

SOUTH AFRICA / JUDGMENT

Malilav S (CA&R268/16) [2017] ZAE CGHC 60 (20 May 2017) [2017] ZAE CGHC 60

COURT

Eastern Cape High Court, Grahamstown

BEFORE

B Hartle, P T Mageza

CASE / FILE NUMBER

CA&R268/16

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO: CA&R268/16

In the matter between

TEBOGO MALILA

Appellant

versus

THE STATE

Respondent

APPEAL

JUDGMENT

HARTLE J:

- [1] The appellant was convicted in the regional court, East London, on a count of rape in contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, No. 32 of 2007, and sentenced to eighteen (18) years' imprisonment.
- [2] He appeals against his sentence only, leave having been granted by the trial court.

- [3] The relevant facts underlying the conviction are that the complainant, a 15 year old girl, accompanied the appellant to his home under the pre-text of fetching medicine that he needed for her father's healing. She had been instructed to do so by her grandmother. The appellant was a preacher and purportedly prayed for people who suffered from a stroke in order to cure them. At his home, the appellant demanded that the complainant enter the house with him and when she refused, he slapped her with an open hand and pulled her inside. Once inside the house he inflicted a superficial knife wound on her leg and raped her twice. He was about to rape her a third time when someone knocked on the door, giving her the opportunity to escape.
- [4] There was a substantial delay in the prosecution of the complainant's rape complaint. The offence was said to have been committed on 20 March 2010. By the time the complainant testified, she was already 22 years of age. I was informed from the bar that the reason for the delay in the prosecution related to the accused evading his trial. He had managed to do so for several years after a warrant has been issued for his arrest.
- [5] Mr. Geldenhuys who appeared on behalf of the appellant submitted that, apart from the trial court finding that substantial and compelling

circumstances existed which justified a departure from the prescribed sentence of life imprisonment which was applicable in terms of the minimum sentencing legislation, the sentence imposed, having regard to all the circumstances, is still unduly harsh and evokes a sentence of shock. Further, despite the fact that the appellant did not plead guilty to the offence, he submitted that he has very good prospects of rehabilitation, being a first offender at the age of 34 years. He added that although the offence is undoubtedly serious and reprehensible, account should have been taken of the fact that the offence did not involve any major or gratuitous violence and that the complainant sustained minimal injuries. There was further no indication at the trial of any emotional harm suffered by her. He submitted that whilst the interests of society require an appropriate sentence which adequately takes into account the seriousness of the offence, such interests also require that the appellant should be rehabilitated and not be "broken" as it were by the sentence. He urged upon the court to substitute the sentence imposed by "a less severe and appropriate sentence".

- [6] There are two misconceptions on the part of counsel concerning his submissions above. The first is that the trial court did indeed take into account the fact that the complainant had not "suffer(ed) permanent damage and injury". To the contrary, he elevated this fact to a substantial and compelling circumstance which warranted a deviation from the statutory benchmark of life imprisonment.
- [7] The second is that, despite an absence of any evidence of the impact of the offence to the complainant (it would have been an ideal

opportunity to learn from the young adult how she had over the years spent waiting to testify been affected by the incident which happened shortly before her sixteenth birthday), there was indeed an indication of some emotional harm occasioned to her by the incident. Indeed the

magistrate remarked in his judgments on both conviction and sentence that the complainant when she testified refused to look at the appellant which he took as a “sign” that she was still traumatized by the events of the day. It also emerges from the evidence that the complainant was very upset immediately after the incident when she reported the rape to her grandmother.[1]

[8] Mr. Geldenhuys’ further submissions concerning the sentence imposed lose sight of the following aggravating features which were in evidence:

8.1 the appellant was respected and held a position of trust vis-à-vis the complainant and her family since he was pastor, healer and self-professed prophet. This must have induced the complainant, her grandmother and brother (who up until a point had accompanied the complainant and the appellant to the latter’s home but had turned back) to think that she would be safe being alone in his company. He took advantage of this trust and lured her to his house where he raped her. This suggests that the offence was also premediated;

