

SOUTH AFRICA / JUDGMENT

Katlego v Minister of Police (313/2018) [2020] ZANWHC 88 (5 November 2020)

[2020] ZANWHC 88

COURT

North West High Court, Mafikeng

BEFORE

V.P. Noncembu, R.D. Hendricks

CASE / FILE NUMBER

CA 06/2020

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IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION - MAHIKENG

Case number: CA 06/2020

In the matter between:-

TLHABELA MOETI KLAAS

APPELLANT

and

THE STATE

RESPONDANT

CRIMINAL APPEAL

HENDRICKS DJP & NONCEMBU AJ

APPEAL

JUDGMENT

INTRODUCTION

- [1] The appellant was convicted on a charge of rape in contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act,[1] read with the provisions of section 51(1) and Schedule 2, Part 1 of the Criminal Law Amendment Act[2] in the Regional Court. The Regional Court found that he had sexual intercourse with the complainant who was 10 years old and who suffered from a mental disability. Finding that

there were no substantial and compelling circumstances in the matter, the Regional Magistrate, sitting in Mmabatho, sentenced him to life imprisonment on the 22 of June 2018. He is now appealing against this sentence. The matter is decided on the papers only.

AD CONDONATION

[2] This appeal is in terms of section 309(1) (a) of the Criminal Procedure Act ('CPA').[3] Regarding the prosecution of appeals from the Magistrate' Courts, Rule 50 of the Magistrate's Court Rules provides as follows:

(1) Where an appeal lies to a Magistrate's court it may be noted

by delivery of notice within 10 days after the date of the

judgment

appealed against.

(2) ...

(3) The party noting an appeal shall prosecute the same within

20 days after the noting of the appeal.

[3] The Notice of Appeal in this matter is dated 23 July 2020 and no application for the condonation of the late filing and prosecution of the appeal was noted on the papers. In his heads of argument, counsel for the appellant stated that he was prevented from consulting with his client and from obtaining an affidavit in this regard because of

the lockdown Regulations necessitated by the Covid-19 pandemic. For the same reasons, counsel for the respondent conceded that the non-compliance with the Rules may be condoned. In the interests of justice and considering that there is no opposition from the respondent, I will condone the non-compliance and allow the appeal to proceed.

BACKGROUND

[4] The complainant ('MT') is a girl child who was born on the 19th of September 2006, which means that she was ten (10) years old at the time of commission of this offence. She was twelve (12) years old when she testified at the trial. A report by the forensic social worker from the Family Violence and Child Protection Unit of the South African Police Service indicated that her cognitive development was 5.1, meaning that it did not function according to her age as she had a cognitive impairment. She was doing grade 4 at a special school which catered for children who suffered from mental impairment.

[5] MT testified via Closed Circuit Television (CCTV) through an intermediary during the trial proceedings. On the second day of the trial, whilst she was still under cross examination, the accused made admissions in terms of section 220 of the CPA, wherein he admitted committing the offence alleged. He was thus convicted accordingly.

THE GROUNDS OF APPEAL

- [6] It is contended by the appellant in the notice of appeal that the Magistrate erred in finding that there were no substantial and compelling circumstances justifying the imposition of a lesser sentence in this matter. The following grounds are at the core of the above made contention. The Magistrate placed the onus of showing the existence of substantial and compelling circumstances on the shoulders of the appellant.
- [7] He held that substantial and compelling circumstances are those circumstances that are out of the ordinary, implying that factors traditionally taken into account during sentencing cannot be regarded as substantial and compelling circumstances. He over-emphasized the seriousness of the offence at the expense of the personal circumstances of the appellant. He did not inquire whether life imprisonment was a just sentence under the circumstances of the case and whether the punishment was proportionate to the crime.
- [8] It is therefore contended that life imprisonment is strikingly inappropriate and induces a sense of shock, thus warranting an interference by this Court as the sentencing discretion of the Magistrate was not reasonably exercised. Counsel for the respondent is opposing the appeal, contending in his heads of argument that there are no substantial and compelling circumstances justifying a lesser sentence in the circumstances of this matter. He further contended that the fact that the appellant changed his plea does not show genuine remorse as he did not testify in court in mitigation and he did not apologize to the complainant and her mother.

