

SOUTH AFRICA / JUDGMENT

Kgotlang v S (CA 27/2020) [2021] ZANWHC 41 (19 August 2021)

[2021] ZANWHC 41

COURT

North West High Court, Mafikeng

BEFORE

J T Djaje, Samkelo Gura

CASE / FILE NUMBER

CA 27/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH

WEST PROVINCIAL DIVISION, MAHIKENG

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CASE

NO: CA 27/2020

In

the matter between:

THABO

KGOTLANG

APPELLANT

AND

THE

STATE

RESPONDENT

CRIMINAL

APPEAL

GURA

J; DJAJE J

JUDGMENT

DJAJE J

- [1] The Regional Court sitting in Mogwase convicted the appellant herein of two counts of rape and one count of robbery with aggravating circumstances. He was sentenced to ten years for each count of rape and fifteen years for robbery with aggravating circumstances. It was ordered that the sentence on the one count of rape be considered as one with the sentence of robbery with aggravating circumstances. Effectively, the appellant was sentenced to twenty five years imprisonment. This appeal is against sentence only.
- [2] It is important to state the facts of this matter briefly before dealing with the issue of sentence. The appellant appeared unrepresented during trial. The order to proceed as such was made as a result of the delays by the appellant in obtaining legal representation. The complainant in count one testified about the incident of 20 August 2010 when she was at a tavern in Sandfontein. In the early hours of the morning she left to go to her boyfriend's place. On her way, she was approached by someone from the back who informed her that he wanted to have sexual intercourse with her. She identified the person as the appellant whom she knew by sight. The appellant proceeded to have sexual intercourse with her under a marula tree without her consent. The appellant stabbed her with a knife when she resisted. The complainant's boyfriend confirmed that a report was made to him by the complainant that the appellant had sexual intercourse with her without her consent.
- [3] The incidents in count two and three took place on 2 September 2010 at about 19:30 whilst the complainant was with her boyfriend sitting near a shop. The appellant approached them asking to sit with

them whilst waiting to catch the person who stole his laptop. After a while, the appellant asked them to go with him to look for the person who stole his laptop. When the complainant refused, the appellant threatened them with a firearm. The appellant took them to a marula tree where he instructed the complainant's boyfriend to have sexual intercourse with the complainant. The boyfriend refused and the appellant instructed him to lie on the ground facing down. The complainant was ordered to lie on top of her boyfriend facing up. The appellant then undressed her and had sexual intercourse with her on top of the boyfriend. Thereafter, the appellant threatened to shoot the complainant's boyfriend if he did not have sexual intercourse with the complainant. The boyfriend pretended to have sexual intercourse with the complainant and the appellant left them. The appellant took the complainant's cellphone when he left.

- [4] The appellant testified in his defence. His testimony in relation to count one was that he had proposed love to the complainant whilst at the tavern. As a result of the complainant accepting the love proposal they both left for his place where they had consensual sexual intercourse. In respect of count two and three he testified that he was in a relationship with the complainant. According to him, they had sexual intercourse at his place with consent. After the sexual intercourse he took the complainant halfway and on the way met her

boyfriend who asked to speak to her. The appellant left them together to go see his friend. The appellant denied that he had sexual intercourse with both complainants on two separate occasions.

- [5] In sentencing the appellant the court a quo found that in respect of all three counts there were no substantial and compelling circumstances to deviate from the prescribed minimum sentences. The sentence in count two and three were taken together for purpose of sentence as the two counts relate to the incidents of the same day.

