

SOUTH AFRICA / JUDGMENT

Mbokothwana v S (CA&R20/17) [2017] ZAECMHC 30 (5 September 2017)

[2017] ZAECMHC 30

COURT

Eastern Cape High Court, Mthatha

BEFORE

S Mbenenge, F Y Renqe

CASE / FILE NUMBER

CA&R20/17

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE LOCAL DIVISION, MTHATHA)

CASE NO: CA &

R 20/17

In

the matter between:

SIMBONILE
MBOKOTHWANA
Appellant
and
THE
STATE
Respondent

JUDGMENT**MBENENGE ADJP:**

- [1] The appellant pleaded not guilty to, but was convicted of, having raped[1] Y. M. (the complainant). He was thereupon sentenced to undergo life imprisonment on the basis that he had raped the complainant “three times”.
- [2] The appellant had admitted to having had sexual intercourse with the complainant on the said day, but contended that the complainant had consented thereto.
- [3] The evidence established that on the day in question she had been to consult a doctor. After the consultation, around “something to five [pm]”, she made her way to the rank to board a taxi homeward. The taxi she boarded was being driven by the appellant, with whom she had previously had an [...] and [...]. She occupied the seat next to that of the driver. After the taxi had loaded some passengers it departed from the rank to various destinations. The appellant drove past the point where the

complainant was to alight. He thereafter dropped all the other passengers along the way intimating that he would drop the

complainant on his way back.

- [4] After all the other passengers had been dropped off at their destined points the appellant did not fulfil his promise and, once again, drove past the complainant’s drop off point. By that time it was already eventide. When the complainant expressed concern at this, the appellant assured her that he would take her home timeously. She was, at a certain stage, prevented from escaping by the taxi conductor who locked the taxi door. The appellant then said he would drop her off at his place, and not hers. When she tried screaming the appellant threatened to assault her.
- [5] At around midnight, after the conductor had disappeared, the appellant, who was clearly pursuing a mischievous agenda, accosted

the complainant to a homestead located next to a forest. On arrival there, he forcefully undressed her and had sex with her,

without her consent. When she tried screaming he pressed her on her chest. The appellant ejaculated and thereafter had another bout of unconsented sex with her. He thereafter wiped off the sperms with a towel and went outside. The complainant also went out, and eventually left the scene; she walked home where she arrived around 8 o’clock on the following morning and reported the matter.

- [6] The appellant's contention that the sexual encounter had been consensual did not prevail, hence he was found guilty of rape as charged. The evidence clearly established that the appellant had had sex with the complainant twice; hence the provisions of section 51(1) of Schedule 2 to the Amendment Act were invoked,[2] resulting in the impugned life imprisonment being imposed.
- [7] The instant appeal is against sentence only, the principal contention being that the sentence imposed is strikingly and shockingly inappropriate.
- [8] The appellant was 25 years old at the time the offence was committed; he is a first offender; he had been employed as a taxi driver earning R500,00 per week; he is married and fathers two minor children, one of whom is [...] and the other begotten through his estranged wife who deserted him since facing the rape charge; he is the sole breadwinner and also fends for his aunt and two teenage brothers (aged 15 and 16 years, respectively) who are still schooling.
- [9] As part of mitigation it was further contended, on behalf of the appellant, that she had suffered no physical injuries and had not been a stranger to the complainant with whom they had [...]. The cumulative effect of the mitigating factors, so it was argued, ought to have been found to constitute substantial and compelling circumstances.
- [10] It is so that ordinarily the prescribed life imprisonment sentence should, unless substantive and compelling circumstances require otherwise, be imposed and that the sentencing court should not deviate therefrom for flimsy reasons.[3] If, on the other hand, the prescribed sentence would be unjust, or disproportionate to the offence, then it must be departed from. [4] It is incumbent on the sentencing court to independently apply its mind to the question of whether the prescribed sentence is proportionate to the crime; if not, substantial and compelling circumstances exist, and the court may not impose the prescribed sentence.[5]
- [11] The legislative guidelines provided by the Criminal Law (Sentencing) Amendment Act 38 of 2007 which came into effect on 31 December 2007 are of significance. Section 51(3)(aA) of the Amendment Act introduced by that Act specifies that when sentencing for rape the apparent lack of physical injury to the complainant and any relationship between the accused person and the complainant prior to the offence being committed will not count as substantial and compelling circumstances to justify the imposition of a lesser sentence.
- [12] Be that as it may, rape has also been conceptualised on a continuum from bad to worse, with even the Supreme Court of Appeal repeatedly holding that life imprisonment is justified only in instances of rapes of the worst type.[6]

[13] The judgment of the Court a quo on sentence contains mainly passages copiously quoted from decided cases dealing broadly with principles governing sentencing guidelines and what the courts have considered to constitute substantial and compelling circumstances.

[14] The personal circumstances of the appellant were dealt with in the following fashion:

“... You never paid damages to this family, you never maintained your child you child is burden to the parents of the complainant... you never supplied maintenance, as if that were not enough, you know on top, you rape this child, what do you want from this family, what do you want these people to do. This Court looked at your personal circumstances, weighed them against the aggravating circumstances factors and the Court really finds that your mitigating factors or personal circumstances are far outweighed by the aggravating circumstances and there is not even any sign of remorse. You lied through and through, you lied throughout, you are lying to this Court to say that you have since made peace with the complainant, and the families have now reconciled and it was agreed that a beast was going to be paid to the family to cleanse this rape of their daughter, and then complainant was called, I should have sentenced this case that date, but I did not go on to sentence the case because I wanted to satisfy you, I am asking you, do you – are you wanting to call the complainant, but I am not obliging you, I am not forcing you, decide what you want to do, then you say, I need the complainant to come. Then when the complainant is here, because you were lying, the truth comes out and your attorney is embarrassed, you are lying to your attorney, you are embarrassing your own attorney. Now the attorney is not calling this person, the State takes advantage and calls this complainant and that was to your detriment because of your lies.

