

SOUTH AFRICA / JUDGMENT

Mhlambi v S (A429/2016) [2017] ZAGPPHC 935 (28 November 2017) [2017] ZAGPPHC 935

COURT

North Gauteng High Court, Pretoria

BEFORE

N V Khumalo, M LaM Manamela

CASE / FILE NUMBER

A429/2016

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IN

THE REPUBLIC OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

CASE

NO: A429/2016

Delivered:

28/11/17

NHLANHLA

MHLAMBI APPELLANT

and

STATE RESPONDENT

JUDGMENT**KHUMALO J****INTRODUCTION**

[1] On 20 May 2016, the Tsakane Regional Court imposed a sentence of life imprisonment upon the Appellant after he pleaded guilty to raping a 41 year old Ms D H ("the Complainant") on a field in Tsakane. The Appellant is appealing against the sentence.

[2] He was duly represented during the trial proceedings. He was convicted following the State's acceptance of the statement in terms of s 112 (2) of the Criminal Procedure Act 51 of 1977 ("the Act") he tendered in explanation of his plea, in response to the charge that ad verbatim read as follows:

"That the accused is guilty of the crime of contravening the provisions of s 3 read with s 1, 55, 56, 57, 58, 59, 60 and 61 of the Criminal Law Amendment Act (Sexual Offences and Related Matters) 32 of 2007 read with s 256, 257 and 281 of the Criminal Procedure Act 51 of 1977; the provisions of Sections 51 and Schedule 2 of the Criminal Law Amendment Act 105 of 1997, as amended as well as Sections 92 (2) and 94 of the Criminal Procedure Act 51 of 1977. The state alleges that the minimum sentence of life Imprisonment is applicable.

IN THAT on or about 26 day of February 2015 and at or near Tsakane in the Region Division of North Gauteng the said accused did unlawfully and intentionally commit an act of sexual penetration with a female person to wit, D. H. (41 years) by inserting his penis into her vagina, whereby involving the infliction of grievous bodily harm without her consent.

Section 51 and Schedule 2 of the Criminal Law Amendment Act 105 of 1997, as amended by Section 33 of Act 62 of 2000 and Section 36 of Act 12 of 2004 and further amended by Act 38 of 2007 is applicable in that:

If accused is convicted of the above charge of part 1 Schedule 2, Section 51 (1) (a) makes no provision for a minimum sentence of life imprisonment."

[3] The important provisions of Plaintiff's statement in explanation of his plea read:

"I make this statement and plead guilty to rape, Section 3, freely and voluntarily without any undue influence or duress.

I admit that on 26 February 2015 I was at Tsakane in the regional Division of North Gauteng.

I admit that I did unlawfully and intentionally commit an act of sexual penetration with a female person, to wit D. H., by inserting my penis into her vagina whereby involving the infliction of grievous bodily harm.

I admit that the offence occurred as follows:

I met the complainant walking in an open veld. I then grabbed her and forcefully removed her clothes and in the process she decided to fight. I then assaulted her with fists and did bite her wherein I overpowered her and raped her by inserting my penis in her vagina.

I admit that as a result of my actions the complainant did suffer injuries.

I admit that I had no right to rape the said complainant.

I further admit that at all material times I knew my actions were wrongful and punishable by the law and I had no excuse in law to act the way I did.

I humbly request this Honourable Court to forgive me.

[4] The reading of the statement in explanation of plea and the charge sheet is crucial to this appeal as they form part of the contentions raised in the Appellant's grounds of appeal.

[5] The Appellant alleges that the trial court erred in sentencing him to life imprisonment on the following grounds:

[5.1] By over-emphasizing the seriousness of 'the offence which the Appellant has committed and the interest of society, whilst the personal circumstances of the Appellant were under emphasised.

[5.2] The charge sheet did not specify whether section 51 (1) or 51 (2) is applicable therefore it is vague, even though it does make mention of the fact that the provisions of s 51 of the Act 105 of 1997 are applicable and the Appellant duly warned that minimum sentence of life is applicable. In that case the Regional Court did not have jurisdiction to impose a life sentence in the matter.

