



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA  
JUDGMENT**

**Not reportable**

**Case No: 581/17**

In the matter between:

**THE DIRECTOR OF PUBLIC PROSECUTIONS,  
EASTERN CAPE DIVISION, GRAHAMSTOWN**

**APPELLANT**

and

**WILLIE THEMBA YOYO**

**RESPONDENT**

**Neutral Citation:** *DPP Eastern Cape v Yoyo* (581/17) [2018] ZASCA 21  
(20 March 2018)

**Coram:** Swain and Mbha JJA and Mothle AJA

**Heard:** 16 February 2018

**Delivered:** 20 March 2018

**Summary:** Attempted rape of 4 year old – sentence of six years imprisonment imposed – half suspended for 3 years – sentence disproportionate and shocking - replaced by 10 years imprisonment.

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## ORDER

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**On appeal from:** The High Court, Eastern Cape Division, Grahamstown.

Tshiki J presiding:

1 The appeal is upheld;

2 The sentence of 6 years' imprisonment half of which was suspended for 3 years is set aside and replaced by the following order:

(a) 'The accused is sentenced to 10 years imprisonment.'

(b) The sentence is antedated to 18 May 2017.

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## JUDGMENT

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**Mothle AJA (with Swain and Mbha JJA concurring)**

[1] This is an appeal with the leave of the High Court, Eastern Cape Division, Grahamstown (Tshiki J), by the appellant, the Director of Public Prosecutions ("*DPP*"), against the sentence imposed on the respondent, Willy Themba Yoyo.

[2] The respondent was charged with rape, in the alternative attempted rape, in contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, read with section 261 of the Criminal Procedure Act, 51 of 1977. He pleaded guilty to the alternative charge of attempted rape which was accepted by the State and he was convicted accordingly.

[3] The High Court imposed a sentence of 6 years imprisonment, half of which was suspended for a period of 3 years on condition that he 'does not commit a sexual offence committed during the period of suspension.' This condition of the suspension is somewhat ambiguous. Ordinarily a sentence is suspended for a specified period, not exceeding 5 years, on condition the

accused is not found guilty (or convicted) of a specified offence or class of related offences, committed during the period of suspension. Therefore in this case the suspended sentence should have read as follows: 'on condition the accused is not convicted of a sexual offence committed during the period of suspension.'

[4] In his plea explanation in terms of section 212 of Act 51 of 1977, the respondent admitted that during the morning of 23 December 2015, he was at his place of residence at Grootvlakte Farm, Graaff Reinet where he was employed. He admitted that he had consumed alcohol during the morning of that day but acknowledged that at the time of committing the offence, he was not under the influence of liquor and he knew what he was doing at all times.

[5] The plea explanation states that during the course of that morning, the complainant was with her mother in the bedroom. The mother was the respondent's girlfriend. The respondent was asleep on the mattress in the kitchen. The complainant came to sleep on the mattress with him. The respondent decided to have sexual intercourse with the complainant. He then removed the complainant's panties and climbed on top of her and attempted to penetrate her. The complainant screamed causing the mother to come from the bedroom to inquire what was happening to the child. The mother pulled the complainant who was still lying on her back, from the mattress.

[6] The complainant was later examined by a medical doctor who recorded in a J88 report that there was a 'Laceration about 0.5 cm on the upper part of the anus (on the outside); Swelling round the entire anus, darkish in colour; There is no injury to the vulva/vagina.' The report recorded that the specimen was taken for further forensic analysis. The findings were not conclusive of sexual assault.

[7] The psychological assessment report stated that the incident had caused the complainant to have an intense fear of the dark which she later overcame. There is no evidence of any impact on her performance at school. The High Court accepted that there was minimal psychological impact.

[8] In mitigation before the High Court, counsel for the respondent submitted from the bar that the respondent was aged 52 at the time of the commission of the offence. The respondent was a farm worker and had achieved grade 3 in his schooling. He had an unrelated previous conviction of using property without the owner's consent, in 1984. The High Court stated in its judgment that the unlawful sexual offences were extremely serious 'more so when committed against young children by adult people like the accused'. During sentencing the High Court took into account that the accused pleaded guilty to the charge of attempted rape; that he did not rape the child and the medical report revealed that there was no injury to the vulva and/or vagina. The child only suffered swelling around the entire anus which was darkish in colour.

[9] The violence and abuse perpetrated on children is a scourge which has become prevalent in South Africa. The lenient sentences imposed by some of the courts fail to deter would-be perpetrators. This Court<sup>1</sup> has repeatedly bemoaned the fact that this type of offence is on the increase.

[10] Given the gravity of the offence in this case and the circumstances in which it was committed, there is no doubt that the respondent abused the trust the complainant had in him. This offence was committed under circumstances where the complainant expected safety in the sanctity of her home and protection of her parents. As in *Director of Public Prosecutions, Gauteng v MG*,<sup>2</sup> the accused in this case also stood in a position of authority and trust in respect of the complainant, which trust he abused. It is thus my view that that fact alone is aggravating.

[11] As to how the High Court imposed a sentence of 6 years for this serious and aggravating offence is not explained. What is more disturbing is that the High Court, for inexplicable reasons, suspended half of the sentence.

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<sup>1</sup> See *The State v Ro and Another 2010 (2) SACR 248 (SCA)* and *Director of Public Prosecutions, North Gauteng v Thabethe 2011 (2) SACR 567 (SCA)*.

<sup>2</sup> *Director of Public Prosecutions, Gauteng v MG 2017 (2) SACR 132 (SCA)*.

This approach in my view constitutes a misdirection which is disturbingly disproportionate to the seriousness of the offence. This misdirection in the judgment of the High Court can best be illustrated by the decision of the full court in *S v Ncanywa*<sup>3</sup>, an appeal on a similar charge of attempted rape of a minor child aged 16 years where a sentence of life imprisonment was imposed for rape and 10 years for attempted rape. The significance of this judgment is that it was delivered by the appeal court of the same division of the High Court in this case, two months before the sentence by the trial court in this appeal.

[12] It is trite that sentence is a matter of discretion by the trial court. A court of appeal will only interfere with a sentence if the sentencing court has failed to exercise its discretion reasonably and properly.<sup>4</sup>The misdirection in this case demands intervention by this court.

[13] Counsel for the respondent conceded that the offence is serious and that a 10 year imprisonment sentence would be proportional to the offence and appropriate. I consider that concession to have been properly made.

[14] In the result:

- 1 The appeal is upheld;
- 2 The sentence of 6 years' imprisonment half of which was suspended for 3 years is set aside and replaced by the following order:
  - (a) 'The accused is sentenced to 10 years imprisonment.'
  - (b) The sentence is antedated to 18 May 2017.

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S P Mothle  
Acting Judge of Appeal

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<sup>3</sup>*S v Ncanywa* 2017 JDR 0458 (ECG).

<sup>4</sup> *S v Kgosimore* 1999 (2) SACR 238 (SCA) at 24.

## APPEARANCES:

For appellant: S Hendricks

Instructed by:

The Director of Public Prosecutions, Grahamstown

The Director of Public Prosecutions, Bloemfontein

For respondent: P W Nel

Instructed by:

Port Elizabeth Justice Centre Legal Aid, Port Elizabeth

Bloemfontein Justice Centre, Bloemfontein