

SOUTH AFRICA / JUDGMENT

Buthelezi v S (A416/2016) [2017] ZAGPPHC 925 (15 December 2017)

[2017] ZAGPPHC 925**COURT**

North Gauteng High Court, Pretoria

BEFORE

Hughes, Rangata

CASE / FILE NUMBER

A416/2016

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA****(GAUTENG****DIVISION, PRETORIA)****Case****Number: A416/2016****Reportable:**

NO

Of

interest to other judges: NO

Revised.

15/12/2017

Lucky

Antony

Buthelezi Appellant

and

The

State Respondent

Coram:

HUGHES J et RANGATA

AJ

JUDGMENT

RANGATA AJ

[1] On the 31 August 2012 in the Vereeniging Regional Court the appellant, Mr Lucky Antony Buthelezi, who was legally represented

throughout the trial was convicted and sentenced by the Regional Magistrate, Mrs Willemse. The conviction was in respect of the charge of rape, in contravention of section (3) of Criminal Law Sexual Offences and Related Matters Amendment Act 32 of 2007 (the Act). The appellant was sentenced to life imprisonment.

[2] After the charges were put to him the appellant pleaded guilty to the charges preferred. Accordingly the magistrate found him guilty and she stated the following: ". ..[O]f Schedule 2 of the Criminal Law Amendment Act 38 of 2007, to wit rapeit is clear that all the necessary elements are admitted and that the accused had the necessary intention to commit the said offence as put to him by the state ...Mr Buthelezi is therefore convicted as charged."

[3] In sentencing the appellant the magistrate reminded herself that she was directed in this instance in terms of "Section 51(1) read with Subsection (3) and (6) as well as part 1 of Schedule 2 of the Act ..." to impose the sentence as indicated in this section of life imprisonment unless she could find substantial and compelling circumstances that existed to deviate from the prescribed minimum sentence to be imposed.

[4] It is evident from the above that the sentence of life imprisonment was imposed in terms of section 51(1) of the Criminal Law Amendment Act 105 of 1997 (the Criminal Law Amendment Act) . The appellant was also declared unfit to possess a fire arm in terms of section 103 (1)(g) of the Fire Arms Control Act 60 of 2000.

[5] Turning back to the charge that was put to the appellant is set out below: "Rape in contravention of the provisions of section 3 read with sections 1, 56(1), 58, 59, 60 and 61 of the Sexual Offences

Act 32 of 2007 read with section 92(2), 256, 257 and 281 of the Criminal Procedure Act 51 of 1977 and the provision of sections 51 and schedule 2 of the Criminal Law Amendment Act 38 of >2007."

Section 3 of the Sexual Offences Act specifically makes provision as follows:

"Any person ('A') who unlawfully and intentionally commits an act of sexual penetration with a complainant ('B'), without the consent of B, is guilty of the offence of rape."

[6] What also emerges from the charge is that section 3 of the Sexual Offences Act was to be read with section 51 and Schedule 2 of the Criminal Law Amendment Act. In terms of this section and in terms of Schedule 2, provision is made when sentencing an offender in these circumstances, in respect of part I schedule 2 of an imposition of life imprisonment and in terms of part II schedule 2, a first offender being sentenced to 15 years; a second offender to 20 years and a third offender to 25 years.

[7] I set out the facts briefly hereafter. The state alleged that on 28 March 2011 and at Sharpville the appellant unlawfully and

intentionally raped the complainant, Nontsokolo Zonda, a 13 year old female, by inserting his penis into her vagina. The appellant pleaded guilty to the charge preferred by way of his statement in terms of section 112 (2) of the Criminal Procedure Act 51 of 1977. In doing so he admitted having had sexual intercourse with a 13 year old female child.

[8] He was accordingly found guilty and prior to sentencing the magistrate made enquiries whether he was aware that the charge for

which he was found guilty attracted a minimum sentence. The appellant duly confirmed that indeed he was aware. Hence, the magistrate

stated:

"It is common cause that the provisions of section 51 of the Criminal Law Amendment Act 105 of 1997 are applicable".

[9] The appellant appeals against the sentence imposed with the leave of the court a quo.

[10] The crucial issue in this appeal is whether the appellant was correctly sentenced in terms of "Section 51 of 105 of 1997 to life imprisonment." As according to the charge sheet and the appellant's plea to the charge sheet he had pleaded guilty to "sections 51 and schedule 2 of the Criminal Law Amendment Act 38 of 2007".

