

SOUTH AFRICA / JUDGMENT

Mashiyane v S (A313/2016) [2017] ZAGPPHC 329 (22 June 2017)

[2017] ZAGPPHC 329**COURT**

North Gauteng High Court, Pretoria

BEFORE

De Vos, Botes

CASE / FILE NUMBER

A313/2016

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****DIVISION, PRETORIA)****CASE****NO. A313/2016****22/6/2017****In****the matter between:****PHILLIP
MASHIYANE APPELLANT
and
THE
STATE RESPONDENT****JUDGMENT**

1. The Appellant pleaded guilty in the Regional Court of Gauteng (hereinafter referred to as "the Court a quo") to one count of rape of a minor.

1.1 The Appellant was sentenced on 10 September 2015 to life imprisonment and he was also declared unfit to possess a firearm and his name was entered in the register of sexual offenders.

1.2 This appeal comes before us by virtue of Section 10 of the Judicial Matters Amendment Act, No 42 of 2013. The Appellant is appealing against the sentence, i.e. life imprisonment, only.

2. It is the Appellant's case that the sentence is disproportionate to the offence and that on its own constitute substantial and compelling

circumstances justifying a lesser sentence.

3. The Court a quo found that there are no substantial and compelling circumstances justifying deviation from the prescribed minimum sentence of life imprisonment, as provided for in Section 51(1) of the Criminal Law Amendment Act, No 105 of 1997 (hereinafter referred to as "the Act"),
4. It is trite law that a Court of Appeal may not and will not interfere with an imposed sentence unless it is convinced that the Court a quo has exercised its discretion improperly or unreasonably, or where the sentence induces a sense of shock or is completely inappropriate. See in this regard *S v Pieters* 1987(3) SA 717 (A) and *S v Rabie* 1975(4) SA 855 (A).
5. It is the Appellant's case that the Court a quo erred in sentencing him to life imprisonment in that the Court a quo over-emphasized the seriousness of the offence and the interest of the society, whilst the personal circumstances of the Appellant were under-emphasized. The Appellant furthermore submits that in imposing a sentence of life imprisonment the Court a quo erred as such a sentence is inappropriate, harsh and induces a sense of shock.
6. The Appellant's personal circumstance\$ should have been taken into account by the Court a quo and constitute mitigating factors which, according to the Appellant, is sufficient for this Court to interfere with the Court a quo's reasoning insofar as the sentence is concerned. These circumstances were recorded by the Court a quo as follows:-
 - 6.1 He was 30 years old when the crime was committed;
 - 6.2 He is not married;
 - 6.3 He has four children;
 - 6.4 He maintains his children;
 - 6.5 He passed Grade 11;
 - 6.6 He has obtained a certificate in electrical engineering;
 - 6.7 He has obtained a certificate from Nigel Resource Centre in computer sufficiency;
 - 6.8 He has obtained certificates in customer service and stock control from Mqrand Business College;
 - 6.9 He was employed as a branch manager by Mr Price;
 - 6.10 The complainant was not assaulted or injured by the Appellant whilst he was raping her;
 - 6.11 He was suffering from emotional distress;
 - 6.12 He was using dagga;
 - 6.13 He did not waste the Court a quo's time;

6.14 He pleaded guilty;

6.15 He is remorseful; and

6.16 He can be rehabilitated.

7. The Appellant therefore submits that the Court a quo erred by not considering the following factors which have a cumulative effect and as such constitute substantial and compelling circumstances :

7.1 The Appellant pleaded guilty to the offence;

7.2 The Appellant maintains his children;

7.3 The complainant did not sustain any injuries and she was not assaulted by the Appellant;

7.4 The Appellant was suffering from emotional distress;

7.5 The Appellant is remorseful; and

7.6 The Appellant is capable of rehabilitation.

8. The Appellant concedes that he was convicted of a very serious offence, but submits that this is not the only factor that this Court should take into account. It is therefore the Appellant's case that even though life sentence is the minimum sentence, as provided for in the Act, it is disproportionate to the facts of this matter and ought to be set-aside and replaced with a lesser sentence, which should be antedated to the date on which he was sentenced, i.e. 10 September 2015.

9. A Court of Appeal should be guided by the principle that sentence or punishment is pre-eminently a matter for the discretion of the Trial Court and should be cautious not to erode such discretion. The sentence imposed by the Trial Court should only be interfered with if it has not been exercised in a judicial manner. See in this regard *S v Rabie*, supra.

10. In considering whether or not a lesser sentence is justified we are mindful of the following guideline which was alluded to by the Supreme Court of Appeal:

"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.

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.

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.

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. All factors 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 considering in the sentencing process. 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.

In applying the statutory provisions, it is inappropriately constricting to use the concepts developed in dealing with appeals against

sentence as the sole criterion. If the sentencing Court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to a crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.

In doing so, account must be taken of the fact that a crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed by paying due regard to the benchmark which the legislature has provided. "

See: *S v Malgas* 2001(2) SA 1222 (SCA) at 1235 F - 1236 E.

11. No person has the right to violate a woman's body, A woman's body is sacred.
12. The crime committed by the Appellant is extremely serious and this Court will not abdicate its responsibility insofar as the imposition of a fair and justifiable sentence is concerned. The only question this Court is faced with is whether or not life imprisonment is, under the prevailing circumstances, the appropriate sentence or not.
13. Rape is a very serious offence, constituting a humiliating, degrading and brutal invasion of the privacy, dignity and the person of the victim. See in this regard *S v Chapman* 1997(2) SACR 3 (SCA).
14. Rape can be described as a "cancer within society". See *S v Swartz & another* 1999(2) SACR 380 (C).

15. Rape is crime that "threatens every woman and particularly the poor and the vulnerable. In this country it occurs far too frequently and is currently aggravated by the grave risk of the transmission of aids. A woman's body is sacrosanct and anyone who violated it does so at his own peril. Our legislature and community at large, correctly expects from our Courts to punish rapists very severely." (See *S v Nchenche* 2005(2) SACR 386 (W)).
16. Rape can never be condoned. Some rapes are worse than others and the life sentence ordained by the legislature should be reserved for cases devoid of substantial factors compelling the conclusion that such a sentence is inappropriate and unjust. (See *S v Abrahams* 2002(1) SACR 116 (SCA)). As Davis J stated:

"As controversial a proposition as this is bound to be, as not all murders carry the same moral blameworthiness, so too, not all rapes deserve equal punishment. That is in, no way to diminish the horror of rape. It is however to say that there is a difference even in the heart of darkness."

See: *S v Swartz & another*, sup.

17. The upshot of the principles referred to herein supra is that the Trial Court's exercise of a discretion in imposing a sentence is not easily disturbed, unless in the prescribed instances.

17.1 In the present case, we do not find any misdirection or irregularity on the part of the Court a quo in how it approached the sentence.

17.2 In our view the Court a quo was correct in its conclusion that there were no substantial and compelling circumstances justifying a deviation from the imposition of the prescribed sentence of imprisonment for life.

18. We will be failing in our duty to protect woman and children, as constitutionally and judicially enjoined, were we to interfere with the sentence imposed on the Appellant. In the result, the appeal should fail.

WHEREFORE an order in the following terms is made:

1. The appeal against the sentence imposed on the Appellant is dismissed.

DE VOS, J

Judge of the High Court

BOTES, AJ

Acting Judge of the High Court

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