

SOUTH AFRICA / JUDGMENT

Banda v S (CA70/2019) [2024] ZANWHC 253 (11 October 2024)

[2024] ZANWHC 253

COURT

North West High Court, Mafikeng

BEFORE

Hendricks, Petersen

CASE / FILE NUMBER

CA70/2019

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

SAFLII

Note: Certain

personal/private details of parties or witnesses have been
redacted from this document in compliance with the law
and SAFLII

Policy

IN THE HIGH COURT OF

SOUTH AFRICA

NORTH WEST DIVISION,

MAHIKENG

CASE

NO: CA 70/2019

REGIONAL

MAGISTRATES CASE NO: E189/10C

Reportable:

YES / NO

Circulate

to Judges: YES / NO

Circulate

to Magistrates: YES / NO

Circulate

to Regional Magistrates: YES / NO

In

the matter between:	BANDA SELLO STEPHEN Appellant and THE STATE Respondent
CORAM:	HENDRICKS JP et PETERSEN J DATE OF HEARING : 27 NOVEMBER 2023 DATE OF JUDGMENT : 11 OCTOBER 2024 FOR THE APPELLANT : MR. MOREMI FOR RESPONDENT : ADV. CHULU
Delivered:	This judgment was handed down electronically by circulation to the parties’ representatives via email. The date and time for hand-down is deemed to be 10h00 on 11 October 2024. ORDER Resultantly,
the following order is made:	The appeal against the sentence of life imprisonment on count 1 (rape in contravention of section 3 of Act 32 of 2007) is dismissed.

JUDGMENT
HENDRICKS JP

Introduction

[1] This matter was enrolled on 27 November 2023 as one of the matters of an appeals project, embarked upon to eradicate the backlog in the North West Division of the High Court. The scribe Mr. D Joubert AJ, who was initially assigned, failed to deliver a judgment for more than ten months which forced me to re-allocate it to a differently constituted panel of Full Bench judges. The delay in delivering a judgment in this matter defeats the very purpose of

the project, to wit, the speedy finalization of appeals, in an endeavor to take care of and eradicate the backlog. The delay is indeed regrettable. This caused me to take it upon myself to write this judgment, as a matter of urgency, after I discovered the unreasonably long delay on 4 October 2024. This appeal is adjudicated on the papers as permitted in terms of section 19 (1)

(a) of the Superior Courts Act 10 of 2013, and as requested by both counsel in their respective practice notes as filed.

[2] The appellant was charged in the Regional Court, Moretele of having committed the offences of rape in contravention of section 3 of Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (count 1) and robbery with aggravating circumstances (count 2). Both offences were alleged to have been committed on 14 May 2010. On the rape charge the appellant is alleged to have unlawfully and intentionally engaged in sexual intercourse with E[...] M[...]

(‘complainant’) without her consent, and having penetrated her more than once. On the robbery charge, the appellant

is alleged to have robbed the complainant of her Nokia cell phone valued at R1 200.00.

Aggravating circumstances were alleged to have been present when the offence of robbery was committed in that a ‘broken bottle’ was used.

[3] The appellant pleaded not guilty to the charge of rape and raised the defence of consensual sexual intercourse. On the charge of robbery with aggravating circumstances, the appellant pleaded guilty to the competent verdict of theft, which the respondent (‘the State’) accepted. The appellant was consequently convicted of theft and sentenced to one (1) year imprisonment. The appellant, following a trial on the charge of rape, was duly convicted and sentenced to life imprisonment. The appeal lies only against the sentence of life imprisonment imposed on the conviction of rape.

[4] The facts can be succinctly summarized as follows. On 14 May 2010 the complainant was sleeping in her house. She was awoken by a knock on the door. Thinking that it was her grandson from Johannesburg, she opened the door, and the appellant entered. He assaulted the complainant on her head with a beer bottle. She sustained an open wound on her head following the assault, which bled profusely. He then dragged her to her bedroom and informed her that he wanted to engage in sexual intercourse with her. He also demanded money. When she refused, the appellant tore her panty. He also proceeded cut off the beaded necklace around her neck, using a knife he took from the kitchen on the way to the bedroom. When the complainant resisted by grabbing hold of the blade of the knife, she sustained a cut to her hand. The complainant protested, demanding to know why the appellant was demanding to engage in sexual intercourse

with her an old woman, when he was so young. All the appellant said in reply was that all the old women have money, as they receive

grants.

