

NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

In the matter between:

Case No: CC 17/2018

Date heard: 24 January 2019

Date delivered: 25 January 2019

THE STATE

And

DONOVAN HEUGH

WANDARAY RUITERS

Accused

SENTENCE

Goosen J:

[1] The accused, having been convicted of kidnapping, rape and robbery with aggravating circumstances must now be sentenced. The task of imposing a fair and just sentence is, generally speaking a difficult task. A wide range of factors must be taken into consideration; competing interests must be weighed and balanced; and the sentence – the court's punishment of the transgression – must be constructed to achieve a range of purposes. The task is made the more difficult because of the

nature of the crime and the circumstances in which it was committed. This is so because the graver the offence and the more egregious its effects the narrower the ambit for punitive options which may properly and effectively remediate the transgression.

[2] In this case, the task is complicated by the significant disparity in ages between the accused. Equivalent criminal conduct ought, so far as reasonably possible, to be met by equivalent and commensurate sanctions. However, no easy calculus is available to achieve such consistency. What is called for is a careful weighing of all of the relevant factors and the imposition of a sanction which achieves, so far as can reasonably be achieved, an appropriate individuation of the sentence so that it meets the exigencies of the crime and the criminal.

[3] The crimes for which the accused have been convicted are, without doubt, grave offences which are alarmingly prevalent and, notwithstanding efforts at policing and the imposition of the harshest of sentences, increasing features of our daily lives. The circumstances in which these crimes were committed are shocking. A young woman waits for her public transport outside of her home so that she may go to work. A car pulls up. She is forced into the car; robbed of her possessions; driven to a secluded place; walked into the bushes by two men and there raped repeatedly.

[4] The seemingly opportunistic circumstances of the crimes are striking. The victim became a victim because she happened to be standing on the side of the road alone. The perpetrators one moment going about their business, next seize upon this opportunity. Within a short period an otherwise unremarkable morning is transformed

into a shattering life experience for the victim and her family. For the perpetrators, their conduct will mark them and their families for life.

[5] It is to redress this egregious and terrible conduct - however imperfectly – that the purpose of sentencing is directed. The crime of rape, committed in circumstances where the victim is raped by more than one person or is raped more than once, carries with it a prescribed sentence of life imprisonment. Robbery committed with aggravating circumstances carries a sentence of 15 years' imprisonment. The crime of kidnapping carries a prescribed sentence of 5 years' imprisonment where it is committed in circumstances involving the use of a firearm¹. However, each of these prescribed sentences does not apply where the accused is a child under the age of 18 years at the time of the commission of the offence². That is the case in respect of accused 2.

[6] In respect of accused 2 the provisions of the ***Child Justice Act***³ apply. Section 77 of that Act provides as follows:

“(3) A child who is 14 years or older at the time of being sentenced for the offence may only be sentenced to imprisonment, if the child is convicted of an offence referred to in-

(a) Schedule 3;

(b) Schedule 2, if substantial and compelling reasons exist for imposing a sentence of imprisonment;

¹ S 51(1) and (2) of Act 105 of 1997 read with Schedule 2 to the Act.

² S 51(6) of Act 105 of 1997 (as amended)

³ Act No, 75 of 2008

(c) Schedule 1, if the child has a record of relevant previous convictions and substantial and compelling reasons exist for imposing a sentence of imprisonment.

(4) A child referred to in subsection (3) may be sentenced to a sentence of imprisonment-

(a) for a period not exceeding 25 years; or

(b) envisaged in section 276 (1) (i) of the Criminal Procedure Act.

(5) A child justice court, imposing a sentence of imprisonment, must take into account the number of days that the child has spent in prison or a child and youth care centre prior to the sentence being imposed."

The offences for which accused 2 has been convicted fall within the ambit of Schedule 3 to the ***Child Justice Act***. Subsection (4), referred to above, recognises the need in a particular case to impose a lengthy period of imprisonment for the very serious offences incorporated in Schedule 3 but imposes a limit on the period of each such sentence.

[7] In determining an appropriate sentence i.e. whether direct imprisonment ought to be imposed and the length of such sentence, a court will have regard to the nature of the crime and its effect; the circumstances of the accused and factors relevant to his moral blameworthiness; and to the interests of the society. It will then seek to balance these interests and to impose a sentence which, in its judgment, meets the purpose of rehabilitating the accused while serving to deter future transgressions.

