IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NUMBER: A 78 / 2023

In the matter between:

EDWARD OWEN GROOTETJIE **APPELLANT**

And

THE STATE **RESPONDENT**

Coram: Wille J *et* Bremridge, AJ
Heard: 9 June 2023
Delivered: 14 June 2023

JUDGMENT

WILLE, J:

INTRODUCTION

[1] This is an appeal from the lower court against both conviction and sentence. The appeal against the sentence is 'automatic' by operation of section 309(1)(a) of

the Criminal Procedure Act[1] because the appellant was sentenced to life imprisonment.

[2] The appellant was convicted of the rape of a minor who was six years old at the time of the alleged offence. The conviction returned against the appellant was rape, as defined in section 3 of Act 32 of 2007[2], read with the minimum sentencing regime set out in section 51 (1) of Act 105 of 1997[3].

[3] The appellant was legally represented for the duration of his trial and pleaded not guilty to the charges preferred against him by the respondent. He exercised his right to remain silent and offered no plea explanation at the commencement of the trial proceedings in the court of first instance.

THE CASE FOR THE PROSECUTION

Ms Adonis:

[4] Ms Adonis was the victim and the complainant and was eight years old when she testified *via* an intermediary. She testified that she knew the appellant in that he lived in proximity. Her evidence was that on the day of the incident, she went to play with her cousins at her aunt's house nearby. The appellant resided at the back of this house. She said that while her cousins went into the house to watch television, she remained outside.

[5] She testified that the appellant called her, but she refused to go to him. The appellant then grabbed her, threw her onto his mattress at the back of the house, and left her crying, telling her that he was going to drink and smoke. The complainant testified that she attempted to leave, but the appellant prevented her from doing so and covered her with a piece of canvas.

---

1 The Criminal Procedure Act, 51 of 1977.
2 The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.
3 The Criminal Law Amendment Act 105 of 1997.

[6] She testified that the appellant raped her by lying on top of her and penetrating her vagina with his penis. The complainant was traumatized. She called out for help, and eventually, her mother intervened, immediately took her for a medical examination, and summoned the police.

***Ms Green**:*

[7] Ms Green testified that she was sitting outside the house where the alleged rape occurred when her sister summoned her and informed her that someone was with the appellant. They both approached the appellant and observed that a piece of canvas was covering the appellant's mattress. The appellant's naked buttocks were visible, and he was making sexual movements with his body.

[8] She pulled the canvas aside and observed the complainant lying underneath the appellant. The appellant's pants were pulled down to his ankles, and he became angry because the canvas partially covering him had been removed. According to this witness, the appellant did seem to be under the influence of alcohol but did not seem to be confused. She called the police, but when they did not arrive, she, with the complainant's mother, carried the complainant to the police station as the complainant was unable to walk correctly.

Ms Blaauw:

[9] She corroborated in all material respects the evidence of the witness summarized above. Significantly, she observed the appellant making up and down movements with his pants pulled down while partially concealed by the canvas. Upon removing the canvas, she observed the complainant underneath the appellant and that the appellant was pinning the complainant down, using his knees to do so.

[10] She dragged the complainant from the appellant's grasp, and after she had done so, the complainant spontaneously complained that her legs were painful. She confirmed that the appellant was angry because she removed the canvas that partially concealed what he was doing to the complainant.

Dr Peffer:

[11] Dr Peffer completed the medico-legal examination of the complainant, and her findings were recorded and entered into the record by consent and remained undisputed. According to this report, there was evidence of recent vaginal penetration.

[12] The examination proved difficult due to the pain experienced by the complainant, as she had abrasions on her labia majora, labia minora, vestibule and hymen. Pubic hair was collected from the complainant's vaginal area and the complainant's underwear and submitted for forensic analysis.

Ms Francis-Pope:

[13] She is a forensic analyst and determined that the semen found on the complainant's underwear matched the sample collected from the appellant.

THE CASE FOR THE APPELLANT

[14] The appellant testified in his own defence and did not call any witnesses. He said he went to buy wine on the day of the incident. He said that he consumed the wine and smoked dagga with 'buttons' (a dependence-producing drug) and then went to the shop to buy cigarettes, where he met the complainant, who asked him to buy her some food, but he refused.

