

SOUTH AFRICA / JUDGMENT

Mboyena v S (CA 35/2020) [2025] ZANWHC 16 (28 January 2025)

[2025] ZANWHC 16**COURT**

North West High Court, Mafikeng

BEFORE

Reid, Wessels

CASE / FILE NUMBER

CA 35/2020

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Source record**IN THE HIGH COURT OF****SOUTH AFRICA****NORTH WEST DIVISION,****MAHIKENG****CASE NUMBER:CA35/2020****REGIONAL COURT CASE****NUMBER:SH23/2007****Reportable: YES / NO****Circulate to Judges: YES / NO****Circulate to Magistrates: YES / NO****Circulate to Regional Magistrates: YES
/ NO****In the matter between:**THABISO
MBOYENA
APPELLANT
and
THE
STATE
RESPONDENT**Coram:**

REID J et WESSELS

AJ

Date: 28 January 2025

ORDER

(i)

The late filing of the appeal is condoned.

(ii)

The appeal against sentence is dismissed.

JUDGMENT

[1] It is apposite to deal with the condonation for the late filing of the notice of appeal. It should be stated that this appeal forms part of a special project for the eradication of a backlog of criminal appeal cases, a fact appreciated by both parties. It is this Court's view that it would be in the interests of justice that the appellant's late filing of the appeal be condoned and this appeal be disposed of on the merits. Subsequently, the late filing of the notice of appeal is condoned.

[2] Turning now to the merits of the appeal. On 1 June 2015, the Regional Court for the Regional Division of the North West held at Zeerust found the appellant guilty of rape and imposed the following sentence:

2.1. sentenced the appellant to 25 years imprisonment;

2.2. declared the appellant unfit to possess a firearm;

2.3. ordered that the appellant's name be listed in the National Register of Sexual Offenders.

[3] The appeal lies against sentence only, the grounds of which are as follows:

"1.It will be argued that a sentence of 25 years Imprisonment is a shockingly inappropriate in the circumstances and out of proportion

to the totality of the accepted facts in mitigation.

2. That the trial court misdirected itself by failure to impose a lesser sentence after finding that the personal circumstances are substantial and compelling circumstances which required the court to impose a lesser sentence."

[4] The appellant was convicted of the offence of rape. The offence falls within the ambit of Section 51(1) of the Criminal Law Amendment Act 105 of 1997.

[5] In terms of the of the Criminal Law Amendment Act[1], the conviction carries a mandatory life sentence on account of the complainant having been raped by the appellant and a co-perpetrator. If the court a quo was satisfied that substantial and compelling circumstances existed the imposition of a lesser sentence[2] would have been justified.

[6] The central question considered in this appeal is whether any substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the 25-year sentence imposed by the court a quo. Except for prescribing certain defined circumstances that are not to be considered as substantial and compelling circumstances[3], the Criminal Law Amendment Act[4] does not provide any definition of substantial and compelling circumstances.

- [7] A rigid definition of substantial and compelling circumstances has, quite correctly, not been formulated by the courts. The Supreme Court of Appeal in *S v Malgas*[5] defined[6] what substantial and compelling circumstances should be regarded as, the relevant portion which reads as follows:

“Moreover, those circumstances had to be substantial and compelling. Whatever nuances of meaning may lurk in those words, their central thrust seems obvious. The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances. Nor were marginal differences in the personal circumstances or degrees of participation of co-offenders which, but for the provisions, might have justified differentiating between them.”

- [8] The Constitutional Court in *S v Dodo*[7] stated with specific reference to life imprisonment that:

“To attempt to justify any period of penal incarceration, let alone imprisonment for life as in the present case, without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the

very heart of human dignity. Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end. Where the length of a sentence, which has been imposed because of its general deterrent effect on others, bears no relation to the gravity of the offence (in the sense defined in para [37] above), the offender is being used essentially as a means to another end and the offender's dignity assailed. So too where the reformatory effect of the punishment is predominant and the offender sentenced to lengthy imprisonment, principally because he cannot be reformed in a shorter period, but the length of imprisonment bears no relationship to what the committed offence merits. Even in the absence of such features, mere disproportionality between the offence and the period of imprisonment would also tend to treat the offender as a means to an end, thereby denying the offender's humanity.”

- [9] To arrive at an appropriate sentence that is just and fair the Supreme Court of Appeal in *Mudau v S*[8] laid down the principles to be followed in the process of consideration of a sentence. These principles have been enunciated therein as follows:

“It is also self-evident that sentence must always be individualised, for punishment must always fit the crime, the criminal and the circumstances of the case. It is equally important to remind ourselves that sentencing should always be considered and passed

dispassionately, objectively and upon a careful consideration of all relevant factors. Public sentiment cannot be ignored, but it can never be permitted to displace the careful judgment and fine balancing that is involved at arriving at an appropriate sentence.

