

SOUTH AFRICA / JUDGMENT

Mathenjwa v S (A56/2020) [2020] ZAGPPHC 490 (1 September 2020)

[2020] ZAGPPHC 490

COURT

North Gauteng High Court, Pretoria

BEFORE

SS Madiba, CJ van der Westhuizen

CASE / FILE NUMBER

A56/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION PRETORIA

CASE NO: A56/2020

In

the matter between:

GLEN
MOJALEFA MATHENJWA
APPELLANT
and
THE STATE
RESPONDENT

JUDGMENT

MADIBA, AJ

INTRODUCTION

- [1] The appellant was convicted in the Regional Court at Benoni on 17 May 2018 on counts of kidnapping and rape. He was sentenced to life imprisonment on the rape count and five (5) years on the charge of kidnapping. Both sentences were ordered to run concurrently.
- [2] Leave to appeal is against sentence only.

SENTENCE

- [3] The aspects in dispute by the appellant are as follows: -
- a) The court imposed a sentence that is shockingly harsh and inappropriate in the circumstances.
 - b) The court erred in finding that there are no substantial and compelling circumstances to deviate from the prescribed minimum sentence.
 - c) That the court misdirected itself in over-emphasizing the elements of deterrence and retribution in imposing the life sentence.

FACTUAL

BACKGROUND

- [4] The complaint was three (3) years old at the time of the commission of the offence. She was playing with her friends when the appellant called her to accompany her to the shops.
- [5] Her aunt received a report that the complainant was walking with a stranger who appeared to be drunk crossing the main road. On enquiry, the aunt was informed by the other kids that the appellant took her away.
- [6] A search for the appellant and the complainant ensued. The complainant was found in the company of the appellant in the bush crying.
- [7] When confronted by the aunt as to what was he doing with the child in the bush, the appellant failed to provide an explanation.
- [8] The aunt assaulted the appellant who ran away. She alerted members of the community who apprehended him. The appellant was arrested by the police who were patrolling in the area.

LEGAL PRINCIPLES FINDINGS APPLICATION

- [9] It is trite law that a court of appeal should be guided by the principle that punishment is a matter for the discretion of the trial court.
- [10] The sentence should only be altered and interfered with if the trial court failed to exercise its discretion reasonably and judicially. The test is whether the sentence is vitiated by an irregularity or misdirection or is disturbingly inappropriate.[1]
- [11] The conviction of the appellant fell within the purview of the prescribed minimum sentence as prescribed in Section 51 (1) of the Criminal Law Amendment Act 105 of 1997.
- [12] The appellant's prospect of success lies in the finding that substantial and compelling circumstances exist justifying the imposition of a lesser sentence or whether the trial court misdirected itself.
- [13] Section 51 (3) of Act 105 of 1977 provides that a lesser sentence than the prescribed minimum sentence shall be imposed in the event of the

court finding substantial and compelling circumstances justifying a lesser sentence.

[14] The personal circumstances of the appellant can be enumerated as follows:

- a) The appellant was 37 years old;
- b) He is unmarried and has a child who is 17 years old;
- c) He was self-employed earning an income of R1 000.00 per month;
- d) The appellant is HIV positive;
- e) He has two previous convictions that of malicious damage to property and housebreaking.

[15] The trial court had to consider whether or not these factors are indeed substantial and compelling to justify deviation from the prescribed minimum sentence.

[16] The legislator has refrained from defining what factors constitute substantial and compelling circumstances. The discretion so granted to the court has to be exercised property and judicially.

[17] All the circumstances taken into account when a sentence is imposed, must cumulatively justify the prescribed minimum sentence to be imposed.

[18] The court in *S v Vilakaz*[2]i held that the sentencing court should guard against imposing disproportionate sentences merely on the basis that they fall within the category of the prescribed sentences.

[19] It is submitted on behalf of the appellant that the fact that the minor child did not suffer serious injuries constitute substantial and compelling circumstances which the trial court failed to consider.

