

SOUTH AFRICA / JUDGMENT

Lefu v S (A73/2019) [2021] ZAFSHC 60 (15 March 2021) [2021] ZAFSHC 60

COURT

Free State High Court, Bloemfontein

BEFORE

Van Zyl, Majosi

CASE / FILE NUMBER

A73/2019

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IN

THE HIGH COURT OF SOUTH AFRICA,

FREE

STATE DIVISION, BLOEMFONTEIN

Case

number: A73/2019

In the matter between:

MOLEKO
PETRUS LEFU
Appellant
and
THE
STATE Respondent

CORAM:

VAN
ZYL, J et MAJOSI, AJ

JUDGMENT

BY: MAJOSI, AJ

HEARD ON: 22 FEBRUARY 2021

DELIVERED ON: 15 MARCH 2021

I

INTRODUCTION

- [1] The appellant was convicted in the Regional Court, Bloemfontein of three counts namely rape and two counts of robbery with aggravating circumstances despite his plea of not guilty. For the rape [1](count
- 1) he was sentenced to life imprisonment and for counts 3 and count 4, he was individually sentenced to 15 years imprisonment. It was ordered that count 3 and count 4 run concurrently with the sentence imposed on count 1.
- [2] An application for leave to appeal was sought against the conviction and sentence in respect of count 1 directly after sentencing proceedings. The appellant contended that the court a quo erred in convicting him of rape under the purview of s 51(1) of the Criminal Law Amendment Act 105 of 1997(the CLLA). The application was refused by the court a quo and after a successful petition to the Judge President of this division, it was determined that by virtue of the sentence imposed, the appellant has an automatic right of appeal in terms of s 309 of the Criminal Procedure Act 51 of 1997 (the CPA).
- [3] In preparation of the appeal, it appeared that the record was incomplete as the testimony of the arresting officer, Mr Motsamai, was omitted from the transcribed record of proceedings. This aspect was canvassed with both counsel in court before arguments were heard and they were in agreement that the said witness testimony pertains to the arrest of the appellant and is not material or relevant to the grounds raised in the appeal. We were in agreement that the omission is not an impediment to hear the appeal.

II THE EVIDENCE

Counts 1, 3 and 4

- [4] On the 27th of October 2007, the complainants' in count 1 and 2 (Ms K and Ms T respectively) were walking home before 20h00 in the evening after their return from shopping at a local retailer. Whilst enroute, they were accosted by two men and a knife was held to Ms K's throat and money, cell phones and valuables were demanded from both of them. Ms K handed over her cellular phone and R 16 in cash. The two men instructed the two complainants to walk with them to another location and after 25 minutes, they reached an open field. It was here where Ms K and Ms T were separated. Ms K went with the appellant to one side of the field and Ms T and accused 2 to the other side. Despite poor visibility, these two men were identified by Ms K as the appellant (accused 1) and accused 2.
- [5] In this open field, the appellant instructed Ms K to remove her clothing and lie down on the ground. He sexually penetrated her vaginally with his penis without the use of a condom and without her consent. Once he was done, he instructed her to get dressed and when he heard the jingle of coins from her clothing, he demanded that she hand over the coins which she did. She was also further instructed to hand over the takkies on her feet adding yet another item to the list of items robbed.

