

SOUTH AFRICA / JUDGMENT

Mokobaki v S (A708/16) [2017] ZAGPPHC 1069 (19 September 2017) [2017] ZAGPPHC 1069

COURT

North Gauteng High Court, Pretoria

BEFORE

NP Mali, C Sardiwalla

CASE / FILE NUMBER

A708/16

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REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE

NO: A708/16

19/9/2017

(1)

NOT

REPORTABLE

(2)

NOT

OF INTEREST TO OTHER JUDGES

(3)

REVISED

In

the matter between:

SAMUEL
MALAWANE MOKOBAKI
APPELLANT
and
THE
STATE
RESPONDENT

JUDGMENT**MALI J**

[1] This is an appeal against both conviction and sentence. The appellant has an automatic right of appeal in terms of Section 10 of the Judicial Matters Amendment Act 42 of 2013.

[2] The appellant appeared before the Regional court • Magistrate in Cullinan where he was charged with three counts as follows:

2.1 Rape in terms of Section 3 of the Criminal Law Amendment Act, 32 of 2007 read with Section 51 of the Criminal Law Amendment Act, 105 of 1997.

2.2. Robbery with aggravating circumstances read with the provisions of s 51 (2) of the Criminal Law Amendment Act 105 of 1997.

2.3 Malicious damage to property.

[3] The appellant who was not legally represented throughout the entire trial, pleaded not guilty to all the three counts. He denied raping the victim because according to him they had consensual sexual intercourse. He also denied robbing the victim of her handbag and money, as well as causing malicious damage to the victim's cellular phone. Despite his plea of guilty to all counts the trial court convicted him accordingly and he was sentenced as follows:

3.1 Count 1 he was sentenced to life imprisonment;

3.2 Count 2 he was sentenced to 15 years imprisonment;

3.3 Count 3 he was sentenced to 6 months imprisonment.

3.4 The sentences were not ordered to run concurrently. In addition the appellant was declared, in terms of the provisions of section 103 of the Firearms Control Act ("the Firearms Control Act"), unfit to possess a firearm. Section 304(4) of the Criminal Procedure Act 51 of 1977 ("CPA") provides that;

"(4) If in any criminal case in which a magistrate's court has imposed a sentence which is not subject to review in the ordinary course in terms of section 302 or in which a regional court has imposed any sentence, it is brought to the notice of the provincial or local division having jurisdiction or any judge thereof that the proceedings in which the sentence was imposed were not in accordance with justice, such court or judge shall have the same powers in respect of such proceedings as if the record thereof had been laid before such court or judge in terms of section 303 or this section."

- [4] In *S v Mokela*[1] the court held that one of the guidelines for ordering the concurrent running of sentences is that the offences must be inextricably linked in terms of locality, time, protagonists and importantly, the fact that they were committed with one common intent. As it will become clear below from the background, the offences committed in the present case satisfy the above guidelines in *Mokela*.

THE

BACKGROUND

- [5] The charges against the appellant arose from the following circumstances. The complainant Ms Vista Marokane ("Marokane") was travelling from Groblersdal to Pretoria in a taxi with two other passengers. The taxi driver informed them that he was not proceeding further and he told them to get into the appellant's motor vehicle because the appellant was travelling to Pretoria.
- [6] Marokane and the other two passengers did as they were advised and travelled with the appellant. The other two passengers alighted at Kwaggafontein and Marokane remained with the appellant. Along the way the appellant changed the route and used a gravel road into a secluded area. He informed Marokane that the way he was using was the short cut to Pretoria.
- [7] The appellant drove for a while and later stopped to urinate. When he came back he asked Marokane whether she was scared that he would kill her. She told the appellant that she was not scared to die as she knew at that moment that she was going to die. The appellant drove for a short while stopped again as he was complaining about the loose

bumper of the motor vehicle.

