

SOUTH AFRICA / JUDGMENT

Hlalele v S (CA17/2021) [2022] ZANWHC 23 (14 July 2022)

[2022] ZANWHC 23

COURT

North West High Court, Mafikeng

BEFORE

Petersen, Gura

CASE / FILE NUMBER

CA17/2021

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

Source record

IN

THE HIGH COURT OF SOUTH AFRICA

NORTH

WEST HIGH COURT, MAFIKENG

CA

17/2021

Reportable:

YES / NO

Circulate

to Judges: YES/ NO

Circulate

to Magistrates: YES/ NO

Circulate

to Regional Magistrates: YES/ NO

In

the matter between:

TSHEPO

HLALELE

Appellant

and

THE

STATE

Respondent

CRIMINAL

APPEAL

CORAM:

PETERSEN J et GURA J

ORDER

(1)

The wording in respect of the conviction is amended to read: "Guilty of Housebreaking with intent to rape and contravening section

3

of

the

Criminal

Law

(Sexual Offences and Related Matters) Amendment Act, Act 32 of 2007."

(2)

The appeal

against

sentence is

upheld.

(3)

The sentence of twenty 20 years'

imprisonment is set aside and replaced with the following sentence:

"The

accused is sentenced to ten (10) years' imprisonment. The accused shall remain unfit to possess a firearm in terms of section 103(1) of the Firearms Control Act 60 of 2000."

(4)

The sentence is ante-dated to 02

July 2013.

JUDGMENT

PETERSEN J:

Introduction

- [1] The appellant was tried at the Mmabatho Regional Court on a charge of housebreaking with intent to rape and rape. He pleaded guilty to the charge on 02 July 2013, was duly convicted on his plea of guilty and was sentenced on the same date to twenty (20) years imprisonment. The appellant initially on 25 February 2021 sought leave to appeal the sentence imposed which was granted by the court a quo. On 26 March 2021, the appellant further sought leave to appeal the conviction which was similarly granted by the court a quo. This appeal against conviction and sentence is therefore with leave of the court a quo.

- [2] In the notice of appeal, the appellant does not persist in the appeal against conviction, indicating that there are no grounds in law to appeal the conviction. Notwithstanding this indication, the issue is dealt with in the heads of argument on behalf of the appellant.

Condonation

- [3] The appellant failed to prosecute his appeal timeously and has filed an application for condonation for the late filing of the appeal accompanied by an affidavit in support of the application.
- [4] In *Mulaudzi v Old Mutual Life Assurance company (SA) Limited*, [1] Ponnann JA re-affirmed the factors to be considered in respect of an application for condonation stated in *Melane v Santam Insurance Co. Ltd*:

"Factors which usually weigh with this court in considering an application for condonation include the degree of non-compliance, the explanation therefor, the importance of the case, a respondent's interest in the finality of the judgment of the court below, the convenience of this court and the avoidance of unnecessary delay in the administration of justice."

- [5] In *Grootboom v National Prosecuting Authority* [2] the Constitutional Court re-affirmed the trite principle that:

"It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court's directions. Of great significance, the explanation must be reasonable enough to excuse the default."

- [6] The main reason advanced by the appellant for the lateness in prosecuting the appeal following the granting of leave to appeal, is that the transcribed record of proceedings was incomplete. The outstanding parts of the record were furnished to the appellant's legal representatives several months later.
- [7] The appellant further relies on an assertion that there are good prospects of success in his appeal against sentence, predicated in the main on the fact that the sentence was imposed in terms of the provisions of section 51(2) of the Criminal Law Amendment Act 105 of 1997 ("the CLAA"), when no reference was made to the said provision or explained to him.
- [8] The application for condonation is not opposed by the respondent on the basis that it concedes there are reasonable prospects of success on sentence having regard to the circumstances of the matter.
- [9] The appellant's explanation is accepted and sufficient cause has been shown for condonation to be granted. Condonation for the late filing of the appeal is accordingly granted.

