

SOUTH AFRICA / JUDGMENT

Matsobane v S (CA71/2018) [2019] ZANWHC 54 (12 December 2019)

[2019] ZANWHC 54

COURT

North West High Court, Mafikeng

BEFORE

T Djaje, B.R. Nonyane

CASE / FILE NUMBER

CA71/2018

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IN THE HIGH COURT OF
SOUTH AFRICA
NORTH
WEST DIVISION, MAHIKENG
CASE NO: CA
71/2018
In

the matter between:	KGOTSO
	MATSOBANE
	Appellant
	And
	THE
	STATE
	Respondent
	DJAJE
	J & NONYANE AJ

JUDGMENT

DJAJE J

Introduction

- [1] The appellant appeared in the Regional Court sitting in Mogwase in the district of Mankwe. He was convicted of two counts of rape and sentenced to life imprisonment on each count on 1 December 2016. It was ordered that the sentences in both counts should run concurrently. He now appeals against sentence only relying on his automatic right of appeal.

Factual

Background

- [2] The complainant in count one testified that on 2 May 2010 which was the date of the incident, she was at home in Phalane village, sleeping. At around 23h00 she was awoken by someone throwing stones on the roof of the house. Thereafter there was a knock at the door. She enquired who it was and the person responded that he was one Tshepo. When she asked the said person to come to the window so that she could positively identify him, the person tried to open the door and she pushed the cabinet towards the door blocking it. The appellant then entered through the window. At that time she ran out through the door and he chased after her and grabbed her. The appellant took her back into the house and had sexual intercourse with her without her consent. She was able to identify him as the lights were on and she knew him before the incident as his house was three houses away from hers. The complainant testified that the appellant had sexual intercourse with her three times during the night and in the morning he threatened to kill her if she reported the incident to anyone. After the appellant
- left, she went to her neighbour Mmolotsi to report about the incident and the police were called.
- [3] Mmolotsi corroborated the complainant's version in all material respects and he knew the appellant very well. He even confirmed that prior to the complainant coming to report he saw the appellant in front of his yard assisting a taxi driver with his vehicle.
- [4] The medical report was handed in and the doctor who examined the complainant indicated that there were lacerations on the complainant's vagina at 5 o'clock and 9 o'clock. There were DNA results handed in that the appellant's DNA matches the one found on the complainant's vagina.
- [5] The appellant in relation to count one testified that on the day of the incident he was in Tlhabane and only returned to Phalane village at the end of May 2010. He did not call any witnesses in his defence.
- [6] The complainant in count two was 17 years at the time of the incident on 29 October 2011. She met the appellant who grabbed her by hand and threatened to injure her if she screamed. The appellant took her to a certain house and had sexual intercourse with her without her consent. She testified that the appellant had sexual intercourse with her three times. She managed to escape through the window when the appellant had gone to another room. She then met a certain man, called Linda and reported to him what happened to her.

Linda took her to the clinic and called her mother.

- [7] Linda could not testify as he had passed away but his statement was handed in as exhibit confirming the report made to him by the complainant. The mother of the complainant testified that she was aware of the rape allegations and that she knew the appellant very well as they attend the same church. According to the complainant's mother she once had to approach the parents of the appellant to reprimand him about bothering the complainant when she comes from school.
- [8] In his defence the appellant testified that he had a love relationship with the complainant in count 2 and that the sexual intercourse on that day was consensual. He further stated that on the date in question he was from town and had bought the complainant shoes and vanilla custard that she had asked for. He was surprised to hear the complainant screaming outside the house saying that he raped her.
- [9] In convicting the appellant the court a quo found that the state succeeded in proving the guilt of the appellant beyond reasonable doubt in both counts and rejected his version as being false.

AD SENTENCE

Submissions

- [10] In the main, the argument for the appellant was that the court a quo misdirected itself by not finding that there were substantial and compelling circumstances justifying the imposition of a lesser sentence in both counts. It was argued on behalf of the appellant that the court a quo failed to adequately take into consideration the personal circumstances of the appellant that would justify deviation from the

prescribed minimum sentence. Further that the extent of the psychological harm on the complainants was not placed before court

which then justifies deviation from the prescribed minimum sentence of life imprisonment.

