

SOUTH AFRICA / JUDGMENT

Likhethe v S (A144 /2022) [2023]

ZAFSHC 69 (17 March 2023)

[2023] ZAFSHC 69

COURT

Free State High Court, Bloemfontein

BEFORE

Daniso, Boonzaaier

CASE / FILE NUMBER

A144 /2022

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FREE

STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC

OF SOUTH AFRICA

Case

No: A144 /2022

Reportable:

NO

Of

Interest to other Judges: NO

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to Magistrates: NO

In

the matter between: -

VINCENT

KAMOHELO LIKHETHE

APPELLANT

and

THE

STATE

RESPONDENT

CORAM:

DANISO J & BOONZAAIER AJ

JUDGMENT

BY: BOONZAAIER, AJ

HEARD ON: 6 MARCH 2023

DELIVERED ON: The judgment was handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII on 17th March 2023. The date and time for hand-down is deemed to be 17 MARCH 2023 at 11H00.

INTRODUCTION:

[1] The Appellant, appeals against the sentence handed down by the Regional Court Magistrate Botshabelo on 14th May 2019. (hereinafter called "the court a quo").

FACTUAL**BACKGROUND:**

[2] The Appellant (in the court a quo was arraigned as Accused number 2), was convicted and sentenced as follows:

2.1 Count: Rape (contravention of Section 3 read with Sections 1, 56, 56A, 57, 58, 59, 60 and 61 of Act 32 of 2007, read with provisions of Sections 52(1) of the Criminal Law Amendment Act 105 of 1997. (hereinafter call the "CLAA") – An effective sentence of Life imprisonment.

[3] The Appellant has an automatic right to Appeal.

3.1. The Appellant`s grounds of appeal against sentence are summarized as follows:

3.1.1 The Court a quo erred in finding that there were no substantial and compelling circumstances to deviate from the prescribed minimum sentence:

3.1.2 The Court a quo placed too much emphasis on the prevalence of the offence as well as interest of the community.

3.1.3 The Court a quo over-emphasized the deterrence factor in punishment.

3.1.4

The Court a quo did not consider the time spent in custody by the Appellant.

3.1.5 The Court a quo erred in ordering the name of the Appellant to be added into the National Register of sex offenders.

3.2 That the court erred by not imposing a shorter term of imprisonment and that the court a quo also:

3.2.1 Did not have regard for the personal circumstances of the Appellant.

3.2.2 Gave a different sentence for the co-Accused even though they were found acting in common purpose.

3.2.3 Did not consider the element of rehabilitation.

3.3 That the court overemphasized the principle of punishment, namely deterrence, retribution over the principle of rehabilitation, the interest of society and the seriousness of the offences.

AD SENTENCE:

[4] In mitigation the personal circumstances of Appellant are as follows:

4.1 The Appellant was 24 years old at the time of sentence.

4.2 He is not married and has no children.

4.3 He is a first offender.

4.4 His highest standard of Education is Grade 8.

4.4 He was arrested on 18 January 2017, and the matter was finalized on 14 May 2019. He spent 2(two) years 4(four) months in custody awaiting the finalization of the matter.

[5] Aggravating circumstances are as follows:

5.1 Appellant was convicted of a very serious offence.

5.2 The complainant was physically violated.

5.3 The physiological emotional trauma suffered by the complainant.

5.4 The Appellant shows no remorse.

5.5 The complainant was raped by more than 2(two) assailants.

APPELLANTS CASE:

[6] It is the Appellant`s case that the Court a quo:

6.1 Erred in finding that no substantial and compelling circumstances exists in order to deviate from the prescribed minimum sentence of Life imprisonment in respect of the charge.

6.2 When considering whether the Court a quo erred in finding that there were no substantial and compelling reasons, a different approach must be adopted and not only whether there was a material misdirection by the court a quo.

6.3 The correct approach on appeal upon considering whether the court a quo was correct to find no substantial and compelling reasons, is not only one of whether there was material misdirection or not but, also whether the facts which were considered by the sentencing court are substantial and compelling or not.

