

SOUTH AFRICA / JUDGMENT

Modise v S (CA 57/2018) [2024] ZANWHC 319 (31 October 2024)

[2024] ZANWHC 319**COURT**

North West High Court, Mafikeng

BEFORE

B Ceylon, M Morgan

CASE / FILE NUMBER

CA 57/2018

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Source record**REPUBLIC****OF SOUTH AFRICA****IN****THE HIGH COURT OF SOUTH AFRICA****(NORTH****WEST DIVISION, MAHIKENG)****CASE****NO: CA 57/2018****(1)****REPORTABLE: YES / NO****(2)****OF INTEREST TO OTHER JUDGES: YES/NO****(3)****REVISED.****DATE:**

31 October 2024

SIGNATURE**IN****THE MATTER BETWEEN:**

SIPHO

MODISE

APPELLANT

AND

THE

STATE

RESPONDENT

JUDGMENT

INTRODUCTION:

- [1] This is an appeal against the sentence handed down by Magistrate J Fourie, Regional Court, Ganyesa ('trial court'), on 10 May 2018.
- [2] The Appellant was charged with three (3) counts of rape, in terms of section 3 of the Criminal Law Amendment Act (sexual offences and related matters) 32 of 2007 read with sections 256, 257 and 261 of the Criminal Procedure Act 51 of 1977 ("the CPA"), the provisions of section 51(1) read with Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 ("the CLAA") as amended as well as with sections 92(2) and 94 of the CPA.
- [3] The Appellant pleaded guilty to all three (3) counts mentioned above and was thus convicted on all charges by the trial Court. All three charges were taken together for the purpose of sentence, and the Appellant was sentenced to life imprisonment.
- [4] The Appellant, in the above circumstances, has an automatic right to appeal. He now appeals against the said life imprisonment sentence imposed.

BACKGROUND:

- [5] The Appellant pleaded guilty to three counts of rape, against a 40-year-old female on 08 March 2008, a 15-year-old female on 05 July 2014 and a 21-year-old female in Tlakgameng Village, North West, respectively. The rape charges he pleaded guilty to were for unlawfully and intentionally committing an act of sexual penetration with the complainants by inserting his penis into each of their vaginas and by so doing had sexual intercourse with each of the three complainants respectively without their consents.
- [6] In respect of the rape charge which took place on or about March 2008, the Appellant admitted that he had a knife during the

incident. He also admitted that at the time of the rape in July 2014, he dragged the complainant to a house and raped her. He further admitted that he was also in possession of a knife when he committed the rape in November 2014.
- [7] The above admissions were made by the Appellant in a statement in terms of section 112(2) of the CPA and signed on 10 May 2018 at Ganyesa, North West Province by the Appellant and his attorney.
- [8] Pursuant to his admissions, the Appellant was convicted on all three counts of rape and sentenced to life imprisonment.
- [9] The Appellant had legal representation throughout the proceedings.

THE GROUNDS OF APPEAL:

[10] The appeal is premised on the grounds outlined in the Notice of Appeal, which are, as follows:

- (i) The trial court erred by not finding any substantial and compelling circumstances to deviate from the prescribed minimum sentence;
- (ii) The life imprisonment sentence induces a sense of shock and is strikingly inappropriate; and
- (iii) The Appellant submits that another court considering the conviction and mitigating factors would impose a lighter and/or different sentence.

THE CONTENTIONS OF THE PARTIES:

[11] I now turn to the main contentions of the parties below.

(I) Appellant's contentions:

- (i) With regards to the Appellant's submission that the trial court erred by not finding any substantial and compelling circumstances, he cited the decision of *Rammoko v Director of Public Prosecutions*[1], wherein the Court referred to *S v Boesman Mahomotsa*[2], : First, to mention the principle that all relevant factors must be taken into account to determine if substantial and compelling

circumstances are present to justify a deviation from the prescribed minimum sentence; and secondly, to explain that certain rapes are more severe than others and that it is only suitable that the differences in the seriousness should each receive recognition when punishment is imposed in a particular case. The Appellant further submitted, relying on *S v Abrahams*[3], that some rapes are worse than others and life sentences prescribed by legislation should be reserved for cases where no substantial

factors exist, compelling the conclusion that such a sentence is inappropriate and unfair. In my view, rape can take form in different

ways however the effect (physiologically, emotionally and physically, the list is not exhaustive) and consequence thereof on all victims is the same. One cannot rate the effect of rape on a victim on a scale or degree of seriousness, that would amount to introducing a subjective test whereas in my view such can only be determined objectively. What may come to the appellant's assistance in considering a lighter sentence would in my view be other facts traditionally taken into account in these type of matters in

mitigation of the sentence and in determining whether exceptional and compelling circumstances do exists to warrant a deviation from the minim prescribed sentence.

