

SOUTH AFRICA / JUDGMENT

Mbele v S (A79/2017) [2017] ZAFSHC 181 (14 September 2017) [2017] ZAFSHC 181

COURT

Free State High Court, Bloemfontein

BEFORE

Mathebula, Chesiwe

CASE / FILE NUMBER

A79/2017

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IN

THE HIGH COURT OF SOUTH AFRICA,

FREE

STATE DIVISION, BLOEMFONTEIN

Appeal

number: A79/2017

In

the application between:

MOSHE
JOHN
MBELE
Appellant
and
THE
STATE Respondent

CORAM:

MATHEBULA, J
etCHESIWE, AJ
HEARD

ON:

21 AUGUST 2017

JUDGMENT

BY: CHESIWE, AJ

DELIVERED ON: 14 SEPTEMBER 2017

- [1] The appellant was convicted in the Regional Court of Harrismith, of raping a thirteen year old girl, who is mentally retarded[1] as defined in Section 1(1) of the Sexual Offences and Related Matters Amendment Act 32 of 2007 (the Sexual Offences Amendment Act). The provisions of Section 51(1) of the criminal Law Amendment Act 105 of 1997 (the Act) are applicable. The appellant was sentenced to life imprisonment.
- [2] In terms of the Judicial Matters Amendment Act of 2013 the appellant has an automatic right to appeal against the sentence that was imposed on 22 March 2010. The appeal therefore lies only against the sentence.
- [3] The appellant now approaches this Honourable Court with an appeal against sentence that the sentence is shockingly inappropriate.
- [4] Mr Kambi, on behalf of the appellant in the heads of argument and oral submission submitted that the mitigating factors and the personal circumstances of the appellant cumulatively amounted to compelling and substantial circumstances which justified the trial court to deviate from the prescribed sentence of life imprisonment.
- [5] He highlighted the following to the courts attention:
- 5.1 The appellant was 21 years old at the time of the offence.
- 5.2 Appellant does not have a child.
- 5.3 Appellant was employed and earned R 500.00 per month.
- 5.4 That the appellant was not advised by the trial court of the provisions of section 51 (1) of the Act, that the Prescribed Minimum Sentence would be life imprisonment, nor did the trial court advice that in the event of a guilty conviction the appellant could be sentences to life imprisonment.
- [6] Adv Namaka on behalf of the respondent submitted in the heads of argument and oral submission that the sentence was shockingly serve and inappropriate and conceded that an interference by the appeal court is warranted. She highlighted the aggravating circumstances

that the complainant was 13 years of age at the time of the offence and was mentally impaired. Though the complainant sustained no severs injuries, but the appellant used a knife to threaten the complainant. The appellant had previous convictions, though not similar to the current conviction.

[7] Adv Namaka submitted that a sentence of 18 years would be more appropriate punishment for the appellant.

[8] The proven facts of this case are briefly that the complainant was forcefully taken by the appellant to a neighbourhood in Warden. The complainant's two cousins, B. and S. attempted to persuade the appellant to leave the complainant alone, whereby the appellant

threatened the two girls with a knife. After the incident the complainant went home and reported that she was raped by the appellant.

[9] During evidence at the trial court, an enquiry was conducted into the complainant's mental condition in terms of Section 1 of the Sexual Offences Act. Professor Frederick Calitz, Clinical Psychologist and Head of Clinical Psychology at the Free State Psychiatric Complex (previously known as Orange Hospital) was the expert witness on behalf of the state. He confirmed that the complaint was mentally challenged as defined in the Act. This is noted on the state witness's comments with regard to the mental impairment of the complainant.

"Edelagbare, miskien kan ek net vir die hof verduidelik wat is verstandelikevertraging. If a person has an IQ from 20 to 34 it is serious, dis emstige vestandelikevertraging."

[10] Mr Kambi submitted that the trial court misdirected itself by not finding that there are no compelling and substantial circumstances

that it would deviate from the Prescribed Minimum Sentence. Further that the appellant's rights to a fair trial was violated[2] in (that) the appellant was not forewarned on the implications of the Prescribed Minimum Sentence.