[5.3] By not finding that the cumulative effect of factors that he was relatively young, pleaded guilty, shown remorse, spent a year in prison and was in the influence of drugs constitute substantial and compelling circumstances justifying a deviation from imposing minimum sentence of life imprisonment .

[6] Appellant therefore contends that the sentence is shocking and strikingly disproportionate to the circumstances of the matter.

[7] It is trite that sentencing is within the trial court's province; see 5 v Rabie 1975 (4) SA 855 (A). In 5 v Pieters 1987

(3) SA 717 (A) at 729 F-735C, Botha JA said that it is basic to all appeals against sentence that the trial court's sentence is only set aside if it appears that the trial court exercised its discretion in an improper or unreasonable manner (at 727F-H). The question is essentially whether the trial court could reasonably have imposed the sentence it did (at 734C-H).

[8] On another instance a finding that a sentence is disturbingly or shockingly inappropriate means that the court of appeal is of the view that the sentence was too heavy or too lenient justifying its interference; see 5 v M 1976

(3) SA 644 (A) at 648H-650F.

[9] A sentencing court must for that reason formulate appropriate and just sentences giving consideration to a wide range of interests and factors. Core to these factors are the offender in relation to his or her nature, the offence in relation to its seriousness and impact on its victim and the interest of society. In 5 v Zinn 1969 (2) SA 537 (A) at 540 these three major factors were referred to as the Zinn triad and entrenched as the foundation of sentencing upon which the four aims of sentencing, that is deterrence, prevention, retribution and reform are to be balanced.

[10] The court is expected to play an active role in making sure that all the information that has to be considered for sentencing is available, more so where the Accused is not represented. All the relevant factors are therefore to be taken into account and no factor is to be overemphasised or underemphasised. The ultimate goal being to consider all the relevant factors in a balanced way= The court would have failed to exercise its discretion properly if it had ignored or given an inadequate weight to a material fact: see 5 v Pi/lay 1977

(4) SA 531 (A) at 535E-G; 5 v Mokgara 2015

(1) SACR 634 (GP) at [19] - [20].

[11] In sentencing the Appellant, the court a quo took into account as one of the relevant factors that the Appellant had admitted to the charge of having inflicted grievous bodily harm to the complainant by assaulting and biting the complainant. The court in an endeavour to obtain the necessary evidence on the nature and extent of the grievous bodily harm inflicted on the complainant and acting in accordance with s 51 (3) of the Criminal Law Amendment Act 105 of 1997 that calls for 'a purposeful enquiry by a sentencing court into the presence of substantial or compelling circumstances' to determine

if a lesser severe sentence is possible, called Dr Khambule, the medical practitioner who completed the J88 medical report. The report was, upon being accepted by both parties during the trial, admitted into evidence.

[12] Dr Khambule, with reference to the medical report and photos of the complainant's injuries that were also by agreement between the parties accepted into evidence, confirmed that the injuries inflicted by the Appellant on the complainant during the commission of the offence were of a very serious nature. The court was then satisfied of the infliction of grievous bodily harm indicating that the matter still resides within the precept of s 51 (1) s of Act 105 of 1997 as amended by s 1 of Criminal Law Amendment Act 38 of 2007.

[13] The court furthermore, with a benefit of pre-sentence reports, proceeded to determine if substantial and compelling circumstances

exist that warrant a deviation from the prescribed minimum sentence in s 51 (1). It acknowledged that the Appellant had no dependants,

qualified as a suitable candidate for correctional supervision (which was a mistake as I could not find that in the report), and by pleading guilty showed remorse. It distinguished between feeling remorse because of being caught out or feeling sorry for himself.

[14] Those affirmative facts were pitted against the seriousness of the offence, its prevalence and impact on the complainant that was covered extensively in the victim impact report, Appellant's infliction of grievous bodily harm on the complainant and her

humiliation. The court found that there are no substantial and compelling circumstances justifying a deviation from the prescribed

minimum sentence of life imprisonment.