[15] The appellant advised the complainant that he was not feeling well and that he was going to lie down. He then proceeded to where he resided and lay on his mattress, covering himself with a blanket and a piece of canvas. He said he was drunk and decided to sleep, intending to join his friends when he woke up. He said that while lying there, he felt someone was busy rummaging through his pockets, and he felt this person touching his private parts, and he became aroused.

[16] He did not see who this person was, but when he turned to sleep on his stomach, he felt that the person was now underneath him. He testified that the person must have crawled underneath him as he was turning because he lifted himself as he was turning over. This person played with his private parts and put his private part between her legs. The first time he opened his eyes was when someone removed his blanket and the canvas that partially covered him. The appellant claims that he did not realise that he was having intercourse with a young child of six years old.

CONSIDERATION

[17] The core argument advanced on behalf of the appellant on appeal against his conviction is a legal argument premised on whether it was reasonably possible that, due to the consumption of alcohol and drugs, the appellant did not have the criminal capacity to appreciate what he was doing was wrong and to form the intention to sexually penetrate the complainant who was a small child at the time.

[18] Put another way, the appellant argues that he was unaware that his conduct was unlawful as he did not know he was having sexual intercourse with a small child. In essence, the defence raised by the appellant is more commonly described as the shield of sane automatism. This shield is also referred to as 'non-pathological' criminal incapacity.

[19] Automatism is a legal shield that refers to an act committed without conscious volition where the automatism is caused by something other than a disease of the mind. In circumstances where drugs or alcohol are involved, the classification of the resulting state will depend on the role played by those substances.

[20] Thus, sane automatism is caused solely by external stimuli and does not result from a mental disease.

[21] While the prosecution bears the burden to establish the requisite element of voluntariness in the accused's conduct, the prosecution is *'… assisted (in*

discharging this onus) by the inference dictated by common experience that a sane person who becomes involved in conduct which attracts the attention of the criminal law ordinarily does so consciously and voluntarily...' Thus, in order to disturb this natural inference, an accused person who seeks to rely on this defence must establish a factual foundation for it.[4] A proper basis must be laid before this inference will be disturbed.[5]

[22] Thus, the *'…mere say so of the accused that the act was unconsciously committed*…' cannot be accepted without circumspection but must be scrutinized, not least because a person who has no other defence *'…is likely to resort to this one in a last attempt to escape the consequences of his or her criminal behaviour*…'[6]

[23] It is undisputed that the appellant had sexual intercourse with a six-year-old child. To determine whether the appellant's claim that he lacked criminal capacity or did not appreciate that the person he was having sexual intercourse with was not an adult, it is prudent to consider his defence on his own version of the events. As alluded to above, this can be established from the appellant's evidence and the detailed version put to the complainant during cross-examination.

[24] According to the statements put to the victim, the appellant was the one who removed both his own and the victim's clothing, and he was the one who then '…*put his penis by this person's vagina….*'

[25] This starkly contrasts with his version during the defence case, wherein he tailored his evidence to allege that it must have been the victim who caused him to penetrate her.

[26] While the appellant contended that he felt '…*a bit drunk…*', it is telling that he testified to a clear recollection of the events leading up to, during and after the rape of the complainant. He was able to recall in detail the amount of money he had in each pocket and his actions in placing this money with his bank card in an opening

---

4 *S v Humphreys 2013 (2) SACR 1 (SCA)*, para [9].
5 *S v Cunningham 1996 (1) SACR 631 (A)*, at 636 A-B.
6 *S v Humphreys 2013 (2) SACR 1 (SCA)*, para [10].

in his mattress and, as above, testified that he took a deliberate decision to go to sleep to join his friends when he woke up.

[27] Moreover, he recalled lying on his back for about ten to fifteen minutes before turning onto his side. He was aware he was having sexual intercourse and instead graphically described the act. He also recalled the intervention of the adult females, the verbal exchanges with them and his reaction to it, including that he took steps to fold up his blanket.

