THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case No: 988/2016

In the matter between:

GERHARDUS PIETER OTTO **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Otto v State* (988/2016) [2017] ZASCA 114 (21 September 2017)

Coram: Swain JA, Plasket, Molemela, Mokgohloa and Mbatha AJJA

Heard: 6 September 2017

Delivered: 21 September 2017

Summary: Criminal law – appeal against conviction of rape – appellant failed to testify – conceded by appellant that sexual intercourse proved – lack of consent and intention also proved – appeal against conviction dismissed – appeal against sentence – no misdirection on part of court below and sentence of 22 years imprisonment not shockingly inappropriate – appeal against sentence dismissed.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Mphahlele J and Petersen AJ sitting as court of appeal):

The appeal against both conviction and sentence is dismissed.

JUDGMENT

Plasket AJA (Swain JA, Molemela, Mokgohloa and Mbatha AJJA concurring):

[1] The appellant was convicted, in the regional court, Heidelberg, of having raped the complainant, his niece. He was sentenced to ten years' imprisonment. He appealed to the Gauteng Division of the High Court, Pretoria against conviction. The State cross-appealed against the sentence imposed on the appellant. The appeal against conviction was dismissed by Petersen AJ, with Mphahlele J concurring, but the State's appeal against sentence succeeded. The appellant's sentence was increased to 22 years' imprisonment. He now appeals against both conviction and sentence and does so with the special leave of this court.

Conviction

The facts

[2] The complainant testified that she, her parents and her younger brother spent the night of 23 July 2011 at the townhouse of her uncle – the appellant – his wife and their two sons.

[3] The townhouse had two bedrooms. The complainant's parents and her brother slept in one, while the appellant and her aunt slept in the other. She slept on a couch in the living area. Her cousins slept in the same general area but a curtain separated them from her.

[4] The complainant's parents, her aunt and the appellant had gone out for a meal. When they returned, her parents went to bed, as did her brother. Her aunt and the appellant watched television for a while. Her aunt then went to her bedroom but the appellant remained in the living area.

[5] While the complainant dozed on the couch, she felt someone touching her upper body. She opened her eyes and saw that the person doing so was the appellant. He then tried to kiss her but she told him to stop. The appellant left the room. The complainant turned her body so that she faced the back-rest of the couch. The appellant returned and told her to look at him. When she did not, he forced her face towards him and thrust his penis into her face. He told her to sit up and he sat next to her. He told her to suck his penis. She initially refused but then did so because she thought that if she did so for a while, he would leave her alone. When, however, he thrust his penis too deep into her mouth, she choked.

[6] The complainant stood up and the appellant pushed her to the kitchen where he stripped her of her panties and pants. He first penetrated her vaginally and then anally.

[7] After this they returned to the couch in the living area where the appellant instructed the complainant not to tell anyone about what he had done to her because, if she did, he would go to jail. The following morning, the complainant and her family left to return to their home. In his evidence, the complainant's father said that he had noticed that the complainant had not been herself that morning: she was quiet and withdrawn.

[8] On 27 July 2011, the complainant told her grandmother that she had been raped by the appellant. Shortly thereafter, she was medically examined. The examination revealed injuries to her vagina and anus that were consistent with her having been penetrated in the recent past.

[9] The appellant's version, as put to the complainant in cross-examination, was a denial of having had sexual contact or intercourse with her at all. He opted not to testify with the result that there was no evidence before the court of any version but that testified to by the complainant.

The issues

[10] The gravamen of the appellant's heads of argument was that the State had failed to prove beyond reasonable doubt that the appellant had sexually penetrated the complainant because her evidence was contradictory in certain respects, was inconsistent in respect of what she had told her grandmother and father concerning the incident and was improbable in various ways.

[11] Mr Strijdom, who appeared for the appellant, was constrained to concede, however, that the acts of sexual penetration testified to by the complainant had been established by the State. In the light of the medical evidence and the appellant's failure to testify – and despite any criticism that could be levelled against the complainant's evidence – that concession was justifiably and correctly made. This concession puts paid to a great deal of the criticism of the complainant's evidence as well as the argument relating to the improbability of the appellant having sexual intercourse with the complainant in such close proximity to where his sons were.

[12] In argument before us, the principal issue was whether the court below was correct in its findings that the complainant had not consented to the three acts of sexual penetration and that the necessary intention on the part of the appellant had been proved.

[13] Rape is no longer a common law crime. It is now an offence defined by statute, the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. Section 3 of the Act provides:

'Any person ("A") who unlawfully and intentionally commits an act of sexual penetration with a complainant ("B"), without the consent of B, is guilty of the offence of rape.'

