

SOUTH AFRICA / JUDGMENT

Keakgilwe v S (CA17/2016)

[2017] ZANWHC 29 (2 May 2017)

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COURT

North West High Court, Mafikeng

BEFORE

T Djaje, R Hendricks

CASE / FILE NUMBER

CA 17/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH

WEST PROVINCIAL DIVISION, MAHIKENG

CASE

NO: CA 17/2016

In

the matter between: OLEBOGENG
 RICHARD KEAKGILWE APPELLANT
 AND
 THE
 STATE RESPONDENT
 HENDRICKS
 J, DJAJE AJ
 DATE

OF HEARING : 21 APRIL
 2017
 DATE

OF JUDGMENT : 02 MAY
 2017
 COUNSEL

FOR THE APPELLANT : MR
 BABANE
 COUNSEL FOR THE

RESPONDENT : ADV
 JACOBS

JUDGMENT

DJAJE AJ

- [1] The Appellant was arraigned in the Regional Court sitting at Taung on a charge of rape. The complainant was a nine year old girl. He pleaded guilty and was sentenced to life imprisonment. Relying on his automatic right of appeal against the sentence of life imprisonment because he was sentenced by the Regional Court, he now appeals this sentence.
- [2] The following facts were placed on record of this matter and are as follows: On 16 November 2014 at Magogong village the Appellant met the complainant a nine year old girl along the road. The complainant was walking alone in the street during the day. The Appellant grabbed her and took her to a veld where he had sexual intercourse with her without her consent. The complainant made a report to her mother when she arrived home that she was raped on the same day of the incident. The Appellant was arrested on 18 November 2014.
- [3] In mitigation of sentence before the Court a quo it was submitted that the Appellant was 28 years old, single with no dependants. Further, that he pleaded guilty and did not waste the court's time with a lengthy trial. The Appellant had also been in custody awaiting trial for a period of nine months. He was a first offender.
- [4] In sentencing the Appellant the court a quo found as follows:

“Although the extend of her trauma was not proved by the state, the fact that she was nine years old the court cannot ignore the fact that she suffered trauma as a result of the incident. And then all circumstances considered the fact that you pleaded guilty and the fact that you are a first offender and you were 27 years old when you committed the offence, the court finds that those are not compelling circumstances or substantial circumstances which will justify a lesser sentence than the sentence prescribed. Perpetrators of these types of crimes should be removed from society. And the court is of the view that the prescribed sentence of life imprisonment is indeed the only appropriate sentence.”

Submissions

- [5] The argument on behalf of the Appellant was that the court a quo erred in finding that there were no compelling and substantial circumstances despite the fact that the Appellant pleaded guilty and has shown remorse. It was submitted by counsel for the Appellant that the court a quo overemphasized the seriousness of the offence without considering that the complainant did not suffer life threatening injuries as well as social discrimination that would require the intervention of social workers and educational psychologist. It is the Appellant's argument that this was not the worst type of rape and therefore deviation from the prescribed minimum sentence is justified.

- [6] Counsel for the Respondent contended that the offence of rape of a young child is heinous and prevalent countrywide. Further that the Court a quo carefully considered the Appellant's mitigating factors thus exercising its discretion judicially in finding that there are no substantial and compelling circumstances.

Law

- [7] In *S v Malgas*; 2001 (2) SA 1222 (SCA), the correct approach to establishing whether or not substantial and compelling circumstances exist was set out in paragraph 25 as follows:

"What stands out quite clearly is that the courts are a good deal freer to depart from the prescribed sentences than has been supposed in some of the previously decided cases and that it is they who are to judge whether or not the circumstances of any particular case are such as to justify a departure. However, in doing so, they are to respect, and not merely pay lip service to the Legislature's view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of the specified kind are committed".

- [8] Counsel for the Appellant argued that the Appellant pleaded guilty which is a sign of remorse. In *S v Mashinini*; 2012 (1) SACR 604 (SCA) paragraph 24, Mhlantla JA held:

"The appellants did not verbalise any remorse. It was submitted on their behalf that their plea of guilt may be an indication of remorse. This submission cannot prevail. It must be borne in mind that the complainant knew the first appellant therefore the issue of identification of him as one of the rapists was not in dispute . . . It is therefore clear that there was overwhelming evidence against the appellants. They had no choice, but to plead guilty. Their plea under such circumstances can never be interpreted as remorse".

- [9] In *S v Matyityi* [2010]; 2011 (1) SACR 40 (SCA) paragraph 13, Ponnan JA remarked as follows:

"Whether the offender is sincerely remorseful and not simply feeling sorry for himself or herself at having been caught is a factual question. It is to the surrounding actions of the accused rather than what he says in court that one should rather look. In order for the remorse to be valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens the genuineness of the contrition alleged to exist cannot be determined".

- [10] As far as the seriousness of the offence is concerned Nugent JA stated as follows in *S v Vilakazi*; 2009 (1) SACR 552 (SCA) paragraph 58:

"In cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the background".

- [11] Sentence is a matter for the discretion of the court burdened with the task of imposing it. A Court of Appeal will be entitled to interfere with the sentence imposed by the trial court if the sentence is disturbingly inappropriate or out of proportion to the seriousness of the offence. See: *S v Romer* 2011 (2) SACR 153 (SCA) paragraph 22

- [12] Imposing an appropriate sentence the court should always balance the nature and circumstances of the offence, the personal circumstances of the offender and the impact of the crime on the community, its welfare and concern. See: *S v Banda and Others* 1991(2) SA 352 (BGD) at page 355.
- [13] The Appellant in this matter is convicted of a serious offence perpetrated on a very young child. The identity of the Appellant in this matter was not an issue as he was arrested two days after the incident. The complainant was walking alone during the day in the street where she thought that she was safe. Instead she was grabbed and pulled to a veld where she was raped. On examination the doctor found that she was bleeding from her nostrils and there was a laceration on the perineum, the hymen was torn and there was fresh blood on her genitalia. The Appellant as a 27 year old adult male at the time of the commission of the offence knew the severity of his actions and he none the less proceeded to rape the complainant. The fact that he was 27 years old is more aggravating than mitigating. As a result the court a quo was correct in finding that there are no substantial and compelling circumstances present in this case.
- [14] It is therefore my view, looking at the facts of this case, that the personal circumstances of the Appellant, the mitigating and aggravating features, as well as the submissions by both counsel, that the sentence imposed is not severe and excessive, but

appropriate under the circumstances of this case.

Order

[15] Consequently, the following order is made:

1. The appeal against sentence is dismissed.

T DJAJE

ACTING JUDGE OF THE HIGH COURT

I agree

R HENDRICKS

JUDGE OF THE HIGH COURT

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Prepared on 23 October 2026 · Esheria