# THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

**Not Reportable**
Case No: 945/2018

In the matter between:

**TYRONE VENTER** **APPELLANT**

and

**THE STATE** **RESPONDENT**

**Neutral citation:** *Tyrone Venter v The State* (Case no 945/2018) [2020] ZASCA 14 (24 March 2020)

**Coram:** SALDULKER, SWAIN, ZONDI, VAN DER MERWE and MOKGOHLOA JJA

**Heard**: 18 February 2020

**Delivered**: 24 March 2020

**Summary:** Criminal Procedure – sentence of four years' imprisonment in terms of s 276(1)*(i)* of the Criminal Procedure Act 51 of 1977 for contravention of s 15(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 and s 17(a) of the Domestic Violence Act 116 of 1998 taken together – sentence not disturbingly inappropriate – no misdirection – appeal dismissed.

## ORDER

**On appeal from:** Gauteng Division of the High Court, Pretoria (Khumalo J and Swanepoel AJ sitting as court of appeal):
The appeal is dismissed.

## JUDGMENT

**Mokgohloa JA (Saldulker, Swain, Zondi and Van der Merwe JJA concurring)**

[1] The appellant was convicted in the Regional Court for the Regional Division of Gauteng, Pretoria on a contravention of s 15(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the Act) as well as a contravention of s 17 (a) of the Domestic Violence Act 116 of 1998 (the Domestic Violence Act). Both counts were taken together for the purposes of sentence. He was sentenced to four years' imprisonment in terms of s 276(1)*(i)* of the Criminal Procedure Act 51 of 1977 (the CPA). He appealed to the Gauteng Division of the High Court, Pretoria against his sentence, but it was dismissed. The appeal against sentence is with the special leave of this Court. The issue in the appeal is whether the trial court properly exercised its discretion in respect of sentence.

[2] Before turning to consider whether the sentence imposed on the appellant was appropriate, a brief consideration of the background facts is necessary. During 2006 the appellant, who was 19 years old at the time, was employed as a sports coach for swimming and cricket at Cornwall Hill College, the school attended by the complainant. The complainant was 12 years old and in grade seven. Like the appellant, the complainant was a swimmer and they were members of the University of Pretoria Sports Institute and would sometimes train together at the university's swimming pool.

[3] Although their friendship started off as being purely platonic, it progressed into an intimate one which included sexual intercourse. They regularly communicated with each other by text messages and through social networks like Mxit. The appellant would invite her to come and visit him at his residence at the University of Pretoria. He would also ask her to come and watch him while he was coaching other swimmers. There they would engage in physical contact that included 'high fives', hugging and holding hands.

[4] The complainant's parents did not approve of this relationship, given the age difference of seven years between the complainant and the appellant. The parents made various efforts to end this relationship but their efforts failed. The complainant's father took away the complainant's cell phone but this did not deter her as the pair continued to communicate and see each other. They did so by using the complainant's friends' cell phones and by writing letters to each other. At some stage the complainant's father phoned the appellant and requested him to stay away from the complainant, to no avail. In June 2007 the complainant's parents obtained an interim domestic violence protection order in terms of the Domestic Violence Act against the appellant, which prohibited him from having any contact with the complainant. The interim protection order did not serve its

purpose, as the appellant simply ignored it and they continued to have contact, with each other.

[5] During 2007 the complainant invited the appellant to attend a carnival at her school so that they could spent some time together. The appellant honoured the invitation and attended the carnival. At some stage, the appellant and the complainant moved away from the crowd and walked to a parking lot near the swimming pool. They started hugging and kissing each other. At that time, the complainant's mother arrived at the school and witnessed the kissing.

[6] In December 2007 the domestic violence protection order was made a final order. Again, the appellant ignored its provisions and they continued communicating with each other. In April 2008 the complainant and the appellant attended the national swimming championships in Durban. They would meet to hug and kiss each other.

[7] The complainant attained the age of 15 years in May 2008. Around this time, the pair discussed having sexual intercourse. The complainant informed the appellant that because of her religious beliefs, she could not have sexual intercourse before marriage. The appellant then started pushing the boundaries sexually, by stating that it would take a lot of self-control for him not to be tempted by the complainant and he would push his pelvic area into her when kissing her, or put his hand under her shirt. The appellant then decided to give her a ring as a symbol that they would be together forever. On 2 June 2008 they had sexual intercourse in the changing room of the squash court near the swimming pool where the complainant and the appellant trained. They continued to have sexual intercourse regularly at different places.

[8] During 2010 the complainant's parents hired the services of a private investigator. They discovered that the appellant had continued to have contact with the complainant in spite of the protection order. The complainant's parents also discovered that the appellant and the complainant had had sexual intercourse. The complainant's father confronted the appellant in the presence of the complainant about his relationship with the complainant. He asked the appellant if the complainant had ever been to his place and whether he and the complainant had ever had sexual intercourse. The appellant denied this. The complainant's parents then opened a criminal case against the appellant. The appellant persisted in his denial, of having had sexual intercourse with the complainant, including during the trial.

[9] In sentencing the appellant, the trial court took into consideration his personal circumstances, the interest of society, the nature of the offences and the fact that the appellant had committed separate offences in terms of the Act and the Domestic Violence Act. In order to ameliorate the effect of the sentence, the trial court decided to take both offences together for the purposes of sentence.

