

SOUTH AFRICA / JUDGMENT

Masekoa v S (A81/2024) [2024]
ZAFSHC 365 (12 November 2024)
[2024] ZAFSHC 365

COURT

Free State High Court, Bloemfontein

BEFORE

Mhlambi, Mpama

CASE / FILE NUMBER

A81/2024

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IN

THE HIGH COURT OF SOUTH AFRICA

FREE

STATE DIVISION, BLOEMFONTEIN

Reportable

/ Not reportable

Case

no: A81/2024

In

the matter between:

MOLATUDI
ABEL MASEKOA
Appellant
and
THE
STATE
Respondent
Neutral
citation: Molatudi
Abel Masekoa v The State (A81/2024)

Coram:

Mhlambi J et Mpama AJ

Heard: 04
November 2024

Delivered: 12
November 2024
ORDER
The appeal against
sentence is dismissed.

JUDGMENT

Mpama AJ (Mhlambi J concurring)

- [1] The appellant stood trial in the regional court sitting at Bothaville on two counts of rape read with the provisions of s 51(1) of the Criminal Law Amendment Act 105 of 1997. He pleaded not guilty to both charges. After the evidence in chief of the first complainant the appellant made admissions in terms of section 220 of the Criminal Procedure Act 51 of 1977. The State led no more evidence. He was convicted of two counts of rape on 28 February 2024 and sentenced to life imprisonment. He now appeals his sentence.
- [2] In view of the appellant's life imprisonment, the appeal is before us on the basis of s 10 of the Judicial Matters Amendment Act 42 of 2013, in terms of which the appellant has an automatic right to appeal his conviction and sentence.
- [3] The appellant's appeal is premised inter alia, on the following grounds:
- (i) That an effective term of life imprisonment is strikingly inappropriate.
- (ii) The court a quo erred in finding that there were no substantial and compelling circumstances warranting deviation from the prescribed sentence of life imprisonment.
- (iii) Whether the court a quo over-emphasized the seriousness of the offence.
- [4] The facts on which the appellant's convictions are based are briefly as follows: The two complainants,

Ms L[...] N[...] and N[...] K[...] were both 15 years old at the time of the commission of the offence. Ms N[...] is the appellant's relative (though it is not mentioned how they are related) and she resided with the appellant. The second complainant was her friend and a neighbour. On the day in question, they were sitting with the appellant and watching television. The appellant stood up, locked the door and ordered them to go to his bedroom. When they reached his bedroom, he ordered them to undress. He raped Ms K[...] first and, undeterred, raped the second complainant. The two complainants were raped in the presence of each other. He instructed them to leave, not to report what befell them and threatened to kill them should they do so.

- [5] An appeal court can interfere with sentence only where the sentence is affected by an irregularity or misdirection and the sentence imposed is so inappropriate that it induces a sense of shock.
- [6] In *S v Rabie*[1] it was stated that punishment is pre-eminently a matter for the discretion of the trial court. A sentence should be altered only if the trial court's discretion has not been judicially and properly exercised. The test is whether the sentence is vitiated by an irregularity or misdirection or is disturbingly inappropriate.
- [7] The appellant was sentenced to life imprisonment. Counsel for the appellant submitted that the trial court ought to have deviated from the prescribed sentence. It is so that the court is allowed to deviate from this sentence if it is satisfied that there are substantial and compelling circumstances warranting deviation. It has been said in *S v Malgas*[2] (*Malgas*) that the specified sentences are not to be departed from lightly or for flimsy reasons. The test for deviation is whether, on

consideration of the circumstances of the particular case, the court is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of the society, so that an injustice would be done by imposing that sentence.

- [8] In *S v Matyityi*[3] the SCA, referring to *Malgas*, expressed as follows at para 11:

'I turn now to the central issue in the appeal, namely whether, given the facts of this case, the trial court was correct in its

conclusion

that substantial and compelling circumstances as contemplated by that expression were indeed present. *S v Malgas* is where one must start. It, according to Navsa JA, is "not only a good starting point but the principles stated therein are enduring and uncomplicated" (*DPP v Ngcobo*). *Malgas*, which has since been followed in a long line of cases, set out how the minimum sentencing regime should be approached and in particular how the enquiry into substantial and compelling circumstances is to be conducted by a court. To paraphrase from

Malgas: The fact that that the parliament had enacted the minimum sentencing legislation was an indication that it was no longer

"business as usual". A court can no longer have a clean slate to inscribe whatever sentence it thought fit for the specified crimes. It had to approach the question of sentencing conscious of the fact that the minimum sentence had been ordained as the sentence which ordinarily should be imposed unless substantial and compelling circumstances were found to be present.'

[9] In the court a quo, the appellant's personal circumstances were presented as follows: That he was 60 years old, married and with one child who is 18 years old. His highest scholastic qualification is standard 5. He has two previous convictions, namely escaping from lawful custody, committed in 2012, and theft, in 1992. The appellant released out on bail, but the record does not indicate that he spent any time in custody before the finalisation of the matter.

