

SOUTH AFRICA / JUDGMENT

Komane v S (07/2017) [2017] ZANWHC 122 (14 December 2017)

[2017] ZANWHC 122

COURT

North West High Court, Mafikeng

BEFORE

Gura, Gutta, Djaje

CASE / FILE NUMBER

CAF07/2017

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“IN THE HIGH COURT OF SOUTH AFRICA”

NORTH WEST DIVISION, MAHIKENG

CASE NO. CAF07/2017

In the matter between:

MOSHE JOHN KOMANE

APPELLANT

and

THE STATE

RESPONDENT

GURA J, Gutta J AND DJAJE J

CRIMINAL APPEAL JUDGMENT

GUTTA J.

A.

INTRODUCTION

- [1] The appellant (formerly accused 1) was arraigned with four others at the Regional Division of North West held at Garankuwa on three counts of Rape (count 5, count 6 and count 7) read with the provisions of Section 51(2) of the Criminal Law Amendment Act 105 of 1997 as amended.

- [2] The appellant pleaded not guilty on all three counts. On 3 October 2002, he was found guilty as charged on count 5. There was no verdict in respect of counts 6 and 7. The matter was then transferred to the High Court for confirmation of the conviction and for sentence.
- [3] On the 14 November 2003, the appellant appeared before Leeuw J (as she then was) and she confirmed the conviction on count 5 and convicted the appellant as an accomplice to Rape on count 6 and 7, and was sentenced as follows:

Count 5 (Rape)

Life imprisonment

Count 6 (Rape) Life imprisonment

Count 7 (Rape)

Life imprisonment

- [4] On the 18 August 2017, leave to appeal the conviction on count 6 and 7 as well as the sentence on counts 5, 6 and 7 was granted. The appeal against the appellant's convictions on count 6 and 7 of Rape read with the provisions of Section 51(2) of Act 105 of 1997 (the Act) as amended together with the sentence of three life imprisonment imposed against the appellant is now before this Court.

B. SUMMARY OF FACTS

- [5] The facts succinctly summarized are as follows:

5.1 The three complainants in count 5, 6 and 7 are three young girls aged 14, 16 and 17. They were on their way to Carltonville when they saw the appellant and his co-accused who reside in the same area as them and they offered them a lift;

5.2 They drove to Kgabalatsane where the appellant and his co-accused smoked dagga. The complainants tried to flee. Accused 5 and the appellant dragged them into the house and called their co-accused to join them. They made the complainants undress and lie on their backs on the bed whereafter the appellant and his co-accused took turns in raping the three complainants. The complainant in count 5, Helen Makgamatha (Helen) said the appellant, accused 3 and accused 5 raped her. She said appellant 1 raped her three to four times during the course of the evening. The appellant also assaulted her by striking her with open hands and threatened her with a knife. Portia Sebelebele, the complainant in count 7, testified that accused 3 and 4 raped her and accused 5 inserted his finger into her vagina. Sophy Baloyi, the complainant in count 6, testified that accused 2, accused

4 and accused 5 raped her. She said accused 5 forced accused 2 to have sexual intercourse with her. The complainants escaped when the appellant and his co-accuseds were fast asleep.

C. AD CONVICTION

[6] The grounds for appeal are the following:

6.1 The High Court should have remitted the matter back to the Trial Court in terms of Section 304(2) of the Criminal Procedure Act 51 of 1977 to pronounce the verdict on Count 6 and 7.

6.2 The Court erred in holding that the appellant was instrumental in forcing the other co-accused into having sexual intercourse with the complainants on count 6 and 7. The evidence of the complainants is that it was accused 5 who forced accused 2, 3 and 4 to have sexual intercourse.

[7] Counsel for the state submitted that:

7.1 In terms of the repealed Section 51(3) of the Act, before there can be a referral to the High Court for sentence, there must be a conviction by the Regional Court. Before the High Court can impose the sentence, it must consider the record of the proceedings in order to establish whether the proceedings were in accordance with justice. If the High Court is so satisfied, it can proceed with the sentence. If not satisfied, it must request the reasons for the convictions from the Regional Court.

