THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No 502/08

In the matter between:

M P COETZEE **Appellant**

and

THE STATE **Respondent**

Neutral citation: ***Coetzee v The State*** (502/08) [2009] ZASCA 134 (30 September 2009)

Coram: **Mpati P, Mthiyane *et* Mhlantla JJA**
Heard: **31 August 2009**
Delivered: **30 September 2009**

Summary: Criminal law – Sentence – appellant, a pastor ─ sentenced to an effective term of four years' imprisonment upon conviction on four counts of indecent assault and two counts of *crimen iniuria*. On appeal all counts treated as one for purposes of sentence ─ sentence set aside and replaced with one of four years' imprisonment in terms of s 276(1)(i) of the Criminal Procedure Act 51 of 1977.

ORDER

On appeal from: High Court, Pietermaritzburg (Koen J and Gorven AJ, sitting as a court of appeal).

1. The appeal succeeds.
2. The sentences imposed by the trial court are set aside and replaced with the following:

'The accused is sentenced to four years' imprisonment in terms of s 276(1)(i) of the Criminal Procedure Act 51 of 1977.'

JUDGMENT

MHLANTLA JA (Mpati P and Mthiyane JA concurring):

[1] The appellant was convicted in the Regional Court, Richards Bay, on four counts of indecent assault and two counts of *crimen iniuria*. He was sentenced to an effective term of four years' imprisonment. An appeal against conviction and sentence was dismissed by the Pietersmaritzburg High Court (Koen J, Gorven AJ concurring). The present appeal is against sentence only and is before us with the leave of the court below.

[2] The essence of the attack on the regional magistrate's decision on appeal is that he misdirected himself or failed to properly exercise his discretion in that the sentence he imposed is excessive and induces a sense of shock.

[3] The facts relevant to sentence are briefly the following. The appellant was employed as a pastor at the Apostolic Faith Mission Church in Meerensee, Richards Bay. All the complainants and their parents were members of the appellant's church. The appellant also provided counselling sessions to members of his church. There was, however, a dispute as to whether the constitution of the church permitted him to do so. A youth pastor, Mr Francois van Niekerk, testified that the appellant was not entitled to conduct counselling sessions. The parents of two of the complainants had nevertheless requested the appellant to provide counselling to them. The incidents forming the subject of the appeal occurred during the period between August 2002 and January 2005.

[4] The first incident, being count 1, occurred in August 2002 and involved Ms Natasha Lamprecht, who was then 19 years old. Her mother had discovered a diary which revealed that Natasha had begun to have sexual relations with her boyfriend. Her parents, probably disapproving of what was going on, arranged for Natasha to consult the appellant. The counselling session took place in the appellant's house in his study.

[5] The appellant's wife was present in the house when he indecently assaulted Natasha. The counselling session commenced with what appeared to be a normal discussion. Out of the blue the appellant began to stroke her leg, moving his hands up and down, and then rubbed her thigh.

Despite her objection, he pulled up her dress and touched her vagina. He then asked her if she ever imagined having a relationship with a pastor and began to ask searching questions about her sexual relations with her boyfriend. Natasha felt shocked, stunned and nervous and did not know what to do about this intrusion. She cried and felt traumatised. Soon after leaving the appellant's home, she reported the incident to her boyfriend.

[6] The second complainant, Ms Adele Taljaard, then 16 years old, was indecently assaulted on two occasions. The relevant counts are counts 3, 4 and 5 respectively. Adele's father had assaulted her for spending a weekend with her boyfriend. Because of the seriousness of the assault a social worker, to whom the matter had been reported, referred her to the appellant for counselling. The first incident occurred on 21 January 2003 at Adele's home. She was alone with her brother when the appellant arrived for the counselling session. He asked her brother to leave the house as he wanted to talk to her alone. The so-called counselling session commenced with him inspecting the weal marks on her legs. He then applied a cream high up on her thigh after he had pulled up her skirt. He touched her vagina saying that he was 'closing it'. These incidents relate to count 3. The appellant forced her to sit on his lap. He asked her about her sexual relations with her boyfriend and about her preference in relation to sexual acts. He pushed open her blouse, as he put it, in order to see her brassiere. These incidents relate to count 5. He then asked her to come to his house the next day when he would discuss her case with her parents.