Mr Mbokothwana, that you are a taxi driver and that you are conveying women, it just does not mean that those women are available as sexual bicycles for your sexual gratification. Taking the people to their respective destinations, take payment in the form of money, not in kind by means of sexual gratification. There is no evidence to say that you ever asked for any payment from this complainant, so which means you were gunning for sexual gratification as your payment.

I can do no more than repeat the Honourable Judge of Appeal, Justice JA's words where he says:

“Accordingly this case, now I'm saying in your case – this case on its facts, is indeed horrendous enough to justify the imposition of the maximum penalty”.

In other words, I am saying that there are no substantial and compelling circumstances, justifying the imposition of a lesser sentence than the prescribed minimum sentence of life imprisonment and you are sentenced to”. Sic.

[15] The tenor of the judgment points to the court a quo as having not applied its mind to the question of whether the sentence was proportional to the offence. In that regard the court a quo misdirected itself.

[16] The evidence in this case also does not reveal anything more specific than that the complainant must have been traumatised by the rape. The record provides no factual material upon which to deliberate on the emotional impact the rape had on the complainant.

[17] In Vilakazi[7] it was held that the personal circumstances of an accused[8] are immaterial in an instance, such as here, where the crime is deserving of a substantial period of imprisonment, but relevant in relation to whether the accused can be expected to offend again. In hoc casu the fact that the appellant reached 25 years without any serious brushes with the law should, taken together with the other mitigating

factors, have counted in his favour.

[18] Another factor deserving of being singled out is the finding of the Court a quo that the appellant who was convicted of a single rape court had raped the complainant “three times”. As already pointed out, the evidence points to two bouts of unconsented sexual intercourse. The relevant portion of the transcript reads:

“PROSECUTOR: Proceed --- After he inserted his penis into the vagina he did up and down movements until he ejaculated.

Proceed --- When he moved I tried to rise, but he held me back and then he inserted his penis into my vagina and he ejaculated again.

Ma’am I just want to be clear. You said he put his penis for the second time, is that what you’re telling this Court? --- Yes, even the first occasion he tried, I tried moving, when he noticed I was trying to move he forced me to the bed.”

[19] It is clear from the excerpt quoted above that the two acts were so closely linked as to amount in substance to the continuation of a single event.[9] The finding by the Court a quo to the contrary insofar as it formed the basis of the ultimate sentence constituted a misdirection. The appellant should, in my view, have been sentenced for a single event of rape.

[20] As already pointed out above, the mitigating factors pointing to the appellant receiving a lesser sentence are: he is the sole-bread

winner – providing for two teenagers and his aunt; he’s had no serious brushes with the law; he’s is relatively

young and there is still a possibility of rehabilitation; and he is a husband with two minor children.

[21] The cumulative effect of the factors dealt with above, in my view, point to life imprisonment as having been disproportionate in this case. A substantial sentence of imprisonment is sufficient to make the appellant aware that the offence of which he was convicted is grave. Direct imprisonment for a lengthy period will, in my view, exact sufficient retribution for the offence.

[22] I need to bring one last consideration to account. The appellant has been in custody since being sentenced on 11 November

2016. He has been incarcerated for approximately ten months. That period is substantial enough, and ought not to be ignored. There seems good reason to order that the sentence expire ten months earlier than would ordinarily have been the case.

[23] The appeal against sentence is therefore upheld. The sentence imposed upon the appellant by the court a quo is set aside and substituted with the following:

“The accused is sentenced to undergo twenty years’ imprisonment from which ten months is to be deducted when calculating the date upon which the sentence is to expire.”

S M MBENENGE

ACTING DEPUTY JUDGE PRESIDENT

HIGH COURT, MTHATHA

I agree:

F Y RENQE

ACTING JUDGE OF THE HIGH COURT

Counsel for the appellant: M Sakwe

Legal Aid Board

MTHATHA

Counsel for the respondent: J K M Joubert

Office of the DPP

Heard on:

25 August 2017

Delivered on:

05 September 2017

[1] In contravention of section 3 read with sections 1, 56(1), 57, 58, 59, 60 and 61 of the Sexual Offences and Related Matters Act 32 of 2007 (further read with section 51(1) of Schedule 2 to the Criminal Law Amendment Act 105 of 1997 (Amendment Act)).

[2] The Court a quo’s finding that the appellant had raped the complainant “three times ... and ejaculated three times” finds no support from the record, but no moment was made of this as the provisions of the relevant section find application in an instance where the victim has been raped “more than once”.

[3] S v Malgas 2001

- (1) SACR 469 (SCA) at para [25].
- [4] Ibid.
- [5] S v Matyityi 2011
- (1) SACR 40 (SCA) at para [23]
- [6] S v Abrahams 2002
- (1) SACR 116 (SCA); S v Mahomotsa 2002 (2) SACR 435 (SCA); Rammoko v DPP 2003 (1) SACR 200 (SCA), compare with S v Vilakazi 2009 (1) SACR 552 at para [11].
- [7] Supra at para [58].
- [8] Whether he is married or single, whether he has two children or three, whether or not he is in employment
- [9] Vilakazi (supra), para [55] also see S v Blaauw 1992 (2) SACR 295 (WLD) 300 a – d.
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