[8] It is now trite that a court may depart from the statutorily prescribed sentences if it is satisfied that substantial and compelling circumstances are present which warrant the departure. Indeed, a court must do so where it is satisfied that the imposition of the prescribed sentence will be disproportionate and will bring about an injustice⁴.

[9] Accused 1 is 25 years of age. The accused is unmarried. He is the father of a 9-year-old daughter who resides with and is cared for by her mother. He was self-employed as a barber at the time of the commission of the offences. He resided with his mother. He completed grade 7 at school. As indicated in the pre-sentence report prepared on behalf of accused 2, to which further reference will be made hereunder, the area in which both accused live is characterised by poverty; alcohol and drug abuse and gang-related activity. The accused did not, however, suggest that this played a role in the circumstances giving rise to the offences. He has 4 previous convictions. On 28 July 2011, he was convicted of robbery and sentenced, in terms of s 276(i) of the **Criminal Procedure Act**⁵ to 3 years' imprisonment. On 11 November 2013, he was convicted of theft for which he received a sentence of 18 months correctional supervision of which 6 months was suspended. On 18 June 2014, he was convicted of malicious damage to property and housebreaking with intent to steal and theft. For the latter he received a sentence of 36 months imprisonment of which 12 months was suspended for 4 years. Finally, on 13 June 2016, he was convicted of a contravention of a domestic violence order issued in

⁴ See generally *S v Malgas* 2001 (1) SACR 469 (SCA); *S v Vilikazi* 2009 (1) SACR 552 (SCA)

⁵ Act No 51 of 1977

terms of the ***Domestic Violence Act***⁶. He was sentenced to 9 months direct imprisonment.

[10] These previous convictions display prior criminal conduct involving dishonesty and violence. The criminal conduct commenced at a young age and both direct imprisonment and deterrent sentences do not appear to have had the desired corrective effect. On the contrary, the pattern of conduct suggests a troubling progression in the seriousness of the offences committed.

[11] The circumstances in which the offences were committed and the impact upon the victim far outweigh the personal circumstances of the accused. In my view, these circumstances, even weighed cumulatively, do not establish substantial and compelling circumstances.

[12] The psychological impact of the crimes upon the victim is serious. She testified to her fear of leaving her home. She explained that she had to change her work since she no longer feels safe to take public transport. She now works close to her home. The victim impact assessment statement contained in the pre-sentence report reflects the severe psychological trauma which the complainant has experienced and continues to suffer. She states that the crimes have been devastating and that her life has been drastically changed. It appears that in the period after the rape the complainant exhibited certain 'bizarre' behaviour. Her employer found that she was responding harshly towards the children; that she was "sexualising" and misinterpreting innocent child behaviour and that she was conflictual. She became emotional when describing this to the probation officer and ascribed it to the trauma she suffered. The consequence was that she could no

⁶ Act No, 116 of 1998

longer work with children, which was what she had trained to do. She is currently undergoing therapy to enable her to cope.

[13] This post-traumatic behaviour is to be contrasted with a report received from the complainant's previous employer, where she had worked prior to the incident. That report describes her as one of the best teachers; that she was hardworking and energetic and that her work with children was faultless. It is apparent from these contrasting reports that the complainant remains deeply traumatized by events giving rise to this case and that her psychological suffering persists.

[14] Our society rightly expects that persons convicted of such terrible crimes – crimes which shatter the lives of the victim and negate the promise of peace and security for women and children, should suffer significant punishment. It is with this in mind, that the legislature has prescribed certain sentences. They should not be departed from for flimsy or insubstantial reasons.

[15] In my view, taking into account the nature of the crimes and their effect upon the victim, I am unable to find, in the case of accused 1 that there are substantial and compelling reasons to depart from the prescribed sentences. I accept that accused 1 is still a relatively young man. He is however not a youth whose callow immaturity might explain his aberrant conduct. He is no stranger to such conduct and he has experienced the effects of punishment. The fact that it has not caused him to alter his behaviour does not augur well.

[16] In all the circumstances I am satisfied that in respect of each of those offences for which a sentence is prescribed, that sentence is both proportionate and appropriate. In respect of the other offence, namely the pointing of a firearm, a short period of direct imprisonment is warranted. In the case of accused 1 all of the

sentences will run concurrently with the prescribed sentence in respect of the rape charge.

