

SOUTH AFRICA / JUDGMENT

Mokalare v S (A28/2016) [2017] ZAGPPHC 274 (2 June 2017)

[2017] ZAGPPHC 274

COURT

North Gauteng High Court, Pretoria

BEFORE

S C Mia

CASE / FILE NUMBER

A28/2016

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA,

GAUTENG

DIVISION, PRETORIA

CASE

NO: A28/2016

DATE:

A28/2016

In

the matter between:

JOHN

MASA

MOKALARE,

APPELLANT

and

THE

STATE

RESPONDENT

JUDGMENT

MIA, AJ

- [1] The appellant was charged and convicted, in the Regional Court, North-West held at KLERKSDORP, of the rape in terms of section 3 the read with sections 1, 56 (1), 57, 58, 59, 60 and 61 of the Criminal Law (Sexual Offences) and Related Matters Amendment Act, Act 32 of 2007 read with the provisions of section 51 and Schedule 2 of the Criminal Law Amendment Act, Act of 105 of 1997. The appellant was informed of the nature of the charge he was facing and that it involved minimum legislation. When the charge was put to the appellant he was informed that the charge related to section 1 of schedule 2 because the complainant was mentally challenged or 'mentally retarded' (in the words of the legislation). For the remainder of the judgment the words physical and or mentally challenged will be utilised in keeping with a more respectful view. The appellant was legally represented throughout the proceedings. The appellant was sentenced to thirty years imprisonment.
- [2] The appellant applied for leave to appeal against his conviction and sentence. This was dismissed by the court a quo. The appellant petitioned the Judge President and was granted leave to appeal against the sentence only. He is therefore before us on appeal against sentence only.
- [3] The appellant did not dispute having sexual intercourse with the complainant on the day in question. He did not dispute that the complainant is mentally challenged and does not function as other persons do. He is known to the family. He is in a relationship with the complainant's relative. He denied having unlawful intercourse with the complainant and stated that he was compelled to have sexual intercourse with the complainant under the threat of being killed and after he was assaulted. He testified that he had sexual intercourse with the complainant after one of the state witnesses physically inserted his penis into the vagina of the complainant. This version was rejected by the court a quo as the assailants who the appellant stated attacked him had not yet arrived at the property when Selinah Kolotie discovered the appellant on top of the complainant and pushed him off the complainant. The aforementioned facts relating to the sexual intercourse influenced the court a quo with regard to sentencing.
- [4] Mr Moeng, appearing for the appellant referred to the appellant's personal circumstances and argued that they be taken into account. The appellant was 31 years old; he could be rehabilitated; he had been living with his girlfriend for almost 10 years; he had 2 minor children aged 5 and 8 years old to maintain who were residing with his girlfriend. He had only completed standard 8 at school. Regarding the offence, he argued that the complainant did not suffer serious injuries save for the injury sustained during the commission of the offence. The appellant was of advanced years and was under the influence of alcohol when he committed the offence. He also requested that the period awaiting trial be factored in so as to reduce the sentence.

