IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, GRAHAMSTOWN)

CASE NO: CA204/09
DATE HEARD: 20 April2010
DATE DELIVERED: 30/04/10

In the matter between

PATRICK NYIKI **Appellant**

And

THE STATE **Respondent**

JUDGMENT

REVELAS J:

Introduction:

On 9 September 2005 in the Eastern Cape High Court, Port Elizabeth the appellant pleaded not guilty to a charge of raping a 3 year old girl. He was found guilty as charged on 2 April 2008 and on 27 June 2008 he was sentenced to life imprisonment, in terms of the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997, ("the Act"), because the complainant was below the age of 16 years. The learned trial judge (Schoeman J) held that there were no substantial and compelling circumstances which warranted a departure from the prescribed minimum sentence of life imprisonment for cases such as the one under consideration. With leave of the trial court, the appellant appeals only against the sentence of life imprisonment imposed upon him.

Background

The relevant facts surrounding the rape of the little complainant, to whom I shall also refer to as B, were the following: B's family and the appellant's family shared living quarters on a farm in the Stormsriver area where various members of the two families were employed.

On the evening of 9 September 2005, B, who was then three years and nine months old, was playing with another little girl (Noxolo) in the appellant's room, from where B's aunt, Ms. Mbanjwa, called B with a request to ask the appellant for some fish oil. The appellant then brought the oil from his room to the opposite room, where Ms. Mbanjwa was preparing dinner. B remained in his room. When dinner was ready Ms. Mbanjwa called B and she emerged from the appellant's room, after the door which was closed, opened. She was crying and walked with her legs apart. According to Ms. Mbanjwa, Noxolo also came running out of that room in tears.

A subsequent physical examination of the area between B's legs resulted in the police being called and B taken to the hospital in Kareedouw with Ms. Mbanjwa who placed B's panties and shorts in a plastic bag and gave it to the police. Subsequent DNA tests revealed that B's panties contained the appellant's semen. Dr. Akue, the medical practitioner who examined B that same night, noted that the injuries to her genitalia and other clinical evidence were 'highly suggestive of forceful penetration', and concluded that B had been raped. It was accepted by the learned trial judge that the injuries sustained by B during the rape were not serious.

Immediately after the incident, before the visit to the hospital, the appellant was confronted by Ms. Mbanjwa and her husband. With downcast eyes he proffered the explanation that B had hurt herself (her genitalia) when he, in an effort to protect her from possible spillage of the hot oil he was carrying to her aunt, pushed her away from him with his leg and her genitals connected with his shin. Later, his explanation for the presence of his semen on B's panties was that the semen was retrieved by Ms. Mbanjwa from a condom he had used earlier when he had sex with his girlfriend, because she (Ms. Mbanjwa) wanted to frame him. The trial judge rejected this explanation on very sound grounds which are not relevant to the current enquiry.

At the time of the incident in 2005, it was not possible to obtain a statement from B as she was unable to properly articulate what had happened to her. She was too young. Three years later, in 2008 she was interviewed by Ms. Khova, a social worker who also gave evidence at the trial. She was then able to relate what the appellant had done to her in his room that night. Ms. Khova was told by B that the rape was physically very painful. Interviews with family members revealed that B still

experiences episodes of bedwetting, has “flashbacks” of the rape and frequently leaves tasks she undertakes uncompleted. She has become distrustful and frightened of male persons. She also has nightmares, and according to Ms. Khova, she is still very angry and experiences intense emotions about the incident. The trial judge pointed out that these feelings were felt by B for half her life (she was six years old when interviewed) and observed that this was “a long time for such a small child.”

Ms. Khova was of the opinion that the rape was a very traumatic experience for B and it had impacted very negatively on her life, particularly with regard to her future relationships with men. Sadly, as is so often the case in matters such as these, there is no prospect of B undergoing the sorely needed psychotherapy which could help her cope and come to terms with this awful event. There are simply no resources for such assistance according to Ms. Khova. The possibility of B’s participation in a restorative process with the appellant was explored, but in vain, because B understandably never wants to see the appellant again.

