THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE HIGH COURT, CAPE TOWN

CASE NO: A523/2010

In the matter between:

PETRUS THERON Appellant

and

THE STATE Respondent

JUDGMENT : 11 MARCH 2011

KOEN A J:

1. On 24 August 2009 the appellant was convicted on one count of indecent assault and two counts of rape. He was sentenced to imprisonment for a period of five years in regard to the first count, and to imprisonment for a period of 20 years in regard to each of the rape convictions. The trial court ordered that the sentences in respect of the rape charges were to run concurrently, the result being that for all three convictions the appellant was sentenced to imprisonment for a period of 25 years.

2. An application for leave to appeal both the conviction and the sentence was refused by the trial court on 26 May 2010. On 1 June 2010 the appellant applied to this court for leave to appeal sentence only. This court granted leave to appeal both conviction and sentence on 19 August 2010.

3. It is necessary to state at the outset that the complainants in all three matters were boys of a tender age. At the time the indecent assault was allegedly perpetrated the complainant, T, was only 6 years old. The complainants in regard to the rape charges, K and S, were aged 10 and 12, respectively, when the offences were alleged to take place. The thrust of the appeal against conviction was that the Magistrate had erred in accepting the evidence of the three young children who, it was argued, were single witnesses whose evidence was not corroborated.

4. At the commencement of the appeal the State made application in terms of section 22 of the Supreme Court Act for leave to introduce further evidence. No proper basis for the reception of the further evidence was evident from the application, and it was accordingly refused.

5. Before dealing with the evidence it is necessary to observe that that the State framed the second

and third charges against the appellant (which I have described as rape charges) under the provisions of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. This Act came into force on 16 December 2007. Amongst other things the intention of this Act was to reform the South African law of rape by providing that both males and females could be victims of the crime of rape. The charge sheet alleged that the appellant was guilty of contravening this section in that he had "since December 2007" committed the acts of which he was convicted. It is apparent from the evidence led by the State that K and S testified that they had been repeatedly raped by the appellant during the December2007/January 2008 school holidays. In fact, K stated, and his evidence was not challenged, that the incidents stopped during January or February 2008. I am therefore satisfied that the provisions of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 ("the Act") applied to a substantial number, if not the vast majority, of the incidents complained of in the charge sheet. I shall now turn to summarise briefly the relevant evidence.

The conviction for indecent assault:

6. T gave evidence on 30 October 20O8, just over 9 years after the incident took place. He was 15 years old at the time he testified.

7. He testified that he had encountered the appellant on a Saturday afternoon whilst riding his bicycle. The appellant had identified himself as "Chris". After he and the appellant had gone to T's house the appellant pushed him on the bicycle to a rugby field near to the Berg River. There the appellant indecently assaulted him by playing with T's penis. T gave a relatively detailed account of what had happened. Upon returning home T immediately told his parents what had happened.

There was nothing about his cross examination which casts any measure of doubt about the reliability of T's evidence.

8. T's parents testified. They testified that T had reported the indecent assault upon him to them immediately. His father testified that he had become enraged upon hearing what had transpired, and had gone to try to find the perpetrator. He had not found him and a complaint was that day made to the police. The next day the appellant had arrived at T's house. He had come to deliver firecrackers he had promised to T, and also brought a letter. Amongst other things the letter contained an apology for what had happened the previous evening explaining that things had happened too quickly. When the appellant had arrived at T's house the following day T's father had made small talk with him to keep him there whilst the police were summoned. The appellant was arrested that day.

9. The appellant admitted that he had met T that Saturday and that the two of them had gone to the rugby field near the river. T's evidence was largely undisputed save that the appellant denied the indecent assault. But the appellant's evidence in regard to the events that day, and the letter he admitted writing, was unimpressive. His version was that T had followed him, but he could not explain why. To all intents and purposes his evidence amounted to nothing more than an unsubstantiated denial of the assault.

10. As **I** have indicated above the thrust of the attack on the conviction in regard to this charge was that the magistrate had erred in accepting the evidence of a young single witness. In my view, however, T's evidence was corroborated in at least one important respect, namely the letter which the appellant admitted he had written. The explanation furnished by the appellant for having

written the letter is entirely unconvincing. In chief he gave no evidence explaining why he would have written such a letter. It is unlikely in the extreme that the appellant would have written a letter containing an apology which he handed to T's father had there been nothing to apologise about. Nothing had transpired between the two which called for an apology. And his explanation in cross examination for having written the letter was, in truth, nothing other than an expression of an inability to explain why he wrote the letter.