- [5] Mr. Moeng argued that the above circumstances when taken cumulatively constitute to substantial and compelling circumstances which the trial court ought to have taken into account. He argued that the learned magistrate erred in not attaching due weight to such circumstances, and that he failed to take into account the period which the appellant spent in custody whilst the trial was in progress. When taken into account, both the time spent in custody as well as the aforementioned factors amounted to substantial and compelling circumstances which warranted a shorter period of imprisonment in the sentence that ought to have been imposed.
- [6] He submitted that the trial court was required to exercise its sentencing discretion but it had failed to do so and therefore the appeal court has to interfere. He referred to the dictum in *S v Malgas* 2001(2) SACR 469 (SCA) which stated that the court should not depart easily from the minimum sentences for flimsy reasons indicating his awareness of the gravity of the offence of rape. He argued however that notwithstanding the gravity of an offence the sentences to be imposed should be proportional to the offences committed and if they are not, then lengthy sentences should not be imposed. He argued further that the appellant would be harmless to the community after spending a long period of time in custody and that the learned magistrate had erred in imposing a sentence which was not proportional to the effects and impact of the offence. In his view the fact that the sentence was not proportional to the offence was indicative on its own that substantial and compelling circumstances were present. Whilst the particular offence called for a heavy sentence it did not require the total removal of the appellant from the community for such a long period.
- [7] Mr Moeng further argued that a sentence with an effective term of 30 years imprisonment did not follow the principles laid down in *Malgas* above in that it erred in over emphasising the seriousness of the offence which the appellant committed as well as the interests of society whilst under-emphasizing the personal circumstances of the appellant. He submitted further that such a lengthy term of imprisonment was harsh, inappropriate and induced a sense of shock.
- [8] He submitted that although the offence committed was sometimes met with a term of imprisonment, each case ought to be dealt with on its own facts. Sentencing was to be exercised in a manner which provided for individualization. This was called for in the present matter. In support of the submission he relied on the case of *S v De Kock* 1997(2) SACR 171(T) at 192H where the court per Van Der Merwe J held that the factors relevant to sentencing and the purpose of punishment must be based on the facts of every case and be placed in a particular balance to one another to determine an appropriate sentence.
- [9] In balancing the particular facts of the case namely the appellant's personal circumstances as highlighted above, he submitted that a lengthy term of imprisonment as imposed by the court a quo was not in the best interests of the community or the appellant. The sentence is too severe in the circumstances. The public interest

would not be served by the imposition of a long term of imprisonment. There was no reason to believe that the long term of imprisonment serves the purpose of deterrence. He relied on and made reference to various cases in support hereof. (See *S v Skenjajana* 1985

(3) SA 51(A); *S v Mafu* 1992(2) SACR 494 (A); *S v Nkambule* 1993(1) SACR 136 (A); *S v Mhlakaza* 1997(1) SACR 515(SCA).) He submitted that a period of 20 years of imprisonment was more appropriate.

[10] An issue raised during the hearing of the appeal and not addressed in the heads of argument was the term of imprisonment applicable and whether the appellant was properly warned of the nature of the charge and the possible sentence if convicted. Mr. Moeng argued that the appellant was not warned of the nature of the charge, that the minimum sentence was applicable and that he faced life imprisonment if convicted. This was disputed by Mr. More appearing for the State who argued that it was sufficient that the charge sheet reflect the particular section. I will deal with this aspect later in the judgment.

[11] Mr. More, counsel for the State argued that section 51 (1) of the Criminal Law Amendment Act 105 of 1997 obliged the court to impose a sentence of life imprisonment for the offences listed in Schedule 2 Part 1 unless there were substantial and compelling circumstances which justified a departure from the prescribed sentence. Schedule 2 Part 1 referred to the rape where the victim:

(ii) is a physically disabled woman who, due to her physical disability, is rendered particularly vulnerable; or

(iii) is a mentally ill woman as contemplated in section 1 of the Mental Health Act 18 of 1973

[12] The State had led the evidence of Dr Leburu who testified that the complainant was mentally challenged and walked with difficulty. It was clear from the doctor's evidence that the complainant experience mental challenges which impacted on her physical abilities. The State had also submitted a psychological report compiled by Dr Thekiso marked exhibit "C" and which formed part of the record. The report indicated that the complainant could not speak properly and had always been mentally challenged. The complainant was incontinent and relied on others to attend to her basic needs. She also spoke incoherently and inappropriately. She could not perform basic tasks such as feeding, bathing or dressing herself. The report indicated further that the complainant had not passed Grade one at school. This indicated the complainant's mental, cognitive and intellectual functioning. Mr More argued that these findings and the conclusions of two medical practitioners indicated that the complainant was a vulnerable person.