Grounds of appeal on sentence

[10] The grounds of appeal are set out in the Notice of Appeal as follows:

"AD SENTENCE

1. The sentence imposed induces a sense of shock and is disturbingly inappropriate.
2. The Learned Regional Magistrate misdirected himself in over-emphasizing the seriousness of the offence at the expense of the interests of the community and the personal circumstances of the appellant.
3. The sentence of twenty (20) years imprisonment in circumstances where the law prescribes 10 years' imprisonment for first offenders like the appellant was a serious misdirection.
4. The Honourable trial court misdirected itself when it held that when a person breaks into another's house he damages that person's house since in law removing or shifting any object in order to gain entry into a house is sufficient to constitute the crime of housebreaking with no need for any structural or other damages.
5. The Learned Regional Court Magistrate should have taken into account the fact that the appellant pleaded guilty and was a first offender on the crime of rape and no gratuitous violence was used when committing the crime.
6. The pre-sentence period spent in custody was not taken into account during sentencing."

The charge

[11] A brief reference should be made to the charge proffered against the appellant insofar as it impacts on this Court having to correct the conviction, even though the appeal is not persisted in on conviction. The appellant was charged with housebreaking with intent to rape and rape in terms of the common law. The common law offence of rape was repealed by the enactment of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, which came into operation on 16 December 2007. In *S v Nedzamba*[3], Navsa JA, said the following in this regard:

"[21] The question, whether a charge-sheet outlining a charge of rape without reference to the Act (Act 32 of 2007 - my insertion) was susceptible to amendment on appeal, was addressed in *S v Matha* 2012 (1) SACR 451 (KZP). The high court permitted an amendment to the charge-sheet to include a reference to s 3 of the Act on the basis that there was no resultant prejudice to the accused. In granting the amendment the high court stated that the test was whether the suggested amended charge differed from the existing one to such an extent that it amounted to another charge, and that an additional consideration is whether there was a possibility of prejudice to the accused. It answered both questions in the negative.

[22] I commend the following part of the reasoning of the court in *Matha*, which applies equally to the present case:

'[13] What becomes clear from the relevant parts of the Act is the following. First, it is not the crime of rape which was abolished, it is the common-law relating to the crime which was repealed. This means that the crime of rape remains a crime, but has a different content. This content, which was previously provided by the common-law, is now provided by s 3 of the Act. The content provided by s 3 includes that content previously provided by the common-law, namely the penetration of the genital organ of the complainant by the genital organ of the accused. The balance of s3 includes actions, now construed as rape, which, under the common-law, did not constitute rape.'

[23] In the present case the appellant had legal representation and his case was conducted on the basis that he had been fully aware that he faced a charge of rape "

[12] In the present matter, the appellant was similarly fully aware that he faced a charge of housebreaking with intent to rape and rape. The appellant in fact pleaded guilty to the charge on this very premise. There is accordingly no prejudice if the conviction were to be amended on appeal to reflect the correct wording of the present Act, Act 32 of 2007.

The test on appeal

[13] It is trite that a court of appeal will not lightly interfere with the sentencing discretion of a trial court. The position is succinctly

set out in *S v Malgas*[4] where it was held that:

"[12] The mental process in which courts engage when considering questions of sentence depends upon the task at hand. Subject of course to any limitations imposed by legislation or binding judicial precedent, a trial court will consider the particular circumstances of the case in the light of the well-known triad of factors relevant to sentence and impose what it considers to be a just and appropriate sentence. A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate court is at large. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate". It must be emphasized that in the latter situation the appellate court is not at large in the sense in which it is at large in the former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned. No such limitation exists in the former situation."

(my emphasis)

The failure to cite or explain and the misapplication of the provisions of section 51(2) of the CLAA

[14] On a reading of the record as a whole, it is clear that the State failed to cite or make any reference to the provisions of section 51(2) of the CLAA in the charge sheet. The Regional Magistrate further failed to explain the provisions of section 51(2) of the CLAA once the charge was read to the appellant. The judgment on conviction is silent on any finding made by the Regional Magistrate relevant to section 51(2) of the CLAA. This is further exacerbated by the absence of any reference to the said provision during the judgment on sentence.

[15] The twenty-year imprisonment term imposed by the Regional Magistrate purports to suggest that it was arrived at as a result of invoking section 51(2) of the CLAA. In this regard, the State proved two previous convictions for housebreaking with intent to steal and theft. The only basis on which the Regional Magistrate could have imposed the twenty-year term, was on a misconstrued application of the provisions of section 51(2)(a) of the CLAA, with emphasis on the first part of the charge being housebreaking with intent to commit an offence. The Regional Magistrate appears to have considered

the two previous convictions for housebreaking with intent to steal and theft, sufficient to justify an incremental departure from the mandated sentence of fifteen

