THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 1210/2016

In the matter between:

DANIEL COENRAAD DE BEER **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *De Beer v The State* (1210/2016) ZASCA 183 (5 December 2017)

Coram: Cachalia and Bosielo JJA and Tsoka, Ploos van Amstel and Rogers AJJA

Heard: 2 November 2017

Delivered: 5 December 2017

Summary: Criminal Law and Procedure: appeal to high court against conviction of rape: after notice to appellant sentence increased to life imprisonment: court entitled to increase sentence in terms of s309 (3) of the Criminal Procedure Act 51 of 1977: sentence disproportionate: sentence of regional court reinstated.

ORDER

On appeal from: Gauteng Local Division, Johannesburg (Vally J and Siwendu AJ, sitting as a court of appeal):

(a) Paragraph 2 of the order made by the Gauteng Local Division, Johannesburg, is set aside, save for that part of it which directed that the name of the appellant shall be reflected in the sexual offenders' register.

(b) The sentence imposed by the regional court is reinstated, namely 15 years' imprisonment, 5 years of which is suspended for five years on condition that the accused is not convicted of a contravention of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, committed during the period of suspension. The effective period of imprisonment will be 10 years.

(c) The sentence is antedated to 9 October 2013.

JUDGMENT

Ploos van Amstel AJA (Cachalia JA and Tsoka and Rogers AJJA concurring):

[1] The appellant in this matter was convicted in a regional court of rape in contravention of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the Act). The charge against him was that over a period of about four months he on numerous occasions committed an act of sexual penetration with an eight year old girl by inserting his fingers into her private parts and that he made her touch his private parts. The regional magistrate sentenced him to 15 years' imprisonment, of which he suspended five years on condition that the appellant is not convicted of contravening the Act in question during the period of suspension.

[2] With the leave of the regional magistrate the appellant appealed against his conviction to the Gauteng Local Division in Johannesburg. The appeal was set down for

hearing on 29 February 2016. On that day the appellant was notified by the court that it would consider increasing the sentence in the event of the conviction being upheld, and that he should be ready to make submissions as to why this should not be done. The appeal was then postponed to 10 May 2016 in order to give both the appellant and the State an opportunity to prepare submissions in this regard.

[3] In the event the court a quo dismissed the appeal in respect of the conviction and increased the sentence to imprisonment for life. On 11 October 2016 this court granted the appellant special leave to appeal against the increased sentence.

[4] The first line of attack in this court related to the power of the court a quo to have increased the sentence in circumstances where the appellant had only appealed against his conviction and the State had not appealed against the sentence.

[5] In *S v Bogaards* 2013 (1) SACR 1 (CC) Khampepe J acknowledged that a court of appeal is empowered to set aside a sentence and impose a more severe one. She said that at common law there was no formal requirement for an appeal court to give an accused person notice when that court was considering an increased sentence on appeal. The Constitutional Court (the CC) held that it was necessary to develop the common law so as to require notice to an appellant where an increase in the sentence is being contemplated by the court of its own accord. Khampepe J said the following at para 72:

'It is worth emphasising that, requiring the appellate court to give the accused person notice that it is considering an increase in sentence or imposing a higher sentence upon conviction for a substituted offence, does not fetter that court's discretion to increase the sentence or to impose a substituted conviction with a higher sentence. The court may clearly do so in terms of s 22 *(b)* of the Supreme Court Act and s 322 of the CPA. Elevating the notice practice to a requirement merely sets out the correct procedure according to which the court must ultimately exercise that discretion. The notice requirement is merely a prerequisite to the appellate court's exercise of its discretion. After notice has been given and the accused person has had an opportunity to give pointed submissions on the potential increase or the imposition of a higher

sentence upon conviction of another offence, the appellate court is entitled to increase the sentence or impose a higher sentence if it determines that this is what justice requires.'

[6] Counsel for the appellant however submitted that where the appeal is only against the conviction the question of sentence is not before the court, with the result that the sentence cannot be increased. In support of this submission he relied on the judgment in *S v Nabolisa* 2013 (2) SACR 221 (CC).

[7] The facts in *Nabolisa* were different. The appellant in that matter had been convicted by the KwaZulu-Natal Division in Pietermaritzburg of dealing in dangerous dependence-producing drugs and sentenced to 12 years' imprisonment. He appealed to this court against his conviction and sentence. The State did not seek leave to cross-appeal against the sentence, but in its written heads of argument indicated that it would ask for the sentence to be increased from 12 years to 15 years' imprisonment. It later filed supplementary heads of argument, in which it indicated that it would ask for the sentence to be increased to 20 years' imprisonment. In accordance with the then prevailing practice this court considered that the matter of sentence was properly before it and increased the sentence to 20 years' imprisonment. On appeal to the CC it was held that the State cannot seek an increase in a sentence without cross-appealing against it. It held that is not sufficient for the State merely to indicate in its heads of argument that it intends to do so.