- [13] Regarding the appropriateness of the sentence, Mr. More referred to the matter of *S v Kibido* 1998(2) SACR 214 (SCA) at 216 G-H and argued that it was trite that the determination of sentence in a criminal matter was pre-eminently a matter for the discretion of the trial court. Further that in this function, the trial court had a wide discretion in deciding which factors should be allowed to influence the Court in determining the measure of punishment and the value to attach to each factor.
- [14] Mr More referred to the decision in *S v Pillay* 1977 (4) SA 531 (A) E-G where the Court held that the word 'misdirection' simply meant an error committed by the court in determining or applying the facts for assessing the appropriate sentence. He argued that it was not an enquiry into whether the trial court's sentence was right or wrong but whether the trial court in imposing the sentence exercised its discretion properly and judicially. A misdirection did not warrant interference with a sentence. The misdirection had to be of such a nature, degree or seriousness that it showed directly or inferentially that the court did not exercise its discretion at all or that it exercised it improperly or unreasonably.' It was when the trial court had improperly exercised its discretion that it vitiated the court's decision on sentence. In such an instance the sentence could be interfered with.
- [15] He referred further to the decision in *S v Malgas* 2001(2) SACR 469 (SCA) at 481-482 and reminded us again of the caution stated there:

"the specified sentences are not to be departed from lightly and for flimsy reason, speculative hypotheses favourable to the offender and sympathy, aversion to imprisoning 1st offenders, personal doubts as to the efficacy of the policy underlined the legislation, marginal differences in personal circumstances or degrees of participation between: offenders are to be excluded."

- [16] In doing so, Mr More exhorts this Court to note that the trial court took into account all relevant factors before imposing an appropriate sentence. He argued that the sentence imposed is commensurate with the gravity of the offence and in no way induces a feeling of shock in light of the following:

15.1 rape is a serious offence which has been recognized by the courts referring the full bench decision in *S v Mosethla* 2014 JDR 1282 (GP) at p10;

15.2 rape is prevalent throughout the country;

15.3 the complainant as well as her brothers are mentally challenged and vulnerable and the appellant took advantage of the vulnerability of the family;

15.4 the complainant could not talk properly, bath or dress herself and would not have been able to offer resistance.

15.5 the appellant was aware that the complainant was vulnerable.

[17] In response to the appellant's submissions regarding his age, Mr. More referred to the case of *S v Matyityi* 2011 (1) SACR 40, where the accused was 27 years old. The Court cautioned against the frequent willingness on the part of courts to deviate from sentences for flimsy reasons. Mr. More argued that we adopt the view in *Matyityi* where:

'Parliament had ordained sentences for certain offences these were to be imposed'.... A departure was only possible when there were truly convincing reasons not ill-defined concepts such as 'relative youthfulness'.

[18] He also referred to *Director of Public Prosecutions, Kwazulu-Natal v Ngcobo and Others* 2009(2) SACR 361 SCA which recognized that violent offences were committed mostly by youthful persons. The relative youthfulness of offenders should not preclude courts from dispensing justice. Courts were expected to send a clear message that such behaviour will be met with the full force and effect of the law. To impress upon this Court further the seriousness he referred to *S v Chapman* 1997(2)SACR 3 (SCA) at p5 A-D where the Court noted:

"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....

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 tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives."

[19] To persuade this Court not to move away from the pre-ordained sentence, he notes the ever present need by referring to *OPP, North Gauteng v Tabethe* 2011

(2) SACR 567 (SCA) 577 G-1, where the Court 14 years later notes that:

"Rape of women and young children has become cancerous in our society. It is a crime which threatens the very foundation of our nascent democracy, which is founded on protection and promotion of the values of human dignity, equality and the advancement of human rights and freedoms. It is such a serious crime that it evokes strong feelings of revulsion and outrage amongst all right-thinking and self-respecting members of society.