[7] The incident in regard to Count 4 occurred on 22 January 2003. Adele arrived at the appellant’s house and was met by his wife who showed her to the appellant’s study. Her parents were not present. The

appellant sat very close to her and lifted her skirt, thus exposing her underwear. She testified that she was shocked and felt ashamed. She left immediately thereafter and later reported both incidents to her boyfriend.

[8] Counts 8 and 9 relate to incidents involving Ms Lee-Ann van Rensburg, then 21 years old. Her parents were concerned about her self-esteem and well-being and referred her to the appellant for counselling during January 2005. The two families had a close relationship and Lee-Ann regarded the appellant as a father figure and a person to whom she could talk about anything. On the day in question the appellant arrived at Lee-Ann's parental home for the counselling session after he had telephoned her. As with the other complainants, the appellant behaved oddly. He began with lifting Lee-Ann's skirt and went on to rub her thighs and then touched her vagina. Subsequently he put his hands inside her bra and looked at her breasts. He then asked her to take a shower and stated that he would choose underwear for her. After she had had a shower, he asked her about her sexual relationship. Lee-Ann testified that she felt very uncomfortable about the encounter.

[9] Following the appellant's conviction two pre-sentencing reports were obtained, one from a probation officer and the other from a correctional officer. Ms Mthembu, a social worker, reported that the appellant did not verbalise remorse although she deduced, from his conduct, the presence of some remorse. She recommended a sentence with an option of a fine or correctional supervision. Ms Mabuyakhulu, on the other hand, recorded that the appellant showed no remorse for his actions and raised concern about the practical difficulties which would arise from the implementation of a sentence of correctional supervision.

She concluded that the appellant was not a suitable candidate for correctional supervision.

[10] The magistrate rejected the suggestion that a wholly suspended sentence or correctional supervision be imposed. He concluded that a term of direct imprisonment was the only appropriate sentence. In respect of each of the counts of indecent assault, the appellant was sentenced to six years' imprisonment, two years of which were suspended for four years on condition he is not again convicted of indecent assault or *crimen iniuria* during the period of suspension. A sentence of 18 months' imprisonment was imposed in respect of each of the *crimen iniuria* counts, half of which was suspended for three years on condition that the appellant is not again convicted of *crimen iniuria*, or indecent assault, committed during the period of suspension. All the sentences were ordered to run concurrently.

[11] The court below concluded that it was in the interests of society that the appellant be sentenced to a term of incarceration and that any non-custodial sentence would merely be a slap on the wrist. The appellant's appeal against sentence was thus dismissed. The court below altered the sentences by treating all the indecent assault counts as one for purposes of sentence and imposed a sentence of six years' imprisonment, two years of which were suspended for four years on condition that the appellant was not again convicted of indecent assault or *crimen iniuria* committed during the period of suspension. Regarding the two *crimen iniuria* counts, the court imposed a sentence of 18 months' imprisonment, half of which was suspended for three years on similar conditions. The sentences were ordered to run concurrently.

[12] In this court it was contended that the regional magistrate committed a misdirection in that he associated the offences in this case with rape. He relied on authorities which dealt with rape and, in the result, exercised his discretion as if he were sentencing a rapist. The second criticism was that the magistrate had placed undue emphasis on the element of deterrence as an object of punishment, with the result that he imposed a sentence that was excessive in the circumstances of this case.

[13] The imposition of sentence is a matter falling pre-eminently within the judicial discretion of the trial court. The test for interference by an appeal court is whether the sentence imposed by the trial court is vitiated by irregularity or misdirection or is disturbingly inappropriate.[1]

[14] Regarding the first challenge, I am, like Koen J in the court below, not persuaded that the regional magistrate misdirected himself in expressing certain sentiments concerning assault on women and children after he had referred to the judgment in *S v Ncheche* 2005 (2) SACR 386 (W), which dealt with rape. In my view this was no more than an indication of the seriousness of the offence. The magistrate in fact, despite his reference to *Ncheche***,** recognised that the offences in question were not committed in a violent manner. And it is clear from the sentence eventually imposed that the magistrate did not treat the appellant as a rapist. In my view, a harsher sentence would have been imposed had the magistrate regarded the appellant as a rapist. In the result, I conclude that there was no material misdirection, justifying interference on that basis.