- [6] Ms T, during her testimony confirmed that they were indeed accosted at knife point by the appellant and accused 2 robbed her of an undisclosed amount of cash by removing it from her clothing pocket (count 4). She and Ms K were taken to an open field where they were separated. It is here where accused 2 sexually penetrated her vaginally with his penis without her consent (count 2). During the rape, accused 2 noticed her earrings and without being distracted, removed them from her ears. After he was done and they had both dressed he noticed her grocery plastic, searched it and robbed her of her cellular phone.
- [7] Upon re-joining Ms K and the appellant, they walked a short distance before taking their own way. The complainants' immediately reported the matter to their respective families and to the police where they were taken to hospital for medical examinations and forensic specimens were collected. Their respective medico – legal reports were handed in by mutual agreement marked Exhibits A and B respectively.
- [8] During their testimonies, both complainants were adamant the appellant and his co accused were the perpetrators on the night in question. It is important to note that although the incident occurred in the year 2007, the complainants' only testified on the 5th of September 2012, almost five years after the incident.
- [9] The state, long after the two complainants testified, handed in Exhibits E and F without any discourse, the respective affidavits in terms of s 212 of the CPA of Sergeant MM Morabe and Warrant Officer MC Mbedezi, Forensic Analysts in the employ of the state. These forensic analysts positively linked DNA samples taken from the appellant and accused 2 from the swaps collected from the respective complainants' rape collection kits.
- [10] The appellant testified and denied any knowledge of the rape or armed robberies and indicated that he had been arrested and detained in respect of another matter. He also contended that the DNA evidence against him was fabricated. Accused 2 on the other hand made an admission in terms of s 220 of the Act that he indeed sexually penetrated Kale without her consent but denied any knowledge of the robbery with aggravating circumstances. The court a quo then convicted and sentenced the appellant on the said counts and convicted accused 2 on counts 2,3 and 4.

III CONVICTION

Grounds of appeal

- [11] In his notice of appeal, the appellant contended that the court erred in finding that the offence of rape falls under Part 1 Schedule 2 of the CLLA and ought not to have imposed life imprisonment.[2] Furthermore, that the sentence of life imprisonment is disproportionate to the appellant's personal circumstances and the circumstances of this case. I will return to this aspect later.

[12] It is important to note at this stage that the appellant does not assail the courts actual conviction on count 1, but rather, as alluded to herein above, the conviction in terms of s 51(1) of the CLLA based on the doctrine of common purpose.[3] Counsel for the respondent though she supports the conviction of the court a quo she agrees that s 51(1) should be the focal point of this appeal.[4]

[13] In the appellants written heads of argument it was submitted that the court a quo misdirected itself;

- a) in finding that the appellant and accused 2 acted in common purpose when only the appellant was charged with count 1
- b) the charge sheet made no reference as to why s 51(1) is applicable as there was no further amendments to count 1
- c) that the appellant nor accused 2 was warned about the applicability of the provisions of the CLLA.

The respondent is not adverse to these grounds.[5]

IV DISCUSSION

Section 51(1) of CLLA and common purpose

[14] Section 51(1) of the CLLA provides that an accused may be sentenced to life imprisonment for rape (contravening s 3 of the Sexual Offences and Related Matters Act 32 of 2007, (SORMA))

“(a) when committed: -

- (i) in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice;
- (ii) by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy...” (my emphasis)

[15] The doctrine of common purpose is defined in Burchell as:

“Where two or more people agree to commit a crime or actively associate in a joint unlawful enterprise, each will be responsible for specific criminal conduct committed by one of their number which falls within their common design. Liability arises from their ‘common purpose’ to commit the crime.”[6]

[16] In *S v Thebus and Another* [2003] ZACC 12; 2003 (6) SA 505 (CC) the case of *S v Mgedezi*[7] was quoted and it was held that for the doctrine to be invoked:

'...In the first place, he must have been present at the scene where the violence was being committed. Secondly, he must have been aware of the assault on the inmates of room 12. Thirdly, he must have intended to make common cause with those who were actually perpetrating the assault. Fourthly, he must have manifested his sharing of a common purpose with the

perpetrators of the assault by himself performing some act of association with the conduct of the others. Fifthly, he must have had the requisite mens rea; so, in respect of the killing of the deceased, he must have intended them to be killed, or he must have foreseen the possibility of their being killed and performed his own act of association with recklessness as to whether or not death was to ensue.'

