

S v Lekeka 2021 (1) SACR 106 (FB)

KEY CONCEPTS	
Life imprisonment	Evidence of children
Sentencing in attempted rape	Attempted rape

FACTS: The appellant was charged in the regional court on a count of housebreaking with an intent to commit an offence unknown to the state and a count of attempted rape in terms of s3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007. It was alleged that the appellant unlawfully and intentionally broke into the house of DK and, while there, attempted to commit an act of sexual penetration on the 13-year-old complainant by smearing Zam-Buk ointment on her vagina and attempting to penetrate her with his penis.

The appellant pleaded not guilty to both counts and the magistrate put the two counts together and convicted appellant of housebreaking with the intent to rape and attempted rape. The appellant was sentenced to life imprisonment.

ISSUE: The appellant appealed on the following grounds:

- The state failed to prove its case beyond reasonable doubt and appellant's version should be accepted as reasonably possibly true
- Trial court overemphasised seriousness of offence and interests of society at the expense of the personal circumstances of the appellant
- The court failed to warn the appellant of the possibility of life imprisonment ito s51(1) of Criminal Law Amendment Act 105 of 1997
- Trial court erred in not finding substantial and compelling circumstances to deviate from the prescribed sentence of life imprisonment
- The sentence of life imprisonment is shocking and inappropriately harsh.

DISCUSSION:

The conviction

The following evidence was led:

- The appellant's version was that he went to DK's house to see his girlfriend, M. The door was unlocked and he went in, but his girlfriend was not there. One of the boys, who lives there, went out and returned with two older men. they were aggressive and wanted to assault him, so he left.
- The complainant testified that she was visiting her aunt, who was not at home, because she went to a tavern. It was only the complainant and four other children at home. They were all asleep on one bed in one of the two bedrooms of the house. She woke up with the bedroom door being opened. The perpetrator entered and grabbed her by her clothes and pressed her against the bed. He then pulled her towards the dining room, and subsequently to the other bedroom where instructed her to undress. When she refused, he strangled her. He used a knife to subdue her

and put his hands underneath her panty and smeared Zam-Buk ointment 'next' to her anus and 'next' to her vagina. He then inserted his finger into her vagina, which she found to be painful. The perpetrator then dropped his trousers, but one of the children called her from outside. The perpetrator then exited the house through the window. The complainant testified that she suffered injuries to her neck.

- It is alleged that the perpetrator entered the house through a broken window, which had been closed with a piece of corrugated iron. A different part of that window was broken and pieces were found lying on the ground outside the window as well as a container of Zam-Buk. The kitchen door was still locked, with the key in the door.
- S was one of the children sleeping in the bed with the complainant. He was 12 years old. He explained that he woke up when the perpetrator opened the bedroom door and entered the room. He identified the perpetrator as N and said he knew him and pointed him out in court. He saw what the perpetrator was doing with the Zam-Buk and ran to call his aunt and uncle at the church.
- Another child, who was in the bed, TBM, testified. He was 11 years old and his testimony corroborated the other children's evidence. He also recognised the perpetrator as having seen him before in his mother's company and identified a scratch on his forehead. He also ran for help.
- Other witnesses testified about being called to the house and seeing someone exiting the window.
- There was also a medical report re the complainant.

The appeal court then dealt with the evidence of children and said that it was trite that the evidence of children should be approached with caution.

- *R v Manda* 1951 (3) SA 158 (A) at 163. In *S v V* 2000 (1) SACR 453 (SCA) para 2 it was stated as follows:
'In view of the nature of the charges and the ages of the complainants it is well to remind oneself at the outset that, whilst there is no statutory requirement that a child's evidence must be corroborated, it has long been accepted that the evidence of young children should be treated with caution'
- The complainant is a single witness pertaining to the alleged sexual violation, and the evidence of a single witness should be approached with caution.
- 'In *S v Sauls* 1981 (3) SA 172 (A) at 180, it was said that there is no rule-of-thumb test or formula to apply when it comes to the consideration of the credibility of a single witness. The trial court should weigh the evidence of the single witness and should consider its merits and demerits and, having done so, should decide whether it is satisfied that the truth has been told despite shortcomings or defects or contradictions in the evidence.'

The appeal court found that the trial court had not only referred to the rules of caution, but had duly applied them. The following corroboration was present:

- Both boys identified the perpetrator
- Another part of the window was broken – pieces and Zam-Buk found there
- Witnesses testified that they saw someone exiting the relevant window
- According to other witnesses, when they arrived on the scene, the kitchen door was locked

- The complainant's evidence that she was strangled by the person who entered the room (who, on his own version, was the appellant), is corroborated by the clinical findings in the J88
- Zam-Buk container at window corroborates complainant's evidence

The appeal court was, therefore, of the opinion that the trial court's findings that the version of the appellant was to be rejected insofar as it differs from the version of the state, could not be faulted.