[14] The term 'sexual penetration' is defined by s 1(1) to include 'any act which causes penetration to any extent whatsoever by . . . (*a*) the genital organs of one person into or beyond the genital organs, anus, or mouth of another person'.

[15] In terms of s 1(2), consent, for purposes, inter alia, of the offence created by s 3 means 'voluntary or uncoerced agreement'. Section 1(3) provides that the circumstances in respect of which a complainant 'does not voluntarily or without coercion agree to an act of sexual penetration . . . include, but are not limited to' the situation 'where there is an abuse of power or authority by A to the extent that B is inhibited from indicating his or her unwillingness or resistance to the sexual act, or unwillingness to participate in such a sexual act'.

[16] The onus rests on the State to prove all of the elements of the offence of rape, including the absence of consent and intention. This is so even where, as in this case, the version put to the complainant by the appellant's legal representative was a denial of any sexual contact with her. That false version makes the State's task a great deal easier,[1] as does the fact that the appellant decided not to testify.[2]

[17] The court below considered the twin issues of consent and intention in some detail. It considered the evidence of the complainant that, when the appellant first kissed her, 'she refused and said no'; that after the appellant left the room and then returned, she refused to turn around and look at him as he had instructed her to do; that when he physically forced her head towards him, he thrust his penis into her face; that he then told her to suck his penis and that she had, at first, refused but then did so in the hope

[1] *S v York* 2002 (1) SACR 111 (SCA) para 19. See too *S v Vilakazi* 2009 (1) SACR 552 (SCA) para 47.
[2] *S v Boesak* 2001 (1) SACR 1 (CC) para 24; *S v Vilakazi* (fn 1) para 48.

that by 'playing along' for a while, he would then leave her alone; that, after he had choked her by thrusting his penis too deep into her mouth, he pushed her to the kitchen, took off her panties and pants and penetrated her.[3]

[18] The court below concluded from this evidence:[4]

'The legal principles applied to the complainant's evidence on consent as highlighted *supra*, demonstrates that the consent by the complainant was neither real, given voluntarily nor demonstrated tacitly. The appellant irrespective of denying intercourse could not have reasonably believed that the complainant had consented to the kissing, the sucking of his penis or the vaginal or anal penetration, all acts which on their own constitute either sexual penetration or sexual violation. In that regard he acted both unlawfully and had the requisite *mens rea* to rape the complainant.'

[19] Mr Strijdom was unable to point to any misdirection in the court below's consideration of the facts and conclusion that the State had indeed proved a lack of consent on the part of the complainant and the necessary intention on the part of the appellant. I too can detect no misdirection. In the result, the appeal against conviction must fail.

Sentence

[20] The jurisdiction of a court of appeal to interfere with the sentence imposed by a trial court is limited. In *S v Bogaards*[5] Khampepe J stated:

'Ordinarily, sentencing is within the discretion of the trial court. An appellate court's power to interfere with sentences imposed by courts below is circumscribed. It can only do so where there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it.'

[3] Judgment para 26.
[4] Judgment para 28.
[5] *S v Bogaards* [2012] ZACC 23; 2013 (1) SACR 1 (CC) para 41.

[21] In *S v Malgas*[6] Marais JA held that when a court imposes sentence in respect of an offence referred to in the Criminal Law Amendment Act 105 of 1997 it is no longer given a 'clean slate on which to inscribe whatever sentence it thought fit': instead, it is required 'to approach that question conscious of the fact that the legislature has ordained life imprisonment or the particular prescribed period of imprisonment as the sentence which should *ordinarily* be imposed for the commission of the listed crimes in the specified circumstances'. The emphasis, he held, was on 'the objective gravity of the type of crime and the public's need for effective sanctions against it'. The appellant's crime – the rape of a person younger than 16 years of age – attracts a prescribed sentence of life imprisonment in the absence of substantial and compelling circumstances to justify a less severe sentence.[7]

[22] Mr Strijdom argued that the sentence imposed by the court below was shockingly inappropriate and ought to be interfered with on this basis. To determine whether there is any substance in the argument, it is necessary to consider the three sets of interests that are required to be balanced in the sentencing process.