THE LEGAL PRINCIPLES

- [9] The sentencing powers are pre-eminently within the judicial discretion of the trial court and a court of appeal should be careful not to erode such discretion. The court sitting on appeal will interfere if the sentencing court exercised its discretion unreasonably or in circumstances where the sentence is adversely disproportionate. [4]
- [10] In *S v Pillay*
- [5] the court said the following regarding an appeal on sentence:

‘as the essential inquiry in an appeal against sentence, however, is not whether the sentence is right or wrong, but whether the Court in imposing it exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence; it must be of such a nature, degree or seriousness that it shows, directly or inferentially, that the court did not exercise its discretion at all or exercised it improperly or unreasonably. Such a misdirection is usually and conveniently termed one that vitiates the Court’s decision on sentence. That is obviously the kind of misdirection predicated in the last quoted dictum above: one that “the dictates of justice” clearly entitle the Appeal Court “to consider the sentence afresh”.

- [11] The Regional Magistrate considered the personal circumstances of the appellant which were the following: he was sixty (60) years old at the time of sentence; he was a first time offender; he had two (2) children and two (2) grandchildren and; he had an injury he had sustained in 1995 after falling from a construction site.
- [12] The issue for determination by this Court is whether the court a quo erred in finding that there were no substantial and compelling circumstances justifying the imposition of a lesser sentence than life imprisonment in this matter.
- [13] The legislature did not prescribe a closed list of what constitutes substantial and compelling circumstances. This in my view was done purposefully so as to ensure that judicial discretion in this regard is not completely eliminated. The Supreme Court of Appeal in *S v Malgas*
- [6] made it quite clear that the minimum sentence provisions have limited, but not eliminated the discretion of the court.[7]
- [14] To say that substantial and compelling circumstances have to be factors which are out of the ordinary was clearly a misdirection on the part of the Regional Magistrate. The term 'substantial and compelling circumstances' has been described as being so elastic that it can accommodate even traditional mitigating circumstances and it involves a value judgment on the part of the sentencing court.[8]
- [15] It was submitted in mitigation that the appellant suffered an injury in 1995 after falling from a construction site. Nothing more was said on this as to how the injury was affecting his life and how it could impact on any sentence that the court could impose on him. People live normal lives with old injuries all the time. This, in my view, was just a neutral factor that was placed on record.
- [16] It is noted that the appellant was a first time offender and that whilst MT was under cross examination, he had a change of heart and altered his plea to that of guilty. However, considering the objective gravity of the offence committed, I cannot find this to be weighty enough to justify the imposition of a lesser sentence than the one prescribed by the legislature.
- [17] The Supreme Court of Appeal [9] made the point quite succinctly when it said the following:
- '[A] court was not to be given a clean slate on which to inscribe whatever sentence it thought fit. Instead, it was required to approach that question conscious of the fact that the legislature has ordained life imprisonment or the particular prescribed period of imprisonment as the sentence which should ordinarily be imposed for the commission of the listed crimes in the specified

circumstances. In short, the Legislature aimed at ensuring a severe, standardised and consistent response from the courts to the commission of such crimes unless there were, and could be seen to be, truly convincing reasons for a different response. When considering sentence the emphasis was to be shifted to the objective gravity of the type of crime and the public's need for effective sanctions against it.

...

The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypothesis favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances.'

[18] I therefore cannot find that the Regional Magistrate erred when he found that the appellant's personal circumstances do not meet the threshold of what constitutes substantial and compelling circumstances.

[19] The enquiry however does not end there. The next step to consider is whether or not the sentence imposed is not disproportionate to the offence committed, the offender, the interests of the victim and of society so as to render it not to be within the dictates of justice.

[20] In *S v GK*[10] Rogers J, agreeing with Bosiello JA in *S v PB*, [11] emphasized that on appeal, the court may take into account and examine not only those factors considered by the trial court, but all the circumstances bearing on the question, in order to determine the correctness of the trial court's finding re the absence or presence of substantial and compelling circumstances.

[21] Rape of a child, especially when committed in a family environment, is a very serious offence. In *S v Abrahams*[12] Cameron JA made the following remarks concerning the rape of a child in a domestic sphere:

'[O]f all the grievous violations of the family bond the case manifests, this is the most complex, since a parent, including a father, is indeed in a position of authority and command over a daughter's best interests, and for her flowering as a human being. For a father to abuse that position to obtain forced sexual access to his daughter's body constitutes a deflowering in the most grievous and brutal sense.'

