

SOUTH AFRICA / JUDGMENT

Halitile v S (Appeal) (CA&R88/2024)

[2024] ZAECMKHC 110 (11 October 2024)

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COURT

Eastern Cape High Court, Makhanda

BEFORE

N G Beshe, P Zilwa

CASE / FILE NUMBER

CA&R88/2024

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, MAKHANDA)

Case Number.: CA&R88/2024

In the matter between:

LUVO HALITILE

Appellant

and

THE STATE

Respondent

JUDGMENT – CRIMINAL APPEAL

Beshe J

- [1] The appellant stood trial on a rape charge before the Regional Court sitting in East London. He was alleged to have committed acts of sexual penetration with Ms V[...] M[...] without her consent. The offences were alleged to have been committed on the 11 June 2016. Having pleaded guilty to the charge, he was convicted on the basis of his plea on the 14 June

2017. It was on the same day that he was sentenced to imprisonment for life. He is now appealing against the sentence imposed on the basis inter alia, that the trial court misdirected itself by over emphasising the seriousness of the offence and by not placing enough emphasis on the appellant's personal circumstances.

[2] The appeal is opposed by the state on the basis that the sentencing court exercised its discretion judiciously and did not commit any misdirection when assessing whether substantial and compelling circumstances existed. Section 51(1) of the Criminal Law Amendment act 105 of 1997 requires that a court if it has convicted an accused of an offence such as the one committed by accused, namely, rape where the victim was raped more than once whether by the accused or by a co-perpetrator or accomplice, to sentence such an accused to life imprisonment. The imposition of a lesser sentence is permissible if the court is satisfied that substantial and compelling circumstances justifying that lesser sentence exist (Section 51(3)(a)). The court a quo having considered all the circumstances of this case concluded that there were no substantial and compelling circumstances justifying a lesser sentence.

[3] It is by now settled law that in determining the existence of or otherwise substantial and compelling

circumstances and whether or not to deviate from the prescribed sentence, the factors that are traditionally taken into account for sentencing continue to play a role. It is trite that a sentence must fit the crime, the offender and be fair to society.

[4] The trial court was urged to consider the following factors as constituting substantial and compelling

circumstances warranting the imposition of a lesser sentence:

The fact that appellant pleaded guilty to the charge. The submission being made that by so doing he exhibited remorse, a factor he also expressed in the statement he made in terms of Section 112(2) of the Criminal Procedure Act 51 of 1977. In the said statement the following was stated in this regard: "I am remorseful of my action and request the court to be lenient when imposing a sentence". It was further submitted that being 24 years old, appellant can be categorised as being young/youthful. Furthermore, that no gratuitous violence was used, even though he threatened the complainant.

[5] This was countered by the respondent by suggesting that aggravating circumstances outweighed whatever factors may be favourable to the accused. The public prosecutor highlighted the prevalence of this type of offence in circumstances where the complainant would have boarded a vehicle as a fare paying passenger, being taken on a detour instead of her intended destination where she is then raped, as it happened to the complainant in this matter. At 24 years of age, there is no evidence to show that he was immature, so the argument went. Accused humiliated the complainant by forcing her to suck his penis. He left the complainant to fend for herself in the middle of nowhere around 21h00 in the

evening. He did not use protection when he raped her. We also know that the incident caused the complainant a great deal of anguish and psychological trauma.

- [6] It is trite that the power of an appellate court to interfere with a sentence that was imposed by the trial court is circumscribed. This was also acknowledged by counsel for the appellant with reference to previously decided cases in their heads of argument. An appellate court may only do so if the sentence is vitiated by (1) an irregularity;
- (2) misdirection; or
- (3) is one which no reasonable court could have imposed.

In casu, it was submitted that the court a quo committed a misdirection by overemphasising the seriousness of the offence and by not placing enough emphasis on the appellant's personal circumstances. It was also suggested that the sentence imposed is unreasonable.

- [7] In *S v PB* 2013 (2) SACR 533 SCA at 539 paragraph [20], the following instructive remarks were made regarding the approach by an appeal court when considering an appeal against a sentence that was imposed as envisaged in the Minimum Sentence regime:

[20] What then is the correct approach by a court on appeal against a sentence imposed in terms of the Act? Can the appellate court

interfere with such a sentence imposed by the trial court's exercising its discretion properly, simply because it is not the sentence which it would have imposed or that it finds shocking? The approach to an appeal on sentence imposed in terms of the Act should, in my view, be different to an approach to other sentences imposed under the ordinary sentencing regime. This, in my view, is so because the minimum sentences to be imposed are ordained by the Act. They cannot be departed from lightly or for flimsy reasons. It follows therefore that a proper enquiry on appeal is whether the facts which were considered by the sentencing court are substantial and compelling, or not.'

- [8] I am inclined to agree with the representative for the state that mitigating factors were outweighed

by the aggravating circumstances and that such mitigating factors were neutral. Granted that this may have been accused's first conviction for a sexual offence. But regarding the suggestion that his age and the fact that he pleaded guilty thereby showing a sign of remorse were not given due weight by the trial court, I take note of what was stated in *S v Matyityi* 2011 (1) SACR 40 SCA. I can do no better than quote directly from the said judgment in this regard at paragraph 14 a-c:

'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. At the age of 27 the respondent could hardly be described as a callow youth. At best for him, his chronological age was a neutral factor. Nothing in it served, without more, to reduce his moral blameworthiness. He chose not to go into the box, and we have been told

nothing about his level of immaturity or any other influence that may have been brought to bear on him, to have caused him to act in the manner in which he did.'

[9] Regarding pleading guilty to a charge, the following was stated at paragraph [13].

'[13] Remorse was said to be manifested in him pleading guilty and apologising, through his counsel (who did so on his behalf from the bar) to both Ms KD and Mr Cannon. It has been held, quite correctly, that a plea of guilty in the face of an open and shut case against an accused person is a neutral factor. The evidence linking the respondent to the crimes was overwhelming. In addition to the stolen items found at the home of his girlfriend, there was DNA evidence linking him to the crime scene, pointings-out made by him, and his positive identification at an identification parade. There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error. Whether the offender is sincerely remorseful and not simply feeling sorry for himself or herself at having been caught, is a factual question.'

These observations apply with equal force in this matter. By concluding that there were no substantial and compelling circumstances

justifying a lesser sentence the court a quo seems to have exercised its discretion judiciously and did not misdirect itself and therefore cannot be faulted. The appellant's personal circumstances did not amount to substantial and compelling circumstances.

[10] Consequently, the appeal against sentence is dismissed.

N G BESHE

JUDGE OF THE HIGH COURT

ZILWA J

I agree.

P ZILWA

APPEARANCES

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