[17] The interpretation of s 51(1) of the CLLA where the offence of rape and the doctrine of common purpose is concerned is not without controversy as evidenced by the various conflicting decisions emanating from various High Courts and the Supreme Court of Appeal. In the case of *S v Phetoe* [8], a gang of accused went on a rampage in a community by committing numerous offences such as rape, assault, housebreaking and armed

robbery resulting in multiple accused being convicted and sentenced for multiple counts on the basis of common purpose as perpetrators

and accomplices including Mr Phetoe. The Supreme Court of appeal disagreed with the Full court and held to convict the appellant on the basis of his mere presence is to subvert the principles of participation and liability as an accomplice in our criminal law.[9]

[18] This was based on the fact that Mr Phetoe's conduct amounted to standing guard with a panga and laughing whilst another accused was raping a complainant.[10] Accordingly, his convictions on other rapes, assaults and housebreakings were set aside save for his conviction on count 9 of armed robbery as it was not proven that he had the requisite mens rea nor knowledge that these other offences were being perpetrated.[11]

[19] In the most recent case of *Tshabalala v the State*, *Ntuli v the State*[12] the Constitutional Court was called upon to decide whether a co – accused can be convicted of the common law crime of rape on the basis of the doctrine in circumstances where he did not himself penetrate the victim.[13] This court subsequently held that the doctrine of common purpose applies to the common law crime of rape.[14] This finding does not come as a surprise in lieu of the extended definition of sexual penetration as defined in s 1 of SORMA

which now transcends as to any body part or any object being used to penetrate. [15]

[20] In my view, the court a quo correctly convicted the appellant on counts 1, 3 and 4 in light of the overwhelming evidence against him, in particular, the DNA evidence. His alibi defence was appropriately rejected as false. The evidence adduced in this case however, does not support a conviction in terms of s 51(1) of the CLLA for several reasons. Firstly, count 1 does not specify on which grounds the state sought conviction in terms of the said section as only the appellant was charged with the offence. Secondly, the evidence of Ms K was very specific on this aspect. She was only raped once by the appellant whilst accused 2 was on the other side of the open field with Ms T.

[21] Both complainants in their respective testimonies alluded to the fact that their individual rapes took place independently of each other and there was no stage that they were raped more than once or by a co perpetrator .Thirdly, the charge sheet was not amended at any stage before judgment even after the issue of common purpose was deliberately elicited by the court a quo from the prosecution after her address on merits.[16]

Charge sheet and appellant's awareness of S 51 (1) of CLLA

[22] The drafting of the charge sheets is the domain of the prosecution and it ought to be drafted to give effect to the contents of the docket. This is especially where rape complainants are concerned as they are vulnerable members of society. The provisions of the CLLA and SORMA are clear as to the respective categories of rape. There is no reason why a presiding officer should not be presented with a charge sheet that is not only complete, but also specifies which provision/sub-section of s 51 and which schedule is applicable. This specification must be made for a presiding officer to canvass the accused person's awareness of the minimum sentence applicable as the accused right to a fair trial includes the right to be informed of the charge to answer to it.[17]

[23] When a presiding officer is confronted with a charge sheet which is unclear in that regard, she or he ought to engage the prosecution and the defence on which specific statutory provision the prosecution seeks to rely on so the accused is informed of same. Even after evidence is adduced but before judgment an amendment may be sought in line with the evidence. In *S v Ndlovu* 2017 (2) SACR 305 (CC) at paragraph 56, Khampepe J articulated this splendidly:

"...the Magistrate could have and should have taken steps to ensure that Mr Ndlovu was prosecuted or convicted in terms of the correct provision of the Minimum Sentencing Act. Courts are expressly empowered in terms of section 86 of the Criminal Procedure Act to order that a charge be amended. Upon realising that the charge did not accurately reflect the evidence led, it was open

to the Court at any time before judgment to invite the state to apply to amend the charge and to invite Mr Ndlovu to make submissions on whether any prejudice would be occasioned by the amendment. This the Magistrate failed to do..."