[20] Counsel for appellant in his heads of argument in my view correctly conceded that the absence of injuries on its own does not amount to substantial and compelling circumstances, but it is a factor to be taken into account.

[21] The medical evidence presented indicates that the complainant was brutally sodomized and suffered injuries. Whether the injuries are not of a worst case scenario, is neither here nor there. One need not concentrate only on the physical injuries sustained. A consideration should also be attached on the psychological and trauma suffered by the victim among others.

[22] The sexual assault inflicted on the complainant resulted in her refusing to play with other kids any more after that incident.

[23] I agree with the finding of the trial court that the absence of serious injuries on the complainant does not constitute substantial and compelling factor under the circumstances.

- [24] It was further submitted on behalf of the appellant that the trial court did not attach any weight and insufficiently considered the personal circumstances of the appellant.
- [25] Speculative hypotheses favourable to the offender, undue sympathy and marginal differences in personal circumstances relevant to sentencing must be measured against the phrase “substantial and compelling circumstances” and must cumulatively justify the departure from the prescribed minimum sentence.[3]
- [26] Pertaining to the personal circumstances of the offender in matters as serious as the offence before court, it was stated in *S v Vilakazi*[4] that:
- “In cases of serious crimes the personal circumstances of the offender by themselves will necessarily recede to the background. Once it becomes clear that the crime is deserving of the substantial period of imprisonment, the question whether the accused is married or single, whether he has two or more children, whether or not employed, are in themselves immaterial to what period should be, and those seems to me to be the kind of flimsy grounds that Malgas said should be avoided.”*
- [27] The personal circumstances of the appellant were indeed considered by the trial court and found that they did not constitute substantial and compelling circumstances. I find no reasons to hold otherwise. The appellant has indeed been convicted of a serious offence.
- [28] In *S v C*[5] it was held as follows: -
- “Rape is regarded by the 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 and mental integrity and security. His monstrous deeds often haunt his victim*
- and subject her to mental torment for the rest of her life. A fate often worse than loss of life.”*
- [29] What is aggravating is that the complainant was three years old when she was sexually assaulted by the appellant. She sustained injuries on her private parts and was under tremendous pain. The appellant was regarded as part of the complainant’s family, a father figure to her.
- [30] The appeal court is to apply its mind to the question whether the sentence imposed by the trial court was proportionate to the offence.
- [31] The intention of the legislature in creating the prescribed minimum sentences was that should there be no substantial and compelling circumstances and in the absence of the trial court having misdirected itself or no irregularity is found, severe punishment should be meted out as prescribed. Such prescribed sentences cannot be deemed to be cruel, inhuman and degrading.
- [32] The sentence imposed by the trial court does not appear to be disturbingly inappropriate and I am of a view that the trial court exercised its discretion reasonably and properly.
- [33] I can therefore find no reason to interfere with the sentence imposed by the trial court.

[34] The appeal against sentence stands to be dismissed.

[35] Consequently the following order is proposed: -

1. The appeal against sentence is dismissed.
2. The sentence imposed by the trial court is confirmed.

SS MADIBA

ACTING JUDGE OF THE HIGH COURT

I agree, and it is so ordered

CJ VAN DER WESTHUIZEN

JUDGE OF THE HIGH COURT

Appearances:

Appellant's Counsel

: Advocate F Van As

Appellant's Attorneys

: Pretoria Justice Centre

Respondents' Counsel

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: National Prosecuting Authority

Date of hearing

: 19 August 2020

Date of judgment

: 01 September 2020

[1] See *S v Rabie* 1975 (4) SA 885 A

[2] 2009

(1) SACR 552 SCA

[3] See *Malgas* 2001 (1) SACR 469 SCA

[4] 2009

(1) SACR SCA at page 574, para 58

[5] 1996

(2) SACR 181 at page 186 D-E

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