6.4 The Appellant propose that the following circumstances are sufficient for the court to deviate from the prescribed minimum sentence because they are substantial and compelling:

6.4.1 Even though the complainant sustained physical injuries as a result of being stabbed with a knife by one of the assailants, the injuries sustained by complainant were not severe.

6.4.2 The fact that the Appellant spent a period of two years and four months awaiting trial.

6.4.3 The fact that the Appellant is a first offender.

6.4.4 The fact that appellant is fairly young and there is prognosis for his rehabilitation.

6.4.5 The factors mentioned as his personal circumstances together with the factors mentioned as substantial and compelling factors, are cumulatively as well as individually, sufficient to constitute substantial and compelling circumstances.

FACTS

OF THE CASE

- [7] During the night of 18 December 2016 around 10pm the complainant and her friend, P [...] accompanied P [...]’s boyfriend halfway home. On their return, the complainant was accosted by the Appellant, former co-accused and another male. They demanded cellphones and money. The complainant did not have any money or a cellphone. P [...] was robbed of her cellphone by one Tsepo (who was already convicted and sentenced by another court, because this court could not attend to this matter after having convicted and sentenced Tsepo). Tsepo then grabbed complainant and took her to a nearby shack, where there was a toilet which door was fastened with a wire. P [...] remained with the appellant and former co-accused.
- [8] When she and Tsepo reached the toilet he stabbed her with a knife on the left side of her chest when she refused to undress. Tsepo then raped her and after he has finished, he called the other two namely, Appellant and Accused 3 and ordered them to also have sexual intercourse with her. P [...] was able to escape. At that time, a detective’s vehicle appeared and Accused 1 (Appellant) ran away. At that stage Tsepo was still nearby watching as Accused 2 was having forced sexual intercourse with the complainant. She stood up went home and told the family about her ordeal. Her clothes were bloodstained. They took her to the police station where P [...] had already laid a charge. The complainant knows the Appellant for a long time. He also stays in the street where she lives.
- [9] Both Accused persons denied having sexual intercourse with the complainant and put all the blame on Tsepo.

LEGAL PRINCIPLES:

- [10] The discretion of the court of Appeal was dealt with in the case of S v

Malgas[1], where Marais JA stated:

"B Courts are required to approach the imposition of sentence conscious that the legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.

C Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts.

D The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender,

undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation,

and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded.

E The legislature has however deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored.

F All factors (other than those set out in D above) traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process.

G The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick ("substantial

and compelling") and must be such as cumulatively justify a departure from the standardised response that the legislature has ordained.

[11] In *R v S*[2], the court stated with regards when a court would interfere:

"There are well recognised grounds on which the court of appeal would interfere with the sentence. Where the trial judge or magistrate, as the case may be, has misdirected himself from the law or facts or has exercised his discretion capriciously or upon a wrong principle or so unreasonable as to induce a sense of shock."

[12] In *S v Matyityi*[3], the court increased the sentence which was originally imposed by the trial court from 25 years to life imprisonment based on the factor that the respondents conduct themselves, was a flagrant disregard for the sanctity of human life or individual physical integrity. In the case of the court stated that the case of *Matyityi*, *supra* shows that:

"Where people acted in a manner that was unacceptable in any civilised society particularly one that ought to be committed to the protection of the rights of all persons including women", no mercy should be accepted.

[13] In R v Zulu and Others[4] it was stated:

"Where no such grounds exist, the appeal court will not interfere merely because the appeal judges considered that they themselves will not have imposed the sentence."

[14] In R v S[5] , the court also stated when a Court of Appeal would interfere:

[15] The seriousness of Rape is clearly emphasizes in the case of S v Chapman[6] where the court sated as follows:

"Rape is a very serious offence, constituting as it does, a humiliating degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, and the dignity to privacy and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilisation. Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully in the streets, to enjoy their shopping, and their entertainment, to go and come from work and to enjoy the peace and tranquility of their homes without the fear, the apprehension and insecurity which constantly diminishes the quality and enjoyment of their lives."