[1] *DPP, KwaZulu-Natal v P* 2006 (1) SACR 243; [2006] 1 All SA 446 (SCA) at para 10.

[15] I turn now to consider the second challenge, which is that the magistrate, in considering an appropriate sentence, overemphasized the seriousness of the offences and attached too much weight to the element of deterrence. Amongst the factors mentioned in mitigation of sentence was that the appellant was a first offender. He is married and has children. He had already lost his job at the church where he worked at the time of the incidents. The complainants were not young girls but mature women who were already sexually active. Counsel for the respondent conceded, correctly in my view, that a sentence of four years' imprisonment in these circumstances was severe. He submitted that a sentence in terms of s 276(1)(i) of the Criminal Procedure Act 51 of 1977 (the Act) would be more appropriate.

[16] It was submitted, on behalf of the appellant, that he had a psychological problem and should be referred for psychological evaluation. This argument cannot be sustained. In my view, if the defence considered that the appellant had a psychological problem for which he required therapy, it should have raised this at the trial and taken the necessary steps to secure a report to that effect and have it placed before the trial court. This court cannot speculate on that score. The appellant cannot expect preferential treatment and be given a second opportunity to present his case. This court cannot remit the matter to the trial court on that basis, more so since the appellant had already been interviewed by a probation officer and a correctional officer before sentence was imposed.

[17] Even if there was no misdirection, however, as I have indeed found there was none, it would still be competent for this court to interfere if it were satisfied that the trial court had not exercised its discretion reasonably and imposed a sentence which is inappropriate in the

circumstances. Although each case stands against the setting of its own facts and circumstances, it may be necessary to have a look at comparative cases in determining whether the trial court properly exercised its discretion in its imposition of sentence.

[18] The first of these examples is *S v R*,[2] where the accused was convicted of indecently assaulting a 15 year old boy and was sentenced to 18 months' imprisonment, half of which was suspended on condition that the appellant received psychiatric treatment. In a further appeal, this court considered the suitability of correctional supervision in terms of s 276(1)(h) of the Act. The court set aside the sentence and remitted the matter to the trial court for the imposition of such a sentence. In *S v R*, evidence was placed before the court by a probation officer that the accused's conduct in that case stemmed from personality defects and a drinking problem. In the present matter we do not have any evidence touching on the appellant's psychological make-up or any evidence justifying an order in terms of s 276(1)(h) of the Act. We are therefore not at liberty to approach the present matter on the same basis as Kriegler AJA did in *S v R*.

[19] In *S v D*,[3] the accused was convicted of indecently assaulting an eight year old girl. He was sentenced to 6 years' imprisonment, two years of which were conditionally suspended. On appeal, this court set aside the sentence and replaced it with a sentence of three years' imprisonment in terms of s 276(1)(i) of the Act, plus a further two years' imprisonment suspended for five years on certain conditions.

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[2] 1993 (1) SACR 209 (A).
[3] 1995 (1) SACR 259 (A).

[20] In *S v K*,[4] the appellant pleaded guilty to seven counts of contravening s 14(1)(b) of the Sexual Offences Act 23 of 1957. He had committed the offences on young boys who were street children. He was sentenced to an effective term of seven years' imprisonment. Expert evidence tendered on behalf of the appellant recommended that he be sentenced to a period of correctional supervision and be compelled to undergo intensive psychotherapy. On appeal to the Provincial Division the sentence of seven years' imprisonment was confirmed on the basis that the appellant had previous convictions for the same offence and that he had in the past not reacted positively to treatment and the boys had begun to display deviant behaviour.

[21] In *S v R*,[5] the appellant, a 25 year old primary school teacher, had been convicted on six counts of indecent assault involving his male pupils. He was sentenced to five years' imprisonment of which two years were conditionally suspended. A clinical psychologist had testified in mitigation of sentence. On appeal this court confirmed the sentence due to the seriousness of the offences.

