IN THE HIGH COURT OF SOUTH AFRICA, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

AR 115/10

In the matter between:

RONSON PILLAY **APPELLANT**

v

THE STATE **RESPONDENT**

JUDGMENT ON SENTENCE

Date of hearing: 28 June 2012
Date of judgment: 08 August 2012

D. PILLAY J

[1] The full court hearing the appeal on both conviction and sentence confirmed the conviction of the appellant on 28 June 2012. It postponed its decision on sentence for further deliberation with a view to reaching agreement on sentence and, failing that, for hearing before a full bench on a date to be arranged on 07 August 2012. It has since come to our attention that unless the full court is unanimous on sentence its judgment on upholding the conviction has to be vacated and the entire appeal be referred to the Judge President for assigning the matter to a full bench. We have since agreed on the sentence. Here follow our reasons.

[2] Counsel for the defence, Mr *L Barnard*, submitted that as the appellant was charged and convicted of only one count of indecent assault under the common law and not the additional incidents to which the complainant testified, the sentence of four years imprisonment was excessive. Furthermore, the trial court should have contemplated a non custodial sentence. Accordingly this court should refer the matter back to the trial court to request a pre-sentencing report.

[3] Turning first to the term of four years imprisonment for one count of sexual assault committed on an 11 year old girl, *Coetzee v S* 2010 (2) ALL SA 1 (SCA) at para 18-25 helpfully summarises cases on indecent assault and contraventions of s 14(1) (b) of the Sexual Offences Act 23 of 1957 (SOA) post 1993. In all the cases cited imprisonment was consistently

imposed as the appropriate sentence. The period of imprisonment varied depending on the nature of the assault, the number of counts, the relationship of the offenders to the complainant and to society and whether the offenders suffered from some psychological personality defect. Of the eight cases[1] surveyed an effective term of three years imprisonment or more was imposed in five of them.[2] In a case where six months imprisonment were imposed for each of the two counts of indecent assault, the assault took the form of touching the breasts of one of the complainants and rubbing the leg and stomach of the other.[3] On a conviction of three counts of indecent assault and one attempted indecent assault of boys between the ages of 10 to 12 years, the trial court imposed eight and a half years imprisonment. On appeal all four charges were taken together and his sentence was reduced to four years imprisonment of which three years was suspended on conditions, one of which was that he subjected himself to programmes for treatment of sexual offenders.[4] That case was decided in 2003; since then our appellate courts have observed that there are no signs of sexual offences abating.[5] Although this is not a sexual offence in which the minimum sentence applies, to be sufficiently deterrent, the sentences for indecent assault should be progressively higher than the sentences imposed in similar cases 12 years ago.

[4] *Coetzee,* on appeal to this division, came before Koen J who with Gorven J concurring that a non-custodial sentence would be a mere slap on the wrist, reduced the sentence of 6 years imprisonment by treating all counts as 1 and suspending 2 years for 4 years. The offender was convicted on four counts of indecent assault. He was a pastor who had assaulted young women. His conduct consisted of touching his victims in intimate parts of their bodies. The victims had come to him for counselling. The trial court had rejected two pre-sentencing reports, holding that the offender was not a suitable candidate for correctional supervision. The SCA found the custodial

1 *S v R* 1993 (1) SACR 209 (A); *S v V* 1994 (1) SACR 598 (A); *S v D* 1995 (1) SACR 259 (A); *S v K* 1995 (2) SACR 555 (O); *S v R* 1995 (2) SACR 590 (A); *S v McMillan* 20032 (1) SACR 27 (SCA); *S v O* 2003 (SCAR 147 (C); *S v Egglestone* 2009 (1) SACR 244 (SCA).
2 *S v V* 1994 (1) SACR 598 (A); *S v D* 1995 (1) SACR259 (A); *S v R* 1995 (2) SACR 590 (A); *S v K* 1995 (2) SACR 555 (O); *S v McMillan* 2003 (1) SACR 27 (SCA)
3 *S v Eggleston* 2009 (1) SACR 244 (SCA)
4 *S v O* supra (n1) 165D-E & 165G-166D.
5 *S v Malgas* 2001 (2) SA 1222 (SCA); *S v Dodo* 2001 (1) SACR 594 (CC); *S v Matyityi* 2011 (2) SACR 40 (SCA)

sentence of 4 years 'excessively severe' and reduced the sentence on the basis that it was 'disturbingly inappropriate'. It took into account that the appellant in that case was a first offender and that the complainants were not young and immature (even though they were between the ages of 16 and 21 years); they were already sexually active; they did not suffer permanent psychological trauma.[6] Preferring to leave the matter of that offender's incarceration in the hands of the commissioner of correctional services, it replaced the High Court's sentence with 4 year's imprisonment in terms of s 267(1)(i) of the CPA.

[5] *Coetzee* also reminds that the matter of sentencing falls 'pre-eminently' within the judicial discretion of the trial court. The test for interference by an appeal court is whether the sentence imposed by the trial court is vitiated by irregularity or misdirection or is disturbingly inappropriate.[7]

[8] Having regard to the sentence, the learned magistrate failed to amend the charge sheet when the defects were brought to her attention before judgment. The first hint that she intended to amend the charge appears at the beginning of her judgment on conviction where she read the charge with s 94 of the CPA, probably because the charge sheet alleged that the offence was committed from June 2006 to May 2007. However, she did not state specifically that she amended the charge sheet. Furthermore, the acts for which the appellant was charged related to one incident only. The acts in the further incidents which escalated in seriousness should have been stated in the charge sheet if the state intended the charge to be read with s 94. Notwithstanding the purported amendment, she convicted him 'as charged'.