- [5] The appellant was with the complainant from around 22h00 to 04h00 the next morning. As a result of the non-consensual sexual encounter, the complainant experienced vaginal bleeding. The appellant also stole the complainant's cell phone. The arrest of the appellant was secured that same morning. The defence of the appellant on the rape charge was that there was an agreement with the complainant that he would engage in sexual intercourse with her, in return for protecting her from other criminals. This, according to the appellant, was a secret arrangement. It is common cause that the complainant at the time of the incident was an elderly lady above the age of seventy (70) years and the appellant who was twenty-four (24) years old was younger than the complainant's grandchild.
- [6] The appeal against sentence is assailed on the basis that the charge sheet does not specify that the offence is classified as being a section 51 (1) offence. This ground is misplaced. It is specifically mentioned in the charge sheet that section 51 (1) and Schedule 2 of the Criminal Law Amendment Act 105 of 1997 ('CLAA') finds application. Whilst the charge sheet and the transcribed record reflects the age of the complainant as twenty-one (21) years old, rather than seventy-one (71) years old, this is of no moment. It may well be a typographical error instead. It is also of no moment that the charge sheet does not refer to the Older Persons Act 13 of 2006. When the appellant was charged, the jurisdictional fact, relevant to the Older Persons Act, was not in force. The mandated sentence of life imprisonment applicable to the rape of an older person as defined in the Older Persons Act only came into operation on 2 August 2017. In any event, the jurisdictional fact relied on by the State was that the complainant was raped more than once. It is common cause that the complainant is at an advanced age. This much was conceded by the appellant. The fact that she is a vulnerable member of society is beyond any doubt.
- [7] The appellant further assails the sentence imposed, on a contention that the trial court 'erred in disregarding the fact that the accused was a first offender and therefore deserving mercy.' This is not entirely correct as previous convictions were proven against him, which had a bearing relevant to the theft conviction. However, as for the rape, the appellant is a first offender as he has no relevant previous conviction for rape. This is but one of the factors that must be taken into account when imposing a suitable sentence.
- [8] It is trite law that a court of appeal will not likely interfere with the sentencing discretion of a trial court. It will only interfere in limited instances, for example where a misdirection has been committed by the trial court or where the sentence is shockingly severe and excessive and totally out of proportion to the crime committed.

See: *S v Mtungwa* en 'n Ander 1990

(2) SACR 1(A).

S v Malgas 2001 (2) SA 1222 (SCA).

S v L 1998 (1) SACR 463 (SCA).

S v Kgosimore 1999

(2) SACR 328 (SCA).

[9] The grounds on which a court of appeal may interfere with a sentence on appeal are:

(i) where the sentence is disturbingly, shockingly inappropriate; and/or

(ii) where the sentence is so badly out of proportion to the magnitude of the offence(s); and/or

(i) where the sentence is sufficiently disparate; and/or

(ii) where the sentence is vitiated by a misdirection or when the trial court exercise its discretion unreasonably; and/or

(iii) where the sentence is otherwise such that no reasonable court would have imposed it.

See: S v Giannoulis 1975 (4) SA 867 (A).

S v Kibido 1998 (2) SACR 213 (SCA)

S v Salzwedel & Others 1999 (2) SACR 586 (SCA)

S v Matyityi 2011 (1) SACR 40 (SCA)

S v Dodo [2001] ZACC 16; 2001 (3) SA 382 (CC)

S v Furlong 2012 (2) SACR 620 (SCA).

[10] I find it quite apposite to quote extensively from S v Malgas 2001 (1) SACR 469 (SCA):

“[15] I consider the dicta in the cases which advocate such an approach to the application of s 51 to be conducive to error. In my view, they constrict unjustifiably the power given to a trial court by s 51 (3) to conclude that a lesser sentence is justified. Any limitations upon that power must be derived from a proper interpretation of the provisions of the Act and not from the assumption a priori that only a process akin to that which a court follows when in appellate mode is intended.

...

[25] What stands out quite clearly is that the courts are a good deal freer to depart from the prescribed sentences than has been supposed in some of the previously decided cases and that it is they who are to judge whether or not the circumstances of any particular case are such as to justify a departure. However, in doing so, they are to respect, and not merely pay lip service to, the legislature's view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of the specified kind are committed. In summary –

A Section 51 has limited but not eliminated the courts' discretion in imposing sentence in respect of offences referred to in Part 1 of Schedule 2 (or imprisonment for other specified periods for offences listed in other parts of Schedule 2).

B Courts are required to approach the imposition of sentence conscious that the legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.

C Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts.

D The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded.

E The legislature has however deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored.

F All factors (other than those set out in D above) traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from

consideration in the sentencing process.

G The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick ("substantial and compelling") and must be such as cumulatively justify a departure from the standardised response that the legislature has ordained.

H In applying the statutory provisions, it is inappropriately constricting to use the concepts developed in dealing with appeals against sentence as the sole criterion.

I If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.

J In so doing, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the bench mark which the legislature has provided.

....