[11] The appellant took issue with the fact that his constitutional right to a fair trial had been infringed. He argued that the court a quo erred in sentencing him to life imprisonment in terms of section 51(1) of the Criminal Law Amendment Act 105 of 1997, when in fact he was charged with contravening section 3 of the Sexual Offences Act read with section 51 of the Criminal Law Amendment Act. He further argued that the magistrate misdirected herself when she alluded to the fact that what was required for her to deviate from the imposition of the minimum sentence was truly convincing reasons. Hence, the conclusion that there was in fact no substantial and compelling circumstances.

[12] The state on the other hand argued that there was no misdirection on the part of the magistrate as all the relevant considerations in respect of sentencing had been taken into consideration prior to sentencing the appellant. Further, that the sentence imposed is fair and appropriate in the circumstances.

[13] In considering this appeal I am mindful of the dicta in *Nyawuza v State*[1] where it was stated that:

"The Court of appeal does not have an unfettered discretion to interfere with the sentence imposed by the trial court. It is only where it is clear that the discretion of the court was not exercised judicially or reasonably that a court of appeal will be entitled to interfere. Where there is not clear misdirection, the remaining question is whether there exists such a striking disparity between the sentence imposed and the sentence the appeal court would have imposed as to warrant interference"

[14] It is evident from the aforesaid that there is a glaring misdirection on the part of the magistrate as she failed to sentence

the appellant in line with the charges that he was convicted of read together with the relevant sentencing provision he had accepted as his fate and had pleaded to. This is a clear violation of the appellant's rights in terms of section 35(3) of the Constitution to a fair trial.

[15] The magistrate by virtue of the fact that she recognised that the applicability of "section 51 of the Criminal Law Amendment Act 105 of 1997 are applicable" is a clear indication that she had the two Acts, that is the Criminal Law Amendment Act 105 of 1997 confused with the Criminal Law Amendment Act 38 of 2007. This in itself is a gross misdirection on the part of the magistrate.

[16] The only instance that the magistrate could convict the appellant to life imprisonment is if he was found to be guilty in terms of section 51 of the Criminal Law Amendment Act 38 of 2007. It is only then that the regional court is able to impose life imprisonment. In terms of section 51 of the Criminal Law Amendment Act 105 of 1977 only the High Court may impose life imprisonment, unless the case is referred to the high court in terms of section 52(1) for sentencing after the accused has been convicted.

[17] A further concern is that the charge that the appellant pleaded to was as stated by the prosecutor in terms of ". . .as well as Section 51 and Schedule 2 of the Criminal Law Amendment Act 30 of 2001". There is no such Act. The charge in my view would be component in respect of the charge of rape but not so in respect of the Act in respect of sentencing the appellant. We are aware that the appellant was found to be guilty as charged.

[18] Mention must be made as regards the manner in which the magistrate embarked on sentencing the appellant. The following comment made by the magistrate is indicative of her attitude, that being vindictive and without consideration of the triad principles. She stated the following:

"In this case of Mr Buthelezi he qualified two times for life imprisonment. First by raping the complainant, the victim under the age of 18 and by raping the complainant knowingly that he was HIV positive."

The dicta of Holmes JA in *S v Rabie* 1975 (4) SA 855 at 8620 resonated:

"It remains only to add that, while fair punishment may sometimes have to be robust, an insensitively censorious attitude is to be avoided in sentencing a fellow mortal, lest the weighing in the scales be tilted by incompleteness."

[19] It is further noted from the aforesaid extract from the magistrate's comment that the two factors that she took into consideration, that being the age of the minor child being 13 years and the fact that the appellant was well aware that he possessed the HIV virus when- the rape was committed, fell within the scope of the of section 51(1) part I of schedule 2, which makes provision as follows:

"Rape

- (a) when committed -

(i)....

(ii)...

(iii)

(iv) by a person, knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus;

(b) where the victim -

(i) is a girl under the age of 16 years:

..."

[20] Thus, the appellant was being sentenced in terms of an Act, which he had not been charged in accordance with, or had pleaded to nor was found guilty of. In the circumstances, this 'is a situation where this court is duty bound to interfere with the sentence of life duly imposed.

[21] In the *Ndlovu v The State*[2], the trial court similarly found the appellant guilty as charged, having been charged with rape read with the provisions of section

51(2). In that case, the Court stated that the appellant was convicted of the offence in terms of part III of schedule 2 and not

an offence referred to in part I of schedule 2. The ultimate conclusion reached by the Court was that the pronouncement of "guilty as charged" by the magistrate was in fact unambiguous.