7.2 The High Court after considering the record of the proceedings identified an omission which the Regional Court committed in favour of appellant regarding the rape in Count 6 and 7. The High Court mero motu rectified the omission by passing a verdict of guilty on the appellant as an accomplice to the rape in count 6 and 7.

7.3 The state should have, after evidence was led by the witnesses, brought an application to the Trial Court for an amendment of the charge sheet taking into account the evidence before Court and the seriousness of the offences. Such application was never brought and the Trial Court also did not enquire from the state and the defence counsel whether they seek an amendment of the charge sheet[1].

[8] The repealed Section 51(1) of the Criminal Law Amendment Act 105 of 1997 reads:

“51.

- (1) Notwithstanding any other law, but subject to subsection (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 a Part 1 of Schedule 2; or
- (b) If the matter has been referred to under section 52 (1) for sentence after the person concerned has been convicted of an offence referred to in Part 1 of Schedule 2, sentence the person to imprisonment for life.” (own emphasis)

[9] The repealed Section 52(1) of the Act 105 of 1997 reads:

“52.

- (1) If a regional court, after it has convicted an accused (own emphasis) of an offence

referred to in Schedule 2 following on-

- (a) a plea of guilty; or
- (b) a plea of not guilty,

but before sentence, is of the opinion that the offence in respect of which the accused has been convicted merits punishment in excess of the jurisdiction of a regional court in terms of section 51, the court shall stop the proceedings and commit the accused for sentence by a High Court having jurisdiction.

(2)

(a) Where an accused is committed under subsection (1)

(a) for sentence by a High Court, the record of the proceedings in the regional court shall upon proof thereof in the High Court be received by the High Court and form part of the record of that Court, and the plea of guilty and any submission by the accused shall stand unless the accused satisfied the Court that such plea or such admission was incorrectly recorded.

(b) Unless the High Court in question -

(i) is satisfied that a plea of guilty or an admission by the accused which is material to his or her guilt was incorrectly recorded; or

(ii) is not satisfied that the accused is guilty of the offence of which he or she has been convicted and in respect of which he or she has been committed for sentence

the Court shall make a formal finding of guilty and sentence the accused as contemplated in section 51.

(c) If the Court is satisfied that a plea of guilty or any admission by the accused which is material to his or her guilt was incorrectly recorded, or if the Court is not satisfied that the accused is guilty of the offence of which he or she has been convicted and in respect of which he or she has been committed for sentence or that he or she has no valid defence to the charge, the Court shall enter a plea of not guilty and proceed with the trial as a summary trial in that Court: Provided that any admission by the accused the recording of which is not disputed by the accused, shall stand as proof of the fact thus admitted.

(d) The provisions of section 112 (3) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), shall apply with reference to the proceedings under this subsection.”

[10] From the aforesaid provisions, it is clear that a matter could only be referred to the High Court “after the person concerned has been convicted of an offence”. The High Court should have remitted the matter back to the Trial Court to pronounce on the convictions in count 6 and 7. Accordingly

the High Court committed a misdirection as it did not have jurisdiction to convict the appellant in counts 6 and 7.

[11] As the conviction on count 6 and 7 are to be set aside by this Court, it follows that the sentence on counts 6 and 7 will also be set aside. The only issue left for consideration is the sentence imposed on the appellant in count 5 of life imprisonment.

D. AD SENTENCE

[12] Counsel for the appellant submitted inter alia the following:

12.1 the Court attached little weight to the appellant's personal circumstances and did not adequately consider the following personal circumstances[2]:

- (a) the appellant was 29 years of age and not married. He was 26 years old when the offence was committed. The youthfulness of the appellant is a prominent factor justifying deviation from the prescribed minimum sentence[3];
- (b) he was a first offender;
- (c) there are prospects of rehabilitation especially because of his age[4];
- (d) he had a minor child of two years;
- (e) he was doing odd jobs before his arrest;
- (f) the element of mercy was overlooked; and
- (g) the appellant had spent more than a year in custody awaiting sentence. The time spent in custody awaiting trial is a relevant factor during mitigation of sentence[5].