[24] In my view, the charge sheet in casu did not specify on which sub-section of s 51 of the CLLA the state sought to rely on where count 1 is concerned. Instead, the prosecution quoted "s 51(1) / s 51(2)" and randomly without specification of grounds, added " part 1 schedule

2."[18] This practice ought to be avoided. It thus does not come as a surprise that this position was not canvassed with the appellant before the trial commenced. One can only assume that it was not the intention of the state to bring common purpose to the fore at plea proceedings nor before judgment as at no stage was an application for amendment of the charge sheet brought as the evidence did not stroke with the doctrine of common purpose.

- [25] Accordingly, based on the evidence presented, more specifically the absence of common purpose, the absence of the appellant's awareness of s 51(1) of CLLA being canvassed, no amendment of the charge sheet being made, the court a quo ought to have found the appellant in count 1 guilty of contravening s 3 of SORMA with the provisions of s 51(2) of the CLLA part III of schedule 2.

V SENTENCE

- [26] It is trite that sentence is the prerogative of the sentencing court and the appeal court should be careful to erode such discretion. The appeal court will only interfere if the sentence imposed by the court a quo is disproportionate. See *S v Rabie* 1975 (4) SA 855 (A) at 857 d- e and also *S v De Jager and Another* 1965 (2) SA 616 (A).
- [27] Counsel for the appellant, Ms Kruger argued that the court a quo ought to have found substantial and compelling circumstances as per his personal circumstances. The complainant also suffered no physical injuries and no evidence was adduced by the state regarding the actual emotional trauma suffered by the complainant. It was also contended the property robbed was low in monetary value.
- [28] Transversely thereto Ms Sekhonyane, counsel for the respondent argued that the factors presented in mitigation paled in comparison to the numerous aggravating factors such as the seriousness and prevalence of the offences, the fact that a knife was used during the commission of the offences and no condom was used during the rape, thereby exposing the complainant to possible contraction of HIV. She thus argued that the court on appeal should not (as the court a quo) find the existence of substantial or compelling circumstances.
- [29] In *S v Mudau* 2013 JDR 0938 (SCA) at paragraph 13 Madjiet JA stated as follows:
- "...it is trite that each case must be decided on its own merits. It is also self-evident that sentence must always be individualised, for punishment must always fit the crime, the criminal and the circumstances of the case. It is equally important to remind ourselves that sentencing should always be considered and passed dispassionately, objectively and upon a careful consideration of all relevant factors. Public sentiment cannot be ignored, but it can never be permitted to displace the careful judgment and fine balancing that is involved at arriving at an appropriate sentence. Courts must therefore always strive to arrive at a sentence which is just and fair to both the victim and the perpetrator, has regard to the nature of the crime and takes account of the interests of society..."*
- [30] The offences committed by the appellant are unquestionably serious. At the time of sentencing, he was a 27-year-old first offender, unmarried, with one child aged 6 years old. He also alluded to the fact that his girlfriend was at that stage 4 months pregnant and that before this matter he was earning an income of R 2 500.00 per month with his highest level of education being grade 7.
- [31] The evidence of Ms K during the trial revealed that the appellant initially robbed her at knife point of her cell phone and cash and thereafter, sexually penetrated her without her consent. In the process of her getting dressed after the savage invasion of her bodily

integrity, he heard the sound of coins and demanded that she hand them over. If that was not enough, he had a closer look at her takkies and demanded that she hand them over as well. The appellant was clearly insatiable and showed an affinity not only to deprive the complainant of her bodily integrity, but also her property. The property, albeit low in value was not recovered and can thus be classified as a permanent loss.