[8] There had been no notification to the appellant in *Nabolisa* that this court, of its own accord, would consider an increase in sentence in the event of the conviction being upheld. That case was concerned solely with the right of the State to ask for an increase in the sentence where it had not cross-appealed. The judgement is therefore not inconsistent with the proposition that the question of sentence may become part of the subject matter of the appeal by the appeal court notifying the appellant that it is considering an increase.

[9] There are provisions of the Criminal Procedure Act 51 of 1977 (the CPA) which are relevant in the present context. Section 309 (3) provides that in an appeal from a lower court the High Court, in addition to the powers referred to in s 304 (2), shall have the power to increase any sentence imposed upon the appellant or to impose any other form of sentence in lieu of or in addition to such sentence. Section 322, which appears in the chapter dealing with appeals in cases of criminal proceedings in superior courts, provides in subsection (1)*(b)* that in the case of an appeal against a conviction or of any question of law reserved, the court of appeal may give such judgment as ought to have been given at the trial or impose such punishment as ought to have been imposed at the trial.

[10] In *S v F* 1983 (1) SA 747 (O) the appellant appealed against his conviction but not against the sentence. He was notified by the court that it may consider increasing the sentence in the event of the conviction being upheld. It was argued that the court did not have the power to do so as sentence was not part of the subject matter of the appeal. Smuts J, with whom LC Steyn J concurred, dismissed this argument and held that in terms of s 309 (3) of the CPA the court had the power to increase the sentence also where the appellant had only appealed against the conviction. This case was referred to with approval in *S v Kirsten* 1988 (1) SA 415 (A) at 421F.

[11] This is consistent with the notion that sentence is always a matter for the court. That is why the State and an accused person cannot bind a court by agreeing what the sentence should be. When an appeal is lodged against a conviction, and it appears to the appeal court that the sentence imposed by the lower court is manifestly inappropriate, it cannot be deprived of its jurisdiction to ensure that justice is done by the failure of the State to cross-appeal. In such a case the appeal court is entitled to notify the appellant that it may consider an increase in the sentence if the conviction is upheld. The question of sentence then becomes part of the subject matter of the appeal. It is true that this may discourage an appellant from pursuing his appeal against the conviction, but this is no reason why a sentence which is manifestly inappropriate

should be allowed to stand. The victims of crime have a legitimate interest in expecting appropriate sentences to be imposed and that justice be done.

[12] When confronted with the provisions of s 309 (3) and the decisions in *S v F* and *S v Kirsten*, counsel for the appellant abandoned the point with regard to the power of the court a quo to have increased the sentence. Nothing further needs to be said about it.

[13] The remaining question is whether the increase by the court a quo of the sentence to life imprisonment was appropriate.

[14] The offences occurred during the period December 2009 to April 2010. The young girl in question is the appellant's stepdaughter. She and her sister lived with him and their mother. At the time of the trial, which commenced in May 2011, the appellant was 34 years old. He was employed by a firm that repaired railway lines. The basis of the charge of rape was that he had inserted his finger in the girl's vagina on numerous occasions, in her bedroom. The medical evidence was that there was swelling in her vagina, and infection. The hymen was however intact. The appellant pleaded not guilty but did not testify in his defence.

[15] As I have said, the regional magistrate imposed a sentence of 15 years' imprisonment, of which he suspended five years. He did not spell out what he considered to be substantial and compelling circumstances. However, my impression, from a reading of his judgment, is that he did not impose the prescribed minimum sentence of life imprisonment because he felt it would be disproportionate in the circumstances.

[16] The court a quo, which heard the appeal, expressed the view that the regional magistrate had not provided any logical reason for not imposing the prescribed minimum sentence. It held that no substantial and compelling circumstances were

shown to exist, and that imprisonment for life would not be disproportionate to the offence.

[17] The minimum sentencing legislation (the Criminal Law Amendment Act 105 of 1997) has had a far reaching effect on sentences imposed in respect of the offences listed in the Act. This court has pointed out on many occasions that injustices may occur if the prescribed minimum sentences are imposed without a proper consideration of the existence of substantial and compelling circumstances, including the question whether the prescribed sentence will be disproportionate to the offence, in the wide sense, in other words, including all the circumstances of not only the offence itself, but also the circumstances of the parties involved.