[16] In the case of S v C [7] the court further stated:

"Rape is regarded by society as one of the most heinous of crimes, and rightly so. A rapist does not murder his victim, he murders her self-respect and destroys her feeling of physical mental integrity and security. His monstrous deed often haunts his victim and subjects her to mental torment for the rest of her life - a fate often worse than loss of life. Serial rapists and murderers are regarded by society as inherently evil beings. They are the most feared and loathed criminals in our community. Society demands protection in the form of heavy and deterrent sentences from the courts against such atrocious crimes."

[17] What make it serious in casu is that the complainant was known to the Appellant. She expected the Appellant to protect her and not abused her. She was raped by three males. The sexual intercourse took place after she was stabbed with a knife and in pain. She was a soft target.

[18] This court was requested to deal with how courts treat a lengthy period in custody prior to sentencing where the minimum sentencing provisions of section 51 of the CLAA apply.[8] (Own emphasis)

[19] The Court a quo did not specifically refer to the fact that the Appellant had been held in custody for a period of 2(two) years 4(four) months to sentencing, but on an overall assessment concluded that there were no substantial and compelling circumstances justifying a lesser sentence. The aforesaid assessment suffices in my opinion.[9]

- [20] With regards to the rehabilitation it is important to mention that, in casu the importance of remorse, or the absence thereof, is to establish the Appellant's propensity for rehabilitation to which an acceptance that he acted in error and had a conscience is most important. Absent such acceptance, the prospects of the crime being successfully addressed, and rehabilitation established are lessened. This is relevant to an assessment of mitigation (not aggravation) of sentence. In casu Appellant expressed no remorse whatsoever and gave no explanation, failing to take the Court into his confidence.
- [21] The material consideration is whether the Appellant can be expected to offend again. While that can never be confidently predicted, his circumstances might assist in making at least some form of assessment. That is where remorse or the absence thereof plays a vital role.

CONCLUSION:

- [22] I agree with the statement of JA Curlewis in *S v Monaheng*[10] that Legislature has ordained life imprisonment as the sentence that should ordinarily and in the absence of weighty justification be imposed for the offence committed by the Appellant and the courts' obligation to respect and not pay mere lip service to that view.
- [23] The Appellant asks this court to deviate, based on the substantial and compelling factors listed. On a balanced consideration of the totality of the evidence, this court finds no substantial and compelling circumstances to deviate from the minimum sentence and accords with the court a quo that the sentence is proportionate to the crime, the criminal and the legitimate needs of society. {own emphasis}
- [24] If one have a holistic approach and look at the overall picture,even if the Appellant is a young and a first offender the sentence fits the crime.
- [25] Hence, having regard to the case law and how the court a quo applied the law, I can find no reason to deviate from the sentence.

ORDER:

- [26] The appeal with regards to sentence is dismissed.

A.S. BOONZAAIER, A J

I agree. It so ordered.

N.S DANISO, J

For the Appellants:

ADV S Kruger

Legal Aid South Africa

BLOEMFONTEIN

For the Respondent:

Adv S Tunzi

Instructed by:

Director of Public Prosecutions

[1] 2001

(1) SACR 469 SCA at 478 B-G

[2] 1958

(3) SA 102 at 104

[3] (2011) SACR (1) 40 (SCA) para 13

6.1997 ZASCA 45[1997] ZASCA 45; ; 1997

(3) SA 341 (SCA) at 345 C-D:

[7] 1996

(2) SACR 181 (C) 186 D-F

[8] The period in custody prior to sentencing was referred to as 'pre-sentence detention (S v Radebe and another 2013

(2) SACR 165 (SCA) at [13]).

[9] S v Lucas (CC72/209[2022] ZAGPPHC 346(13 May 2022).

[10] (590/06)

[2008] ZASCA 129, 2009 1 ALL SA 237 (SCA) (1 October 2008).

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