

SOUTH AFRICA / JUDGMENT

M.M v S (CAF19/15) [2015] ZANWHC 63 (25 September 2015) [2015] ZANWHC 63

COURT

North West High Court, Mafikeng

BEFORE

Landman, Hendricks, Chwaro

CASE / FILE NUMBER

CAF 19/15

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH

WEST PROVINCIAL DIVISION, MAHIKENG

CASE NO: CAF 19/15

In

the matter between:

M.
M.
APPELLANT
And
THE
STATE
RESPONDENT
FULL BENCH CRIMINAL APPEAL
HENDRICKS J; LANDMAN J; CHWARO AJ

JUDGMENT

Landman J:

[1] This is an appeal against sentence with the leave of the court a quo (Leeuw JP). M. M., the appellant, was convicted in the Regional Magistrate's Court of the rape of his daughter. The case was then referred to this court for sentence. Court a quo sentenced the appellant to life imprisonment.

[2] The following facts and circumstances were relevant at the stage of sentencing:

The appellant's personal circumstances

- (a) he left school after passing standard 4;
- (b) he was 34 years of age;
- (c) he was married and is financially maintained his two minor children;
- (d) he was self-employed undertaking casual jobs;
- (e) he stated that he was remorseful;
- (f) he pleaded guilty, but as the learning magistrate was not satisfied with his explanation a plea of not guilty was entered; and
- (g) he was a first offender.

The crime

The appellant was convicted of raping his daughter who was 13 years and 10 months of age. Rape is a serious crime, and in this case, the appellant raped his own daughter, whom he was supposed to love and protect. However, no violence was employed and no injuries were inflicted although there would be some psychological harm.

The interests of society

Members of our society deserved protection from this kind of crime, so that an appropriate sentence should be imposed, which would punish the appellant and deter other offenders.

Evaluation

[3] The court a quo considered the facts and circumstances set out above, and concluded that there were no substantial and compelling circumstances present that would have entitled the court to impose a lesser sentence than the prescribed sentence of life imprisonment.

- [4] It was submitted on behalf the appellant and conceded on behalf of the state that the sentence of life imprisonment induces a sense of shock and that the specific circumstances of the case, together with the personal circumstances of the appellant constitutes substantial and compelling circumstances which would have permitted the court a quo to impose a lesser sentence.
- [5] The question of what are substantial and compelling circumstances has been considered in *S v Malgas* (117/2000) [2001] ZASCA 30; [2001] 3 All SA 220 (A) (19 March 2001) where it was said at para 14:

‘When applying the provisions of s 51 a trial court is ... faced with a generalised statutory injunction to impose a particular sentence which injunction rests, not upon all the circumstances of the case including the personal circumstances of the offender, but simply upon whether or not the crime falls within the specific categories spelt out in Schedule 2. Concomitantly, there is a provision which 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” (my emphasis) it.’

- [6] This court will only interfere with the exercise of the sentencing court’s discretion if it is vitiated by a misdirection or if it induces a sense of shock. Marais JA in *S v Malgas* 2001 1 SACR 469 (SCA pointed out that:

‘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. ... 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”.’

The question was again considered in *Bailey v S* (454/2011) [2012] ZASCA 154; 2013 (2) SACR 533 (SCA) (1 October 2012) where the court said at para 20:

‘What then is the correct approach by an appellate court on appeal against a sentence imposed in terms of the Act? Can the appellate court interfere with such a sentence imposed by the trial court after exercising its discretion properly simply because it is not the sentence which it would have imposed or that it finds it shocking? The approach to an appeal on sentence imposed in terms of the Act, should in my view, be different to an approach to other sentences imposed under the ordinary sentencing regime. This in my view is so because the minimum sentences to be imposed are ordained by the Act. They cannot be departed from lightly or for flimsy reasons. It follows therefore that a proper enquiry on appeal is whether the facts which were considered by the sentencing court are substantial and compelling or not.’

- [7] In my view the sentencing court committed a misdirection by overemphasizing the crime at the expense of the personal circumstances of the appellant taken cumulatively.
- [8] In my view this misdirection permits this court to set aside the sentence and to impose sentence afresh.
- [9] Rape is a very serious offence. See *S v Chapman* [1997] ZASCA 45; 1997 (3) SA 341 (SCA) at 344I-J which described rape as ‘a humiliating, degrading and brutal invasion of the privacy, the dignity and the

person of the victim’. Cameron JA had this to say about the rape of a minor by her father in *S v Abrahams* 2002 (1) SACR 116 (SCA) para 17:

‘Of all the grievous violations of the family bond the case manifests, this is the most complex, since a parent, including a father, is indeed in a position of authority and command over a daughter. But it is a position to be exercised with reverence, in a daughter’s

best interests, and for her flowering as a human being. For a father to abuse that position to obtain forced sexual access to his

daughter’s body constitutes a deflowering in the most grievous and brutal sense.

- [10] However, the personal circumstances set out above are such that taken cumulatively they constitute substantial and compelling circumstances so that this court may impose a lesser sentence than life imprisonment.

- [11] Both counsel proposed that a sentence of 18 years imprisonment would be adequate in the circumstances. Although it is not possible to compare the circumstances in one case accurately with those in another case, nevertheless it is prudent to consider the general

trend in similar cases. In *S v Sikhapha* 2006

- (2) SACR 439 (SCA) the Supreme Court of Appeal, in setting aside a sentence of life imprisonment where the appellant had raped a 13 year old girl, regarded it as substantial and compelling circumstances the fact that the appellant was regarded as capable of rehabilitation and that the complainant was not seriously injured. The court imposed a sentence of 20 years’ imprisonment because of the age of the complainant.[12] Taking into account all the facts and circumstances set out above, including the goals of sentencing and not forgetting to blend the sentence with a measure of mercy. I am of the view that a sentence of 18 years

imprisonment would be an appropriate sentence. The sentence should be backdated to the date of sentencing by the court a quo, namely 24 November 2000.

Order

- [13] In the result I make the following order:

1. The appeal against sentence is upheld.
2. The sentence of life imprisonment imposed by the court a quo is set aside and replaced by a sentence of 18 years imprisonment.
3. The sentence of 18 years imprisonment is backdated to 24 November 2000.

A A Landman

Judge of the High Court

I agree

R D Hendricks

O K Chwaro

Acting Judge of the High Court

APPEARANCES:

Date of hearing:

18 September 2015

Date of Judgment:

25 September 2015

Counsel for the Appellant:

Adv Khan

Instructed by:

The Mafikeng Justice Centre

Counsel for the Respondent:

Adv Van Niekerk

The Director of Public Prosecutions

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