

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: A343/2021

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

Date: 7 June 2022 E
van der Schyff

In the matter between:

RIAAN BEKKER

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

Van der Schyff J (Mosopa J concurring)

Introduction

[1] The appellant, Mr. Bekker, was convicted in the Regional Court Brakpan on a count of sexual assault in contravention of section 5(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007 (the Act). The

appellant was sentenced to 10 years' imprisonment. Leave to appeal against the sentence was granted on 27 July 2021.

- [2] The appellant was legally represented in the court *a quo*. The victim was 11 years and 6 months old at the time that the offence was committed.

Grounds of appeal

- [3] It is submitted on behalf of the appellant that the court *a quo* erred and misdirected itself in imposing a sentence that is excessively severe in the circumstances of the case. Reliance is placed on the following grounds:

- i. The trial court committed a material irregularity in forcing the accused to disclose his previous conviction in circumstances where the prosecution failed to do so, thereby eliciting prejudicial information in contravention of the accused's right against self-incrimination;
 - ii. The trial court misdirected itself in failing to consider all relevant features to arrive at a balanced sentence, especially in dismissing any prospect of rehabilitation.
- (i) *Did the trial court act irregularly and elicited prejudicial information from the accused?*

- [4] In light of the defined issues raised as grounds of appeal, it is necessary to turn to the record of the impugned proceedings to contextualise the issues before the court. The record of 12 October 2018 reflects that after the judgment was handed down, and the accused was found guilty, the learned regional court magistrate (the magistrate) asked the prosecutor whether the State is proving any previous convictions. The prosecutor indicated that the State does not prove any previous convictions, and the magistrate then asked Mr. Bekker's legal representative whether it is his instructions that his client is a first offender. The legal representative indicated that he has not discussed the issue with Mr. Bekker, whereafter the magistrate provided him with the opportunity to obtain instructions. Mr. Bekker's legal representative placed it on record that it is for the State to prove

previous convictions and not for the defence to allude to any. The magistrate agreed with Mr. Bekker's legal representative that it is for the state to prove an accused's previous convictions and that an accused cannot even admit his previous convictions if it is not proven. The magistrate repeated the request that Mr. Bekker must indicate whether he is a first offender or not. The legal representative then stated that Mr. Bekker was not a first offender. The magistrate concluded that the SAP 69 was wrong and asked the prosecutor what he had to say in this regard. The prosecutor indicated that he would request a postponement to obtain an updated SAP 69. The magistrate asked Mr. Bekker's legal representative whether he would request a sentencing report. Mr. Bekker's legal representative indicated that he did not thought to ask for a sentencing report but in light of the State's request for a postponement it would be in the best interest of Mr. Bekker to obtain such report. The matter was postponed until 7 December 2018.

[5] On 7 December 2018 the State obtained an updated SAP 69. The State proved one previous conviction in that the accused was previously found guilty of rape. Mr. Bekker admitted this previous conviction.

[6] The appellant takes issue with the magistrate's requiring him to confirm whether he was a first offender. Counsel for the appellant referred to a number of cases, e.g., *S v Kqawane* 2004 (2) SACR 80 (T), where it was held that it is irregular for a court to elicit details of previous convictions from an accused for the purpose of sentencing.

[7] It has been held in *S v Joaza* 2006 (2) SACR 296 (T) 297G-I:

'Previous convictions of an accused person certainly play an important role in the assessment of a fair and just sentence. Apart from the seriousness of the offence, it is a crucial determining factor to reflect an informed punishment which the offender deserves. If persons are simply regarded as first offenders and receive lenient sentences then the administration of our criminal justice system will invite societal disdain. Although it is at the discretion of the prosecution to place the

list of an offender's previous convictions before the court, I am of the view that it is prudent to do so in every case, thereby ensuring that the offender is rightly and judiciously sentenced. Let it be said that in this age of advanced information technology, any person's previous convictions can easily and swiftly be obtained from the South African Criminal Bureau data bank. Therefore, there is no excuse why the prosecution should omit to furnish a recordal of previous convictions to the sentencing court.'

