

SOUTH AFRICA / JUDGMENT

Koetle v S (A18/2021) [2021] ZAFSHC 52 (2 March 2021)

[2021] ZAFSHC 52**COURT**

Free State High Court, Bloemfontein

BEFORE

Mathebula, Opperman

CASE / FILE NUMBER

A18/2021

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****FREE****STATE PROVINCIAL DIVISION****Case****No.: A18/2020****In****the matter between:****MODISAGOREKWE
MACDONALD KOETLE**
Appellant
and
**THE
STATE**
Respondent**Coram:**Mathebula,
J et
Opperman,
J
Date
of hearing: 1
March 2021**Delivered:**The
judgment was handed down electronically by circulation to the
parties' legal representatives by email and release to SAFLII
on 2 March 2021. The date and time for hand-down is deemed to be 2
March 2021 at 15h00

Summary:	Appeal - rape - sentence order On appeal against sentence by Regional Court Magistrate, Ms. M Jacobs, Thaba Nchu Regional Court, Free State on 12 June 2019. (Court a quo case no.: RC 121/2018)
Order:	The appeal against the sentence is dismissed.

JUDGMENT

INTRODUCTION[1]

- [1] Women and men may go to taverns; they may consume alcohol and they may walk home alone; this does not make them deservedly of rape, this does not give anybody the right to rape them.
- [2] The facts that caused the conviction and resultant sentence are that the complainant visited a Tavern after work. As she walked home from the Tavern at about 22h00, slightly inebriated and alone, the Appellant accosted her, dragged her to his house, assaulted her and raped her twice. She tried to flee but he held her captive with fierce and arrogant violence; as if he had a right to his actions. The brother of the Appellant heard and noticed the commotion that went with the rape but did not come to the aid of the complainant; this as if it is nothing out of the ordinary. The complainant only managed to leave in the morning and fled to the police. The Appellant's reaction towards the complainant when the police arrested him was: "Hau, are you serious." The Appellant showed no remorse at any stage. The complainant sustained some injuries.

[3] The grounds for appeal are that:

1. The court a quo erred in imposing a sentence of life imprisonment as the sentence is shockingly harsh and inappropriate;
2. That the court a quo erred in finding no substantial and compelling circumstances to deviate from the prescribed sentence of life imprisonment;
3. That the court a quo erred in overemphasizing the community's interest as well as that of the victim.

SHOKINGLY HARSH AND INAPPROPRIATE

- [4] In asking whether the sentence in casu is shockingly harsh and inappropriate Rumpff JA in *S v Anderson* 1964 (3) SA 494 (A) at 495 captured the essence of the duty and power of a court on appeal concisely and precise:

“Over the years our Courts of appeal have attempted to set out various principles by which they seek to be guided when they are asked to alter a sentence imposed by the trial court. These include the following: the sentence will not be altered unless it is held that no reasonable man ought to have imposed such a sentence, or that the sentence is out of all proportion to the gravity or magnitude of the offence, or that the sentence induces a sense of shock or outrage, or that the sentence is grossly excessive or inadequate, or that there was an improper exercise of his discretion by the trial Judge, or that the interests of justice require it. Some of the cases in which these principles are mentioned are referred to in the judgment of SELKE, J., in Rex v Zulu and Others, 1951 (1) SA 489 (N) at p. 490.

A Court that interferes with a sentence imposed by a lower court, itself exercises a discretion when it imposes a new sentence and there cannot, therefore, be a ready-made test in the strict sense of the word. Nor is it advisable to attempt to lay down a general rule as to when the Court's discretion to alter a sentence will be exercised, see *Rex v Sandig*, 1937 AD 296 and *Rex v Ramanka*, 1949 (1) SA 417 (AD). The decisions clearly indicate that a Court of appeal will not alter a determination arrived at by the exercise of a discretionary power merely because it would have exercised that discretion differently. There must be more than that. The Court of appeal, after careful consideration of all the relevant circumstances as to the nature of the offence committed and the person of the accused, will determine what it thinks the proper sentence ought to be, and if the difference between that sentence and the sentence actually imposed is so great that the inference can be made that the trial court acted unreasonably, and therefore improperly, the Court of appeal will alter the sentence. If there is not that degree of difference the sentence will not be interfered with.” (Accentuation added)

SUBSTANTIAL AND COMPELLING CIRCUMSTANCES

- [5] The court a quo in assessing the presence of substantial and compelling circumstances expressed herself as follows:

“It is indeed so that rape is seen in a very serious light. In light of the fact that the complainant was raped twice by you the Court is satisfied that this rape falls under schedule two part one of the Minimum Sentences Act 105 of 1977. The Court is thus in terms of section 51(1) of the said Act obliged to sentence you to life imprisonment. The Court can only deviate from such if the Court can find substantial and compelling circumstances under which to do so.”

