

SOUTH AFRICA / JUDGMENT

Kalane v S (CA20/2019; RC2/90/2017)

[2024] ZANWHC 108 (16 April 2024)

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COURT

North West High Court, Mafikeng

BEFORE

FMM Reid, NG Laubscher

CASE / FILE NUMBER

CA20/2019; RC2/90/2017

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IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

CASE NUMBER: CA20/2019

CASE NUMBER A QUO: RC2/90/2017

Reportable: NO

Circulate to Judges: NO

Circulate to Magistrates: NO

Circulate to Regional Magistrates: NO

16 April 2024

In the matter between:-

AARON KAMUTLA KALANE Appellant and THE STATE Respondent

CORUM: REID J et LAUBSCHER AJ

FMM REID J

- [1] The appeal is against the sentence imposed by Magistrate Nzimande on 1 September 2017 in the Regional Court, Provinsial Division of North West held at Klerksdorp, of 20 years on the count of rape read with the provisions of Section 51(1) of the Criminal Law Amendment Act 105 of 1997 (Criminal Law Amendment Act).

- [2] The appellant was also found guilty on housebreaking with the intent to commit an offence unknown to the State, and sentenced to 4 years' imprisonment to be served concurrently with the 20 years sentence of rape.
- [3] Section 51(1) and Schedule 2 of the Criminal Law Amendment Act is applicable as the appellant was charged and found guilty of rape where the complainant was raped more than once.
- [4] The appellant was legally represented for the duration of the trial.

The charge sheet reads as follows:

"Count No: 1

THAT the accused is guilty of the crime of Housebreaking with intent to commit a crime unknown to the State (read with the provisions of Section 262 of the Criminal Procedure Act 51 of 1977.

IN THAT upon or about 25 – 26 July 2014 and at or near Klerksdorp in the Regional Division North West, the accused did unlawfully and with the intent to commit a crime unknown to the State break into and enter the house of S[...] K[...].

Count No 2:

RAPE

THAT the accused is/are guilty of the crime of contravening the provisions of Section 3 read with the provisions of Sections 1, 56(1), 57, 58, 59, 60 and 61 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007

RAPE (read with the provisions of Sections 51(1) and Schedule 2 of the Criminal Law Amendment Act 105 of 1997 as amended)

IN THAT on or during the 25th – 26th of July 2014 and at or near KLERKSDORP in the Regional Division of NORTH WEST the said accused did unlawfully and intentionally commit an act of sexual penetration with the complainant to wit S[...] K[...] by having sexual intercourse without the consent of the said complainant.

· Section 51(1) and Schedule 2 of the Criminal Law Amendment Act 105 of 1997, as amended is applicable as: the said Complainant was raped more than once."

- [5] The appellant pleaded not guilty to both charges. In relation to count 2 the appellant provided a plea explanation and admitted that on the day in question he did have sexual intercourse once with

the complainant with her consent. On the night in question the appellant outside her house. The complainant invited him to her house and inside her house they had consensual sexual intercourse.

- [6] The J88 medical examination of the complainant as well as the photo album were admitted into evidence by agreement.

The appeal

- [7] The appellant appeals on the following grounds:

7.1. That the court a quo found that substantial and compelling circumstances existed and deviated from the prescribed minimum sentence of life imprisonment. However, the appellant claims that the sentence of 20 years' imprisonment is too heavy.

7.2. That the court a quo erred in not placing more emphasis on the mitigating factor that the appellant has a possibility of rehabilitation since he was young.

7.3. That the court a quo erred in over-emphasising the age difference between the appellant and the complainant.

- [8] After being found guilty, the appellant elected to not testify and the following mitigation circumstances were placed before the court a quo by his legal representative:

8.1. The accused was born on 12 December 1989 and as such 25 years old at the commissioning of the offence.

8.2. He lives together with his grandmother, his brother and his brother's children.

8.3. The appellant does piece jobs on the farm and earns approximately R650 per week.

8.4. His highest academic qualification is Standard 5.

8.5. He has 1 previous conviction of assault with the intent to do grievous bodily harm on 1 October 2012 for which he was sentenced to a fine of R1,750 or 9 months' imprisonment of which R1,000 or 6 months' imprisonment suspended for 5 years.

8.6. The age difference between the complainant and the appellant. The complainant was born on 10 July 1958 and was thus 56 years old at the time of the offence and the appellant was 25 years old.

8.7. The J88 medical report reflects that the complainant was "alcohol smelling" during the medical examination.

The legal principles

- [9] The provisions of section 51(1) of the Criminal Law Amendment Act are applicable in this matter and prescribe the following minimum sentence in a peremptory manner:

"Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person—

- (a) if it has convicted [a person] of an offence referred to in Part 1 of Schedule 2 ... to imprisonment for life."