- (ii) The Appellant further argued that the trial court erred by over-emphasising the seriousness of the offence, taking into account

that no evidence was led on how these incidents impacted the lives of the complainants and that no victim impact reports were submitted to prove the contrary, and that the trial court referred to the J88 reports and made its own conclusion that the complainants were severely traumatised.

(iii) The Appellant contended that the complainant, in relation to charge 1, sustained a cut on her finger and that no genital injuries were sustained during the incident. He submitted that, with regards to charge 2, the complainant had an abrasion on her genitalia, which the medical examiner referred to as multiple excoriations. According to the Appellant, multiple excoriations are a skin-picking disorder that involves the conscious creation of neurotic excoriations through repetitive scratching. He further submitted that the complainant had no injuries regarding charge 3.

(iv) The Appellant contended that he was 19 years old when charge 1 was committed and 25 years old when charges 2 and 3 were committed.

He argued that the trial court did not consider his youthfulness as a factor, which clearly shows the Appellant's immaturity when the offences occurred.

(v) The Appellant submitted that the trial court erred in overlooking that he pleaded guilty to all charges from the outset and, therefore, did not waste the trial court's time. He contended that the trial court did not view the guilty plea as a factor of remorse when he took the Court into his confidence, and he wasted no time by electing not to challenge the DNA evidence linking him to the offences committed, which would have taken the trial Court a long time to finalise the trial.

(vi) The trial court erred in not taking the period the Appellant was in custody awaiting trial, for eight (8) months, into account, relying on *S v Vilakazi*[4], where it was held that:

"While good reason might exist for denying bail to a person who is charged with a serious crime it seems to me that if he or she is not promptly brought to trial it would be most unjust if the period of imprisonment while awaiting trial is not then brought to account in any custodial sentence that is imposed."

(vii) The Appellant contended that an effective term of life imprisonment induces a sense of shock and is strikingly inappropriate and submitted that another court would consider and impose a lighter and/or different sentence.

(II) The Respondent's contentions:

(i) The Respondent submitted that all three offences that the Appellant was convicted for attract the legally prescribed minimum sentence of life imprisonment in terms of the CLAA as detailed above, there are no substantial and compelling circumstances applicable and the trial court is duty-bound to impose the minimum prescribed sentences in terms of said legislation, citing *S v Malgas*[5] and *S v Matyityi*[6].

(ii) The Respondent further argued that, regarding *S v Vilakazi*, supra, the principle was emphasised that in cases involving serious crime, the offender's personal circumstance, involving questions such as "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 the period should be, and those seem to me to be the kind of "flimsy" grounds that *S v Malgas* 2001 (1) SACR 469 (SCA) said should be avoided." According to the Respondent, this principle applies particularly when the conviction, as in casu, results in the minimum sentence of life imprisonment as the starting in terms of section 51 (1) of CLAA.

According to the Respondent, the Appellant's guilty plea to all the charges levied at him is not in itself an indication of his remorse, citing *Director of Public Prosecutions, Limpopo v Motloutsi*[7], where it was held that:

"Remorse is an important consideration in sentencing. However, genuine remorse must be distinguished from self-pity and an unavoidable acknowledgment of guilt because the evidence against the accused is overwhelming. Before remorse can be a valid factor in position of sentence, it has to be sincere, and the accused must take the court into his or her confidence."

According to the Respondent, the Appellant was linked to the offences through DNA, and he had no other choice but to plead guilty to the charges and, therefore, had no genuine remorse.