[28] This notwithstanding, the appellant avers that he was unaware that the person he raped was a small child. In my view, the actual test to be applied to the shield of sane automatism has been correctly summarized by JM Burchell in *South African Criminal Law and Procedure (Vol 1) - General Principles of Criminal Law (3rd ed)* by describing voluntary conduct (at pp 41– 42), in the following terms:

> *'…Modern Western philosophy derives the notion of individual responsibility from the doctrine of free will. This holds that all humans are born with the ability to freely choose between different courses of action. Having this freedom, the individual may justifiably be held responsible for the consequences of his chosen actions. It follows from this that persons will only be held criminally liable if their actions are determined by their own free will. This principle is expressed by the requirement that for the purposes of criminal law, a human act must be voluntary in the sense that it is subject to the accused's will. Where for some reason or another he is deprived of the freedom of his will, his actions are 'involuntary', and he cannot be held liable for them ..."*

[29] In my view, there is simply no room to argue that the court of first instance was unjustified in rejecting the appellant's version and convicting him of the offence of rape. I say this because, on the facts presented by the respondent and the facts that appear from the appellant's own testimony, the appellant would have been able to distinguish between the genital anatomy of an adult and that of a small child. This is because, among other things, there were signs of injuries to the complainant's genital area.

[30] On the contrary, I find that the appellant *'…did not come close to establishing a factual basis for any doubt about the voluntariness of his conduct*…'[7]

[31] The grounds of appeal advanced on behalf of the appellant in connection with his sentence are, in broad terms, the following, namely: (a) that the sentence imposed was shockingly harsh and inappropriate; (b) that the appellant was sacrificed at the altar of retribution, as opposed to that of rehabilitation and, (c) that there were substantial and compelling circumstances present dictating a deviation from the minimum sentencing regime to the benefit of the appellant.

[32] The appellant was charged with a contravention of the provisions of section 3 read with sections 1, 55, 56(1), 57, 58, 59, 60, 61 and 68 of the Criminal Law Amendment Act (Sexual Offences and Related Matters)[8], read with sections 256, 257, 261 and 281 of the Criminal Procedure Act 51 of 1977. Sections 51 and Schedule 2 Part 1 of the Criminal Law Amendment Act, 105 of 1997 and the provisions of sections 92 (2) and 94 of the Criminal Procedure Act 51 of 1977 also found application.[9]

[33] The appellant's circumstances at the time of sentencing were: (a) he was (59) years old at the time of his arrest; (b) he was arrested on 1 February 2020 and was held in custody awaiting the finalization of his trial; (c) he is unmarried and lived on the premises for about four months before his arrest; (d) he is the recipient of a disability grant of R1360,00 per month due to an injury sustained during an accident; (e) he was employed as a gardener and worked in a factory once or twice a week (earning R300,00 per week), and (f) his last previous conviction dates back more than twenty years.

[34] The test on appeal is whether the court *a quo* misdirected itself by the sentence it imposed or if there is a disparity between the trial court's sentence and the punishment an appellate court would have imposed. Further, can the sentence imposed appropriately assessed be described as shockingly, startling or disturbingly

---

7 *S v Humphreys*, supra at p.7 [11] d – e.
8 Act No, 32 of 2007.
9 As formulated in the charge sheet.

inappropriate?[10] It is trite law that in sentencing, the punishment should fit the crime and the offender, be fair to society and the offender, and be blended with mercy.[11]

[35] The appellant submits that the cumulative effect of the factors listed above should have been regarded as substantial and compelling sufficient to deviate from the prescribed minimum sentence. A court of appeal is enjoined to consider all circumstances bearing down on this question to properly assess the trial court's finding and determine the proportionality of the sentence imposed upon the offender.

[36] An appeal court's discretion to interfere with a sentence may be exercised only: (a) when there has been an irregularity that fails justice; (b) or when the court *a quo* misdirected itself to such an extent that its decision on sentencing is vitiated, or (c) when the sentence is so disproportionate or shocking that no reasonable court could have imposed it.

[37] Crimes in general, but especially against women and children, offend against the aspirations and ethos of all South Africans. In this case, the victim was a soft target for the appellant. The court of the first instance also emphasized that this type of crime was prevalent within its jurisdiction.

[38] In these peculiar circumstances, the sentence of life imprisonment imposed upon the appellant in connection with the crime of rape must reflect a censure for this type of conduct. Not only do crimes against women in this country amount to a severe invasion of the dignity of the victims, but these crimes do not contribute to our claims that we live in a gender-equitable and just society. This crime perpetrated against a six-year-old child renders it even more reprehensible.

