

SOUTH AFRICA / JUDGMENT

Moraka v S (CA30/15) [2015] ZANWHC 67 (15 October 2015) [2015] ZANWHC 67

COURT

North West High Court, Mafikeng

BEFORE

Landman, Chwaro

CASE / FILE NUMBER

CA 30/15

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IN

THE HIGH COURT OF SOUTH AFRICA

(NORTH

WEST DIVISION, MAHIKENG)

CASE

NO.: CA 30/15

In

the matter between:

THEKISO
MORAKA
APPELLANT
and
THE
STATE
RESPONDENT
LANDMAN
J & CHWARO AJ

JUDGMENT

Landman J:

Introduction

[1] Mr Thekiso Moraka, the appellant, was convicted in the Regional Court on one count of rape and sentenced to life imprisonment. The appeal is against conviction and sentence.

Appeal against conviction

- [2] The appeal against conviction is based on the following contentions:
- (a) the State did not set out the implications of section 51(1) of Act 105 of 1997;
 - (b) the dates of the commission of the crime as averred in the charge sheet do not tally with the evidence presented by the State;
 - (c) thus the conviction should be set aside.
- [3] It is common cause that the charge sheet provided to the appellant and read to him at his trial included a reference, as regards count 1 (in respect of which he was convicted) to section 51 and section 5 and Schedule 2 of the Criminal Law Amendment Act 105 of 1997. The appellant was represented throughout his trial by a legal practitioner.
- [4] Counsel for the appellant pointed out that the charge sheet referred to a number of sections as well as the sections referred to above in Act 105 of 1997. Counsel submits that the appellant was not warned about the meaning and implications of the sections and that this rendered his trial unfair. He submits that the charges were not clearly understandable and did not place the appellant in a position to understand the gravity of the sentence that he would be facing. See *S v Makatu* 2006
- (2) SACR 528 (SCA).
- [5] The appellant was represented at the trial and there is nothing to show that his legal representative did not inform him of the minimum sentence that he would be facing if convicted. The legal practitioner in question has not filed an affidavit dealing with this issue. This court may therefore assume that the legal practitioner advised her client fully of the situation. Moreover, the appellant has not filed an affidavit to the effect that he was not informed of the ambit and the purport of the minimum sentence legislation.
- [6] I turn to the second ground of appeal against the conviction which is that the evidence led at the trial is in conflict with the charge sheet, which provides that the appellant committed an act of sexual penetration with the 12-year-old complainant upon or about April until 24 December 2009 at or near Lekubu Village. This indeed was the evidence of the complainant. Counsel for the appellant, however, complains that the charge sheet reads that “the appellant on or about 24 December 2009 at or near the village, lawfully and intentionally committed an act of sexual penetration with the complainant”. He submits there is no evidence whatsoever of a rape on 24 December 2009.
- [7] There is absolutely no merit in this submission. It was sufficient for the State to prove that unlawful sexual penetration of the complainant took place during the period outlined in the charge sheet. The complainant testified that it was his custom to have intercourse with her after she returned from school.
- [8] Therefore in my opinion the appeal against conviction should be dismissed.

Sentence

- [9] An attack on a sentence imposed in terms of the minimum sentence legislation ought to commence with a challenge to the finding of the court a quo that there were no substantial and compelling circumstances present. If the court a quo was correct in making this finding this would be the end of the appeal.
- [10] Counsel for the appellant submitted that substantial and compelling circumstances were to be found in the fact that the appellant had a clean record and in his age; he was 46 years old at the time of sentence (42 years old at the time of the offence).
- [11] The court a quo arrived at its conclusion that no substantial and compelling circumstances were present after taking into account the following considerations, facts and circumstances:
- the purpose of punishment.
 - the age of the appellant; he was 42 years old when the crime was committed.
 - he was unmarried.
 - he has three children, two girls and a boy.
 - the children live with their mother, who is unemployed.
 - he was not formally employed, but earned a living as a traditional healer.
 - he was a first offender.
 - rape is a serious offence.
 - the crime of rape is very prevalent and warrants a sentence that would deter the offender and others.
 - the sentence must be proportionate to the offences committed.
 - he was regarded as a stepfather of the complainant and was supposed to protect her.
 - he abused the complainant and more than one occasion.
 - this conduct cannot be tolerated.
 - the court's duty towards society is to impose appropriate sentences.
 - the court considered the submission that substantial and compelling circumstances could be found in the age of the appellant and the fact that he was a first offender.
 - the court took into account the impact of the sentence on the appellant's children.
 - a non-custodial sentence would be to over-emphasize the personal circumstances of the appellant at the expense of the other relevant elements.
 - the complainant was 12 years old when she was subject to rape during the period April to December 2009.

[12] I am of the opinion that the learned Regional Court Magistrate took into account all the facts and circumstances, as indicated by S v Malgas 2001

(1) SACR 469 (SCA) and that there are no grounds to interfere with the Magistrate's decision. It follows that the learned Magistrate was obliged to impose a sentence of life imprisonment.

[13] In the circumstances the appeal against sentence must fail.

Order

[14] I make the following order:

1. The appeal against conviction and sentence is dismissed and the conviction and sentence is confirmed

A A Landman

Judge of the High Court

I Agree

O K Chwaro

Acting Judge of the High Court

APPEARANCES:

Date of hearing:

9 October 2015

Date of Judgment:

15 October 2015

Counsel for the Appellant:

Mr Mmutloane

Instructed by:

The Mafikeng Justice Centre

Counsel for the Respondent:

Adv Mokone

Instructed by:

The Director of Public Prosecutions

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