[18] The duty on the courts to avoid injustice, in the present context, was perhaps brought into sharper focus by the provisions of the Criminal Law (Sexual Offences and Related Matters) Amendment Act. Its effect was to expand the definition of rape to include an unlawful and intentional act of sexual penetration with a complainant, without his or her consent. 'Sexual penetration' is defined in s 1, in wide terms, to include any act which causes penetration to any extent whatsoever by any part of the body of one person, or any object, into or beyond the genital organs or anus of another person. What would previously have amounted to an indecent assault, and attracted a significantly lighter sentence, may now fall within the definition of rape in s 3, and attract the minimum prescribed sentence. Where the victim is a person under the age of 16 years the prescribed minimum sentence, in terms of s 51(1) read with Part I of Schedule 2 of Act 105 of 1997, is imprisonment for life.

[19] It is therefore important, in every case, to guard against an injustice being perpetrated by adhering slavishly to the prescribed minimum sentences. In *S v Malgas* 2001 (2) SA 1222 (SCA) Marais JA said the following, at para 22:

'The greater the sense of unease a court feels about the imposition of a prescribed sentence, the greater its anxiety will be that it may be perpetrating an injustice. Once a court reaches the point where unease is hardened into a conviction that an injustice will be done, that can only be

because it is satisfied that the circumstances of the particular case render the prescribed sentence unjust or, as some might prefer to put it, disproportionate to the crime, the criminal and the legitimate needs of society. If that is the result of a consideration of the circumstances the court is entitled to characterise them as substantial and compelling and such as to justify the imposition of a lesser sentence'.

He added the following, at para 23: 'While speaking of injustice, it is necessary to add that the imposition of the prescribed sentence need not amount to a shocking injustice ("n skokkende onreg" as it has been put in some of the cases in the High Court) before a departure is justified. That it would be an injustice is enough. One does not calibrate injustices in a court of law and take note only of those which are shocking'.

[20] In *S v GK* 2013 (2) SACR 505 (WCC) is an insightful discussion by Rogers J, with whom Gamble J concurred, of the approach to the proportionality of life sentences in rape cases. He referred to cases such as *Malgas, S v Abrahams* 2002 (1) SACR 116 (SCA), *S v Mahomotsa* 2002 (2) SACR 435 (SCA*), S v Vilakazi* 2009 (1) SACR 552 (SCA) and *S v SMM* 2013 (2) SACR 292 (SCA), all of which support his approach. He also referred to crimes which would previously have constituted indecent assault and would probably have attracted a few years' imprisonment, but now fall within the minimum sentencing regime. The present case falls into this category. See in this regard the analysis in *S v Coetzee* 2010 (1) SACR 176 (SCA), at paras 18 to 25, of sentences imposed in cases of indecent assault. The sentences included terms of imprisonment ranging between eighteen months and five years, with portions thereof suspended, and in some cases correctional supervision in terms of s 276(1) of the CPA.

[21] The court a quo does not seem to me to have given proper consideration to the question whether a life sentence was proportionate to the crime, the appellant and the legitimate needs of society. It seems to me to have focused too much on the fact that life imprisonment was the prescribed minimum sentence.

[22] I am of course conscious of the fact that the complainant was only eight years old when the crime was committed. The appellant was in a position of trust as her stepfather, which he abused. On the other hand, the crime was not accompanied by the

sort of violence that often occurs when a young girl is attacked by a stranger, away from her home. The rape was committed by the insertion of a finger, which is plainly lower on the scale of severity than full sexual intercourse. What counts against the appellant however is the fact that he did this over the course of about four months, although the complainant testified that it only happened on three occasions. It also counts against him that he threatened to hurt the complainant if she told anyone what he was doing. The complainant has been affected emotionally and psychologically by the incident, although the main cause of her sadness appears to be that her mother did not believe what she said, and took the appellant's side.

[23] The appellant deserved a custodial sentence, but imprisonment for life in my view will be an injustice. The disproportionality seems plain to me.

[24] It remains to consider what to do about the sentence. The discretion in this regard belonged to the regional magistrate. I do not consider that he misdirected himself in any material respect, or that he exercised his discretion improperly. There is therefore no basis for interfering with his sentence. The suspended part of the sentence will hopefully serve its purpose.

[25] In those circumstances the appeal against the increase of the sentence should succeed, subject to the correction of an error in the condition of suspension imposed by the regional magistrate.