[15] The court a quo certainly did not mention having taken into account the Appellant's submissions made to the probation officer, that he was under the influence of drugs when he committed the offence. It was not his evidence upon which he was found guilty. The only facts on the merits to be taken into consideration on sentencing of the Appellant are those accepted by the state on submissions made in the explanation of the plea. Both parties are bound by the facts stated therein. According to his statement he had no excuse in law to act the way he did. The allegation was therefore appropriately disregarded; see *5 v Van der Merwe & Others* 2011

(2) SACR 509 (FB) at 518e; *5 v Khumalo* 2013

(1) SACR 96 (SCA) [17].

[16] The court further did not mention or seem to have considered the age of the Appellant, even though the defence made a submission in that regard. There was no enquiry if Appellant being 23 years old and therefore age appropriate for rehabilitation, why a rehabilitative sentence would still not be suitable for him.

[17] However it does not mean that as a result of a finding that indicates that the fact of age was not properly addressed, the sentence will automatically have to be reduced or matter remitted to the trial court for consideration of this fact, but that this court can then establish if the personal circumstance of the age of the Appellant should in addition to the other mitigating factors that have been considered, reduce the moral blameworthiness of the Appellant, all the arguments on sentence having already been before the trial court. In order to reach such a finding the matter would have to be considered against the background of all the relevant circumstances especially relating to the nature and extent of the offence; see *5 v E* 1979 (3) SA 973 (A).

[18] Rape is undeniably the most heinous crime that can be committed against a person. It certainly somehow diminishes the sense of self-worth and lamentably the public's estimation of the worth or value of an individual. It invokes the sense of anger as well as helplessness to those impacted by it, if not effectively dealt with by those who supposedly hold the answers. It is a life changing

misfortune that requires society to deal with decisively, through the courts and corrective facilities, in order to eradicate its

prevalence. It is therefore understandable that the court was gravely concerned and hence side-tracked by the gravity of the offence and how it impacted on the complainant, her family and society which in no doubt increases rather than diminishes the Appellant's moral blameworthiness.

[19] The Appellant has indicated traits of a person not easily deterred or who can be steered away from committing a crime. The complainant attempted, by putting up a fight, to apply some measure of deterrence to prevent or discourage the Appellant from going on to rape her. Appellant nevertheless exhibited a strong resolve to rape and nothing was going to stop him. He fought ferociously with the complainant using even his teeth to subdue her and inflicting grievous bodily harm. Despite a strong resistance, Appellant ended up having his own way, with humiliating results for the complainant. Therefore deterrence should displace supersede rehabilitation in such an instance as it was confirmed in *S v Vilakazi* 2009 (1) SACR 552 (SCA) [58] that

"In cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the background. Once it becomes clear that the crime deserves of a substantial period of imprisonment, the question whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be, and those seem to me to be the kind of 'flimsy' grounds that Malgas said should be avoided. But they are nonetheless relevant in another aspect. A material consideration is whether the accused can be expected to offend again"

[20] He also is not a juvenile but an adult, which he was even at the time of the commission of the crime. He therefore cannot talk of immaturity of judgment or youthful vulnerability to error and impulse. The evidence shows resolve or determination to commit

the offence to the extent of not hesitating to use violence when there is resistance; see *S v Dlamini* 1991

(2) SACR 655 (A). The mere mention of his age, as it happened during the trial, does not entitle the Appellant to a reduced sentence. How his age could have impacted on him committing the offence should be clarified. He was also not a first offender. He had a previous conviction of housebreaking and theft.