[10] Ms Kruger argued that the appellant's advanced age warranted deviation from the prescribed sentence. Mr Pretorius, however, held a different view. He referred the court to the case of *Mohale v S*[4] (*Mohale*) where this court held:

'It was submitted by Mr Reyneke that the imposed sentence of life imprisonment can be equated to a death sentence, considering the age of the appellant. However, any substantial period of imprisonment including the sentence between 15 to 18 years, as argued for by Mr Reyneke, can equally be regarded as a death sentence. The horrendousness of the crime committed far outweighs the advanced age of the appellant.'[5]

The appellant in that matter was 61 years old. I align myself with the reasoning in *Mohale*. The appellant was 60 years at the time of sentencing. I am of the view that his advanced age is a neutral factor that cannot persuade

the court to deviate from the prescribed sentence.

[11] It is also evident from the record that the seriousness of the offence, as well as the interests of the community were considered by the trial court. The offence of rape is described in *S v Chapman*[6] as a 'humiliating, degrading, and brutal invasion of the privacy, the dignity and the person of the victim'.[7]

[12] In *Director of Public Prosecution v Thabethe*[8] the court expressed itself as follows

'... Rape of women and young children has become cancerous in our society. It is a crime which threatens the very foundation of our nascent democracy, which is founded on protection and promotion of the values of human dignity, equality and the advancement of human right and freedoms. It is such a serious crime that it evokes strong feelings of revulsion and outrage amongst all right-thinking and self-respecting members of society. Our courts have an obligation to impose sentences for such a crime, particularly where it involves young, innocent, defenceless and vulnerable girls, to impose the kind of sentences which reflect the natural outrage and revulsion felt by the law-abiding members of society. A failure to do so would regrettably have the effect of eroding public confidence in the criminal justice system.'[9]

[13] In *Director of Public Prosecutions, Western Cape v Prins and Others*[10] the following was said at para 1:

'No judicial officer sitting in South Africa today is unaware of the extent of sexual violence in this country and the way in which it deprives so many women and children of their right to dignity and bodily integrity, and in the case of children, the right to be children.'

[14] It was further argued on behalf of the appellant that lack of physical injuries does justify a deviation from the prescribed sentence. The court was referred to the judgment of S v Nkawu[11] where the court held:

‘I am of the view that it is possible to read s 51(3)(aA)(ii) in a way that would render it unconstitutional. That is to interpret it, and the other provisions of s 51(3)(aA), to mean that any one of them may not be regarded as a substantial and compelling circumstance justifying a departure from the prescribed sentence but that each one of them may be considered along with other factors cumulatively to amount to substantial and compelling circumstances. On this interpretation, I am not precluded from considering the fact that the complainant suffered injuries that were neither serious or permanent along with a basket of other factors, in order to arrive at a just and proportionate sentence.’[12]

[15] The presence or absence of injuries cannot in isolation constitute a substantial and compelling circumstance. Irrespective of the presence of physical injuries, or lack thereof, rape always causes its victim severe harm.

[16] A Victim Impact Statement was handed in aggravation of sentence on how the incident affected Ms K[...]. The complainant was a school going child, doing her Grade 9. The statement displays that she was doing very well in her studies and the incident affected her so badly that she had to be progressed to Grade 10. For the first time she failed a class and had to repeat Grade 10. The appellant was a neighbour and she trusted him. Ms K[...] finds it so difficult to walk on the streets due to the trauma she endured at the hands of her neighbour. This reflects the long-lasting devastating effects and the emotional trauma the incident had on the complainant’s wellbeing. The other complainant, who is the appellant’s relative, was not available and nothing much was said about her during sentencing.

[17] The complainants were young children. They trusted the appellant as an elderly person and the appellant violated that trust. Ms N[...] is the appellant’s relative and at the time of the offence she resided with the appellant. He displayed a flagrant disregard for the complainants’ emotions; rape in itself is traumatic; having to witness the rape of another child is without doubt more traumatic.

[18] The court a quo did not underestimate the personal circumstances of the appellant. I am unable to find that the trial court erred in finding that there were no substantial and compelling circumstances that warrant any other punishment than life imprisonment. The sentence imposed by the court a quo is not shockingly inappropriate. The sentence that was imposed by the trial court fits the appellant, the crime and serves the legitimate interests of the society. The aggravating circumstances in this matter far outweigh the appellant’s personal circumstances.

[19] In my view the appeal against sentence must consequently fail. In the premises, I would make the following order:

MPAMA, AJ

I concur and it is so ordered:

MHLAMBI, J

Appearances On behalf of Appellant: Ms S. Kruger Instructed by: Legal Aid South Africa
Bloemfontein On behalf of Respondent: Adv.D.Pretorius Instructed by: Office of the DPP
Bloemfontein

[1] S v Rabie 1975 (4) SA 855 (A) at 857D-E.

[2] S v Malgas 2001

(1) SACR 469 (SCA).

[3] S v Matyityi

[2012] ZASCA 127; 2011 (1) SACR 40 (SCA).

[4] Mohale v S unreported judgment of the Free State Division of the High Court, Case No A52/2024.

[5] Para 17 per Musi JP et Greyling-Coetzer AJ.

[6] S v Chapman 1997

(3) SA 341 (SCA),

[7] Ibid para 3.

[8] Director of Public Prosecution v Thabethe [2011] ZASCA 186; 2011 (2) SACR 567 (SCA)

[9] Ibid para 22.

[10] Director of Public Prosecutions, Western Cape v Prins and Others

[2012] ZASCA 106; 2012 (2) SACR 183 (SCA).

[11] S v Nkawu 2009 (2) SACR 402 (ECG).

[12] Ibid para 17.

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