

SOUTH AFRICA / JUDGMENT

Letlala v S (A71/2021) [2021] ZAFSHC 270 (5 November 2021) [2021] ZAFSHC 270

COURT

Free State High Court, Bloemfontein

BEFORE

Loubser, Page

CASE / FILE NUMBER

A71/2021

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IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Appeal No: A71/2021

In the matter between:

TSHEPO PAULUS LETLALA

Appellant

and

THE STATE

Respondent

CORAM: LOUBSER J et PAGE AJ

HEARD ON: 6 September 2021

DELIVERED ON: 5 November 2021

*JUDGMENT BY: PAGE AJ

- [1] The appellant was arraigned and convicted in the regional court Botshabelo in the regional division of the Free State on charges of Abduction and a contravention of Section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, read with Section 51 of the Criminal Law Amendment Act. The appellant was sentenced to five years imprisonment in respect of the charge of Abduction. Having found that no substantial and

compelling circumstances existed, the trial court sentenced him to Life Imprisonment on the charge of rape.

- [2] The Appellant enjoys an automatic right of appeal as provided for in in terms of section 309(1)(a) of the Criminal Procedure Act 51 of 1977.
- [3] The appeal only lies against the sentences imposed by the court a quo. The issue before this court is whether the trial court erred in its conclusion that there existed no substantial and compelling circumstances which justified a deviation form the prescribed minimum sentence of life imprisonment in respect of the charge of rape. A further issue raised is whether the sentences imposed should run concurrently.

The Facts

- [4] The complainant, who was aged 17 years at the time of the commission of the crimes, had visited P[....] N[....] on the day of the incident, where other persons, including the appellant had been drinking liquour. She left P[....]'s residence around 22h00 accompanied by P[....], M[....] and T[....]. They saw the appellant and a person by the name of Gold at the shop. They were afraid and went back to T[....]'s and requested S[....], another male person to join them. On their way the appellant emerged with a knife and told S[....] to back off. The appellant grabbed the complainant and pulled her away. Her friends left to report this at home. The complainant was unable to free herself since he threatened her with a knife. The two of them arrived at a field and found Gold already there.
- [5] The complainant's parents, sister and friends arrived on the scene. Her father approached the appellant to come to her aid. The appellant scratched the complainant's father with the knife. The father slipped and fell down whereafter the complainant saw the appellant making more stabbing movements towards her father who was on the ground. The complainant offered to leave with the appellant to rescue her father from being stabbed by the appellant. Her mother reached out to help her daughter but was hit a stone on her upper arm.
- [6] The appellant left with the complainant. On the way they met up with friends of the appellant. She asked for help and the appellant scratched her with the knife on her head. He then threatened to stab her if she screams. The three of them continued walking. The appellant took her to a shack. He undressed her whereafter he undressed himself. He ordered her to suck his penis and she complied.
- [7] He threw her on the bed and raped her vaginally. Gold arrived inside the shack as well after having left and also raped the complainant. The two of them raped the complainant during the night. She estimated that they each raped her four times.
- [8] The appellant released the complainant in the morning. He accompanied her to a nearby school. She went home from there and reported the incident at the police station.

- [9] The complainant's identity document and a medical report (J88) was handed in as evidence. An affidavit in terms of Section 212 of the Criminal Procedure Act 51 of 1977 forms part of the evidentiary material which concludes that the appellant's DNA matches the DNA found on the person of the complainant.

Legal Position and Relevant Case Law

- [10] Ordinarily, sentencing is within the discretion of the trial court. A court of appeal can only interfere with the sentence imposed if the trial court misdirected itself to such an extent that its decision on sentence is vitiated, or the sentence is so disproportionate or shocking that no reasonable court could have imposed it.[1]
- [11] The rape in this matter falls within the ambit of Section 51(1) of the Criminal Law Amendment Act 105 of 1997, the prescribed sentence being life imprisonment in circumstances where the complainant was raped more than once, unless there exist substantial and compelling circumstances which justify deviation from the prescribed sentence.
- [12] Section 51(1) (3) (aA) of the Criminal Law Amendment Act 105,1997 reads:

"When imposing a sentence in respect of the offence of rape the following shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence:...

- (ii) an apparent lack of a physical injury to the complainant."

- [13] S v Malgas 2001 (1) SACR 469 (A) at paras 18 and 25:

The enquiry related to whether substantial and compelling circumstances exist is set out in this case as follows:

"Here lies the rub. Somewhere between these two extremes the intention of the legislature is located and must be found. The absence of any pertinent guidance from the legislature by way of definition or otherwise as to what circumstances should rank as substantial and compelling or what should not, does not make the task any easier. That it has refrained from giving such guidance as was done in Minnesota from whence the concept of "substantial and compelling circumstances" was derived is significant. It signals that it has deliberately and advisedly left it to the courts to decide in the final analysis whether the circumstances of any particular case call for a departure from the prescribed sentence. In doing so, they are required to regard the prescribed sentences as being generally appropriate for crimes of the kind specified and enjoined not to depart from them unless they are satisfied that there is weighty justification for doing so. A departure must be justified by reference to circumstances which can be seen to be substantial and compelling as contrasted with circumstances of little significance or of debatable validity or which reflect a purely personal preference unlikely to be shared by many"

- [14] S v PB 2013 (2) SACR 533 (SCA) par 20:

“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.”

