

SOUTH AFRICA / JUDGMENT

Bhaso v S (A10/2020) [2020]

ZAGPJHC 193 (21 May 2020)

[2020] ZAGPJHC 193

COURT

South Gauteng High Court, Johannesburg

BEFORE

D Dosio, S Yacoob

CASE / FILE NUMBER

A10/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NUMBER :A10/2020

In

the matter between:

SIZAMKELE

BHASO APPELLANT

and

THE

STATE RESPONDENT

JUDGMENT

DOSIO AJ:

INTRODUCTION

- [1] The appellant was arraigned in the Alexandra Regional Magistrate Court, sitting in Wynberg, on a contravention of section 3 read with sections 1, 56 (1), 57, 58, 59 and 61 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (“The Sexual Offences Act”). The appellant pleaded not guilty, but was subsequently found guilty of raping a fourteen year old mentally retarded child and was sentenced to life imprisonment. He was further declared unfit to possess a firearm in terms of section 103 (1) of Act 60 of 2000 and the trial court ordered that his name be entered into the National Register for Sexual

Offenders.

- [2] The appellant was legally represented during the trial and has elected to only appeal his sentence. Due to the fact that a term of life imprisonment was imposed, the appellant enjoys an automatic right to appeal his sentence.

AD SENTENCE

- [3] It is trite that in an appeal against sentence, the court of appeal should be guided by the principle that punishment is pre-eminently a matter for the discretion of the trial court and the court of appeal should be careful not to erode that discretion.

- [4] A sentence imposed by a lower court should only be altered if:

- i. An irregularity took place during the trial or sentencing stage.
- ii. The trial court misdirected itself in respect to the imposition of the sentence.
- iii. The sentence imposed by the trial court could be described as disturbingly or shockingly inappropriate.[1]

- [5] As was stated by the learned Maya DP (as she then was) in the case of *S v Hewitt* 2017 (1) SACR 309 SCA;

“It is a trite principle of our law that the imposition of sentence is the prerogative of the trial court. An appellate court may not interfere with this discretion merely because it would have imposed a different sentence. In other words, it is not enough to conclude that its own choice of penalty would have been an appropriate penalty. Something more is required; it must conclude that its own choice of penalty is the appropriate penalty and that the penalty chosen by the trial court is not. Thus, the appellate court must be satisfied that the trial court committed a misdirection of such a nature, degree and seriousness that shows that it did not exercise its sentencing discretion at all or exercised it improperly or unreasonably when imposing it. So, interference is justified only where there exists a 'striking' or 'startling' or 'disturbing' disparity between the trial court's sentence and that which the appellate court would have imposed. And in such instances the trial court's discretion is regarded as having been unreasonably exercised”.

- [6] The trial court should be allowed to exercise its discretion in the imposition of sentence within reasonable bounds.

- [7] Section 51 (1) of the Criminal Law Amendment Act 105 of 1997 (“The Criminal Law Amendment Act” states that;

“(1) Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part 1 of Schedule 2 to imprisonment for life”.

- [8] Part 1 of Schedule 2 offences include rape as contemplated in section 3 of the Sexual Offences Act;

“where the victim –

- (i) Is a person under the age of 16 years;
- (ii) Is a physically disabled person who, due to his or her physical disability, is rendered particularly vulnerable; or
- (iii) is a person who is mentally disabled”

[9] Counsel for the appellant contended that the court a quo misdirected itself in that it should have found substantial and compelling circumstances present that justified a deviation from the prescribed minimum sentence of life imprisonment. The substantial and compelling circumstances are as follows;

- i. The appellant was twenty-one (21) years old when he committed the offence and his relatively young age was not explored by the court a quo to determine the degree of his maturity and the influence, or lack thereof, of his family and home environment to assess his moral culpability.
- ii. The appellant did not live the life of an adult as he lived at home, and the income he derived from his temporary work was ploughed back into his family.
- iii. The appellant is a useful member of the society fulfilling his obligations in respect to society and his family.
- iv. The appellant was relatively young when he committed the offence and there exists a real possibility of rehabilitation.
- vi. There was no gratuitous violence in addition to the rape.

[10] The appellants counsel contended that an appropriate sentence would be twenty (20) years imprisonment.

[11] In the matter of *S v Solomon and Another* 2008(2) SACR 149 (E) at paragraph [17] the learned Liebenberg J stated;

“It must be accepted that even where a person can be said to be suitable for rehabilitation, occasions do arise where the seriousness of the crime committed is such that it is only deserving of the severest punishment”.