(iv) The Respondent submitted that no exceptional mitigation circumstances exist in the Appellant's favour, and the aggravating

circumstances far outweigh the mitigating circumstances. The Respondent contended that the following aggravating circumstances,

inter alia, exist in this case: the offences fall within the ambit of section 51(1) of CLAA and is very serious, prevalent, that gender-based violence is on the increase in the country, the Appellant targeted defenceless women, he used knives to threaten two of the complainants to submit to his demands, one of the complainants sustained a cut on her finger during the rape incident, one of the complainants was only 15 years old, dragged into a house and raped, the Appellant has two (2) relevant previous convictions, and it reflects the imprisonment for lesser terms has not served as a deterrent on the Applicant because he raped again in 2014, he did not show genuine remorse, the Respondent, relying on *S v Chapman*[8], submitted that the rights to dignity, privacy and integrity, under the Constitution, especially of women, should be protected by the Courts as the Courts are duty bound to send a clear message to accused persons, other potential rapists and to the community that they are determined to protect the equality, dignity and freedom of all women and that no mercy shall be shown to those who seek to invade those rights.

(v) The Respondent argued that no substantial and compelling circumstances exist to justify a lesser sentence than the prescribed

minimum sentence of life imprisonment in this instance.

(vi) The Respondent contended that all relevant factors were taken into account by the trial court when the appropriate sentence was imposed, including the crime, the Appellant, the society, deterrence, retribution and whether there were factors present that would justify a lesser sentence to be imposed than the minimum prescribed one.

(vii) The Respondent concluded that, in casu, the sentence is not vitiated by any irregularity or material misdirection, and therefore, the appeal against the sentence should be dismissed.

LEGAL PRINCIPLES/EVALUATION:

[12] The following legal principles were consulted in this matter:

(a) Section 51 (1) of the CLAA provides that:

“(1) Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence in Part 1 of Schedule 2 to imprisonment for life.”

Part 1 of said Schedule 2 includes the offence of rape.

(b) In *S v Romer*[9], the Supreme Court of Appeal held that a court of appeal would only interfere with the sentence meted out by the trial court where the sentence is disturbingly inappropriate or out of proportion to the seriousness of the offence. In *S v Malgas*[10], the principle was explained as follows:

“A court exercising appellate jurisdiction cannot, in the absence of material misdirection by a 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. But an appellate court may interfere with the exercise of the sentencing court of its discretion, even in the absence of a material misdirection, when the disparity between the sentence imposed by the trial court and the sentence which the appellant 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.”

In *S v Vilakazi*[11], it was held that:

“it is incumbent on a court in every case, before it impose a prescribed sentence, to assess, upon a consideration of all circumstances of a particular case whether the prescribed sentence is indeed proportionate to the particular offence.”

(c) In *PM v S*[12], the court stated:

*“To arrive at a just and appropriate sentence, a court must consider the personal circumstances of the Appellant, the nature of the offence, factor in the interests of society, weigh this against the others and then blend them with the requisite measures of mercy. The court must act even-handedly, not over-emphasising the effect of the crime or under-emphasising any of the elements or purpose that are relevant to sentencing.” [also see *S v Zinn* 1969*

- (2) SA 537 (A) and S v Rabie 1975 (4) SA 855 (A)].
- (d) The meaning of substantial and compelling circumstances was explained as follows in S v Pillay[13]:

“For circumstances to be substantial and compelling, they need not be exceptional in the sense that they are seldom encountered or rare, nor are they limited to those which diminish the moral guilt of the offender.”

- (e) In S v Letsoalo[14], it was held that where a court is convinced that, after considering all relevant factors, an injustice will occur if the minimum

prescribed sentence is imposed, it can characterise such factors as constituting substantial and compelling circumstances and deviate

from such minimum prescribed sentences.

- (f) In Maila v S[15], the Supreme Court of Appeal stated that:

“The Legislature has specifically amended the CLAA to provide categorically that the fact that a complainant was not injured during a rape cannot be considered as compelling or substantial.”

- (g) Section 51 (3)(aA) of CLAA it states that:

“[W]hen imposing a sentence in respect of the offence of rape the following shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence:

.....

- (ii) an apparent lack of physical injury to the complainant.”