Khampepe J, in *Ndlovu* writing unanimously for the Court stated the following:

"[45] The Magistrate was aware that the charge was "rape read with the provisions of [s]ection 51(2)" and specifically found Mr Ndlovu "guilty as charged". This wording simply does not permit an interpretation that the Magistrate in fact convicted Mr Ndlovu of rape contemplated in section 51(2). Nor does the evidence of the complainant's injuries automatically cure the charge in terms of section 51(1), as posited by the state. A defective, or incomplete, charge may be remedied by

evidence in some instances by section 88 of the Criminal Procedure Act. However, this charge was complete and not defective. Quite simply, the charge was not rape involving the infliction of grievous bodily harm and evidence alone could not make it so."

[22] The same situation ensures in this instance. The charge in this case is also complete as regards the act of rape as recorded in the charge sheet it is recorded as the sexual penetration with the complainant without her consent. No evidence was led as the appellant pleaded guilty to the charge put to him.

[23] Turning to deal with the relevant sentence that ought to have been imposed. I am mindful of the fact that the thirteen year old child that the appellant raped was his "true cousin" and that appellant was 32 years of age. I also take cognisance of the fact that the appellant was on parole when this offence was committed and that he had two previous convictions, though not related to rape. The conclusion of the doctor on the J88 is also of relevance in that he records the following:

"Multiple genital injuries compatible with forceful penetration of the vagina."

[24] From the presentencing report it can be deduced that the appellant completed matric, then he embarked and completed N1 and N2 Motor Mechanic courses before his arrest. The appellant has two children from different mothers, the second one being from his girlfriend he was involved with at the time of committing the offence. The information gathered from the victim impact report reveals that the child trusted the appellant and went with him as suggested to pick 'n pay. On the way he then pulled her in a nearby bush and raped her four times. The psychological impact report recorded that the child is withdrawn, self conscious and afraid of people. She is not coping well in school and that "she hated her cousin for what he did to her." The social worker also records that she is suffering from the stigma that she receives from the community that she had been raped by her cousin.

[25] Therefore, the appellant was not convicted of a rape that fell into part 1 of schedule 2, that being the only provision that sets out instances to allow for both the regional and high court to impose life imprisonment, in terms of section 51 of the Criminal Law Amendment Act 38 of 2007. Hence, this rape falls into the category of

part III schedule 2.

[26] In the circumstances, taking the fact advanced above in mitigation and in aggravation, I find that there are no facts before me to deviate from the minimum sentence that ought to have been imposed. The appellant having still been on parole is indicative that he was still serving a sentence when he committed this act of rape. The appellant also admitted a conviction in October 2003 of robbery, a conviction of theft and the use of property without consent in August

2006. He attained 6 years for the latter two convictions and was on probation when he committed this rape.

- [27] The circumstances, of this rape puts it as being one of the most harrowing and malignant crime confronting the society. Rape is perhaps the most horrific and dehumanising violation that a person can live through and is a crime that not only violates the mind and body of a complainant, but also one that vexes the soul. This crime is an inescapable and seemingly ever-present reality and scourge on the nation and the collective conscience of the people of South Africa[3].
- [28] However, the manner in which this case was dealt with, the incorrect provisions of the Act being used is a violation to the victim and her family. The interest of the children is paramount in the formulation and prosecution of offenders where children are the victims prosecutors and magistrates should be more diligent.
- [29] Due to the manner in which this matter was dealt with in the court below i am of the view that this court is in a position to sentence the appellant and the matter need not be remitted to the court a quo. In the circumstances, though the appellant is taken as a first offender for this offence i am mindful of the factors surrounding this particular rape mentioned above when sentencing the appellant.
- [30] The sentence imposed is duly set aside. The regional court had the power to sentence the appellant to a minimum of 10 years and a maximum of 15 years in terms of the Criminal Law Amendment Act.
- [31] The factors set out in the victim impact report elevate the seriousness of this offence and it is in my view warranted to go beyond the minimum sentence prescribed for a first offender of any such offence. In terms of section 51(2) of the Criminal Law Amendment Act the maximum sentence over and above the minimum that the regional court may impose is 5 years.
- [32] Having considered the personal circumstances of the accused, the seriousness of the offence committed, the impact of the offence to the victim and the interest of the society the appellant is accordingly sentenced to a period of 15 years imprisonment.
- [33] Consequently I make the following order:
- (a) The appeal against sentence is upheld.
 - (b) The sentence of life imprisonment imposed on 31 August 2012 is set aside.
 - (c) The appellant is sentenced to 15 years imprisonment antedated to 31 August 2012.

B. Rangata

Acting Judge of the High Court Gauteng, Pretoria

I concur

It is so ordered

W. Hughes

Judge of the High Court Gauteng, Pretoria

[1] 2014 Jol 32320 KZP 6 para 15

[2] Ndlovu v The State [2017] ZACC 19 on page 15 at para [45]

[3] Ndlovu (supra)

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