[11] With regard to the right to a fair trial for the appellant, where the state rely upon the sentence regime created by the Act, a fair trial will generally demand that its intention be pertinently brought to the attention of an accused at the outset of the trial, or in the charge-sheet or in some form, so that an accused is placed in position to properly appreciate in good time the charge he faces will have its possible consequences. What is required is that an accused person is given sufficient notice of the State's intention in order for such a person to properly conduct his defence.[3]

[12] The trial court in having invoked the provisions of the Act without pertinently bringing it to the appellant's attention neither taking into consideration that the appellant suffered prejudice due to the court's failure to warn the appellant of the consequences of a guilty verdict or the learned magistrate's findings. This in itself constituted a substantial and compelling reason why the prescribed sentence ought not to have been imposed.

[13] In every appeal against sentence, the Judges hearing the appeal should be guided by certain appellate principles. The first is that

punishment of an offender is primarily for the discretion of the trial court. The second is that such judges should be careful not to erode such discretion. The third is that the sentence should only be altered, on appeal, if the discretion has not been judicially and properly exercised.[4]

[14] It is indeed so that the first principle that the sentencing courts should not readily depart, for flimsy reasons, from the prescribed minimum sentence ordained as an ordinarily appropriate punishment. The prescribed minimum sentence of life imprisonment is the harshest a court can impose on an offender. It is the ultimate punishment in our Criminal Law system. The sentencing court always has that choice dictated by the peculiar circumstances of a particular case. To say that the court has no choice boiled down to some kind of neglect to exercise the sentencing discretion judicially and constitute a material misdirection. *S v Rabie* supra.

[15] Rape is a very serious offence and the punishment to be imposed must be proportionate to such seriousness. Rape is a violation of a person's constitutionality entrenched rights. It is an invasion of a woman's most valuable of all rights, namely dignity. The courts cannot ignore the frequency at which rape offences takes place in the country especially if it's perpetrated against children and worse in the case of a mentally impaired child. The interests of the public must be protected against people of the appellant's calibre.

[16] The court must take into consideration the appellants personal circumstances, the nature and gravity of the offence and the interests of the community. These factors must be balanced against each other, in order for the court to reach an appropriate sentence as set out in *S v Malgas* [5] at 481 b-c where the court states

"The court must strive to impose sentences that are proportionate to the crime, the criminal and the needs of the society and achieve justice."

[17] It is trite that a court of appeal should not replace the sentence imposed by the trial court with its own, unless it is justified to do so.[6]• Further that the respondent conceded that the trial court has over emphasised the aggravating factors at the expense of the mitigating factors. Counsel for the plaintiff submitted that the appeal court may interfere in the sentence, as the appellant was not advised on the implications and consequences of the Prescribed Minimum Sentence. Therefore it warrants the appeal court to deviate, in order to restore a balance.

[18] I therefore see no reason not to interfere and replace the sentence imposed.

[19] In view of the aforesaid, I am persuaded that the trial court misdirected itself and that the sentence is shockingly inappropriate.

[20] In the circumstances I make the following order:

1. The appeal against sentence succeeds.

2. The sentence of life imprisonment imposed on the appellant is set aside and is substituted with the following sentences:

2.1 The appellant is sentenced to

fifteen (15) years imprisonment.

2.2 The sentence must be deemed to have been imposed on 23 March 2010.

S CHESIWE, AJ

I concur

MATHEBULA, J

On behalf of applicant: Attorney SS Kambi

Instructed by:

Bloemfontein Justice Centre

Southern Life Plaza Building

On behalf of respondent: Adv. C Nameka

Instructed by:

Director of Public Prosecutions

Waterfall Centre

Bloemfontein

[1] Although the Act refers to "retarded" I will throughout the judgment use the term "impaired" as it is the most

appropriate term to use.

[2] It was their submission that this lies in Section 35(3) of the Constitution, that provides that every accused person has a right to a fair trial which, inter alia includes the right to be informed of the charge with sufficient detail to answer it.. It requires in clear terms that, before a trial can start, every person must be fully and clearly informed of the specific charge(s) which he or she faces. This evidently would include all competent verdicts. This is intended to avoid trials by ambush.

[3] S v Ndlovu 2003

(1) SACR 331 j

[4] S v Rabie 1975

(4) SA 855 (A) at Per Holmes JA.

[5] 2001 (1) SACR 469 (SCA)

[6] S v Obisi 2015

(2) SACR 35 w at 35i-j

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Prepared on 10 October 2026 · Esheria