

SOUTH AFRICA / JUDGMENT

Mapipa v S (CA225/2016) [2016] ZAECHGC 112 (28 October 2016)

[2016] ZAECHGC 112

COURT

Eastern Cape High Court, Grahamstown

BEFORE

N G Beshe, PW Tshiki, GG Goosen

CASE / FILE NUMBER

CA225/2016

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IN THE HIGH
COURT OF SOUTH AFRICA
(EASTERN
CAPE DIVISION, GRAHAMSTOWN)
CASE
NO.: CA225/2016
In

the matter between: BONGANI
 MAPIPA
 Appellant
 And
 THE
 STATE
 Respondent

JUDGMENT

BESHE J:

- [1] The appellant was sentenced to life imprisonment for the rape of a mentally disabled 23 year old woman who had the mental age of a 5 year old. He was also sentenced to two (2) years imprisonment for housebreaking with intent to rape. The appeal, with leave having been granted by the court below, is only directed at the sentence for life imprisonment.
- [2] Imprisonment for life is the sentence that is prescribed for rape of the kind appellant was convicted of.[1]

- [3] No substantial and compelling circumstances were found to exist by the court a quo, hence the appellant was sentenced to imprisonment for life in respect of the rape charge.
- [4] The guiding principle regarding a court's discretion when it comes to interference with a sentence is trite and enduring. In an appeal against sentence, interference is only justified if there was a misdirection or the sentence is found to be so severe that it induces a sense of shock. See *S v Holder*.^[2] The principle / test was elaborated on in *Kgosimore*^[3] as follows:

"It is trite law that sentence is a matter for the discretion of the court burdened with the task of imposing the sentence. Various tests have been formulated as to when a court of appeal may interfere. These include whether the reasoning of the trial court is vitiated by misdirection or whether the sentence imposed can be said to be startlingly inappropriate or to induce a sense of shock or whether there is a striking disparity between the sentence the Court of appeal would have imposed. All these formulations, however, are aimed at determining the same thing, viz whether there was a proper and reasonable exercise of the discretion bestowed upon the court imposing sentence. In the ultimate

analysis

this is the true inquiry. Either the discretion was properly and reasonably exercised or it was not. If it was, a Court of appeal has no power to interfere; if it was not, it is free to do so." See also *S v Malgas*.^[4]

- [5] The finding of the court a quo that no substantial and compelling circumstances existed is assailed on the following basis:

That the court should have found that the following circumstances, taken cumulatively, amounted to circumstances that justified the imposition of a sentence lesser than the prescribed one;

Prior to his arrest, the appellant was assaulted to the extent that he could not speak; he had consumed alcohol prior to the rape; his family failed to provide proper parental guidance to him having been raised by his grandmother.

His parents separated when he was one year old. The grandmother who raised him passed away when he was ten (10) years old. Three years later his mother also passed away. After the demise of his mother, his behaviour changed and he behaved badly. The offence was committed when he was twenty three (23) years old. At the time of sentencing he was twenty five (25) years old.

- [6] We were also urged to have regard to sentences that were imposed in similar cases in order for us to determine whether there is a striking disparity between the sentence imposed and that which this court considers appropriate.
- [7] Whilst there is nothing wrong with this approach, namely of taking into account sentences which were imposed in similar cases, it must be borne in mind that each case must be decided on its own unique facts. This is so because precedent can have the effect of obscuring the particularity of the matter under consideration.^[5]

[8] To determine whether substantial and compelling circumstances exist, facts that mitigate in favour of the convicted person cannot be looked at in isolation. They must be considered in conjunction with the nature of offence that the person has been convicted of.

[9] The offences in respect of which the appellant was convicted were committed in the following manner.

During the evening of the 26 April 2012, the appellant broke into a shack belonging to the Qongwane family in Silvertown, Queenstown.

He took the complainant into the said shack and proceeded to rape her.

The complainant was a twenty three (23) year old mentally disabled woman who had the mental capacity of a five (5) year old.

The appellant was caught red-handed by a family member who had been sent to get something from the shack who in turn raised an alarm.

Even after community members had arrived at the scene, the appellant persisted in having sexual intercourse with the complainant.

Attempts by the members of the community to remove the appellant from on top of the complainant failed.