She purported to effect the amendment expressly after her judgment on conviction and during the delivery of her judgment on sentence. Section 88 of the Criminal Procedure Act 51 of 1977 (CPA) permits the court to amend the charge sheet after a defect is brought to its attention but before judgment.[8] Consequently, her finding that the defects were cured by the evidence is inconsistent with s 88.

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6 *Coetzee* para 15, 26

7 *DPP, KwaZulu-Natal v P* 2006 (1) SACR 243; 2006 (1) ALL SA 446 (SCA); *S v Coetzee* [2010] 2 All SA 1 (SCA) para 13.

8 *S v Gaba* 1981 (3) SA 745 (O) at 752D; Hiemstra's Criminal Procedure Online

However, the practical purpose of requiring the court to amend the charges before judgment is to allow the parties an opportunity to address the court on the amendment and, if possible, to cure any prejudice the defence might consequently endure. Generally, it is inadvisable to assume that it makes no difference that the amendment is effected after judgment and that it is a mere procedural flaw. In this case, however, having regard to the appellant's bizarre defence of conspiracy and the failure to put his version to the witnesses, he would not have materially altered the proceedings to his advantage if the magistrate had effected the amendment before convicting him. The probabilities are that his situation might have worsened because she might have convicted him on all counts. The misdirection about not effecting the amendment before the conviction was therefore not fatal as far as the conviction went.

Although not fatal for the purposes of the conviction, the failure to amend the charges misled the appellant as far as sentence went. In the midst of delivering her judgment on sentence, the learned magistrate 'regarded the charge sheet as having been automatically amended'. That she sentenced him for all the incidents and not merely the one count is confirmed by her treating as aggravation the oral sex the appellant asked the complainant to perform on him. To be convicted of one count and sentenced on three counts is manifestly unfair.

[8] However, is the sentence of four years imprisonment in terms of s 276(1)(i) of the CPA excessive for one count of indecent assault? Subsection (i) mitigates direct imprisonment by allowing the appellant to be placed under correctional supervision in the discretion of the Commissioner or a parole board. Subsection 73 (7) of the Correctional Services Act 111 of 1998 (CSA) requires the appellant to serve only one sixth of his sentence before being considered for placement under correctional supervision, and the court did not direct otherwise. In fact, the learned magistrate specifically had in mind 'a short spell in prison' to satisfy the punitive aspect of punishment. Effectively, the learned magistrate left the duration of his imprisonment partly in his own hands and those of the correctional officer, as the SCA did in *Coetzee*.

Imprisonment under sub-sec 267(1)(i) of the CPA read with sub-sec 73(7) of the CSA is the preferred sentencing option for first offenders convicted of indecent assault.

Turning to the facts, the appellant was a police officer and a trusted friend of the complainant's family. They brought him into their home at a time when he was in need of shelter. They looked upon him as a family member. In return, he reciprocated their kindness by violating their security at their most vulnerable state. Additionally, his arrogance in assuming that he was entitled to live rent free in the complainant's family home suggests that he is a long way from rehabilitation. As for the interests of the community, sexual offences show no signs of abating. The impact of the assault on the complainant is also a compelling consideration.

Although *Coetzee* is relevant to this case in setting a recent (2009) standard for sentencing, it is distinguishable on the facts. On the one hand, in contrast to *Coetzee*, the complainant was an impressionable school girl of 13 years when the assault occurred. She suffered the trauma not only of the assault but also of having to make statements to the police and testify in court, all of which spanned 3,5 years. On the other hand, this case involves 1 count as opposed to the 4 counts in *Coetzee.* Furthermore, the learned magistrate did misdirect herself by convicting the appellant on 1 count but sentencing him on three counts. Accordingly, the sentence falls to be reduced.

[6] As to the suggestion that the appellant might suffer from some psychological or other impairment no evidence was led to lay the basis for such a finding. The proposition is entirely speculative. No court can readily draw such an inference without evidence. To do so in this case would set an untenable precedent encouraging sexual offenders to dredge up speculative defences in the many cases that pass through these courts for which no explanation exist whatsoever. *Coetzee* specifically spurned such special treatment.[9]

[7] As for remitting the matter for a pre-sentencing report, to the trial court the defence specifically enquired whether the prosecution would call for such

9 *Coetzee* para 16

a report. The learned magistrate pointed out that pre-sentencing reports were usually done with juveniles. She invited the defence to explain how it would assist the court and enquired whether he was asking for such a report. The defence attorney replied 'no, just a suggestion, your worship'. The magistrate concurred that it was not necessary. Before adjourning the matter for sentencing the learned magistrate urged the defence to adduce information to assist her to arrive at an appropriate, just and fair sentence. In the circumstances I am satisfied that a pre-sentencing report was considered and disposed of in the trial court. In the absence of any evidence as to his medical condition no basis exists for this court to call for a pre-sentencing report. Accordingly, the defence had more than a week from conviction to prepare and adduce relevant evidence in mitigation.

In the circumstances, I propose the following order:

The appeal succeeds.

The sentence imposed by the trial court is set aside and replaced with the following:

> 'The accused is sentenced to 2 years imprisonment in terms of s 267(1)(i) of the Criminal Procedure Act, 51 of 1977.'

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D. Pillay J

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Y. Mbatha J

I agree.

It is so ordered.

Counsel for the Appellant:	Mr L. Barnard
Instructed by:	Manilall, KwaDukuza
Counsel for the Respondent:	Ms R A Ramouthar
Instructed by:	Director of Public Prosecutions Durban