[8] In *S v Nhlapo* 2012 (2) SACR 358 (GSJ) the court held:

"Accordingly in order for a court to discharge its adjudicative responsibilities when considering sentence, including those imposed by statute, it is necessary for the court to have details of previous convictions placed before it. To accord the prosecutor a discretion which is not subject to judicial oversight may result in like offenders being treated differently, even if the prosecutor had obtained the SAP69 beforehand. It appears that the permissive nature of s 271 (1) must yield both to the legislative intent of s 51 of [Act 105 of 1997] and the inherent danger of conferring an arbitrary and potentially discriminatory power on the prosecution. . . . A failure to properly establish and inform the presiding officer of previous convictions imposed on the offender adversely affects the proper administration of justice and undermines the court's responsibilities where the minimum-sentencing regime applies under . . . Act [105 of 1997]. At best, it ought to be countenanced only in exceptional circumstances that are properly explained to the court. Ordinarily there is no apparent reason why the SAP69 should not have been requested by and provided to a prosecutor before sentencing, and in good time to enable the accused to consider it.'

[9] The learned author of Commentary on the Criminal Procedure Act,¹ expressed the view that the judgment of Spilg J should not be interpreted narrowly as being limited to cases that involve minimum sentence legislation. He highlighted that at paragraph [17] of the judgment, it was pointed out that some of the cases frequently cited in support of the permissive practice regarding s 271 really originally established no more than a rule that where the prosecutor does not wish to prove the SAP 69, a court may not ask the accused directly whether he has previous convictions. Spilg J stated at paragraph [18] that some cases:

'appear to have been influenced by concerns regarding the prejudicial nature of a court undertaking an enquiry *mero motu* with the risk of consequent perceptions of bias and partisanship. Concern was also expressed about the fallibility of the offender's own recollection. Moreover, the earlier cases were decided at a time when the presiding officer generally exercised a discretion regarding sentencing, unfettered by statutorily imposed considerations regarding previous convictions. Since these cases had regard to the provisions of s 271(1) of the CPA in the limited context of a magistrate assuming the role of inquisitor, the courts were not called on to consider whether the prosecutor had nonetheless a duty to provide details of previous conviction, bearing in mind that the overriding considerations regarding sentencing are to be informed by s 274 of the Act.'

[10] In *S v Smith* 2019 (1) SACR 500 (WCC) the Full Bench of the Western Cape Division likewise asserted that it is imperative for the prosecution to produce the record of an accused's previous convictions to enable the sentencing court to properly discharge its sentencing function.

[11] In terms of s 271 of the Criminal Procedure Act 51 of 1977, the prosecution may, after an accused has been convicted but before sentence has been imposed upon him, produce to the court *for admission or denial by the accused* a record of previous convictions alleged against the accused. The magistrate enquired

¹ E Du Toit, JUTASTAT, RS 60, 2018 ch 27-p6.

whether Mr. Bekker admits that has no previous convictions, as stated by the prosecutor. In the same vein he subsequently enquired at later stage whether Mr. Bekker admits the previous conviction set out in the updated SAP 69. In *S v Khambule* 1991 (2) SACR 277 (W) it was held:

‘[Section] 271 of the Criminal Procedure Act did not confer the power on a magistrate to adopt a procedure of questioning the accused as to his previous convictions, *he was limited to asking whether the accused admitted or denied the record of previous convictions produced by the State*’.

[12] In *Nhlapo*, the court explained that s 274(1) of the CPA provides that a court may receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed. Mudau AJ continued:

‘[21] In my respectful view the distinguishing features in the earlier cases are the specific concern the courts wished to address, and hence the confinement of the enquiry to s 271 of the CPA in the earlier decisions without reference to s 274 of the Act, and also the logistical difficulties that may have arisen, particularly in outlying magisterial areas, in obtaining a SAP69 timeously. It is also necessary to take into account the provisions of s 51 of the CLAA and the landscape as defined by more recent authority of the SCA regarding the general duties of a court when considering sentencing, and its concern that the interests of society must be properly taken into account. ...

[22] The significance of the question, whether the court interferes with the apparent discretion afforded to the prosecutor when calling for a SAP69 or whether the prosecutor is impermissibly tying a court's hands by not providing it, is more clearly exposed where the legislature has specifically directed that, absent sufficient and compelling reasons, previous convictions must have a material impact on either the nature of sentence that can be imposed or the minimum period of a custodial sentence.’