- [8] When the appellant was done checking the bumper, he went to the boot of the car. He took out a cooler box, an iron rod as well as a firearm in his possession. He then opened the passenger door and ordered Marokane to get out of the motor vehicle as he was not taking her to Pretoria. He told her that he was going to rape her, cut off

her breasts and her tongue and kill her. He then dragged her towards the river where he assaulted her with the iron rod and ordered her to throw out the contents of her bag on the ground. The appellant took Morake's bank card and demanded the pin code and took an amount of R1300.00 that was inside the purse. He also threw her diary into the river and in the process her cell phone got damaged.

- [9] The appellant then ripped off Marokane clothes and raped her, without using condom. In the process he made her to perform oral sex on him. He bit her tongue assaulted her with a firearm at the back of her head and he took a knife and attempted to cut off her breast, whilst telling her that he would sell each of her breast at R1000.00 in Nelspruit. It is at that stage that a motor vehicle appeared and the appellant ran away.

- [10] The driver of the motor vehicle, Mr Antonio Carvalho ("Carvalho") assisted her by calling the police and one Ms Pelser ("Pelser") for help. Carvalho also testified that he saw a man coming from the bushes and asked him what he was doing there. He answered him whilst holding his face down. Pelser arrived in company of her assistants and they took Marokane to Pelser's house where she was provided with clothes and juice to drink. Pelser then took her to the police station, where she was taken by ambulance to the hospital and receive medical assistance. Carvalho and Pelser corroborated Marokane's evidence. Dr Eales who examined Marokane testified and confirmed her injuries and that she was raped.
- [11] The appellant testified in his defence but called no witnesses in support of his case. In his evidence the appellant told the court that he found Marokane next to the road asking for a lift to Pretoria. Along the way he proposed love to her and she agreed. The appellant further stated that he asked the complainant how much she would pay him if he takes her to Pretoria. This is because the appellant was going to Kwa Mhlanga and not to Pretoria. According to the appellant Marokane in response said she was a woman she would see to the means of paying him as she did not have money with her but would withdraw money in Pretoria.
- [12] The appellant further testified that they decided to park the motor vehicle at Cullinan and got to the back seat where they had consensual sexual intercourse. He stated that when they were done he informed Marokane that he did not have enough fuel to take her to and from Pretoria. That is when the argument ensued between them, he then pushed her and she fell on the ground. He denied assaulting and robbing her of her belongings.

ISSUE

- [13] The crucial question that the trial court had to determine was whether the stated proved its case beyond reasonable doubt.

LAW

- [14] As was stated in *S v MAVININI*[2] by Cameron JA, as he was then:

' It is sometimes said that proof beyond a reasonable doubt requires the decision-maker to have "moral certainty" of the guilt of the accused....It comes down to this: even if there is some measure of doubt, the decision-maker must be prepared not only to take moral responsibility on the evidence and inferences for convicting the accused, but to vouch that the integrity of the system that has produced the conviction - in our case, the rules of evidence interpreted within the precepts of the Bill of Rights - remains intact. Differently put, subjective moral satisfaction of guilt is not enough: it must be subjective satisfaction attained through proper application of the rules of the system.'

- [15] In *S v SHACKELL*[3] at paragraph 30 the following is stated:

"... It is a trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused's

version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true. On my reading of the judgment of the Court a quo its reasoning lacks this final and crucial step. On this final enquiry I consider the answer to be that, notwithstanding certain

improbabilities in the appellant's version, the reasonable possibility remains that the substance thereof may be true..."

(See also *S v V* 2000 (1) SACR 453 (SCA) paragraph 3).'

ARGUMENTS

[16] The argument advanced in appellant's heads of argument is that the trial court did not prove its case beyond reasonable doubt. It is further stated that the trial court erred in finding that there are no material contradictions in the state's case. There is not even a single example of the said contradictions. In the heads of argument it is also stated that the court erred in finding that the state witnesses gave evidence in a satisfactory manner. Again this statement is not supported.

[17] The appellant admitted that he had sexual intercourse with Marokane, albeit with her consent. Marokane was alone when the crimes were committed but her evidence is overwhelmingly corroborated by Pelser and the doctor's evidence. Carvalho and Pelser also corroborated

Marokane's evidence that they found her naked. In fact during the hearing of the appeal, the appellant's counsel submitted that she could not take the argument further than what was on the heads of argument.