12.2 The sentence of life imprisonment induces a sense of shock that warrants interference by this Court.

12.3 The complainant did not suffer life threatening injuries.

12.4 The court a quo, erred by not finding that there were substantial and compelling circumstances.

12.5 The appellant was charged with Rape read with the Provisions of Section 51(2) of the Act where the minimum sentence for Rape is ten years for a first offender. The Court erred by sentencing the appellant in terms of Section 51(1) of the Act where the minimum sentence is life imprisonment.

[13] Counsel for the respondent submitted inter alia that:

13.1 The appellant kidnapped three minor girls, committing an act of an unlawful sexual penetration with the three girls together with his four co-accused more than once during the night until they fell asleep.

13.2 These offences were committed at the appellant's place and the appellant drove the three minor girls to his place. He called his co-accused 2, 3 and 4 to take part in the commission of the offences. He did not stop his co-accused from taking turns in raping the three minor children despite their resistance[6].

13.3 Ten (10) years imprisonment is the minimum sentence that can be imposed in terms of section 51 (2) of the Act. This means that any sentence in excess of 10 years imprisonment including life imprisonment could be imposed by a Court having jurisdiction to do so.

13.4 The state failed the three minor children by drafting the charge for counts 5, 6 and 7 in terms of Section 51(2) of the Act instead of Section 51(1) and by failing to add more charges of rape and kidnapping as the complainants were raped more than once by appellant and his co-accused (gang rape).

[14] The respondent conceded that the sentence of life imprisonment was too severe. Counsel for the respondent submitted that a sentence of 25 years imprisonment is appropriate because of the severity of the offence.

EVALUATION

[15] As stated supra, the appellant was charged in terms of section 51(2) of the Act where the minimum sentence is 10 years imprisonment for a first offender but he was convicted of rape of minor girls where the prescribed sentence is life imprisonment. In *Ndlovu v The State* supra there were two issues for the Constitutional Court to consider, namely whether Ndlovu's right to a fair trial was infringed

when, after he was charged with rape read with the provisions of section 51 (2) of the Act, he was sentenced pursuant to a different

harsher, minimum sentencing provision in terms of section 51 (1) of the Act. The second issue was whether the Regional Court had the requisite jurisdiction to sentence him to life imprisonment. The Constitutional Court only dealt with the jurisdictional issue and said the following:

"[24] The jurisdiction question is the threshold concern: if the Regional Court did not have jurisdiction to sentence Mr Ndlovu in terms of section 51 (1), the matter ends there and the sentence imposed cannot stand. If the Regional Court did have jurisdiction, a further question needs to be addressed: namely, whether Mr Ndlovu was impermissibly and prejudicially misled by the reference to section 51

(2) in the charge sheet to the extent that his right to a fair trial was infringed.

[42] In terms of section 51 (1) of the Minimum Sentence Act, the Regional Court would have had jurisdiction to sentence Mr Ndlovu to life imprisonment only if it had convicted him of an offence referred to in Part I of Schedule 2. The question is thus whether Mr Ndlovu was convicted of an offence referred to in Part I of Schedule 2.

[44] The Magistrate's statement that the accused is found "guilty as charged" is unambiguous. Mr Ndlovu was convicted of "rape read with the provisions of section 51 (2)". This means that he was convicted of an offence referred to in Part II of Schedule 2 – not an offence referred to in Part I of Schedule 2.

[45] The Magistrate was aware that the charge was "rape read with the provisions of [s]ection 51 (2)" and specifically found Mr Ndlovu 'guilty as charged'. This wording simply does not permit an interpretation that the Magistrate in fact convicted Mr Ndlovu of rape contemplated in section 51 (1). Nor does the evidence of the complainant's injuries automatically cure the charge in terms of section 51 (1), as posited by the state. A defective, or incomplete, charge may be remedied by evidence in some instances by section 88 of the Criminal Procedure Act. However, this charge was complete and not defective. Quite simply, the charge was not rape involving the infliction of grievous bodily harm and evidence alone could not make it so.