- [21] It is also clear that the remorse that he is alleged to have shown is, as outlined in the probation officer's report, inferred from his plea of guilty not from genuinely expressed feelings of remorse for what he did to the complainant. In his explanation of plea he admits that the complainant suffered injuries as a result of his actions but does not apologise to her for what he did. He instead asks for forgiveness from the court, which is a plea for leniency to the court rather than remorsefulness. The probation officer's report also indicate that what he communicated was his fear regarding the consequences of the offence. His conduct demonstrates that he was more anxious about what the court was going to do to him in the face of the incontrovertible evidence rather than the consequences of his actions on the complainant. The remorse inferred from his plea of guilty should therefore carry no weight to his moral blameworthiness.
- [22] The Appellant has also raised the issue of the formulation of the charge sheet, specifically that it did not specify whether section 51
- (1) or 51 (2) is applicable therefore alleging that it is vague, even though it does make mention of the fact that the provisions of s 51 of the Act 105 of 1997 are applicable.
- [23] Upon finding that a misdirection existed due to the alleged failure to warn the Appellant of the applicability of the minimum sentence legislation, an appeal court will be at large to consider sentence afresh, the court disabusing itself of what the court a quo said in respect of sentence and endeavour to impose an appropriate sentence; see *Machongo v S* (20344/14) [2014] ZASCA 179 (21 November 2014).
- [24] It is the duty of the court to ensure that it has got the necessary jurisdiction to consider imposing an applicable sentence. Also to make sure the accused is adequately apprised of such jurisdiction at the appropriate time. This is particularly so when the state intends to prove an offence that, in terms of the Prescribed Minimum Act carries a mandatory sentence of life imprisonment, as in casu. The accused has a constitutional right to be properly and adequately informed that the state might or will seek to invoke the minimum sentence provisions of the Amendment Act 105 of 1997; see *S v Makatu* 2014
- (2) SACR 539 (SCA). The appropriate time is before he pleads to the charge.
- [25] As a result, failure to appropriately inform the accused or reference to a wrong subsection of the Amendment Act in the charge sheet will compromise the right of the accused to a fair trial, resulting in an irregularity, that vitiates the sentencing proceedings. In *Lebang v S* (Unreported, GP case no A 173 /2013, 21 April 2015 at (25) - (27), the court imposed a sentence of life imprisonment even though the minimum prescribed sentence to be imposed in terms of s 51 (1) was not mentioned in the charge sheet. On appeal the court found that it does not seem that the Appellant had been warned either before pleading or at any stage during the trial that he was facing a minimum sentence of life or any other minimum sentence and only came to know of it for the first time when it was imposed. It held that the failure to warn the appellant resulted in an irregularity that vitiated the sentence of life imprisonment imposed; see *S v Mashinini & Another* 2012 (1) SACR 604

(SCA) at (11).

- [26] However failure to appropriately inform the accused in the absence of an indication that the accused's right has indeed been compromised, or prejudiced will not invalidate the proceedings. Also just the mere mentioning that s 51 of the Prescribed Minimum Act found application, without the state specifically indicating that it would be seeking to invoke the subsection 51 (1) was found to be adequate where the Appellant could not prove to have suffered any prejudice as a result thereof; see *S v Khumalo* (Unreported, NWM case no CAF 12/15, 13 August 2015) at [13] and *S v Mashinini* supra.
- [27] In casu, the state indicated in the charge sheet that the minimum sentence of life imprisonment is applicable, in addition to mentioning an indication that Section 51 is applicable. Furthermore the court from the outset, warned the represented Appellant that the state is relying on the section that deals with the imposition of life imprisonment in the instance of a conviction. The appellant's representative also confirmed that the Appellant accused understood before he tendered his plea. I am therefore satisfied that the accused was well aware and informed prior and when the trial" proceedings commenced. In addition when reading the record, no prejudice could be identified.
- [28] Having taken into consideration all the relevant circumstances, we also conclude that no substantial or compelling circumstances exists that justifies a deviation from the prescribed minimum sentence as found by the court a quo.
- [29] Under the circumstances the following order is made: [29.1] The Appeal is dismissed.

N V KHUMALO J

JUDGE OF THE HIGH COURT

GAUTENG DIVISION: PRETORIA

I concur

M LaM MANAMELA

ACTING JUDGE OF THE HIGH COURT

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