(15) years imprisonment. This is exacerbated by the fact that the rape in the circumstances of the present matter was a rape in terms of section 51(2)(b) of the CLAA. This, bearing in mind that the said provisions were never cited nor explained to the appellant. Section 51(2)(a) and (b) of the CLAA provides that:

"51. Discretionary minimum sentences for certain serious offences

(2) Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in-

(a) Part II of Schedule 2, in the case of-

(i) a first offender, to imprisonment for a period not less than 15 years;

(ii) a second offender of any such offence, to imprisonment for a period not less than 20 years; and

(iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years;

(b) Part III of Schedule 2, in the case of-

(i) a first offender, to imprisonment for a period not less than 10 years;

(ii) a second offender of any such offence, to imprisonment for a period not less than 15 years; and

(iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 20 years."

[16] In *S v Mokela*[5], Bosiello JA held that:

"[6] It is a clear requirement of s 51(2)(a)(ii) that for the appellant to attract a minimum sentence of imprisonment of not less than 20 years, the State had to prove that he is a second offender of robbery with aggravating circumstances. This is the jurisdictional requirement necessary to trigger s 51(2)(a)(ii). All that the State proved in this case is that the appellant had previous convictions amongst others for rape, robbery, theft, assault and escaping from lawful custody. In terms of s 51(2)(a)(ii) it is not sufficient that the appellant has a previous conviction for robbery. The conviction must be robbery with aggravating circumstances. Robbery and robbery with aggravating circumstances are two different offences calling for different sentences."

[17] The Regional Magistrate clearly misdirected himself materially in imposing the sentence of twenty years' imprisonment. The sentence mandated by the legislature if the provisions of section 51(2) of the CLAA were cited or explained to the appellant would have been a minimum sentence of 10 years' imprisonment for a first offender of such offence as the appellant was. The Regional Magistrate in the ordinary course would have been constrained to the penal jurisdiction for the Regional Courts as provided in section 92 of the Magistrates' Act 32 of 1944, which provides for a maximum term of fifteen years' imprisonment.

[18] A fair trial in the circumstances of the present appeal where the misdirection by the Regional Magistrate inadvertently brings about a sentence regime of fifteen years imprisonment, dictates that this should not be prejudicial to the appellant. In the circumstances, if it were not for this misdirection, the appellant would have been faced with a minimum sentence of ten years' imprisonment. It is on this basis that this Court being at large to consider the question of sentence afresh will approach sentencing.

The

facts

[19] A brief summary of the facts which underscored the conviction of the appellant is necessary in the consideration of a suitable sentence. The facts on which the appellant was convicted are based on his plea of guilty. The salient facts set out in the statement in terms of section 112(2) of the Criminal Procedure Act 51 of 1977 read as follows:

"5.

On the night in question I went (sic) complainant's house and opened the window and entered and went to her bedroom while she was sleeping.

6.

I entered her bedroom and went to her bed and forcefully had sexual intercourse without her consent.

7.

She did then scream while having intercourse and I decided to run away as she was alarming the neighbours. I went straight home and later on the police came as a result I was arrested for the charge of housebreaking with intent to rape and rape."

[20] The J88 medical report in respect of the complainant did not demonstrate any injuries and concluded that there was possibly penetration.

Sentence

[21] The personal circumstances of the appellant at the time of sentence are as follows. He was 24 years old, an only child to his mother who passed away in 2003, his father abandoned his mother and himself when he was still a baby, had two previous convictions for housebreaking with intent to steal and theft, had no children, left school in Grade 10 and was unemployed and spent one year in custody awaiting trial.

[22] The appellant broke into the home of the complainant at night as she lay asleep and violated her dignity as a human being by sexually violating her. It does not avail the appellant that the complainant suffered no physical injuries. The outcry by society in matters of this nature speaks for itself. In the normal course, had the provisions of section 51(2)(b) of the CLAA been applicable, the circumstances of the matter would have been such, in my view, that no substantial and compelling circumstances could be found.

[23] In my view therefore, a sentence of ten (10) years imprisonment would be a suitable sentence, ante-dated to 02 July 2013. The order declaring the appellant unfit to possess a firearm should stand.