[22] The position of the appellant in the present matter was no different to that of a parent. As the grandfather of MT he was in a position of authority and entrusted with the responsibility of looking after and protecting her best interests, which position he abused in the most grievous and brutal sense. Apart from being a 10 year old child, MT also suffered from a mental disability, which meant that she was in the worst vulnerable position and needed more protection than an average child.

[23] It is generally said that rape is not merely about sex but about power. (See *Masiya v Director of Public Prosecutions Pretoria and Another*)

[13] where the following was said:

'Today rape is recognised as being less about sex and more about the expression of power through degradation and the concurrent violation of the victim's dignity, bodily integrity and privacy. In the words of the International Criminal Tribunal for Rwanda the "essence of rape is not the particular details of the body parts and objects involved, but rather the aggression that is expressed in a sexual manner under conditions of coercion.'

[24] Mathopo AJ[14] said the following on the seriousness and prevalence of the offence of rape:

'This scourge [of violence against women and children] has reached alarming proportions in our country. Joint efforts by the courts, society and law enforcement agencies are required to curb this pandemic. This Court would be failing in its duty if it does not send out a clear and unequivocal pronouncement that the South African Judiciary is committed to developing and implementing sound and robust legal values of equality, human dignity and safety and security. One such way in which we can do this is to dispose of the misguided and misinformed view that rape is a crime purely about sex.'

[25] Section 28 of the Constitution provides that the best interests of a child are of paramount importance in any matter that involves a child.[15] This 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 duty falls not only on law enforcement agencies but also on right thinking people and ultimately this Court, which is the upper guardian of all children.[16]

[26] Rape of a child is viewed in a very serious light, worst if committed by those entrusted with the care and safety of the child. Sexual violation against children evokes communities' indignation and often prompts them to resort to self-help to keep their children safe. Home is supposed to be a place where children are cared for and protected. It is considered a sanctuary and a place of safety.[17]

[27] Taking into account all that has been stated above, I find that the seriousness of the offence committed and the interests of society, to which I include the best interests of a child, far outweigh the personal circumstances of the accused in this matter. Considering the seriousness of the offence committed by the accused, I am satisfied that the prescribed sentence of life imprisonment is not disproportionate to the offence committed and as such it is within the dictates of justice. In the circumstances therefore the appeal must fail.

ORDER

[28] Consequently, the following order is made:

The appeal against sentence is dismissed.

V.P. NONCEMBU

ACTING JUDGE OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG

I concur

R.D. HENDRICKS

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

APPEARANCES

DATE OF HEARING

: 23 October 2020

DATE OF JUDGMENT

: 12 November 2020

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[1] Act 32 of 2007.

[2] Act 105 of 1997.

[3] Act 51 of 1977.

[4] See *S v Rabie* 1975 (4) SA 855 (A) at 857 D-E; see also *S v De Jager and Another* 1965 (2) SA 616 (A).

[5] 1977 (4) SA 531 A at 535 E-F.

[6] 2001 (1) SACR 469 (SCA).

[7] See also *S v Dodo* 2001 (2) SACR 594 CC.

[8] *S v PB* 2013 (2) SACR 533 (SCA) at para [21].

[9] *S v Malgas* 2001

(1) SACR 469 (SCA) at paras 8-9.

[10] 2013 (2) SACR 505 (WCC).

[11] See note 9 supra.

[12] 2002 (1) SACR 116 SCA.

[13] CCT54/06)

[2007] ZACC 9; 2007 (5) SA 30 (CC); 2007 (8) BCLR 827 (10 May 2007

[14] *Tshabalala v S*; *Ntuli v S* (CCT323/18; CCT69/19) [2019] ZACC 48; 2020 (3) BCLR 307 (CC); 2020 (2) SACR 38 (CC); 2020 (5) SA 1 (CC) (11 December 2019).

[15] Constitution of the Republic of South Africa, 2006.

[16] See *De Reuck v DPP* WLD 2003 (1) SACR 448 (WLD), referred to in *AL v S* (A201/2019)

[2020] ZAFSHC 88 (9 April 2020).

[17] See AL v S (A201/2019)

[2020] ZAFSHC 88 (9 April 2020).

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