[46] In the light of this, I can do nothing but conclude, inexorably, that the Regional Court did not have jurisdiction to impose life imprisonment in terms of section 51 (1) of the Minimum Sentencing Act. Mr Ndlovu was convicted of rape, read with section 51 (2); accordingly, the Regional Court was required in terms of section 51

(2) to impose a minimum sentence of 10 years (as he was a first offender). The Regional Court's jurisdiction was limited in terms of section 51 (2) to imposing a maximum sentence of 15 years."

[16] In casu, as the appellant was charged in terms of section 51 (2) and the charge sheet was not amended, the evidence could not cure the error and change the charge to section 51 (1) of the Act. The Court in the circumstances did not have the jurisdiction to impose the minimum sentence of life imprisonment[7]. Accordingly the Court erred by imposing a sentence of life imprisonment in terms of section 51(1) of the Act. This misdirection

calls for the setting aside of the sentence and for this Court to consider an appropriate sentence.

[17] To reiterate, as stated supra, the factors in mitigation of sentence are briefly that the appellant:

17.1 was a first offender;

17.2 was 26 years of age when he committed the offence;

17.3 was not married;

17.4 had one dependant who was a minor child aged two years; and

17.5 had spent more than a year in custody awaiting sentence.

[18] The aggravating factors are the following:

18.1 the complainant in count 5 was 14 years old;

18.2 the appellant and his two co-accused kidnapped the complainant in count 5 and two other minor girls and took them to his place of residence;

18.3 the appellant was the driver of the vehicle used to kidnap the three girls;

18.4 the appellant and co-accused 5 dragged the complainant into the house;

18.5 the appellant called his co-accused into the house where all 3 complainants were gang raped;

18.6 the appellant had a knife in his possession which he used to subdue the complainant. He placed the knife under the pillow;

18.7 the complainant in count 5 was first raped by accused 5, then accused 3 and then by the appellant;

18.8 the appellant after raping the complainant for the first time, wanted to rape her for a second time. She refused and he slapped her with his open hand on her face and then raped her;

18.9 the complainant was raped three times by the appellant;

18.10 only when the appellant and his co-accused fell asleep, did the complainant and her friends escape.

[19] In a leading case of *S v Malgas*[8], the Supreme Court of Appeal held that when the Court is determining whether there are substantial and compelling factors even the traditional and or ordinary mitigating factors still play a role and none is excluded and the Court must look at the cumulative effect of the factors both mitigating and aggravating.

[20] In the case of *DPP, North Gauteng v Thabethe*[9], the Court held that:

“[22] . . . Rape of women and young children has become cancerous in our society. It is a crime which threatens the very foundation of our nascent democracy which is founded on protection and promotion of the values of human dignity, equality and the advancement of human rights and freedoms. It is such a serious crime that it evokes strong feelings of revulsion and outrage amongst all right-thinking and self-respecting members of society. Our courts have an obligation in imposing sentences for such a crime, particularly where it involves young, innocent, defenceless and vulnerable girls, to impose the kind of sentences which reflect the natural outrage and revulsion felt by law-abiding members of society. A failure to

do so would regrettably have the effect of eroding the public confidence in the criminal justice system.”

[21] Our courts have repeatedly expressed their outrage at the high incidence of rape in South Africa. As Bosielo JA in *S v Makatu*[10] held that:

“For some time now this country has witnessed an ever increasing wave in crimes of violence, notably murder and sexual offences.

Undoubtedly, these crimes seriously threaten the social and moral fabric of our society. As a result our society is seriously

fractured. The majority of our people, particularly the vulnerable and the defenceless, which include women, children, the

elderly and infirm, live in constant fear. It is no exaggeration to say that every woman or girl in this country is a potential victim of either murder or rape. This is sad because these heinous crimes occur against the backdrop of our new and fledgling constitutional democracy, which promises a better life for all. These crimes have spread across the length and breadth of

our beautiful country like a malignant cancer. They are a serious threat to our nascent democracy. They have to be

exterminated at their roots.