The formulation of charges

[24] In the unreported appeal judgment of *Mogapi v S*[6] of this Division, I said the following on the formulation of charges in matters such as the present, which merits repetition:

'[21] The court a quo dealt with sentencing on the two composite charges of housebreaking with intent to rape and rape as one, following the drafting of the charge by the state. In the unreported judgment of *OPP v Mushane* 2018 JDR 0687 (SCA) at paragraphs [10] and [11], Rogers AJA said:

"[10] Strictly speaking, each count in the present case involved two distinct offences, namely (a) housebreaking with intent to commit rape; and (b) rape (*S v Zamisa* 1990 (1) SACR 22 (N) at 23d-e.) However, since the indictment was framed as if each housebreaking and the ensuing rape constituted a single offence, and since the contrary was not argued, I shall approach the case as if the respondent was convicted of two offences, not four. This is what the court a quo did.

[11] In the case of the two rapes, the respondent was, for purposes of the legislation, a first offender (the rape conviction in October 2015 post-dated the rapes with which he was charged in the present case), so the minimum sentence in respect of each rape was ten years' imprisonment in terms of s 51(2)(b)(i) read with Schedule III."

[22] In *S v Maswetswa* 2014 (1) SACR 288 (GSJ) at para [6], Wepener J, in similar vein, said the following about the drafting of charges in relation to housebreaking with intent to rob and robbery with aggravating circumstances, emphasizing that the same principle should be applicable to rape and murder, where minimum sentences apply:

"[6] There now appears good reason why the offence of housebreaking with intent to commit a crime and the crime should be charged as separate offences and not as a single offence in the case of robbery, murder and rape and any offence for which a minimum sentence is prescribed. In matters where the charges involve housebreaking with the intent to rob and robbery a first offender for robbery would attract a minimum sentence of 15 years imprisonment whilst the housebreaking charge would attract a different, albeit lesser, minimum sentence of 5 years imprisonment. The same would apply to housebreaking with intent to murder or rape. I leave aside the fact that lesser sentences may be imposed when substantial and compelling circumstances allow for lesser sentences than the prescribed minimum sentences to be imposed.

[25] In my view, it is important to deal with one last important aspect, the manner in which the charge was drafted by the State ... The legislature has provided for a statutory offence of rape in section 3 of Act 32 of 2007. This court has noted a trend which continues unabated in the drafting of charges involving housebreaking with intent to commit an offence of "rape" when regard is had to the appeals serving before our courts. The trend demonstrates that 12 years on, drafting of charges are not done in accordance with the statutory provisions of Act 32 of 2007 in that the charges still refer to the common law offence of rape. Housebreaking with intent to "rape" as a substantive charge on its own should be framed with reference to the statutory contravention, in the following terms, "Housebreaking with intent to contravene section 3 of the Criminal Law (Sexual Offences and Related Matters Amendment Act) 32 of 2007."

[25] Having regard to *Nedzamba supra*, there appears to be no issue with the reference to rape as part of the narrative of housebreaking with intent to rape. The crime of rape is well understood in society. I would accordingly propose that the formulation of charges in matters of this nature should read as follows: "Housebreaking with intent to rape and contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters Amendment Act) 32 of 2007."

Order

[26] In the result the following order is made:-

- (1) The wording in respect of the conviction is amended to read: "Guilty of Housebreaking with intent to rape and contravening section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, Act 32 of 2007."
- (2) The appeal against sentence is upheld.
- (3) The sentence of twenty 20 years' imprisonment is set aside and replaced with the following sentence:

"The accused is sentenced to ten (10) years' imprisonment. The accused shall remain unfit to possess a firearm in terms of section 103(1) of the Firearms Control Act 60 of 2000."

- (4) The sentence is ante-dated to 02 July 2013.

A H PETERSEN

JUDGE OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG

I agree

SAMKELO GURA

For appellant Mr

M Kekana

Instructed by

Legal Aid South Africa

Mahikeng Justice Centre

For respondent Adv

J Maseko

Instructed by

The Director of Public Prosecutions, Mahikeng

Date of hearing 10

June 2022

Date of judgment 14

July 2022

[1]

(2017) ZASCA 88; (2017) 3 All SA 520 (SCA); 2017 (6) SA 90 (SCA); 1962 (4) SA 531 (A) at 532 C- E.

[2]

(2013) ZACC 37; 2014 (2) SA 68 (CC) at paragraph 23.

[3] 2013 (2) SACR 333 (SCA) at paras 21 to 23.

[4] 2001 (2) SA 1222 (SCA)

[5] 2012 (1) SACR 431 (SCA) at para (6).

[6] CA 40/2017 (03 January 2019)

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/2022/23.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/hlalele-v-s-unknown-topic-anwhc-2022--6a3ea51d3b1caa91298134d2>

Prepared on 10 October 2026 · Esheria