8.2 before the rape, he slapped and stabbed her to cause her to submit to him;

8.3 he held her hostage at his home for a considerable period of time until she could make her fortuitous getaway, sleeping in-between the sexual encounters with her as if they were lovers;

8.4 she sustained a bleeding tear and increased friability to the posterior fouchette as well as a superficial wound to her thigh. Whilst at first glance these injuries are undramatic it hardly redounds to the appellant’s benefit. The lack of further injuries is best ascribed to her submitting to him, obviating the need for further violence, rather than to him going gentler on her as it were;

8.5 the appellant showed no remorse and instead proffered a version which painted him as a saint and the complainant as a blatant liar, despite an overwhelming case against him;

8.6 offences of violent sexual crimes against vulnerable women and children are rife and the expectation on the part of the community is that severe sentences should be imposed for offences of this nature; and

8.7 the appellant did not use a condom during the intercourse. In this regard the comments of Tshiqi JA in *S v PB*[2] are particularly apposite:

“[20] The appellant did not use a condom. This is yet another aggravating factor, specifically at a time when the whole world is grappling with the scourge of the HIV and Aids pandemic. The majority of rape victims are not only left to deal with the physical, emotional and psychological trauma of the rape, but are also exposed to the possible hardships associated with living with HIV, its side effects and stigma. The only manner in which victims may be protected is through anti-retroviral drugs, which also have side effects. It is not clear ex facie the medical report (J88) whether or not this precaution was taken with regard to this young girl. No evidence was led in this regard.”

[9] I am inclined to agree with the submission of Mr. Obermeyer, who appeared on behalf of the state, that the appellant was given the

benefit of the court's finding that substantial and compelling circumstances were at play to justify a deviation from the

discretionary minimum sentence of life imprisonment, but that, apart from this concession, there is nothing which suggests that he did not exercise his discretion judiciously or that he misdirected himself in imposing the sentence which he did.

[10] In my view, upon a conspectus of all the evidence, the sentence is not shockingly inappropriate or unreasonable. On the contrary, it befits the relevant circumstances. There is therefore no basis to interfere with the sentence imposed by the trial court.

[11] In the result the appeal is dismissed.

B HARTLE

JUDGE OF THE HIGH COURT

I AGREE

P T MAGEZA

ACTING JUDGE OF THE HIGH COURT

DATE OF APPEAL : 29 March 2017

DATE OF JUDGMENT : 20 May 2017

Appearances:

For the appellant:

Mr. Geldenhuys, Justice Centre, Grahamstown.

For the first respondent: Mr. Obermeyer, National Director of Public Prosecutions.

[1] The child ostensibly also saw a social worker who assisted the family in laying the complaint. In *S v Matyityi* 2011 (1) SACR 40 (SCA), at par [17], the court noted the importance of placing the salient information concerning the true impact to the victim before the court sentencing an accused person following his conviction for rape, to enable it to meaningfully and properly exercise its discretion in this regard. The court should not have to speculate as to the complainant's emotions and experience of the trauma which is difficult for any court to assume because of such a wide range of factors at play in any given experience. I suppose that if the child had testified closer to the events a professional report of a psychologist, or the social worker who counselled her, would have been to hand, to at least justify the basis for an application to testify in camera and with the assistance of an intermediary. Nugent JA emphasized in *S v Vilikazi* 2009 (1) SACR 552 (SCA), at par 21, how essential it is in the prosecution of rape, where the complainant is a young victim, to take the "greatest care" to bring forth the balanced perspective achieved by consideration of both the perpetrator and

the victim in sentence proceedings. In this regard, from prosecutors, it calls for “thoughtful preparation, patient and sensitive presentation of all the available evidence, and meticulous attention to detail”. I am not suggesting that the prosecutor did not put the best effort forward here, but perhaps because of the passing of time and the fact that the complainant had just got on with her life, the emotional impact to her was simply glossed over.

[2] 2011 (1) SACR 448 (SCA) at para (20).

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