- [30] Liebenberg J gave anxious consideration to the question of sentence and concluded that the circumstances of the case could not be regarded as substantial and compelling in their mitigatory effect and therefore such as to justify the imposition of a lesser sentence than imprisonment for life. He reached that conclusion with regret and said that if it had not been for the fact that a sentence of life imprisonment was prescribed by the relevant statute, he would not have considered sentencing appellant to imprisonment for life. He referred to the lack of unanimity in the provincial divisions of the High Court as to the correct interpretation of the legislation and regarded himself as bound by the approach indicated by Stegmann J in *S v Mofokeng* which approach had been approved by Jones J in an unreported decision in the Eastern Cape Division. He indicated that he was, in any event, in agreement with that approach. One of the findings made by Stegmann J in *Mofokeng's* case was that “for substantial and compelling reasons to be found, the facts of the particular case must present some circumstance that is so exceptional in its nature and that so obviously exposes the injustice of the statutory prescribed sentence in the particular case, that it can rightly be described as ‘compelling’ the conclusion that the imposition of a lesser sentence than that prescribed by Parliament is justified”.
- [31] As I have indicated earlier in this judgment the requirement that the circumstances be “exceptional” does not appear from the legislation and, in so far as Liebenberg J approached the question of sentence from that perspective, he erred. In all other respects Liebenberg J approached the question of sentence in a manner consistent with the approach set forth in this judgment. He made reference to the very serious nature of the crime. He pointed to the element of premeditation present and the defencelessness of the deceased. He considered that the motive for the killing was greed. There were apparently some life insurance policies from which Carol would benefit and the appellant stood to gain from the “lekker lewe” of which Carol had spoken. He adverted to the prevalence of crimes of violence in the country and the community’s interest in having the courts deal severely with offenders.”
- [11] In *S v Matyityi* 2011 (1) SACR 40 (SCA) the following is stated:

“[23] Despite certain limited successes there has been no real let-up in the crime pandemic that engulfs our country. The situation continues to be alarming. It follows that, to borrow from Malgas, it still is ‘no longer business as usual’. And yet one notices all too frequently a willingness on the part of sentencing courts to deviate from the minimum sentences prescribed by the legislature for the flimsiest of reasons – reasons, as here, that do not survive scrutiny. As Malgas makes plain courts have a duty, despite any personal doubts about the efficacy of the policy or personal aversion to it, to implement those sentences. Our courts derive their power from the Constitution and like other arms of state owe their fealty to it. Our constitutional order can hardly survive if courts fail to properly patrol the boundaries of their own power by showing due deference to the legitimate domains of power of the other arms of state. Here parliament has spoken. It has ordained minimum sentences for certain specified offences. Courts are obliged to impose those sentences unless there are truly convincing reasons for departing from them. Courts are not free to subvert the will of the legislature by resort to vague, ill-

defined concepts such as ‘relative youthfulness’ or other equally vague and ill-founded hypotheses that appear to fit the particular sentencing officer’s personal notion of fairness. Predictable outcomes, not outcomes based on the whim of an individual judicial officer, is foundational to the rule of law which lies at the heart of our constitutional order.”

[12] It was contended that the trial court erred in finding that there are no substantial and compelling circumstances present in this case, which warrants a deviation from imposing the prescribed sentence of life imprisonment, and that the sentence is ‘shocking and inappropriate’. It needs to be emphasized that the appellant was twenty (24) years old at the time of commission of the offences. The complainant was on the appellant’s own version seventy-one (71) years old. She was in the safety and sanctity of her home when accosted by the appellant. He assaulted her severely with a beer bottle on her head causing an open wound which

bled profusely. He threatened to kill her with the knife which he found in the kitchen. He cut her necklace. She sustained a cut on her hand after attempting to grab a hold of the knife. He had sexual intercourse with her without her consent, to the extent that he caused her vaginal bleeding. When she attempted to wipe herself, he prevented her from doing so. She was emotionally traumatized. He took her cell phone. She had to suffer the humiliation of reporting the rape to her neighbours and asking for help.

[13] Taking all these circumstances into account, the personal circumstances of the appellant necessarily recede to the background. The aggravating facts and circumstances of this case inherent in the injuries sustained by the complainant an elderly vulnerable woman, by far outweigh the personal circumstances of the appellant, which in my view is not at all substantial nor compelling and does not warrant a deviation from the prescribed sentence of life imprisonment. In my view, the reasoning of the Regional Magistrate cannot be faulted.

[14] The legislature has ordained minimum sentences for the type of rape perpetrated on the complainant. Rape, where serious bodily harm is inflicted, and where such rape was perpetrated more than once is an instance where life imprisonment as a sentence is justified. In the premise, I am unpersuaded that any misdirection was committed on the part of the Regional Magistrate. The appeal should accordingly fail, and the sentence confirmed.

Order

[15] Resultantly, the following order is made:

R D HENDRICKS

JUDGE PRESIDENT OF THE HIGH COURT OF SOUTH AFRICA,

I agree.

A H PETERSEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA,

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZANWHC/2024/253.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/banda-v-s-unknown-topic-anwhc-2024>

Prepared on 9 October 2026 · Esheria