Separate counts

The appellant was charged on two separate counts, each of which constitutes a separate and distinct offence. There is no basis upon which the court a quo could have 'combined' the two counts to form only one count. A judgment or verdict needs to be pronounced on each of the counts. The appeal court was of the opinion that the trial court should have found the appellant guilty on count 1, on the competent verdict of housebreaking with the intent to rape, as well as guilty on count 2.

Sentence

In terms of s 51(1) of Act 105 of 1997, read with part I of sch 2 thereto, life imprisonment is, inter alia, the prescribed minimum sentence where the victim is a person under the age of 16 years. Section 55 of Act of 2007 provides that any person who 'attempts to commit a sexual offence in terms of this Act, is guilty of an offence and may be liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.'

The trial court used this reasoning to conclude that life imprisonment is also to be considered the prescribed minimum sentence for a contravention of s 55 of Act 32 of 2007 i.e. same punishment for attempted rape as for rape. The present court disagreed, arguing that before the amendment by the Criminal Law (Sentencing) Amendment Act 38 of 2007, part IV of sch 2 to Act 105 of 1997 made provision for the attempt to commit certain crimes, but the reference in part IV to offences referred to in sch 1 to the Criminal Procedure Act was removed by means of the amendment by Act 38 of 2007. In doing so, the legislature removed any inclusion of the attempt to commit any crime. The present court consequently found that the trial court had misdirected itself and that entitled this court of appeal to consider the sentencing afresh.

Determining an appropriate sentence requires the consideration of the personal circumstances of the appellant, the nature and seriousness of the offences of which he was convicted and the interests of society. The appeal court looked at the following:

Appellant's circumstances

- Appellant was 30 years of age at the time of the commission of the offences, and was self-employed as a builder, earning approximately R3500 per month. He is not married, but has two children, aged 8 years and 1 year, respectively, which children stay with their mother.
- Appellant spent approximately one year and six months in custody awaiting trial.

- The appellant also shows a complete lack of remorse.
- The appellant is not a first offender. He has previous convictions for assault, housebreaking and robbery.
- The current two offences were committed while the appellant must have been on parole which constitutes a severe aggravating factor.

Nature and seriousness of offence

- Both the offences of which the appellant will be convicted in terms of this judgment are very serious offences. He broke into the house, being the very place where the occupants thereof are supposed to have been safe. He found the children fast asleep on one bed, defenceless and vulnerable. The only reason why the accused did not complete what he intended to do was because of S who acted swiftly to go and get help.
- The prevalence of sexual offences is very high, not only in this court's jurisdiction, but countrywide. The court takes judicial notice of the countrywide campaigns to promulgate awareness of the huge problem in our country regarding violence towards women and children, which violence includes sexual violence. The type of conduct displayed by the appellant is completely unacceptable within a civilised society.
- The fact, that the appellant committed these offences during the time when he was still on parole, after having been sentenced to six years' imprisonment, is in my view indicative thereof that the previous periods which the appellant served in prison were not enough to successfully rehabilitate him.

Interests of society

- An appropriate sentence is one that would serve the public interest, by the prevention of crime through deterrence, but also by protecting society against the currently unrehabilitated appellant by his removal from society.
- In *Director of Public Prosecutions, North Gauteng v Thabethe* 2011 (2) SACR 567 (SCA) ([2011] ZASCA 186) para 22 it was stated:
'Our courts have an obligation to impose sentences . . . of the kind which reflects the natural outrage and revulsion felt by law-abiding members of society. A failure to do so would regrettably have the effect of eroding the public confidence in the criminal justice system.'
- Considering the rather out-of-the-ordinary manner in which the charge-sheet was drafted by charging the appellant with two separate counts in the circumstances, it is necessary to approach sentencing in a manner which will not prejudice the appellant as a result of him having been so charged.
'Where multiple counts are closely connected or similar in point of time, nature, seriousness, or otherwise, it is sometimes a useful, practical way of ensuring that the punishment imposed is not unnecessarily duplicated or its cumulative effect is not too harsh on the accused.'

FINDING: The appeal court upheld the conviction but amended it to 2 counts i.e. housebreaking with intent to rape and attempted rape. The appeal against sentence was upheld and the sentence of life imprisonment was set aside. The court deemed it

appropriate to take the two counts together for the purpose of sentencing and sentenced the appellant to 10 years' imprisonment.