[10] Before us, counsel for the appellant submitted that the trial court misdirected itself by over-emphasising the seriousness and prevalence of the offence without having proper regard to the appellant's personal circumstances. Counsel submitted that the trial court had failed to take proper consideration of the nature of the relationship between the appellant and the complainant, which had according to him gradually developed into a love relationship. It was only after two years that their relationship had become sexual when the complainant had turned 15. Counsel also submitted that if the appellant's intentions were purely sexual, he would have insisted on sexual intercourse sooner. He submitted that the appellant had no malicious intent, but rather inappropriately fell in love with a girl, much too young for him.

[11] In *S v Bogaards*, it was held that an appellate court's power to interfere with sentences imposed by lower courts was as follows;

'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.'[1]

[12] The question is whether the trial court misdirected itself to such an extent by imposing a sentence of four years' imprisonment in terms of s 276(1)*(i)*of the CPA, that the sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it. In my view, the trial court did not misdirect itself as suggested by counsel. The submissions have no factual foundation as the appellant consistently denied that a genuine love relationship between him and the complainant gradually led to sexual intercourse. For the following reasons, I regard the sentence as appropriate. The complainant was 12 years old and appellant was 19 years old, and the complainant looked up to the appellant as her swimming role model. Aside from their age difference, the appellant was employed by her school to coach swimming. The appellant was in a position of authority and trust with regard to the complainant. In spite of this, the appellant began grooming the complainant when she was still young, and when she was 15 years old, he began a sexual relationship with her.

[13] On numerous occasions, the complainant's parents begged him to stop any contact with the complainant to the extent that they obtained a domestic violence protection order against the appellant. The appellant ignored the court order and continued to engage with the complainant. The appellant knew that the complainant believed in abstaining from sex until marriage, however, he seduced

[1] *Bogaards v S* [2012] ZACC 23 (CC); 2013 (1) SACR 1 (CC); 2012 (12) BCLR 1261 (CC) para 41

her into acceding to his requests for sexual intercourse, by giving her a ring to assure her that this was no fleeting relationship.

[14] When the complainant's father confronted the appellant about him having had sexual intercourse with the complainant, the appellant denied it and persisted with this denial throughout the trial. The first time he admitted that he had had sexual intercourse with the complainant was when he applied for special leave to appeal to this Court. In my view, this was done to persuade this Court to grant him special leave. In the circumstances, the appellant does not take responsibility for his actions, which have not only affected him, and his swimming career, but also the complainant and her swimming career.

[15] Central to the argument of the appellant was that correctional supervision was a suitable sentence in the present case. The probation officer viewed correctional supervision as a suitable sentence, together with a suspended sentence, for the contravention of the protection order. The appellant submitted that in terms of s 276 (3) (a) of the CPA, specific provision is made for the imposition of a suspended term of imprisonment, in addition to correctional supervision. The probation officer however agreed, that the appellant did not take responsibility for the sexual intercourse, because he still denied that he had had sexual intercourse with the complaint, as at the time the probation officer gave evidence. The appellant did however accept that he had caused harm to the family of the complainant. The probation officer also stated that the appellant, because he did not take responsibility for his actions, did not have real regret and remorse for what had happened.

[16] The State therefore correctly submitted, that the appellant displayed no real remorse for what he had done and that nothing in the evidence showed that he had accepted the seriousness of his conduct and intended to make such amends,

as lay within his power. The State submitted that there was no remorse, no regret and therefore no hope of rehabilitation on the part of the appellant and pointed to the age gap of seven years between the complainant and the appellant, as an aggravating factor. The complainant was only 12 years old and the appellant 19 years old, when the relationship started. In addition, the complainant was only 15 years old and the appellant 22 years old, when sexual intercourse first took place. A further aggravating feature was that the appellant disregarded, over a period of time, the consequences of the contravention of the protection order that was in place. In addition, it was the appellant and not the complainant who pursued the sexual interaction and from the letters exchanged between them, the complainant was not ready for sexual intercourse. The State submitted that the appellant used the complainant's youthfulness in order to manipulate her discreetly into submission. The State accordingly disputed that the Magistrate overemphasised the interest of the community, at the expense of the personal circumstances of the appellant. The Magistrate had considered all of the circumstances of the case, in deciding that the sentence was proportionate to the offences, of which the appellant had been convicted.

[17] There is, accordingly, in my view, no basis to find that the trial court misdirected itself in imposing the sentence of four years' imprisonment in terms of s 276(1)*(i)* of the CPA, in terms of which the appellant may be placed under correctional supervision in his discretion by the Commissioner of Correctional Services. As decided in *S v Scheepers* 2006 (1) SACR 72 (SCA) para 10, this section is appropriate where it is decided that a custodial sentence is essential, but the nature of the offence, suggests that an extended period of incarceration is inappropriate. It achieves the object of a sentence unavoidably entailing imprisonment, but mitigates it substantially, by creating the prospect of early release on appropriate conditions, under a correctional supervision program. In terms of s 73 (7) of the Correctional Services Act 111 of 1998, the appellant must

serve at least one sixth of his sentence ie 8 months, before being considered for placement under correctional supervision. There is accordingly no basis upon which to find, that the sentence imposed by the trial court is so disproportionate or shocking, that no other court would have imposed such a sentence. This Court is therefore not entitled to interfere with the sentence imposed by the trial court. The appeal must accordingly fail.

[18] In the result, the following order is made:

The appeal is dismissed.

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F E Mokgohloa

Judge of Appeal

APPEARANCES

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| For appellant: | P Pistorius |
| Instructed by: | Emile Viviers Attorneys, Pretoria |
| | Symington & De Kok Attorneys, Bloemfontein |
| For respondent: | S Scheepers |
| Instructed by: | Director of Public Prosecutions, Pretoria |
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