It is common cause that appellant was also severely assaulted by the members of the community in a bid to stop him from raping the

complainant, to the extent that he could not speak to the police on their arrival at the scene.[6]

[10] The aggravating factors in this matter were aptly highlighted by the judge a quo in the learned judge's judgment on sentence as follows:

"There are simply too many aggravating features in this case.

Firstly regarding the crime itself, the accused clearly took advantage of a mentally retarded woman who was physically mature and thus in his mind a useful object for the satisfaction of his cravings. He must have known that she was mentally retarded and unlikely to resist or be capable of resisting to any great degree. She was furthermore unprotected by any of the person or persons of maturity and because of her mental disability had placed herself in a vulnerable position without any knowledge of the serious dangers lurking in the night. Once the accused had dragged her into the shack he proceeded to rape her in a brutal manner. He was so intent upon his purpose that when the community members found him he was fully engaged in the sexual act and had the temerity to warn them off whilst he completed his vile deed. Having been caught red handed in this fashion the accused pleaded not guilty and forced this court to undertake a full trial with all the expenses and inconvenience involved in order to prove his guilt.

Notwithstanding his conviction he has steadfastly continued to deny his involvement as evidenced from his interview with the probation officer. When one couples this attitude with his previous convictions and his pattern of unlawful activity commencing when he was a teenager it

seems to me that there is little or no prospect of rehabilitation”

[11] As I indicated earlier, it was submitted on behalf of the appellant that the court a quo should have taken into account that the appellant was assaulted by the members of the community. There was however, both below and in this court, an acknowledgement that the appellant was assaulted partly as a means of stopping him from continuing to rape the complainant. Members of the community could not be expected to have thrown in the towel, to say – well appellant is refusing to move from top of the complainant and give up. They apparently tried everything to rescue the complainant.

[12] As regards appellant having consumed alcohol prior to the rape, there is no evidence as to what effect the alcohol had on the appellant or his behaviour. By his own admission, he was not very drunk, he was mildly under the influence of alcohol.[7]

[13] There is no evidence to support the submission that appellant’s family failed to provide him with proper parental guidance. On the contrary, according to the pre-sentence report, from the information gathered the following transpired: Appellant grew up in a stable family environment as a normal child. Although his parents separated, he received love from both his maternal and paternal families.

[14] The fact that the offence was committed when he was twenty three (23) years old is a neutral factor. See *S v Matyityi*[8] in this regard, where the following was stated:

“... .. Thus, whilst someone under the age of 18 years is to be regarded as naturally immature, the same does not hold true of 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.”

[15] To the extent that the above factors can be regarded as mitigating factors, in my view they pale into insignificance when compared to the aggravating factors already alluded to earlier. There can be no doubt that appellant conducted himself in a manner that gave a new meaning to brazenness. He broke into a stranger’s shack, a shack that neither belonged to him nor the complainant. He continued to rape the complainant and resisted endeavours to stop him from doing so by members of the community who had responded to an alarm that had been raised. Appellant has not shown any remorse. I can find no fault with the finding that there are no substantial and compelling circumstances that justify a lesser sentence.

[16] Upon consideration of all the facts of this case as well as submissions by counsel, I am not persuaded that in sentencing the

appellant the court a quo exercised the discretion bestowed upon it improperly. That being the case, I am of the view that there is no justification for this court to interfere with the sentence imposed.

[17] Accordingly the order that I propose is that the appeal be dismissed.

N G BESHE

JUDGE OF THE HIGH COURT

TSHIKI J

I agree, it is so ordered.

PW TSHIKI

GOOSEN J

I agree.

GG GOOSEN

APPEARANCES

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Date Heard : 24 October 2016

Date Reserved : 24 October 2016

Date Delivered : 28 October 2016

[1] Section 51 (1) of the Criminal Procedure Act 105 of 1997.

[2] 1979 (2) SA 70 A.

- [3] 1999 (2) SACR 238 (SCA) at 241 para. 10.
 - [4] 2001 (1) SACR 469 at 478 [12] d-f.
 - [5] R v Karg 1961 (1) SA 231 at 236 G.
 - [6] Page 264-5 of the record.
 - [7] Page 14 of the record.
 - [8] 2011 (1) SACR 40 SCA at 448 a-b.
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