[12] In the matter of *S v Mhlakaza and Another* 1997 (1) SACR 515 (SCA) at 519 d – e The court stated;

“Given the current levels of violence and serious crimes in this country, it seems proper that, in sentencing especially such crimes, the emphasis should be on retribution and deterrence”.

[13] In the matter of *S v Matyityi* 2011 (1) SACR 40 (SCA) at paragraph [14], the learned Ponnar JA stated;

“...Thus, whilst someone under the age of 18 years is to be regarded as naturally immature, the same does not hold true for an adult. In my view a person of 20 years or more must show by acceptable evidence that he was immature to such an extent that his immaturity can operate as a mitigating factor”.

[14] The following aggravating factors are present:

- i. The appellant showed no signs of remorse. He did not play open cards with the court, instead he put the court through a lengthy trial.
- ii. The child whom he raped was a mentally retarded fourteen (14) year old child with a mental age of four (4) years and nine (9) months.
- iii. The child suffered severe gynaecological injuries in that she was a virgin prior to the rape and as a result thereof, her hymen was torn at 5 and 8 o’ clock. There was also bruising at 3 and 9 o’ clock.
- iv. The appellant threatened the child that if she told anyone what he had done he would assault her and kill her.
- v. Since this rape, the child has been experiencing nightmares, and it is clear that this incident has impacted on her psychologically.
- vi. When the appellant was committing the rape he put a pillow on the child’s face.

[15] The personal circumstances of the appellant are the following;

- i. He was twenty-one (21) years old when he committed the offence of rape and twenty-four (24) years old when he was sentenced.
- ii. He is single, has no dependents and passed grade 11.
- iii. He is enjoying good health and was employed earning R120 a day.
- iv. He is a first offender who was raised in a loving home where his needs were catered for.

[16] The appellant’s personal circumstances, whilst relevant, are not the only important considerations in deciding on an appropriate sentence. The court must also take into account the nature and seriousness of the offence and the interests of society.[2]

[17] In the matter of *De Reuck v DPP* 2003 (1) SACR 448 (WLD) the learned Epstein AJ stated;

“The fact that the Constitution regards a child's best interests as of paramount importance must be emphasized. It is the single most important factor to be considered when balancing or weighing competing rights and interests concerning children. All competing

rights must defer to the rights of children unless unjustifiable. Whilst children have a right to, inter alia,

protection from maltreatment, neglect, abuse or degradation, there is a reciprocal duty to afford them such protection. Such a duty falls not only on law enforcement agencies but also on right thinking people and, ultimately, the Court, which is the upper guardian of all children”.

[18] The appellant did not present any evidence to show that he conducted himself in the manner that he did, because of immaturity. In fact, he knew exactly what he was doing. From the contents of the pre-sentence report, the appellant had many girlfriends, having commenced engaging in sexual intercourse at the age of sixteen (16) years old. From the contents of the pre-sentence report, it is clear that the appellant had a girlfriend at school. It is therefore unknown why the appellant wanted to keep this sexual relationship with this specific child a secret.[3]

[19] I find that the appellant was acting as a mature adult and I do not find that his age is a mitigating factor.

[20] In *S v Malgas* (supra) the court stated;

“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 be ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances. 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, standardized and consistent response from the courts. The specified sentences are not to be departed from lightly and for flimsy reasons”.

[21] I find that there are no substantial and compelling circumstances to depart from the minimum prescribed sentence of life imprisonment.

There was no misdirection on the sentence imposed by the Court a quo. The sentence of life imprisonment is not out of proportion to the gravity of the offence committed.

[22] In the result, having considered all the relevant factors and the purpose of punishment I consider an effective term of life

imprisonment to be an appropriate sentence.

[23] In the premises I order the following:

The appeal is dismissed.

Dated at Johannesburg on this 21nd day of May 2020

D DOSIO

ACTING JUDGE OF THE HIGH COURT

I agree

S. YACOOB

JUDGE OF THE HIGH COURT

On behalf of the Appellant: ADV. W. ROBERTSE

On behalf of the Respondent: ADV. N.P. SEREPO

Instructed by : Director of Public Prosecutions

Gauteng Local Division,

Cornet Pritchard and Kruis Street

Johannesburg

Date on roll: 21 May 2020

Handed down Judgment: 21 May 2020

[1] See *S v Salzwedel* 1999 (2) SACR 586 (SCA) at 591 F-G, and *Kgosimore v S* 1999 (2) SACR 238 (SCA)

[2] *S v Zinn* 1969 (2) SA 537 (A) at 540 g-h

[3] Page 222 of the bundle at line 1-4 of the transcript

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Prepared on 10 October 2026 · Esheria