This issue was raised by the parties in argument and the court was initially also under such impression. It was further argued that the Regional Magistrate may have misdirected herself in applying and considering the provisions of the Minimum Sentencing Act.

Section 55 of SORMA, however, states that any person who 1) *attempts, conspires, or aids, abets, induces, incites, instigates, instructs, commands, counsels or procures another person, to commit a sexual offence in terms of this Act, is guilty of an offence and may be liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable*." (OWN EMPHASIS)

In this particular case, the offence the Appellant had been convicted of was an attempt to commit a rape in terms of s3 of SORMA.

[28] On a basic understanding of the provisions of s55 relating to sentence, it seeks to give power to a court to impose the same punishment on a person convicted of attempting to commit any of the offences as mentioned in SORMA as would be imposed on a person convicted of actually committing that offence.

[29] The types of punishment a court can impose are set out in s276 of the Criminal Procedure Act.

Such punishment in the case of a Magistrate or Regional Court is subject to the limits imposed on its jurisdiction as set out in s92(1)(a) of the Magistrate's Court Act 32 of 1994. This power to impose a sentence is however subject to the provisions of any other law, which can either be any statute which prescribes a specific sentence or the Minimum Sentencing Act.

In my view, that would be the same punishment to which such an offender would be liable to undergo; either in terms of a court's sentencing powers or in terms of the provisions of s276 of the CPA. See *Director of Public Prosecutions, Western Cape v Prins and Others 2012 (2) SACR 183 (SCA)*.

[30] The Minimum Sentencing Act does not make express provision for the imposition of a prescribed sentence in any of Part I – IV of Schedule 2 in the sentencing of an attempt to commit any of the listed offences. However, SORMA prescribes that an offender may be liable upon conviction of an attempt to commit rape in terms of s3 or s4 to a punishment which such offender would have been subjected to if such offender had actually committed such an offence. In this particular case, the prosecution revealed in the charge sheet that it would be relying on the provisions of the Minimum Sentencing Act, and in particular the provisions of Part III of Schedule 2, which prescribes a sentence of 10 years imprisonment unless of course the court finds that there are substantial and compelling circumstances to deviate from such a prescribed sentence.

[31] Therefore is no doubt in my mind that the Regional Magistrate was correct in applying the provisions of the Minimum Sentencing Act.

She was also correct in finding that there were substantial and compelling circumstances to deviate from the prescribed sentence.

[32] The question to consider now is whether the sentence of 6 years imprisonment in respect of both charges, after it had been taken together for the purpose of sentence, was appropriate.

[33] In considering whether it was an appropriate sentence, this court will have to assess whether the court *a quo* took into consideration all the factors and circumstances that it would ordinary take into account when it imposes a sentence, such as the triad and the aims of punishment.

[34] The appellant is currently 27 years of age. He passed matric and studied for a period of 3 years at the University of the Western Cape, whereafter he dropped out due to financial problems. Thereafter he worked for a Call-Centre at Old Mutual and plans to resume his studies. He is the youngest of 8 children and has no criminal record.

[35] The court also has to consider the fact that the appellant committed a very serious crime. He attacked a defenseless woman in the sanctity of her house and wanted to

rape her. As a result of his attempt to rape her, she jumped out of a window from the first floor of her flat and sustained severe injuries. This is a particularly serious crime which is deserving of a sentence of imprisonment.

[36] The Regional Magistrate did not impose a sentence which is disproportionate to the offender, the crime and society. In my view, given the circumstances of this case, the sentence she imposed was an appropriate one. She also ordered that the sentences run concurrently. There is therefore no reason to interfere with the sentence she imposed.

[37] In the result therefore, I make the following order:

> "That the appeal against conviction of count 1 and the sentence of six (6) years imprisonment imposed cumulatively on count 1 and 2 is dismissed."

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HENNEY, J

Judge of the High Court

I agree.

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NELSON, AJ

Acting Judge of the High Court