[17] Accused 2 stands in a wholly different position to accused 1. He was 16 years old at the time of the commission of the offences. An abridged birth certificate handed in as exhibit "F" reflects his birth date as 21 December 2000. The offences were committed on 17 July 2017. He has no previous convictions. A pre-sentence report (exhibit "G") was prepared by a probation officer. It is based on extensive interviews conducted with members of the accused's family. It records that the accused is the only child of his parents. The accused's father was tragically killed in 2002 when the accused was 2 years old. He was thereafter cared for by his mother who passed away in 2009. Following an investigation into the social circumstances of the accused, he was found to be a child in need of care. His paternal aunt and uncle took him into foster care. He has been living with them and their four children since then. The economic circumstances of the household are poor. The family survives on the single income of his foster father and a child support grant.

[18] The accused is described as a quiet, introverted child who functions well within the family and participates in church-related activities. It appears that he was exposed, at an early age, to drug and alcohol abuse by his parents and that his intellectual capacity, described as borderline, is mildly impaired. He attended a school for children with special needs between 2012 and 2016.

[19] According to the report the accused started using drugs, particularly marijuana, approximately 4 years ago. Despite being warned about this and attempts by his foster parents to prevent it, he has continued. He lost interest in school and 'dropped-out' as a result. He has taken to associating with youth in the area where

he lives and has at times spent time at a house where they gather to smoke marijuana.

[20] He is the father of a child who will shortly be 1 year old. Since he is not employed and has no means to support the child his foster parents provide the mother of the child with some assistance. In regard to his attitude to the offences, the report states that he does feel regret at his actions. Although he maintains his innocence in relation to the rape charge, he admits his role in the robbery and kidnapping.

[21] In dealing with sentencing options the author of the report expresses the view, in the light of the seriousness of the crimes, that direct imprisonment would be the only appropriate sentence. The report notes however that his personal circumstances, his age and his role in the commission of the offences are strongly mitigating.

[22] As indicated in the main judgment, the complainant testified that accused 2 was a reluctant participant in the rape. She explained that he was threatened by accused 1. Although it could not be found that accused 2's conduct was driven by duress establishing a defence of necessity, it must be accepted that he acted under the influence of his older co-accused. This accords with the assessment of his intellectual capacity set out in the pre-sentence report. It also accords with the account of him having taken to associating with particular elements in the neighbourhood. Accordingly, substantial mitigating circumstances are present which bear upon accused 2's moral blameworthiness.

[23] Although he has been convicted of very serious offences, the consequences of which will severely impact the victim in the long term, it seems to me that there is

a prospect that accused 2 may be rehabilitated. He has to some extent taken responsibility for his conduct and he has the benefit of a caring and considerate family. Notwithstanding the existence of strongly mitigating features a sentence of imprisonment is, in my view, the only appropriate sentence. I am mindful of the injunction provided by the provisions of the ***Child Justice Act***⁷ to impose imprisonment upon a child only as a last resort. In my view, the nature of the offences for which accused 2 has been convicted, requires that such a sentence be imposed. If indeed accused 2 is to be appropriately rehabilitated then such corrective programmes as are available in prison, will need to run their course.

[24] Taking into account his youthfulness, his particular personal circumstances and the role that he played in the commission of the offences I consider that a period of 12 years' imprisonment for rape will be appropriate. I consider that a period of half the term of imprisonment for robbery which is ordinarily prescribed, but for the age of the accused, would also be appropriate. In order to mitigate the cumulative effect of the term of imprisonment to be served in respect of the robbery and kidnapping charges I intend to order that these sentences be served concurrently with the sentence in respect of rape.

[25] In the result the following sentences are imposed:

1. Accused 1

Pointing of a firearm	-	1-year imprisonment;
Kidnapping	-	5 years' imprisonment;
Rape	-	life imprisonment;
Robbery with aggravating circumstances	-	15 years imprisonment;

⁷ Act No, 75 of 2008

Robbery with aggravating circumstances - 15 years imprisonment;

It is ordered that the sentences on counts 1, 2, 6 and 7 run concurrently with the sentence imposed on count 3.

2. **Accused 2**

Kidnapping - 3 year's imprisonment;

Rape - 12 years' imprisonment;

Robbery with aggravating circumstances - 7 years' imprisonment

It is ordered that the sentences imposed on counts 2 and 6 run concurrently with the sentence imposed on count 4.

G.G. GOOSEN

JUDGE OF THE HIGH COURT

Appearances:

Obo the State:

Adv. M. Driman

National Director of Public Prosecutions

Obo Accused 1:

Prof. D. Erasmus

Instructed by:

Legal-Aid South Africa, Port Elizabeth

Obo Accused 2:

Adv J. Coertzen

Legal-Aid South Africa, Port Elizabeth