[26] The following order is made:

(a) Paragraph 2 of the order made by the Gauteng Local Division, Johannesburg, is set aside, save for that part of it which directed that the name of the appellant shall be reflected in the sexual offenders' register.

(b) The sentence imposed by the regional court is reinstated, namely 15 years' imprisonment, 5 years of which is suspended for five years on condition that the accused is not convicted of a contravention of the Criminal Law (Sexual Offences and

Related Matters) Amendment Act 32 of 2007, committed during the period of suspension. The effective period of imprisonment will be 10 years.

(c) The sentence is antedated to 9 October 2013.

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JA Ploos van Amstel

Acting Judge of Appeal

Bosielo JA (Tsoka AJA concurring):

[27] This is an appeal against a sentence of imprisonment for life imposed on appeal by the Gauteng Local Division, Johannesburg. The appellant was convicted of rape of an eight year old girl, read with s 3 and further with ss 1, 55, 56(1), 57, 58, 59, 60 and 61 of the Criminal Law Amendment Act (Sexual Offences and Related Matters) 32 of 2007. Furthermore, this charge was to read together with ss 256, 257 and 281 of the Criminal Procedure Act 51 of 1977 (CPA) together with the provisions of s 51 of the Criminal Law Amendment Act 105 of 1997 (CLAA) as amended as well as ss 92(2) and 94 of the CPA.

[28] In essence, the charge against the appellant is that he inserted his fingers on various occasions into the complainant's private parts, licking it and showing her his private parts which he would ask her to touch.

[29] The appellant was convicted as charged and sentenced to imprisonment for 15 years with 5 years suspended on condition that he is not convicted of contravening the

Sexual Offences and Related Matters Act 32 of 1997 during the period of suspension. The effective sentence was 10 years' imprisonment.

[30] With the leave of the regional magistrate, the appellant filed this appeal with the Gauteng Local Division, Johannesburg, against his conviction only. The state did not file any appeal against the sentence imposed by the regional magistrate, nor did it cross-appeal against the sentence. In essence there was no appeal against the sentence before the court below.

[31] The appellant's appeal against his conviction was initially enrolled for 29 February 2016. On this day, the high court, *mero motu* placed the appellant on notice to indicate why his sentence should not be increased if it were to find that his conviction was in order.

[32] It appears that the high court had a *prima facie* view that the sentence of 10 years' imprisonment was in the circumstances of this case inappropriate, as the prescribed minimum sentence was life imprisonment. Hence it gave notification to both parties and an opportunity to prepare arguments on this issue in the case. The matter was postponed to 10 May 2016 to allow both the appellant and the respondent sufficient time to prepare their submissions.

[33] At the hearing of the appeal, both the appellant and the respondent led evidence and addressed the court regarding the sentence as per the notification. After submissions by both parties, the court below confirmed the conviction and set aside the effective sentence of imprisonment for 10 years and replaced it with life imprisonment.

[34] Aggrieved by this, the appellant petitioned this Court for special leave to appeal against both conviction and sentence. This Court granted the special leave to appeal only against the sentence of life imprisonment only on 11 October 2016.

[35] The crisp legal question to be answered in this appeal is whether a sentencing court has the authority where the respondent neither lodged an appeal nor cross-appeal against the sentence imposed by another court, to raise the inappropriateness of the sentence *mero motu*. The appellant says it can whilst the respondent says it cannot.

[36] Before us on appeal, counsel for the appellant submitted that, absent a formal application for a cross-appeal on sentence, the court below had no authority to raise the issue of the inappropriateness of the sentence *mero motu*.

[37] On the other hand, the respondent's counsel submitted that s 309(3) of the CPA gave the court below the power and authority, where the circumstances justify it, to set a sentence by the trial court aside, and substitute it with an appropriate sentence.

[38] He argued further that in this case, not only did the court below give both parties due notice, it gave them sufficient time to prepare their submissions. As a result, both the applicant and the respondent made submissions to the court below on the issue on which the court below had warned them. In conclusion, he asserted that the court below acted properly in terms of s 309(3) and the appeal ought to be dismissed.

[39] A clear reading of s 309(3) tells us in no uncertain terms that the court below had authority to act as it did. During the hearing counsel for the appellant conceded this.

[40] The next question is whether the sentence imposed by the court below is proportionate to the crime committed. It is true that because the offence for which the appellant was convicted falls within the ambit of s 51(1) of the CLAA, life imprisonment in the absence of substantial and compelling circumstances, would have qualified as an appropriate sentence. However, every case has to be adjudicated on its own circumstances, including the nature and impact of the crime and the legitimate interests

of the public, the personal circumstances of the appellant, the so-called basic triad. *S v Zinn* 1969 (2) SA 537 (A).