[10] Section 51(3)(a) of the Criminal Law Amendment Act contains a redeeming provision and provides as follows:

“If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and [may] must thereupon impose such lesser sentence: Provided that if a regional court imposes such a lesser sentence in respect of an offence referred to Part 1 of Schedule 2, it shall have jurisdiction to impose a term of imprisonment for a period not exceeding 30 years.”

[11] Section 51(3)(aA) of the Criminal Law Amendment Act aids the interpretation of the phrase “substantial and compelling circumstances” by stating which facts shall not constitute “substantial and compelling circumstances”. This provision reads as follows:

“When imposing a sentence in respect of the offence of rape the following shall not constitute substantial and compelling circumstances

justifying the imposition of a lesser sentence:

- (i) The complainant's previous sexual history;
- (ii) an apparent lack of physical injury to the complainant;
- (iii) an accused person's cultural or religious beliefs about rape; or
- (iv) any relationship between the accused.”

[12] The provisions of section 51(1) refer to Schedule 2, Part 1. In respect of this matter the applicable provisions of this Part of Schedule 2 is the part which deals with “rape”.

This part reads as follows:

“Rape as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 —

- (a) when committed—
 - (i) in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice;
 - (ii) by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy;
 - (iii) by a person who has been convicted of two or more offences of rape or compelled rape, but has not yet been sentenced in respect of such convictions; or
 - (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 person under the age of 16 years;

(iA) is an older person as defined in section 1 of the Older Persons Act, 2006 (Act No. 13 of 2006);

(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 as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; or

(c)

involving the infliction of grievous bodily harm.”

[13] On appeal against the sentence of 20 years’ direct imprisonment, this Court is to determine whether the court a quo erred in finding that the above circumstances was substantial and compelling in deviating from a life sentence, to 20 years’

sentence. On appeal this Court is called upon to find that 20 years’ sentence is too harsh.

[14] The court a quo found the following in determining an appropriate sentence:

“I have noted your personal circumstances as put forward by your attorney that currently you are 27 years old. You have one child who is 2 years old. The child stays with his mother.

You were working and you used to earn an amount of R650 per week.

As far as education is concerned you progressed as far as standard 5.

You have a previous conviction which is just 5 years old however I have been asked that, that previous conviction is not that very much relevant to the present one.

Therefore I record as a compelling and substantive factor the fact that you are relatively young though you have previous conviction it is not directly related to this case.

As conceded by your attorney that there are however aggravating circumstances you raped a lady who could be as old as your mother and the fact that this rape took place in an area or in the house where she thought she was secure.

Though I found that there are substantial and compelling circumstances the Court is of the view that nonetheless a heavy sentence long term imprisonment is warranted which will show or send the message that women must be respected irrespective of the condition they find themselves.”

[15] The court a quo thus considered the following factors to be substantial and compelling to deviate from the legislatively prescribed minimum sentence of lifelong imprisonment:

15.1. That the accused was approximately 25 years old at the time of the offence and the complainant was approximately 56 years old.

15.2. That the complainant has probably consumed alcohol prior to the rape.

[16] In respect of the sentence of 20 years' imprisonment, which the appellant has received in respect of the charge of rape, this Court is satisfied that it should not interfere with the sentence imposed by the court a quo.

[17] I have given careful consideration to the record of the proceedings a quo, and to the detailed written submissions in relation to the appeal. I am not persuaded that the Magistrate a quo was misdirected on any relevant or material respect in the assessment of the evidence and in the factual findings pursuant thereto.

[18] For the reasons set out above, the appeal against the sentence of the appellant is dismissed.

Order:

[19] In the premises I make the following order:

- i) The appeal is dismissed.
- ii) The sentence of 20 years' imprisonment on count 1 of rape is confirmed.

FMM REID

JUDGE OF THE HIGH COURT

NORTH WEST DIVISION MAHIKENG

I agree

NG LAUBSCHER

ACTING JUDGE OF THE HIGH COURT

DATE OF HEARING : 01 DECEMBER 2023

DATE OF JUDGMENT : 16 APRIL 2024

APPEARANCES

ON BEHALF OF THE APPELLANT: ADV DT LETLHABANE INSTRUCTED BY: LEGAL AID SOUTH AFRICA TEL: 018 381 1315/6/9 CELL: 073 803 2029 E-MAIL: nwbarassociation@gmail.com ON BEHALF OF THE RESPONDENT: ADV MOLEFE INSTRUCTED BY: NATIONAL PROSECUTING AUTHORITY MAGACITY COMPLEX MMABATHO TEL: 018 381 9008

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Prepared on 10 October 2026 · Esheria