The relevant personal circumstances of the appellant are the following: The appellant was nineteen years old when he raped B. He completed school when he was in grade 4. He worked as a farm worker until his arrest. When he was released on bail he obtained further casual employment at the docks in Port Elizabeth. Ms. Mboya, a probation officer for the Department of Social Development in Humansdorp, assessed the appellant and wrote the pre-sentencing report which became evidence at the trial. She had interviewed the appellant and some of his family members. She reported that the appellant was the sixth of nine children, that he grew up in an area where the consumption of alcohol is common and children are exposed to “serious negative influences”. He regularly attended the Zion Church of which he was a member. Both his parents consumed alcohol to excess but were not violent. The appellant’s maternal aunt, when interviewed, expressed shock when she learnt of the rape and mentioned that the appellant liked to be amongst children. His employer also said he liked to be with children. At the time of the sentence which was imposed by the trial court the appellant was the father of a four month old baby.

Arguments

The appellant's legal representative, Ms. Coertzen, submitted that the trial court had erred in not finding that the personal circumstances of the appellant, in particular that he was a youthful first offender, constituted compelling and substantial circumstances which would have justified the imposition of a lesser sentence than the minimum prescribed by the Act. The other personal circumstance relied upon was that the appellant, who was employed when he was arrested for the offence in question, had found new employment when he was released on bail. It was submitted that this demonstrated that the appellant was a useful member of society and contributed towards supporting his family.

Ms. Coertzen conceded that the offence in question warranted a long term of imprisonment, but argued that the appellant should nonetheless not be removed permanently from society, because that would undermine the rehabilitation element of punishment. In this regard, she argued that the appellant's youth was a significant indicator of the possible rehabilitation of the appellant and that this should have been reflected in the sentence imposed. She further submitted that the sentence induced a sense of shock if due consideration was given to the appellant's age at the time of commission of the offence.

Findings of the Trial Court

The learned judge in the court a quo considered all the personal circumstances of the appellant as set out above, as well as the fact that he had spent 10 months in prison awaiting trial. The aggravating factors taken into account by the trial judge were the following: Firstly, the lack of remorse on the part of the accused who always protested his innocence, even in the face of overwhelming and irrefutable forensic evidence. Secondly, the fact that the appellant abused the trust of those who entrusted him with their children and the trust of the children themselves. Thirdly, "the pervasiveness of raping a toddler." The trial judge rejected the notion that this rape might not have fallen into the category of "not the worst case scenario" as referred to in S v Mahomotsa 2002 (2) SCR 435 (SCA), with the reposte that the rape of a toddler was the worst case scenario.

Insofar as the appellant's youth is concerned, the learned trial judge considered the appellant to be a person who lived as an adult, who worked for his own account and was sexually active. As stated above, it was accepted by the trial judge that B's injuries were not serious, but it was also taken into account that the serious psychological consequences of the rape, even though these could not be measured with precise accuracy, had a deep impact.

Discussion

A court's discretion to interfere with a sentence on appeal is limited. "It may only do so if the sentence is vitiated by (1) irregularity, (2) misdirection, or (3) is one to which no reasonable court would have come, in other in other words one where there is a striking disparity between the sentence imposed and that which this court considers appropriate" (S v Petkar 1988 (3) SA 571 (A) at 574 C, per Smalberger JA). In order to determine whether there is a striking disparity between the sentence imposed and that which the court sitting on appeal sentences imposed in similar cases, must be considered. (S v MacMillan 2003 (1) SACR 27 (SCA) at 34 paras F – H).

The starting point of the enquiry in this case is an appreciation that the prescribed minimum sentence of life imprisonment is applicable. The court a quo was obliged by section 51(1) of the Act to impose that sentence unless there were circumstances to be found which justified a departure therefrom.