[41] After careful consideration of relevant facts, the regional magistrate imposed a sentence of 15 years' imprisonment and suspended 5 years on suitable conditions after it had found substantial circumstances. However, the court below found the sentence to be disproportionate to the crime committed. It altered the sentence to life imprisonment.

[42] The question which confronts us in this appeal is whether a sentence of imprisonment for life which was imposed by the court below, in the circumstances of this case, is disturbingly disproportionate that it evokes a sense of shock, and is unjust.

[43] In a nutshell, the evidence showed that: the appellant raped the complainant several times with his fingers, he made her lick his fingers, he also made her touch his penis, that she was 8 years old, thus a minor, the appellant was her stepfather, thus in a position of trust. However, the medical report revealed superficial scratches on her vagina, but the hymen was still intact.

[44] Regarding the appellant, he was 37 years old at the time when he was sentenced; he is married to the complainant's mother; although he is not the complainant's natural father, he is gainfully employed and looks after his brother. The court below found these facts not weighty enough to qualify as substantial and compelling to justify a lesser sentence than life imprisonment.

[45] It is a truism that the Criminal Law Amendment Act 108 of 1997 introduced far-reaching changes to our sentencing regime. As a reaction to the escalating levels of serious crime, the Legislature introduced mandatory sentences for certain specified offences. There is some measure of uncertainty, regarding the correct approach as to the proper application of minimum sentences prescribed by the CLAA. Some courts

have held that the minimum prescribed sentence must be applied as a matter of course as soon as an accused is convicted of an offence falling within the various categories of the CLAA, unless the circumstances of the appellant are shown to be exceptional. This approach is wrong.

[46] The correct approach was adumbrated as follows in *S v Vilakazi* 2009 (1) SACR 552 (SCA) at 566A-D:

'The court was required to apply its mind to the question of whether the sentence was proportional to the offence. . . .'

The court proceeded at 559e-562d to hold that:

'It was accordingly incumbent upon a court to assess whether the prescribed sentence was indeed proportionate to a particular offence. If any circumstances were present that would constitute weighty justification for the imposition of a lesser. Thus, a prescribed sentence could not be assumed a priori to be either proportionate to the offence, or, indeed, constitutionally permissible. Proportionality was to be determined on the circumstances of a particular case.'

Accordingly, the notion that prescribed sentence is to be imposed in 'typical' cases, and departed from only in 'atypical' ones was without merit.

[47] As alluded to above, the question remains, whether are circumstances in this case such that they call for life imprisonment as the most appropriate sentence. Is the sentence of imprisonment for 10 years imposed so disturbingly disproportionate that it requires to be interfered with?

[48] Having perused the record, I am not persuaded that the circumstances of this case call for life imprisonment as the appropriate sentence. In fact it appears to me to be disturbingly disproportionate and it induces a sense of shock. Importantly, no misdirection has been shown on the part of the regional magistrate. Neither has it been shown to have exercised its discretion injudiciously. It follows its sentence is not open to an attack. It must stand.

[49] It is axiomatic that imprisonment for life is the ultimate sentence in our statute books. It replaced the death sentence. It has serious and far reaching consequences. Section 51(1) of the CLAA prescribes it for the offences like the one for which the appellant is convicted unless the court can find substantial and compelling circumstances to justify a departure from the sentence which is peremptorily decreed by the CLAA.

[50] What then are substantial and compelling circumstances? This Court has cautioned in the seminal judgment of *S v Malgas* 2001 (1) SACR 469 (SCA) that there is no closed category of substantial and compelling circumstances. It cautions all sentencing officers to consider all the facts, including what is traditionally known as ordinary mitigating circumstances to determine if, taken together, they do not constitute substantial and compelling circumstances. See *Malgas* (supra)

[51] Having considered all the facts relevant to sentencing, the regional magistrate imposed a sentence of 15 years' imprisonment with 5 years thereof suspended for five years on suitable conditions. The court below found that there was no justification for the regional court to have imposed the sentence that it did and not the minimum sentence prescribed by CLAA. To my mind, the facts of this case do not justify a sentence of imprisonment for life.

[52] It follows that the sentence imposed by the court below is inappropriate and must be set aside.

For all these reasons, I will concur in the order of the majority.

L O Bosielo
Judge of Appeal

APPEARANCES:

For Appellants:	J J Greeff
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