[22] In *S v V*,[6] the appellant was convicted on a charge of a contravention of s 14(1)(b) of the Sexual Offences Act, in that he had committed an indecent sexual act with a girl under the age of 16. He was sentenced to five years' imprisonment of which two years were suspended on certain conditions.

[23] In *S v McMillan*,[7] the accused, a 32 year old man, who had an unhappy childhood and was molested as a child was convicted of five

[4] 1995 (2) SACR 555 (O).
[5] 1995 (2) SACR 590 (A).
[6] 1994 (1) SACR 598 (A).
[7] 2003 (1) SACR 27 (A).

counts of indecent assault against three boys ranging in age between nine and 12 years. The evidence before the trial court was that he suffered from a sexual deviance and that he had a need for intensive psychiatric treatment over a long term. The trial court, despite the expert evidence imposed a sentence of ten years' imprisonment. On further appeal to this court, Brand JA held that it was expected of courts, through the sentences they imposed, firstly to reflect society's resentment and repugnance for the present type of conduct, and, secondly, insofar as it was possible by sentencing, to prevent the recurrence of thereof, either by the particular offender or by others. The court held that the sentence of ten years' imprisonment, particularly when compared with sentences imposed in comparable cases and which were confirmed on appeal, was too severe. The court set aside the sentence and replaced it with one of five years' imprisonment in terms of s 276(1)(i) of the Act.

[24] In *S v O*,[8] the accused pleaded guilty to three counts of indecent assault and one of attempted indecent assault on four boys ranging in age from eight to 12 years. He was sentenced in the trial court to eight and a half years' imprisonment. On appeal all four charges were taken together for purposes of sentencing and his sentence was reduced to four years' imprisonment, of which three years were suspended on certain conditions, including that the accused subject himself to programmes for treatment of sexual offenders.

[25] In *S v Egglestone*,[9] the appellant, who had been conducting an escort agency employing high school teenagers from impoverished communities, was convicted in the High Court on three counts of indecent assault, one of rape, one of assault and one of kidnapping. On

[8] 2003 (2) SACR 147 (C).
[9] 2009 (1) SACR 244 (SCA).

appeal to this court the convictions of kidnapping and assault were set aside. This led to a reduction of the sentence. The rape and indecent assault on the one complainant were taken together for the purpose of sentencing and the appellant was sentenced to eight years. In regard to the two counts of indecent assault on the other two complainants where the appellant had touched the breasts of one of the complainants and had rubbed the leg and stomach of the other complainant, the court confirmed the sentence of six months' imprisonment on each count.

[26] Turning to the facts of this case and having regard to sentences imposed in the above named cases and, given the personal circumstances of the appellant, namely that he is a first offender, coupled with the fact that the complainants were no longer young and immature and did not appear to have suffered permanent psychological trauma, it seems to me that a custodial sentence of four years was excessively severe. In the result this court is at large to interfere with the sentence on the basis that it is disturbingly inappropriate.

[27] The seriousness of the offences committed by the appellant cannot be underestimated. He did not show remorse. He abused his position as pastor and the position of trust placed in him by the complainants and their parents. All the complainants were vulnerable and in need of counselling. Having regard to all of the above factors, I am of the view that a custodial sentence should be imposed, but the length of the appellant's incarceration be left in the hands of the Commissioner. I propose to impose a sentence of direct imprisonment in terms of s 276(1)(i) of the Act. To achieve this goal, all the counts will be taken as one for purposes of sentence. Accordingly a sentence of four years' imprisonment in terms of s 276(1)(i) of the Act will be appropriate.

[28] In the result the following order is made:

1. The appeal succeeds.

2. The sentences imposed by the trial court are set aside and replaced with the following:

'The accused is sentenced to four years' imprisonment in terms of s 276(1)(i) of the Criminal Procedure Act 51 of 1977.'

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N Z MHLANTLA
JUDGE OF APPEAL

Appearances:

For Appellant	J Marais SC
	Breytenbach Attorneys, DURBAN McIntyre & van der Post, BLOEMFONTEIN
For Respondent	P Bezuidenhout SC
	Director of Public Prosecutions, PIETERMARITZBURG
	Director of Public Prosecutions, BLOEMFONTEIN

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