- [11] In contention the respondent argued that the trial court correctly found that there were no compelling and substantial circumstances justifying deviation from the prescribed minimum sentence of life imprisonment. It was submitted that the sentence imposed is commensurate with the seriousness of the offence of rape committed more than once in each count. Further that the aggravating factors far outweigh the mitigating factors in that the appellant in count one gained entry into the house through a window and chased after the complainant. In count two the complainant was threatened and actually kidnapped by the appellant. Counsel for the respondent argued that having considered the circumstances of this matter the sentences of life imprisonment imposed on the appellant are not severe or inappropriate and therefore there is no need for this court to interfere.

Law

[12] In *S v Bogaards* 2013 (1) SACR 1 (CC) the Constitutional Court held:

“[41] Ordinary, sentencing is within the discretion of the trial court. An appellate court’s power to interfere with sentence imposed by courts below is circumscribed. It can only do so where there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it. A court of appeal can also impose a different sentence when it sets aside a conviction in relation to one charge and convicts the accused of another”

[13] In the matter of *Marota v The State* (300/15) [2015] ZASCA 130 (28 September 2015) Petse JA stated as follows:

“The imposition of sentence is primarily a matter of judicial discretion by a sentencing court save where the legislature has decreed otherwise. This requires that a sentencing court should have regard to, inter alia, the peculiar facts of each case, the nature of the crime and the personal circumstances of the offender. (See eg: S v Zinn 1969

(2) SA 537 (A) at 540G). Accordingly, a court of appeal will interfere with the exercise of such discretion only on limited grounds.”

See also: *S v Malgas* 2001 (1) SACR 469 (SCA)

[14] In the case of the *S v Vilakazi* 2009 (1) SACR 552 (SCA) Nugent JA said at par 15:

“It is clear from the terms in which the test was framed in Malgas and endorsed in Dodo that it is incumbent upon a court in every case, before it imposes a prescribed sentence, to assess, upon a consideration of all the circumstances of the particular case, whether the prescribed sentence is indeed proportionate to the particular offence. The Constitutional Court made it clear that what is meant by the ‘offence’ in the context (and that is the sense in which I will use the term throughout this judgment unless the context indicates otherwise) consist of all factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence and the culpability of the offender.

If a court is indeed satisfied that a lesser sentence is called for in a particular case, thus justifying a departure from the prescribed sentence, then it hardly needs saying that the court is bound to impose that lesser sentence. That was also made clear in *Malgas*, which said that the relevant provision in the Act vests the sentencing court with the power, indeed the obligation, to consider whether the particular circumstances of the case require a different sentence to be imposed. And a different sentence must be imposed if the court is satisfied that substantial and compelling circumstances exist which ‘justify’...it.”

Analysis

[15] The following personal circumstances of the Appellant were highlighted at the time of sentence:

- He was 27 years old and had a previous record of theft which was ten years old at the time of sentencing;
- He has two children at that time aged seven years and nineteen months old and he was responsible for their maintenance;
- He was gainfully employed at Rasimone mines earning R5400-00 per month;
- He was financially responsible for his mother and his siblings at his home.

[16] Rape is regarded as a very serious offence. The appellant in this matter was known to the complainants and he took advantage of that. He threatened to kill the complainants so that they could not report the incidents. In count one he knew that the complainant was alone with young children and used that information to perpetrate his bad deeds. The complainant tried to stop him from coming in through the door but he did not let up and instead gained entry through the window. He desperately wanted to get into the house and have sexual intercourse with the complainant.

[17] In count two the appellant had been reprimanded by the complainant's mother before the incident to stop following the complainant when she is from school. He was not deterred by the reprimand and went ahead to rape her. The appellant kidnapped the complainant in count two as she was forced to walk with him to a certain house against her will

and was raped more than once. His actions can be described as cruel, uncaring and barbaric.

[18] The offence, the personal circumstances of the appellant and the interest of society should be balanced in determining an appropriate sentence.

[19] As far as the sentence of life imprisonment is concerned, it is apparent that the learned Regional Magistrate found that there are no substantial and compelling circumstances present in this case which warrants a deviation from imposing the prescribed minimum sentence. I am of the view that the learned Regional Magistrate was correct in this regard. There is no reason for this court to interfere as there was no misdirection.

Order

[20] Consequently, the following order is made:

1. The appeal against the sentence is dismissed.

J T DJAJE

JUDGE OF THE HIGH COURT

I AGREE

B.R.NONYANE

ACTING JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF HEARING

: 29 NOVEMBER 2019

DATE OF JUDGMENT

: 12 DECEMBER 2019

COUNSEL FOR THE APPELLANT : MR SETUMU

COUNSEL FOR THE RESPONDENT : ADV JACOBS

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Prepared on 12 October 2026 · Esheria