[39] The appellant was (59) years old when the offence was committed. Following section 73(1)(b) of the Correctional Services Act,[12], a person sentenced to life imprisonment theoretically remains in prison for the rest of his or her natural life. Life imprisonment, in practice, is regarded as a sentence of twenty-five (25) years of

[10] *S v Van De Venter* 2011 (1) SACR 238 (SCA) at para [14].
[11] *S v Rabie* 1975(4) 855 (AD) at 862 G.
[12] Act 111 of 1998 (the 'Act)

imprisonment. In this connection, the parole provisions that may become relevant are indicated as follows:

> *'… A person sentenced to life imprisonment may not be placed on parole until he or she has served at least twenty-five (25) years of the sentence, but such a prisoner may, on reaching the age of sixty-five (65) years, be placed on parole after he has served at least fifteen (15) years of the sentence…'*[13]

[40] After some anxious consideration, I find no redeeming factors to the appellant's benefit in mitigating his sentence. I find only aggravating factors even though the appellant has spent a significant period incarcerated as a pre-trial prisoner. When an offender has been incarcerated as an awaiting trial prisoner for an extended period, this may be considered when an appropriate sentence is imposed.

[41] This is not a substantive and compelling circumstance on a strict interpretation. However, nothing prevents this court from considering the period that the offender has been incarcerated, pending his or her trial, when imposing the appropriate sentence. This does not apply mechanically through arithmetic calculation.

[42] A court is expected to depart from the prescribed minimum sentence regime if it can find and identify substantial and compelling circumstances to justify such a departure to the appellant's benefit. In addition, it is obliged to remember that a specified sentence has been prescribed by law as the sentence that should be regarded as ordinarily appropriate in these circumstances.

[43] Deterrence and retribution often tend to steer the severity of the proposed sentence in a specific direction. Rehabilitation, on the other hand, tends to pull the proposed sentence in yet another direction. In my view, focusing on rehabilitation, in this case, would lead to an unfair and inappropriate sentence, which will be disproportionate to that deserved by the appellant for the crime upon which he

---

[13] Section 73(6)(b)(iv) of the Act.

stands convicted. This crime has an element of gender-based violence, which has regrettably reached pandemic proportions in our country.

[44] That this crime was committed against a six-year-old child requires that in considering the issue of a sentence, the court must take into account the provisions of section 28 of the Constitution, namely the right of every child under section 28(1)(d), to be protected from maltreatment, neglect, abuse or degradation, a right which the accused egregiously infringed in this case.[14] I believe an unambiguous message must be sent to offenders participating in this type of criminal activity.

[45] In my view, the court of the first instance did give sufficient weight to the appellant's circumstances and the issue of his possible rehabilitation. This I say because the lower court did not err when imposing the sentence of life imprisonment upon the appellant. Also, the appellant did not show any remorse. Instead, he sought to suggest that the complainant, a six-year-old child, was in some way responsible for his unlawful conduct. Undoubtedly, the circumstances of this case demand that the appellant, for all practical purposes, be incarcerated for an extended period.

[46] As alluded to, focusing on rehabilitation would lead to an unfair and inappropriate sentence, which would be disproportionate to what the appellant deserves for the crime he was convicted of. Significantly, the appellant had a previous conviction for a similar sexual offence. Although this offence occurred a long time ago, it seemingly did not act as a deterrent to this type of criminal conduct. Finally, the imposition of a life sentence upon the appellant was not unjust and disproportionate, considering the circumstances surrounding the commission of the offence.

ORDER:

---

[14] *S v Myburgh 2007 (1) SACR 11 (W)*, at p.15 h - i.

[47] In conclusion, an order is issued in the following terms, namely that:

1. The appeal on conviction is dismissed.

2. The appellant's conviction is confirmed.

3. The appeal on the sentence is dismissed.

4. The sentence of life imprisonment is confirmed.

5. The remaining direction that the appellant was declared unfit to possess a firearm is confirmed.

_____

WILLE, J

I agree.

_____

BREMRIDGE, AJ