[15] S v Matyity 2011 (1) SACR 40 (SCA) paras 13 and 14:

“Although the exact extent of the mitigation will depend on all of the circumstances of the case, in general a court will not punish an immature young person as severely as it would an adult. It is well established that the younger the offender the clearer the evidence needs to be about his or her background, education, level of intelligence and mental capacity in order to enable a court to determine the level of maturity and therefore moral blameworthiness. The question, in the final analysis, is whether the offender’s immaturity, lack of experience, indiscretion and susceptibility to being influenced by others reduces his blameworthiness. Thus whilst someone under the age of 18 years is to be regarded as naturally immature the same does not hold true for an adult. In my view a person of 20 years or more must show by acceptable evidence that he was immature to such an extent that his immaturity can operate as a mitigating factor”

The court a quo’s findings

[16] The court a quo took the following aggravating circumstances into account:

1. The serious nature and prevalence of rape as well as the element of violence of the crime.
2. The specific facts of the case which are set out hereabove.
3. The impact of the crime on the complainant.

[17] The following mitigating factors were considered

1. The appellant is a first offender.
2. He has a minor child aged 5 years.
3. That no serious physical injuries were sustained by the complainant.
4. The period of incarceration of the appellant whilst awaiting trial.
5. The youthful age of the appellant who was 22 years of age when the crime was committed.

[18] The court was mindful of the above case law and referred thereto during the sentencing proceedings. The court a quo found no substantial and compelling circumstances existed which would warrant a departure from the prescribed sentence in respect of the rape charge.

Conclusion

- [19] Rape remains a repulsive and heinous crime and whether the circumstances of some cases may be more shocking than others it is the most flagrant invasion of a human being's core of person and dignity.
- [20] In casu, the complainant was 17 years of age which is a tender age for a young woman who now faces the trauma and a complete turn around in her life. The circumstances under which the rape was committed is an indication of the complete and utter disregard of the offender for the complainant and her family members who tried to protect her and failed to do so at the hands of the appellant who attacked both mother and father. The complainant, in fear for the safety of her parents decided to submit to the appellant and followed him to where she was raped by him through the night about four times.
- [21] The personal circumstances placed on record of the appellant are nothing out of the ordinary. His counsel has submitted that his youthful age, the fact that the complainant did not sustain serious physical injuries and because it is not the worse rape case ever encountered, are substantial and compelling circumstances which warrant a deviation from the prescribed minimum sentence. It is a further submission that the emotional trauma of the complainant is not ever-lasting.
- [22] The court a quo has duly considered all circumstances before arriving at the conclusion that no substantial or compelling circumstances exist calling for a lesser sentence than life imprisonment.
- [23] In considering the submissions of the appellant's counsel, it is noted that but for his age which was placed on record, no further evidence related to his level of maturity and the possibility of him being influenced was led. In order to qualify for some consideration of his youthfulness, the appellant had to convince the court that there are more to the submission that was made. Judging from the facts of the case, the appellant acted on his own and was not influenced by a peer. He was determined to rape the complainant no matter how hard she fought against it. He was so determined that he attacked her parents when they tried to rescue her.
- [24] The lack of physical injuries is not a substantial and compelling circumstance as provided for in the Act.
- [25] I am satisfied that upon a proper enquiry of the considerations considered by the court a quo that there exist no substantive and compelling circumstances which justify a departure from the prescribed minimum sentence in respect of the rape charge.
- [26] I am satisfied that court a quo has not overemphasized the serious nature of the offence and the interests of the community. The court a quo has clearly, as it appears from the record balanced all factors as well as the appellant's personal circumstances appropriately in concluding that no substantive and compelling circumstances exist.

[27] I agree with the submission by counsel that it is more appropriate for the sentence imposed in respect of the charge of kidnapping to run concurrently with the sentence of life imprisonment imposed on the charge of rape.

[28] I therefore make the following order:

1. The appeal is dismissed.
2. The sentence in respect of count 1 of 5 years imprisonment is confirmed and is ordered to run concurrently with the sentence imposed in respect of count 2.
3. The sentence in respect of count 2 of Life Imprisonment is confirmed.

C PAGE AJ

I CONCUR

P.J LOUBSER J

For the Appellant: M P. Mokoena

Legal Aid SA

BLOEMFONTEIN

For the Respondent: Adv. M. Strauss

Office of the DPP

[1] S v Petkar 1988(3) SA 571 (A) at 574; Bogaards v S [2012] ZACC 23 (CC); 2013 (1) SACR 1 (CC); S v Ncheche 2005(2) SACR 386 (W) AT 388.

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