Courts must therefore always strive to arrive at a sentence which is just and fair to both the victim and the perpetrator, has regard to the nature of the crime and takes account of the interests of society.”

[10] The extent to which this Court, sitting as a court of appeal, is empowered to interfere in the sentence of the court a quo is to be measured against the following test laid down in *S v Malgas*[9] at paragraph 12 thereof:

“A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate court is at large. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate". It must be emphasised that in the latter situation the appellate court is not at large in the sense in which it is at large in the former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned. No such limitation exists in the former situation.”

[11] The circumstances advanced by the appellant’s legal representative that should have been taken into account by the court a quo in mitigation were that the appellant:

11.1. was 36 years of age when he committed the crime

11.2. had 2 children

11.3. was employed as a construction worker

11.4. had no previous convictions

11.5. had inherent prospects of rehabilitation.

[12] Although not addressed in argument, the court a quo found the fact that the appellant and his co-accused were under the influence of alcohol and so was the victim to a certain extent, not to be a mitigating factor and did not take this fact into consideration when it sentenced the appellant.

[13] The court a quo took into consideration when determining a sentence, the fact that the appellant was still relatively young at the time of the crime (36 years of age) and had no previous convictions and that the rape was not the worst type of rape.

[14] In *S v Mahomotsa*[10] the Supreme Court of Appeal found that the rape in that matter (a rape of a repetitive nature) could “not be classified as

falling in the worst category of rape”. In coming to such a finding the Supreme Court of Appeal a justified departure from the sentence of life imprisonment. In paragraph 18 of this judgment the court remarked as follows:

*“It perhaps requires to be stressed that what emerges clearly from the decisions in Malgas and Dodo is that it does not follow that simply because the circumstances attending a particular instance of rape result in it falling within one or other of the categories of rape delineated in the Act, a uniform sentence of either life imprisonment or indeed any other uniform sentence must or should be imposed. If substantial and compelling circumstances are found to exist, life imprisonment is not mandatory nor is any other mandatory sentence applicable. What sentence should be imposed in such circumstances is within the sentencing discretion of the trial court, subject of course to the obligation cast upon it by the Act to take due cognisance of the legislature’s desire for firmer punishment than that which may have been thought to be appropriate in the past. Even in cases falling within the categories delineated in the Act there are bound to be differences in the degree of their seriousness. There should be no misunderstanding about this: they will all be serious but some will be more serious than others and, subject to the caveat that follows, it is only right that the differences in seriousness should receive recognition when it comes to the meting out of punishment. As this Court observed in *S v Abrahams* 2002*

(1) SACR 116 (SCA) “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” (para 29)”

[15] In following *S v Vilikazi*[11], when deciding whether substantial and compelling circumstances exist, the court must consider mitigating and aggravating factors and the cumulative effect thereof.

[16] The court a quo found that the personal circumstances of the appellant as advanced as mitigating factors, the nature of the rape not falling in the worst category of rape as well as the general mitigating factors (as also referred to in the appellant’s notice of appeal) constituted substantial and compelling reasons as provided for in Section 51(1) of the Criminal Law Amendment Act[12]. Having deviated from the prescribed minimum sentence, the Magistrate sentenced the appellant to 25 years imprisonment.

[17] In the final analysis, there exists no reason to interfere with the sentence imposed by the court a quo.

Order

[18] Resultantly the following order is made:

(ii) The appeal against sentence is dismissed.

M WESSELS

ACTING JUDGE OF THE HIGH COURT

I agree

FMM REID

JUDGE OF THE HIGH COURT

APPEARANCES

Date of hearing : 20 June 2024

Date of judgment : 28 January 2025

Counsel for Appellant : Mr RK Thuwe

Instructed by : Legal Aid

Mahikeng

Counsel for Respondent : Adv CM Ramakgaphola

: Director of Public Prosecutions

Mmabatho

[1] Criminal Law Amendment Act 105 of 1997

[2] Section 51(3)(a)

[3] Section 51(3) (aA) of the Criminal Law Amendment Act

[5] S v Malgas 2001 (1) SACR 469 (SCA)

[6] paragraph 9 of the judgment

[7] S v Dodo [2001] ZACC 16; 2001 (3) SA 382 CC at paragraph 38

[8] Mudau v S (764/12) [2013] ZASCA 56 at paragraph 13

[9] S v Malgas 2001 (2) SA 1222 (SCA)

[10] S v Mahomotsa [2002] ZASCA 64

[11] S v Vilikazi 2009 (1) SACR 552 (SCA)

[12] Criminal Law Amendment Act 105 of 1997

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