[31] There is a huge and countrywide outcry by citizens, civic organisations, NGOs, politicians, religious leaders and people across racial, class and cultural divides over these crimes which have become a scourge. There is hardly a day that passes without a report of any of these crimes in the media, be it print or electronic. The legislature responded to the public outcry with, amongst others, the Criminal Law Amendment Act 105 of 1997, which singled out these crimes, that are a threat to our wellbeing, for very severe sentences, the main objective being to punish

offenders effectively and, in appropriate cases, to remove those who are a danger to society from its midst, circumstances permitting,

either for life or long term imprisonment. In addition the national government declared the period from 25 November to 10

December, popularly known as '16 days of activism', to be a nationwide campaign promoting a culture and ethos of zero violence

against women and children. I regret to state that everyday media reports and statistics from the South African Police Service

(SAPS) and the National Prosecuting Authority (NPA) seem to suggest that, despite all these valiant efforts by government, we are not winning the war against these crimes.

[32] Faced with this scourge, what role can our courts play to ensure that the rights of all citizens are protected? Our courts which are an important partner in the fight against crime cannot be seen to be supine and unmoved by such crimes. Our courts must accept their enormous responsibility of protecting society by imposing appropriate sentences for such crimes. It is through imposing appropriate sentences that the courts can, without pandering to the whims of the public, send a clear and

unequivocal message that there is no room for criminals in our society. This in turn will have the salutary effect of engendering and enhancing the confidence of the public in the judicial system. Inevitably this will serve to bolster respect for the rule of law in the country. See R v Kara[11]; S v Mafu[12]; and S v Mlhakaza and Another[13].”

[22] In casu, the aggravating factors far outweigh the mitigating factors. When considering the cumulative effect of both the mitigating and

aggravating factors, then I am of the view that there are no substantial and compelling circumstances present to justify a deviation from the minimum sentence. The complainant who was only 14 years old was viciously and mercilessly violated by the appellant and

his co-accused. This Court has a duty to impose a sentence which reflects the outrage and revulsion felt when young girls are brutally

raped in our society[14]. She was only 14 years old and this ordeal must have scarred her physically, psychologically and mentally. I am of the view that an appropriate sentence under these circumstances is 20 years imprisonment.

[23] In the result,

1. The conviction and sentence on Courts 6 and 7 are set aside and the matter is remitted back to Mr Mogotsi at the Regional Court to pronounce a verdict on counts 6 and 7.
2. The sentence of life imprisonment in count 5 is set aside and substituted with a sentence of 20 years imprisonment.
3. The sentence in count 5 is ante dated to the 14 November 2003.

N. GUTTA

JUDGE OF THE HIGH COURT

I agree

SAMKELO GURA

T.J DJAJE

APPEARANCES

DATE OF HEARING

: 17 NOVEMBER 2017

DATE OF JUDGMENT

: 14 DECEMBER 2017

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ATTORNEYS FOR RESPONDENT : DIRECTOR OF PUBLIC PROSECUTIONS

- [1] Ndlovu v The State [2017] ZACC 19.
- [2] S v Nkomo 2007(2) SACR 198 (SCA) and S v GN 2010(1) SACR 129 (GNP).
- [3] S v Mahlangu and Others 2012 SACR 373(GJS) at page 375. S v Mabuza and Others 2009(2) SACR 435 (SCA) at page 443 paragraph 22.
- [4] S v Maluleke 2008(1) SACR 49 (T), Bertelsmann J
- [5] S v Brophy and Another 2007(2) SACR 56 (W) and S v Vilakazi 2009(1) SACR 552 (SCA).
- [6] S v Kolea 2013(1) SACR 409 (SCA).
- [7] S v Makatu 2006
- (2) SACR 582 (SCA) at page 586.
- [8] 2001(1) SACR 469 (SCA)
- [9] 2011
- (2) SACR 567 (SCA) at 577G–I
- [10] 2014
- (2) SACR 539 (SCA) at paragraph 21
- [11] 1961
- (1) SA 231 (A) at 236A– C
- [12] 1992
- (2) SACR 494 (A) at 496g–j
- [13] 1997
- (1) SACR 515 (SCA) (1997 2 All SA 185)
- [14] DPP; North Gauteng v Thabethe 2001 (2) SACR 567 (SCA) 577 G-I

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