The court concluded:

“[26] Accordingly, the issue no longer presents itself as one where the prosecutor appears entitled to exercise a discretion which may or may not impermissibly tie the court's hands. Nor does the issue of unnecessary delay arise, since a SAP69, or at the very least the underlying data on the South African Police Criminal Record System, of an offender's previous convictions, ought to be readily available to a prosecutor, even if there was an initial oversight in calling for the record in good time. See the competing concerns raised by Preiss J in *Sethokgoe* at 545*i* – 546*g*, at a time prior to the general utilisation of computers and the ability of authorised personnel in remote areas to instantly access or obtain and download the relevant data. Any current exception ought not to make the rule.

[27] Accordingly in order for a court to discharge its adjudicative responsibilities when considering sentence, including those imposed by statute, it is necessary for the court to have details of previous convictions placed before it. To accord the prosecutor a discretion which is not subject to judicial oversight may result in like offenders being treated differently, even if the prosecutor had obtained the SAP69 beforehand. It appears that the permissive nature of s 271(1) must yield both to the legislative intent of s 51 of the CLAA and the inherent danger of conferring an arbitrary and potentially discriminatory power on the prosecution.’

- [13] The matter at hand is to be distinguished from cases where the prosecutor exercised a discretion not to hand in a list of previous convictions before sentence, and matters where the presiding officer questioned an accused to elicit details of previous convictions. The record reflects that after being informed that Mr. Bekker has previous convictions, the learned regional court magistrate asked Mr. Bekker's legal representative ‘So what you are saying to me, is this SAP 69 incorrect?’. The learned magistrate did not engage with Mr. Bekker after Mr. Bekker's legal

representative answered 'Yes, your worship', and placed the ball squarely in the prosecutor's court when he asked 'Mr. Prosecutor, what do you have to say?' The matter was subsequently postponed for an updated SAP 69 to be obtained. Against this background, I am of the view that the learned regional court magistrate did not act irregularly when he asked Mr. Bekker's legal representative 'Is it also your instructions, Mr. Katrada, that your client is a first offender?'. The magistrate only asked whether Mr. Bekker admitted the record produced by the State, he did not 'interrogate' Mr. Bekker regarding previous convictions.

(ii) *Did the trial court fail to consider all relevant features to arrive at a balanced sentence, especially in dismissing any prospect of rehabilitation?*

[14] From the submissions made by counsel it is evident that this ground of appeal revolves around two particular incidents, (i) the magistrate's assumption that Mr. Bekker's previous conviction involved a minor child, and (ii) his view that Mr. Bekker is non 'rehabilitatable'.

[15] The record reflects that the learned magistrate was well aware of the principles that have to be applied when a convicted offender is sentenced. The appellant correctly points out that there is no evidence on record indicating that the appellant's prior conviction relating to rape, involved a minor child, as assumed by the learned magistrate. The fact remains, however, that the Mr. Bekker has a previous conviction for rape, an offence directly related to the offence for which he was now convicted. The record reflects that the learned regional court magistrate carefully considered all the relevant facts pertaining to the appellant's personal circumstances, the nature and seriousness of the offence, the impact of the crime on the victim and the public interest.

[16] The appellant likewise referred to the learned regional court magistrate's remarks that he is of the view that Mr. Bekker 'is not rehabilitatable and will re-offend'. This was clearly an obiter remark as the learned regional court magistrate said:

‘So my words to you here today is, keep on committing this offence and you will be going to prison for longer and longer and longer period until you spend the rest of your life in prison’.

[17] It is trite that a court of appeal ‘does not have a general discretion to ameliorate the sentences of a trial court’.² A court of appeal can only interfere where it is of the view that the discretion was not judicially exercised. After carefully considering the record of the proceedings in the trial court and the learned regional court magistrate’s judgments, particularly the judgment relating to sentence, this court is not of the view that that the sentence is vitiated by irregularity or misdirection or is so severe that no reasonable court could have imposed it. As for the only misdirection relating to the trial court’s assumption that the previous conviction also involved a minor, this court can equivocally state that had the previous conviction also involved a minor, this court would seriously have considered increasing the sentence. The misdirection in this regard does not render the sentence inappropriate or unjust.

ORDER

In the result, the following order is granted:

- 1. The appeal against the sentence imposed on 8 February 2019 is dismissed.**

E van der Schyff
Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

For the appellant:

Mr. H. L. Alberts

Instructed by:

Legal Aid South Africa

² *S v De Jager* 1965 (2) SA 616 (A) 626.

For the respondent:

Adv. P. W. Coetzer

Instructed by:

State Attorney, Pretoria

Date of the hearing:

10 May 2022

Date of judgment:

7 June 2022