Submissions

- [6] This appeal is being decided on papers as requested by counsel for both the appellant and the respondent. The argument on behalf of the appellant is that he seeks a declaratory order, to declare that the sentence in count two and three should run concurrently with the sentence in count one. It was submitted that the sentence of twenty five years imprisonment is excessively long and induces a sense of shock that warrants interference by the appeal court. A further argument advanced for the appellant was that the personal circumstances of the appellant were not considered in imposing the sentence in that he was thirty seven years old at the time of the offence with no children. Another factor that was argued on behalf of the appellant is that at the time of sentencing he was serving another sentence of eighteen years which was not related to any of the counts he was convicted of in this matter.
- [7] In contention, the respondent argued that the sentence imposed against the appellant is appropriate in that the offence of rape is a serious one that constitutes violation of women's rights to dignity. It was submitted that the appellant raped the complainant in count one whilst she was on her way to see her boyfriend and was not deterred by that fact. In relation to count two and three the respondent argued that the appellant's conduct was humiliating as he raped the complainant whilst being on top of her boyfriend. Thereafter instructing the boyfriend to have sexual intercourse with

the complainant whilst he sat and watched. The respondent's submission is that the court had not basis to order that the sentence in count two and three should run concurrently with the sentence in count one. As such the appeal should be dismissed because there was no misdirection by the trial court.

Law

- [8] 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:

"[58] The personal circumstances of the appellant, so far as they are disclosed in the evidence, have been set out earlier. In cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in

themselves largely immaterial to what that period should be, and those seem to me to be the kind of ‘flimsy’ grounds that Malgas said should be avoided. But they are nonetheless relevant in another respect. A material consideration is whether the accused can be expected to offend again. While that can never be confidently predicted his or her circumstances might assist in making at least some assessment”.

- [9] 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
- [10] In imposing the 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.
- [11] Section 280 (2) of the Criminal Procedure Act 51 of 1977 provides that punishment consisting of imprisonment shall commence one after the other unless the court orders that such sentence shall run concurrently. The reason for this is that the sentencing court should always be aware of the cumulative effect of imposing more than one sentence. However the cumulative effect of the sentence should not underestimate the seriousness of the offence. In this matter the offences that the appellant was convicted of are very serious. The offence of rape in count one was committed in August 2010 whilst the offences in counts two and three were committed in September of the same year. The incident in count one is not related in any way to the ones in count two and three.
- [12] The trial court ordered that the sentence in count two and three should be taken as one for purpose of sentence as the offences in count two and three were committed on the same complainant at the same time. There exists no reason for the said sentence to run concurrently with the sentence in count one. As far as the sentence of eighteen years is concerned, such was not proven before the trial court and could not have been considered when imposing the sentence in this matter. It is only during this appeal that counsel for the appellant mentions in the heads of argument that the appellant is serving another sentence besides the one imposed in this matter. This also serves as an aggravating factor against the appellant that he failed to disclose to the trial court that he had a previous conviction which should have been taken into consideration by the trial court in imposing sentence.
- [13] The appellant in this matter was convicted of serious offences on two separate incidents. His identity was not an issue as he was known by the witnesses and also identified by the complainants. In count one he did not just rape the complainant but he stabbed her with a knife when she resisted. In count two he not only humiliated the complainant by raping her whilst lying on top of her boyfriend, but he forced her boyfriend to have sexual intercourse with her whilst he watched. This conduct by the appellant can only be described as repulsive and abhorrent.

[14] The appellant's personal circumstances were stated as follows:

He was 37 years old at the time of the commission of the offence;

He has no children and is single;

He completed grade 12 at school;

He was unemployed at the time of his arrest;

He had previous convictions of housebreaking with intent to steal and theft and one of rape which was not proven by the state.

[15] Looking at the facts of this case, the personal circumstances of the appellant, the mitigating and aggravating features, as well as the submissions by both counsel, the sentence imposed by the court a quo is not severe and excessive, but appropriate under the circumstances of this case. Therefore the argument raised on behalf of the appellant that the Court a quo misdirected itself by not ordering the sentences to run concurrently cannot be sustained.

Order

[16] Consequently, the following order is made:

The appeal against sentence is dismissed.

J T DJAJE

JUDGE OF THE HIGH COURT

NORTH WEST PROVINCIAL DIVISION

MAHIKENG

I agree

SAMKELO GURA

APPEARANCES

DATE OF HEARING

: 06 AUGUST 2021

DATE OF JUDGMENT

: 19 AUGUST 2021

COUNSEL FOR THE APPELLANT : MR MADIBA

COUNSEL FOR THE RESPONDENT : ADV NDI MANDE

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