In S v Malgas 2001 (1) SACR 469 (SCA), the anticipated drastic effects of the new legislation were tempered to a large extent, but the court nonetheless warned (at paras 7 and 8 of the judgment) that the sentencing process where minimum sentences were applicable, was no longer "business as usual". Parliament ordained a life sentence for the rapists of women below the age of 16 years and that prescript should not lightly be departed from. One of the main reasons for the prescribed life sentence for this type of offence is the prevalence of rape, particularly of women, from the elderly and infirm to children and infants. The learned trial judge was alive to this sad feature of society in our country.

During argument, this Court raised the question whether the possible absence of premeditation of the offence and lack of serious injuries sustained by the complainant, constituted other substantial and compelling circumstances, over and above the appellant's youth and the fact that he was a first offender. Whether the appellant's youth *per se* justified a departure from the benchmark set by the legislature, was the primary enquiry in this appeal.

The fact that B did not suffer any serious injuries during the rape, was not regarded as a compelling or substantial circumstance by the trial judge. In Booysen v S [2009] JOL 24464 (ECG), Jones J was called upon to consider whether or not Jansen J's failure to regard the lack of injuries sustained by the complainant in that case as such a circumstance was a misdirection. The appellant in that case had raped a ten year old girl. Jones J stated in paragraph [3] of the judgment:

> "In my opinion, his failure to do so was not a misdirection. The complainant was 10 years old. She was a tiny child, slender and slightly built, and quite incapable of offering resistance to a sexual assault by an adult… In the circumstances of this case the learned Judge was, in my view, perfectly justified in ignoring the lack of injuries."

In the present case, where the complainant was a mere toddler, the approach adopted by Jones J towards a small rape victim's lack of injuries, is eminently appropriate and the trial judge equally justified in not regarding it as a circumstance which warranted a departure from the prescribed sentence. The sentence of life imprisonment imposed by Jansen J was confirmed on appeal in *Booysen*.

It is so that the rape in question does not appear to have been planned, but in my view, the lack of premeditation is of little or no mitigatory value where the victim is so very young. There is also some merit in the submission made by *Ms. Swanepoel*, for the State, that when the appellant was called away from the room, to carry oil to B's aunt, the period he was away from B presented an opportunity for him to reflect on what he was about to do, and to refrain from engaging in such a repugnant and destructive deed. He nonetheless returned to the room and raped B.

The pervasive and traumatic effects of the rape on B's life, was the most important factor which influenced the trial judge in not departing from the benchmark set for sentencing in this case. Her views are shared by many other courts. In S v Blaauw 2000 (2) SACR 255 (CPD) at 257 the following was said about the rape of children:

> "The traumatic effects of sexual abuse are argued to be the most complex and most pervasive in terms of the impact on a child's life. When trauma is inflicted by a person the child knows, the suffering may be more intense and persistent. The sudden, horrifying and unexpected nature of an event also defines the trauma."

The following observation in S v D 1995 (SACR 259 (A) at 260 G- H is apposite in the present matter:

> "Children are vulnerable to abuse, and the younger they are, the more vulnerable they are. They are usually abused by those who think they can get away with it, and all too often do."

In S v Ncheche 2005 (2) SACR 386 (WLD) at 395 H-I Goldstein J described rape as "an appalling and utterly outrageous crime, gaining nothing of any worth for the perpetrator and inflicting terrible and horrific suffering and outrage on the victim and her family."

In Vaaltyn v S [2005] JOL 15342 (C) a sentence of life imprisonment was confirmed on appeal where the appellant (not a youthful, but also a first offender) pleaded guilty to raping a 12 year old girl. Davis J said the following at page 11 of the judgment:

> "In my view the gravity of the crime perpetrated by the appellant and the significant impact of the appellant's actions upon the life of the complainant are factors of key import."

In S v Mbele [2006] JOL 18069 (W), a youthful accused who pleaded guilty to raping a two year old girl did not escape a sentence of life imprisonment. It is not certain

how old he was, but at page 14 of that judgment Borchers J said the following about the young accused's possible rehabilitation:

> "As far as rehabilitation is concerned, this lies in the uncertain future. As the accused is young and a first offender, he is more likely to be capable of rehabilitation than an older more hardened offender, but he is a sly and wily person, as he demonstrated when he testified in mitigation of sentence and his so-called remorse is a façade. He expresses no remorse for raping the complainant. Real remorse must precede rehabilitation and whether and if it will come about is a matter for speculation."