“The court must now decide whether there are indeed compelling and substantial circumstances under which to deviate from the prescribed sentence of life imprisonment. In doing so the Court will indeed keep in mind the guidelines as set out in S v Malgas 2001(1) SA 469. The Court will indeed consider all circumstances mitigating as well as aggravating cumulatively to come to a decision:

You attacked the complainant, a female, while she was alone and vulnerable. Secondly you strangled and assaulted her during the whole incident to such an extent that she sustained scratch marks on her neck and bruising around her eyes as well as redness inside both her eyes and she also sustained gynaecological injuries. Thirdly she was locked inside the house from late evening until the next morning when she was eventually allowed to leave. You also have previous convictions for violent offences namely rape and assault with the intent to do grievous bodily harm, but as already indicated Court accepts that those were committed decades before the incident before Court.

As mitigating factors Court will consider the fact that for a very long time you withheld yourself from any offences committed. You furthermore have a child aged 7 years although Court will consider that the child has not lived with you.

After careful consideration of all the circumstances and factors Court took into account cumulatively Court is satisfied that there can be no substantial and compelling circumstance found.”

[6] To this I add that the Appellant is 49 years old and receives a disability grant but nevertheless, must conclude that the sentence cannot be legally faulted in any way whatsoever. There is no evidence as to the nature of the disability and whether it has any bearing on his conduct. Even if the previous convictions are completely

ignored the sentence imposed is just, albeit strict. This type of crime is rife in the area of the court a quo and the country; and the ease with which the Appellant perpetrated the crime is astounding.

[7] I align myself with the statement of the Honourable Justice Bosielo (with Brand JA, Heher JA, Malan JA and Pillay JA concurring) in *S v PB* 2013 (2) SACR 533 SCA at paragraphs [19] and [20]:

“[19] ... Suffice to state that it remains an established principle of our criminal law that sentencing discretion lies pre-eminently with the sentencing court and must be exercised judiciously and in line with established and valid principles governing sentencing, as enunciated in a long line of cases which includes S v Zinn 1969 (2) SA 537 (A), which espoused a proper consideration and balancing of the well-known triad; S v Rabie 1975 (4) SA 855 (A) at 862; and S v de Jager and Another 1965 (2) SA 616 (A) at 628 – 629. This salutary approach has recently been endorsed by Marais JA in S v Malgas para 12.

[20] What then is the correct approach by a court on appeal against a sentence imposed in terms of the Act? Can the appellate court interfere with such a sentence imposed by the trial court's exercising its discretion properly, simply because it is not the sentence which it would have imposed or that it finds shocking? The approach to an appeal on sentence imposed in terms of the Act should, in my view, be different to an approach to other sentences imposed under the ordinary sentencing regime. This, in my view, is so because the minimum sentences to be imposed are ordained by the Act. They cannot be departed from lightly or for flimsy reasons. It follows therefore that a proper enquiry on appeal is

whether the facts which were considered by the sentencing court are substantial and compelling, or not.”

OVEREMPHASIZING THE COMMUNITY’S INTEREST AS WELL AS THAT OF THE VICTIM

[8] The balancing of the factors presented by the Appellant by the court a quo was in accordance with the law and the inquiry into the existence of compelling and substantial factors proper. As Terblance[2] noted:

“It is regularly stated that balance is an important consideration in sentencing. Balance, in this context, has been said to mean that the trial court should consider all the relevant facts, factors and circumstances evenly, and strive for the attainment of all the purposes of punishment.

As long as balance is understood in these terms there is little objection to its use. This is not, however, balance in the ordinary

sense of the word. The seriousness of the crime may totally outweigh the mitigating factors and the personal factors of the offender.

This cannot amount to balance, since the scales would be heavily weighed against the offender. It would therefore be more accurate to state, as in *S v De Kock*, that the three factors of the Zinn triad have to be considered in conjunction with one another and that each should be afforded a certain weight depending on the facts of the case.”

[9] The minimum sentence promulgated by the Legislator to serve the interest of the community and the victim tips the scale against the Appellant.

[10] ORDER

The appeal on sentence is dismissed.

M. OPPERMAN, J

I concur

M.A. MATHEBULA, J

APPEARANCES

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- [1] The matter lies before this court as a so-called automatic appeal in terms section 309(1) of the Criminal Procedure Act 51 of 1977. The Appellant was sentenced to life imprisonment in terms of section 51(1) of the Criminal Law Amendment Act 105 of 1997.
- [2] A Guide to Sentencing in South Africa, Last Updated: 2016 - Third Edition at Chapter 6 at 5, <https://www.mylexisnexis.co.za/Index.aspx> on 18 January 2021.

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