[18] I vouch for the integrity of the trial court in that the Magistrate satisfied himself of the evidence. At page 161 of the record from line 12 -16 the following is stated:

"The Court finds that the complainant was a good and credible witness and where possible her evidence was, the other evidence, the evidence by the doctor as well as the first person who reached the scene and the last State witnesses supported her evidence about what happened."

[19] On the other hand the trial court had the following to say about the appellant:

"It is also part of the law that where the version of the Accused is reasonably possibly true, the Court must let him go. The Accused was not a good witness. As the Prosecutor put to the Accused he wanted to be clever or sarcastic when he was asked to answer questions, although himself decided to go and testify."

The trial court found that the state had proved its case against the appellant beyond reasonable doubt. In our view the appeal against conviction cannot succeed.

[20] I now turn my attention to the appeal against sentence. The appellant's complaint against the sentence is that the trial court misdirected itself in finding that there are no substantial and compelling circumstances to deviate from the minimum sentence. It is further submitted that the sentences imposed are strikingly inappropriate in that they induce a sense of shock. The trial court should have found that the following factors, cumulatively taken amount to substantial and compelling circumstances:

20.1 The appellant had spent a year in custody awaiting trial;

20.2 He was a first offender;

20.3 There are prospects of rehabilitation;

20.4 He was not of good health as he had chronic diseases.

[21] It is trite law that sentencing is pre-eminently a matter for the discretion of the trial court. The trial court is in a position to appreciate the atmosphere of the case better and can better estimate the circumstances of the locality and the need for a heavy or a light sentence than an appellate tribunal. The appellate court should be slow to interfere with the discretion of the trial court.

[22] In *S v MATYITYI*[4] at paragraph 23 the following is stated

"..;Courts are not free to subvert the will of the legislature by resorting to vague, ill-defined concepts such as 'relative youthfulness' or other equally vague and ill-founded hypothesis that appear to fit the particular sentencing officers personal notion of fairness.

Predictable outcomes, not outcomes based on the whim of an individual judicial officer, is foundational to the rule of law which lies at the heart of our constitutional order."

[23] The trial court took into consideration the ill health of the appellant. At page 210 from line 7-10 it is stated "The Court finds that although the illness of the Accused may be seen as substantial and compelling circumstances (sic), it can be handled by the prison warders and, in fact they started to treat the Accused for his illness.

[24] It is apparent from the above that the trial court correctly did not view other complaints in 20 above as substantial and compelling circumstances. See *Matyityi* above. The only misgiving found on the part of the trial court is the omission to order sentences to run concurrently.

[25] Having regard to the above, appeal against sentence must fail.

[26] In the result the following order is granted:

1. The appeal against conviction is dismissed.
2. The appeal against sentence succeeds to extent that the sentences imposed by the court a quo being; Count 1, in terms of section 51(1) of Act 105 of 1997, the accused are sentenced to imprisonment for life, Count 2, in terms of Section 51(2)(a)(i), the accused is sentenced to 15 (fifteen) years' imprisonment and Count 3, the accused is sentenced to 6 (six) months' imprisonment are to run concurrently.
3. The sentences imposed is ante-dated to 9 March 2016.

NP MALI

JUDGE OF THE HIGH COURT

I agree

C SARDIWALLA

ACTING JUDGE OF THE HIGH COURT

Counsel for the Appellant: Adv. Moloi

Instructed by:

Legal Aid South Africa

Counsel for the Respondent: Adv Luyt

Instructed by:

Director of Public Prosecutions

Date of Hearing:

11 September 2017

Date of Judgment:

19 September 2017

[1] 2012 (1) SACR 431 (SCA)

[2]

[2009] 2 All SA 277 (SCA) at para 26

[3] (380/99) [2001] ZASCA 72; [2001] 4 All SA 279 (A) (30 May 2001)

[4] 2011 (1) SACR 40 (SCA)

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