- (h) The Applicant’s submissions with regards to the fact that no injuries were sustained by the victims during the rapes, that knives and violence were not used in some of the rapes, and that the excoriations were not caused during the rapes do not constitute substantial and compelling circumstances to justify the imposition of a lesser sentence where there is a lack of physical injury to the complainant under section 51(3)(aA) of CLAA and the Maila decision, supra. Therefore, these submissions are not sustainable.
- (i) As far as the Applicant’s submission that the trial court overlooked the fact that he pleaded guilty to all charges, did not waste the Court’s time in finalising the trial, and took the court into his confidence and by so doing, showed his remorse for his deeds, this Court is persuaded by the Respondent’s submission on this point because the Court agrees that this is not genuine remorse, but only self-pity and an unavoidable acknowledgement of guilt because the Applicant was facing overwhelming DNA evidence in the offences and had no choice but to plead guilty to the offences.
- (j) The Applicant’s submission that the trial Court did not consider the eight months he has spent in custody awaiting trial is also without merit. Because the Applicant was charged and convicted of an offence in Part 1, Schedule 2, the trial court imposed a sentence of life

imprisonment in terms of said section 51(1) of CLAA. The Court a quo, after considering all the facts and circumstances in this case, imposed the life imprisonment sentence, which is the legally prescribed minimum sentence [see: *Malgas and Matyityi supra*]. Therefore, the Applicant's contention in this regard is not sustainable.

- (k) The further submission of the Appellant is that the life imprisonment sentence induces a sense of shock and is strikingly inappropriate and that another Court would come to impose a different or lighter sentence. Again, as indicated above, the trial court imposed the statutory minimum sentence following CLAA. This sentence was also in respect of three different serious offences of rape, taken together for purposes of sentencing by the Court a quo. This is evident because the Appellant was charged under Part 1, Schedule 2 of CLAA, and the Court a quo was duty bound to impose the minimum sentence as envisaged in the *Malgas and Matyityi* decisions *supra*. Considering those mentioned earlier, the trial court could not impose any sentence other than the prescribed minimum one in terms of the said legislation.
- (l) This Court is further of the opinion that the aggravating circumstances raised by the Respondent (and which is unchallenged) outweigh the mitigating circumstances and that no substantial and compelling circumstances exist that justify a lesser sentence than the prescribed minimum sentence.
- (m) As far as the facts and circumstances shown in this matter, the trial court did take into account the interest of society, the nature of the offence and the personal circumstances of the Appellant and the aspect of mercy in considering an appropriate sentence, as envisaged in the *Vilakazi, PM v S and Zinn* decisions *supra*.
- (n) We close this judgment with the following apt remark:

“Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, to privacy, and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilization. Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquility of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives.”[16]

ORDER:

[13] In the result, the following order is made:

- (a) the appeal against the decision of the trial court is dismissed.

pp

B CEYLON

ACTING JUDGE OF THE HIGH

COURT OF SOUTH AFRICA

NORTH WEST DIVISION

MAHIKENG

I AGREE AND IT IS SO ORDERED:

M MORGAN

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

HEARING DATE:

Not applicable matter adjudicated on the papers

JUDGMENT

DATE:

31 October 2024

[1] Rammoko v Director of Public Prosecutions 2003

(1) SACR 200 (SCA).

[2] S v Boesman Mahomotsa

[2002] 2 AII SA 435 (A).

[3] S v Abrahams 2002

(1) SACR 16 (SCA)

[4] S v Vilakazi 2009(1) SACR 552 at para 60.

[5] S v Malgas 2001

(1) SACR 469 (SCA).

[6] S v Matyityi 2011 (1) SACR 40 (SCA).

[7] Director of Public Prosecutions, Limpopo v Motloutsi

[2008] ZASCA 182 at para 14

[8] S v Chapman 1997

(3) SA 341 (SCA).

[9] S v Romer 2011

(2) SACR 153 (SCA) at para 22.

[10] S v Malgas 2001 (1) SACR 469 (SCA) at para 12.

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- [11] S v Vilakazi supra para 15.
- [12] PM v S [2023] ZAGPJHC 700 at para 18
- [13] S v Pillay 2018
- (2) SACR 192 (K2D) at para 10.
- [14] S v Letsoalo
- [2023] ZAGPJHC 452 at para 12.
- [15] Maila v S
- [2022] ZASCA 3 at para 48.
- [16] S v Chapman
- [1997] ZASCA 45; 1997 (3) SA 341 (SCA) at paras 3-4.
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