11. There were other aspects of the appellant's evidence during the trial which require comment. At one stage during his cross examination he suggested that he had been entrapped by T, as a reason for his having gone to T's house. He then explained this statement as one which came from a strange man whose thoughts were wandering. He could not satisfactorily explain why he had been in the company of T, who was so many years his junior, why they had gone to the river, or what they had done whilst at the river. After first testifying under cross examination that he had pushed T on his bicycle to the river he then testified that T had followed him to the river. These are mutually irreconcilable versions. He testified further, under cross examination that he had been on his way to meet people from Blommendal he knew, but did not explain why he had spent as long as he did sitting and talking to T at the river, if he was on his way to meet friends.

12. These factors provided a sufficient basis for the magistrate to be satisfied that T's evidence should be accepted. The Magistrate found T to be a credible witness and that the appellant had lied to the court. **I** do not think that she can be faulted in this respect.

The Rape Convictions

13. For the purposes of this judgment I propose to deal with both convictions under the same

heading, as the facts are strikingly similar. The complainants in regard to these charges were K and S, aged 10 and 12, years respectively. Both testified that the appellant had had penetrative sex *per anum* with them. Both testified that they had witnessed the appellant raping the other. Their evidence was thus not the evidence of a single witness, as each witnessed the other being raped. Their evidence was not seriously challenged in cross examination. In addition their evidence was to a degree corroborated by one Jakobs, who had witnessed the two young boys in the presence of the appellant on regular occasions during the December 2007 / January 2008 holidays.

14. On the appellant's own version he admitted knowing the two boys, and socialising with them at the place where the offences took place, the local swimming pool, over the period in question. He said he had witnessed the two boys having sex with each other. None of this was put to the two boys in cross examination by the appellant's counsel at the trial, a feature which supports the conclusion that the version given by the appellant is palpably false. Moreover, on the appellant's own version he did nothing to stop the two boys from having sex with each other, notwithstanding that he disapproved of their conduct, a quite unlikely state of affairs.

15. In 5 *v Hodebe and Others* 1997 (2) SACR 641 (SCA) reference was made to the principles applicable in appeals against findings of fact. In this regard Marais JA said, at 645 e - f. *In short, in the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong".* I am not satisfied that the Magistrate misdirected himself in a material or demonstrable way or that he erred in accepting the evidence of the young boys. In my view the State proved its case beyond a reasonable doubt and there is no basis for interfering with the convictions.

16. This leaves the question of sentence. It is well settled that an appeal court may only interfere with the sentencing discretion of a trial court if it is satisfied that the trial court did not exercise its sentencing discretion reasonably. In *S v Malgas* 2001(1) SACR 469 (SCA) the circumstances entitling an appeal court to interfere with sentence were stated to be as follows:

> *"A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where a material misdirection by the trial court vitiates its exercise of that discretion, an appellate Court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate court is at large. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", startling", or "disturbingly inappropriate"."* (at Par 12).

In this case counsel for the appellant submitted in his heads of argument that the Magistrate had failed to take sufficient account of the appellants personal circumstances, the prospects of rehabilitation and the fact that he had lived with the burden of the 1st charge for over nine years before the trial. I do not think that there is any merit in these points. The offence was a grave one, which has dramatically affected the lives of three young boys. He took

advantage of the vulnerable. Amongst his previous convictions was a conviction for a sexual offence (indecent assault) in respect of which correctional supervision had been imposed. None of his previous convictions and the sentences imposed had the hoped-for deterrent effect. In my view the Magistrate properly took all relevant factors into account and I cannot fault the exercise by her of her sentencing discretion.

17. One further aspect of the matter requires mention. A contravention of section 3 of the Act is equivalent to a conviction for the offence of rape (see *Corolus v* 5 [2008] 3 All SA 321 (SCA) at par. 36). The minimum sentence prescribed in respect of the rape of a boy or girl under the age of 16 years, and where the rape occurs more than once, is life imprisonment. The minimum sentence in respect of a contravention of section 3 of the Act was introduced by Act 38 of 2007 which came into force on 31 December 2007. Although the appellant commenced committing the offences before this time it is clear from the evidence of both K and S that the commission of the offences continued on a number of occasions for some time after 31 December 2007. The Magistrate was thus correct to warn the appellant at the commencement of the trial that the prescribed minimum sentence was applicable. The Magistrate considered this aspect of the matter when sentencing the appellant, and although she did not expressly mention those facts which persuaded her to depart from the minimum sentence it is apparent that she considered the facts advanced in argument by the appellant's legal representative at the trial in deciding that she was justified in imposing a lesser sentence.

18. In the result I would dismiss the appeal against conviction and sentence.

K 0 E N , AJ

I agree and it is so ordered

FORTUIN, J