Our courts have an obligation to impose sentences for such a crime - particularly where it involves young, innocent, defenceless and vulnerable girls - of the kind which reflects the natural outrage and revulsion felt by law-abiding members of society. A failure to do so would regrettably have the effect of eroding the public confidence in the criminal justice system. Regrettably, the court below omitted to pay attention to these important considerations. In fact, it is clear to me that the court below accorded undue weight to the respondent's personal

circumstances and paid scant regard to the seriousness of the offence and the broader interests of society. It appears to me that the learned judge in the court below inadvertently allowed maudlin sympathy for the respondent to cloud his better judgment. The result is a sentence which is disturbingly disproportionate to the seriousness of the offence. Any crime that threatens the wellbeing of society deserves a severe punishment.

[20] In *S v Rabie* 1975

(4) SA 855 (A) at 857 the Court set out the following guiding principles with regard to interference with a sentence on appeal:

"1. In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal -

- (a) should be guided by the principle that punishment is "pre-eminently a matter for the discretion of the trial Court"; and
 - (b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been "judicially and properly exercised".
2. The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate."

[21] Having regard to the record, the court a quo considered all factors and balanced the personal circumstances of the appellant against the aggravating circumstances that it considered were present in this matter, namely, that the offence is serious, that the complainant was vulnerable in that she was mentally challenged, the appellant was aware of the complainant's vulnerability and proceeded with his conduct. The interests of society demanded deterrent sentences and the appellant showed no remorse. It is apparent from the reasons for sentence that the court a quo also took into account that the appellant was young and could be rehabilitated and regarded this factor as substantial and compelling which may have influenced the court to deviate from imposing a sentence of life imprisonment. The court however correctly considered that a lengthy term of imprisonment was appropriate.

[22] The argument raised by Mr Moeng that the appellant was not aware of the charge that he faced is without merit as the matter was postponed the first time it was set down for trial when the witnesses were present. The court explained to the witnesses that the appellant could not plead without his attorney having consulted fully in view of the nature of the charge. On the second occasion before the charge was read out the prosecutor placed on record that the charge related to minimum sentence legislation. Further the charge was read out and reference was made to the legislation applicable. The appellant was legally represented throughout the proceedings. There can be no doubt that he was aware of the charge he faced having regard to the record. The submission on behalf of the appellant does not appear to be based on the record or a particular instruction. The case law referred to by Mr More supports the State's submissions that the appellant was fully apprised of the charge

he faced and that there would have been no prejudice if a sentence of life imprisonment were imposed. (see S v Tshoga 2017(1) SACR420(SCA;) S v Kolea 2013(1) SACR409(SCA)).

[23] Having regard to the record, the trial court thoroughly considered the mitigating as well as the aggravating factors relevant to this case. The court deviated from the minimum sentence applicable in meting out a sentence of thirty years imprisonment whilst the minimum sentence was life imprisonment. I am not able to find that the court over-emphasised. the aggravating factors and under-emphasised or attached too little weight, to the personal circumstances of the appellant, as argued by Mr Moeng in his Heads of Argument. He referred to a number of cases to support his view that a lengthy term was not always warranted. This is countered by the State's submissions and the view in the cases cited by the Mr More. Ultimately the sentence to be imposed in a matter depends entirely on the particular circumstances of the case, and although sentences imposed in similar matters are useful guides to sentencing, they serve only as a guide. As indicated in S v De Kock above each case requires that the circumstances of that particular case be considered. In the present matter, in the fine balancing act that was required to be performed, the court a quo, in my view, properly applied that test in S v De Kock above and balanced the seriousness of the offence, the interests of society and the interests of the appellant. I cannot find any misdirection on the part of the court a quo which warrants the interference of this court in the sentence that it imposed.

[24] In the circumstances, I propose that the following order be made:

1. The appeal against the sentence is dismissed.

S C Mia

Acting Judge of the High Court, Pretoria

I agree.

Judge of the High Court, Pretoria

Appearances:

On behalf of the applicant :

Adv S Moeng

Instructed by : Legal Aid Board

On behalf of the respondent :

Adv LA More

Instructed by :

NDPP

Date of hearing :

11 May 2017

Date of judgment :

2 June 2017

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