In S v N 2008 (2) SACR 135 (SCA), where a 17 year old boy was convicted of raping a 17 year old girl, a more optimistic approach towards the rehabilitation of youthful first offenders was adopted by Cameron JA at paragraph [447]:

> "Is this too soft? [referring to a substituted sentence of five years' imprisonment in terms of s 276(1)(i) of the Criminal Procedure Act 51 of 1977]. I cannot say no with any assurance. But I am less unsure that it may be too soft than I am sure that an undifferentiated sentence of direct imprisonment is too harsh. And if we are to risk erring at all, the Constitution requires us to err by recognizing the possibility of promise that may still flower from his youth, rather than fixing on the destruction that was immanent in his crime."

The appellant in the present matter is however, not seventeen, but nineteen years old and he did not rape his high school sweetheart as was the case in S v N (supra). His victim was a toddler. It is very tempting to ask oneself in these circumstances, if there really is a significant difference between a seventeen year old and a nineteen year old for purposes of sentencing them for their criminal conduct. In Centre of Child Law v Minister of Justice and Constitutional Development and others (National Institute for Crime Prevention and the Re-integration of Offenders, as Amicus Curiae) 2009 (2) SACR 477 (CC) the Constitutional Court considered and granted an application for the confirmation of declarations of statutory invalidity, made by the North Gauteng High Court, Pretoria. Potterill AJ struck down certain sections of the

Criminal Law Amendment Act 105 of 1997. The sections made minimum sentences applicable to offenders aged 16 and 17 years at the time they committed offences. These sections were regarded as incompatible with section 28(1)(g) of the Constitution. It provides that every child has the right not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under section 12 and 35, the child may be detained only for the shortest appropriate period and has the right to be kept apart from detainees over the age of 18 and be treated in a manner that takes account of the child's age. The question why a person under 18 in particular should be regarded as a child was raised. Cameron J in that case observed that "there is no intrinsic magic in the age of 18, except that in many contexts it has been accepted as making the transition from childhood to adulthood. The Constitution's drafters could conceivably have set the frontier at 19 or 17. They did not. They chose 18. This is a bulwark that the legislature cannot overturn without cogent justification." The appellant, although youthful, is no longer a child. He cannot be said to be more "vulnerable or susceptible to negative influences and outside pressures" or that his character (like children under 18) is not yet fully formed and he therefore is "uniquely capable of rehabilitation" as put in paragraphs [34] and [35] of the *Centre for Child Law* case (supra).

Had the appellant been two years younger, he could have been sentenced differently, but he is not. He was nineteen when he raped B. Whereas his relative youth may be a mitigating factor, it does not in my view, constitute a circumstance which would justify the imposition of a lesser sentence. The seriousness of the offence far outweighs the fact that he is a youthful first offender.

The trial court did not err in regarding the appellant as an adult who was sexually active, who worked for his own account, and lived as an adult. This finding was factually correct and it is a factor which militates against the notion that the appellant is entitled to a measure of leniency on account of his age.

The appellant showed no remorse for his actions. He persisted with his complete denial of the rape and with his malicious and false accusation that his sperm was retrieved from a discarded condom in a dustbin and placed on B's panties as revenge for some work related grievance on the part of Ms. Mbanjwa's son. The trial

judge did not err in regarding this aspect as an aggravating feature. The possibility of rehabilitation is very remote where the perpetrator does not want to take responsibility for his actions.

In my view, the appeal must fail. Accordingly I made the following order:

The appeal is dismissed.

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E. REVELAS
JUDGE OF THE HIGH COURT

I agree,

_____
J.M. ROBERSON
JUDGE OF THE HIGH COURT

I agree,

_____
J.G. GROGAN
ACTING JUDGE OF THE HIGH COURT

Appearing on behalf of appellant: Adv. Coertzen
Appearing on behalf of respondent: Adv. Swanepoel