[23] The court below found that the personal circumstances of the appellant were generally positive. He was 40 years old at the time of the commission of the offence, a first offender, in stable employment and his family's breadwinner. He displayed no remorse for violating his niece. As a result of his false denial, it must be added, he put her through the gruelling, unpleasant experience of having to testify about her ordeal. While the appellant's lack of remorse is not an aggravating factor,[8] it is indicative of a failure on his part to take responsibility for his actions and of an absence of empathy for his victim. The court below took most of these factors into account.[9]

[24] It also considered his conduct in relation to the complainant when it said:[10]

---

[6] *S v Malgas* 2001 (1) SACR 469 (SCA) para 8.
[7] See Criminal Law Amendment Act, s 51(1) and s 51(3), read with Part 1 of Schedule 2.
[8] *S v Hewitt* [2016] ZASCA 100 para 16.
[9] Judgment para 38.
[10] Judgment para 40.

'The appellant abused the relationship of trust of an uncle over his niece. He callously and unperturbed by the presence of his sons and family members in the house, satisfied his sexual desires with the young complainant. He violated the innocence of the complainant both physically as she was a virgin; and emotionally by telling her he would be imprisoned if she spoke out, perpetuating this by taking her cellphone number and phoning her to remind her.'

[25] These points, it seems to me, go to the seriousness of the offence. In addition, the appellant penetrated the complainant three times in three different ways. The court below also had regard to the consequences of the rape upon the complainant. While the physical injuries she suffered would have healed fairly quickly, the emotional trauma that she suffered was of an altogether different character: the court below recorded (from the pre-sentence report of a social worker) that while the complainant 'had received counselling, at the time of sentencing in 2013, she still suffered from the post-traumatic effects of the rape', that it 'adversely affected her behaviour and interaction with older men' and that it had also affected the quality of her life.[11]

[26] The court below also considered the interests of society. After observing that society's interests 'in serious crimes involving the abuse of women and children' has been considered by this court on a regular basis, the court below proceeded to refer to dicta in some of these cases.[12] They cumulatively express concern at the fact that abuse of women and children 'has now morphed into a scourge to our nation';[13] that '[d]omestic violence has become a scourge in our society' which should not be 'treated lightly' and should be both 'deplored' and 'severely punished';[14] and that the 'rights of children are all too frequently and brutally trampled over in our society' and that those guilty of this conduct 'must face the wrath of the courts'.[15]

[27] The court below concluded in respect of the interests of society:[16]

---

[11] Judgment para 51.
[12] Judgment paras 41-43.
[13] *S v Mashigo & another* [2015] ZASCA 65 para 31.
[14] *S v Kekana* [2014] ZASCA 158 para 20.
[15] *S v P* 2000 (2) SA 656 (SCA) para 13.
[16] Judgment para 44.

'Government and society are alive to the scourge of abuse of children. Despite all positive attempts, we are no closer to eradicating this evil in our society. Courts operate in society and must through their sentencing discretion promote respect for the law. A message must be sent to others of like mindedness that "we are determined to protect the equality, dignity and freedom of all and we shall show no mercy to those [who] seek to invade those rights".'

[28] While I agree with the sentiment that stern sentences are required to punish those who abuse the vulnerable in our society, and to deter those who may be tempted to do so, the idea that no mercy should be shown to them overstates the point. Each case must be decided on its own facts and, as Holmes JA held in *S v Rabie*,[17] punishment should 'fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances'.

[29] The court below then turned to a determination of the sentence and, after considering the 'totality of the facts', it concluded that while a sentence of life imprisonment would have been disproportionate and thus inappropriate, 'the facts of this matter justify a sentence at the higher scale of the deviation from the mandated sentence'.[18] It considered a sentence of 22 years imprisonment to be appropriate in the circumstances.[19]

[30] I can detect no misdirection in the court below's approach to sentence. The offence, for the reasons cited above, is a particularly serious one. The personal circumstances of the appellant have been properly weighed against the seriousness of the offence and the interests of society. Far from inducing a sense of shock, the carefully considered sentence imposed by the court below strikes me as being one that is proportionate to 'the crime, the criminal and the legitimate needs of society'.[20]

[31] That being so, no basis has been established for this court to interfere with the sentence imposed by the court below. The appeal against sentence must therefore fail.

---

[17] *S v Rabie* 1975 (4) SA 855 (A) at 862G-H.
[18] Judgment para 50.
[19] Judgment para 52.2.
[20] *S v Malgas* (fn 6) para 22.

The order

[32] The appeal against both conviction and sentence is dismissed.

_____

C Plasket

Acting Judge of Appeal

APPEARANCES:

For the Appellant:	JJ Strijdom SC
Instructed by:	OA De Meyer Attorneys, Pretoria
	Stander & Vennote, Bloemfontein
For the Respondent:	C Harmzen
Instructed by:	Director of Public Prosecutions, Pretoria
	Director of Public Prosecutions, Bloemfontein