- [32] To advance the argument that the complainant did not suffer any injuries may only be correct where extra genital injuries is concerned. The J88 however reveals that the complainant sustained genital injuries as a result of sexual penetration in the form of 3 vaginal tears, one in the 7 o' clock position of the posterior fourchette and two tears in the 6 o' clock position of the fossa navicularis.
- [33] It is so that there was no evidence presented pertaining to the extent of emotional trauma that the complainant may have suffered. This aspect can be taken into account cumulatively if one looks at how the Supreme Court of Appeal in *S v Chapman* held that the offence of rape is not only serious but constitutes a humiliating, degrading and brutal invasion of privacy, the dignity and the person of the victim and that women claim to walk peacefully in the streets without fear or apprehension or insecurity which constantly diminishes the quality of their lives. [19]
- [34] The court a quo found no substantial and compelling circumstances. After considering the mitigating factors against the aggravating factors of this matter together with community interest, I am not persuaded that substantial and compelling circumstances are present to justify a deviation from the prescribed minimum sentence of 10 years' imprisonment for rape under circumstances referred to in s 51(2) part III schedule 2. This view also extends to counts 3 and count 4.
- [35] Both counsel were in agreement that counts 3 and 4 ought to run concurrently with the sentence imposed for count 1. Ordinarily, this would be the case given the fact that the offences were borne from a single transaction. Due to the insatiable and callous nature of the offences as alluded to in paragraph 31 herein above, it would be unjust if the whole period imposed in count 3 and 4 runs concurrently with count 1, taking into account that the prescribed minimum sentence for rape under s 51(2) is 10 years' imprisonment.

VI ORDER

[36] In the circumstances, the following order is made:

1. The conviction in count 1 is set aside and replaced with:

The accused is found guilty of contravening s 3 of the Sexual Offences and Related Matters Act 32 of 2007 with the provisions of s 51(2), Part III, Schedule 2 of the Criminal Law Amendment Act 105 of 1997 being applicable.

2. The appeal in respect of sentence in count 1 is upheld. The sentence of life imprisonment is set aside and replaced with 10 years' imprisonment.

3. The sentences imposed in count 3 and count 4 of 15 years' imprisonment are confirmed, which sentences are to run concurrently.
4. It is ordered that only 7 years' imprisonment of the sentence imposed in count 1 will run concurrently with the sentences imposed in counts 3 and 4.

MAJOSI, AJ

I concur

VAN ZYL, J

On behalf of Appellant:

Adv. S. Kruger

Instructed by:

Bloemfontein Justice Centre

BLOEMFONTEIN

On behalf of Respondent:

Adv. T. Sekhonyana

Instructed by: Director

of Public Prosecutions

[1] Contravening s 3 of the Sexual Offences and Related Matters Act 32 of 2007.

[2] Notice of Appeal P 244 para 1.

[3] Appellants heads of argument para 3.1,3.2 and 3.3.

[4] Respondents heads of argument P 4 para 2.2 and 2.3.

[5] Respondents Heads of Argument P 6. para

[6] Burchell Principles of Criminal Law 5ed (Juta, Cape Town 2016 at 477.

[7] S v Mgedezi and Others 1989

(1) SA 687 (A).

[8] 2018

(1) SACR 593 (SCA).

[9] Ibid para 15.

[10] Ibid para 16.

[11] Ibid paras 17,18 and 20.

[12] Tshabalala v The State; Ntuli v The State cases CCT323/18 and CCT 69/192019 ZACC 48 (11 December 2019)

[13] Ibid para 22.

[14] Ibid para 66.

[15] “sexual penetration’ includes any act which causes penetration to any extent whatsoever by-

- (a) the genital organs of one person into or beyond the genital organs, anus, or mouth of another person;
- (b) any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or
- (c) the genital organs of an animal, into or beyond the mouth of another person.”.

[15] “sexual penetration’ includes any act which causes penetration to any extent whatsoever by-

- (a) the genital organs of one person into or beyond the genital organs, anus, or mouth of another person;
- (b) any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or
- (c) the genital organs of an animal, into or beyond the mouth of another person.”.

[16] Transcribed record P 113 para 20.

[17] S 35(3) of the Constitution of South Africa Act 108 of 1996.

[18] Charge sheet P. II.

[19]

[1997] ZASCA 45; 1997

(3) SA 341 (SCA) paras 3 and 4.

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