

SOUTH AFRICA / JUDGMENT

Moreo v S (CA22/2021) [2024] ZANWHC 265 (24 October 2024)

[2024] ZANWHC 265**COURT**

North West High Court, Mafikeng

BEFORE

R D Hendricks, K D Ramolefe

CASE / FILE NUMBER

CA22/2021

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA****NORTH****WEST DIVISION-MAHIKENG****CA22/2021****Reportable:**

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In

the matter between:-

BRAM

SELEKE

MOREO

Appellant

and

THE

STATE

Respondent

Coram: R D Hendricks JP
K D Ramolefe AJ
ORDER
Consequently,

the following order is made: (i)
The appeal against sentence is dismissed;
(ii)
The sentence of 10 years imprisonment is confirmed.

JUDGMENT

Ramolefe AJ

Introduction

- [1] This is an appeal from the Klerksdorp Regional Court, North-West Division (“the Court a quo”), against the sentence of 10 years imprisonment for one count of rape read with the provisions of section 51(2)(b) and Schedule 2 of the Criminal Law Amendment Act 105 of 1997 (“the CLLA”), passed down by the learned Magistrate Nzimande (“the Magistrate”) on 8 June 2018.
- [2] The appellant, Abram Seleke Morea, was arrested on 4 September 2016 on a charge of raping N[...] M[...] (“the complainant”). The charge against him was for one count of rape and contravening the provisions of section 3 read with sections 1, 2, 50, 56(1), 56A, 57, 58, 59, 60 and 61 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 further read with sections 94, 256 and 261 of the Criminal Procedure Act 51 of 1997.
- [3] The trial commenced on 28 February 2018. The appellant was legally represented throughout the proceedings. He pleaded not guilty to the charge and no plea explanation was tendered, as he elected to exercise his right to remain silent.
- [4] Four witnesses were called to testify on behalf of the State and two on behalf of the appellant.
- [5] On 8 June 2018, the appellant was convicted and sentenced to 10 years imprisonment. At the time he was 26 years old. The complainant was 21 years of age.
- [6] On 17 November 2020, the appellant lodged an appeal against both conviction and sentence, but was only granted leave against the sentence that was imposed. The Magistrate granted the appellant leave to appeal against the sentence of 10 years though expressing the strong view that the appropriate sentence should have been 15 years instead of 10 years.

Grounds of Appeal

[7] Firstly, the appellant contends that the Magistrate should have deviated from imposing the prescribed minimum sentence of 10 years, as he was 26 years old when was convicted and sentenced and the fact that he was a first time offender. On the basis of these two mitigating factors, the appellant submits that they should be regarded as compelling and substantial circumstances that warrant a deviation from the statutory minimum sentence.

[8] Secondly, the appellant contends that the imposed term of imprisonment over- emphasizes the public interest and ignores his personal circumstances in that:

8.1. it is out of proportion with the totality of the accepted facts in this matter;

8.2. the sentence leaves no room for the appellant to be rehabilitated and reintegrated back into society as he is still a young man. It also over- emphasizes the retribution element of sentencing.

[9] Thirdly, the appellant contends that the court a quo erred in over-emphasising the following factors -

9.1. the seriousness of the offence;

9.2. the interests of society;

9.3. the prevalence of the offence;

9.4. the deterrent effect of the sentence; and

9.5. the retributive element of sentencing.

Factual

Background

[10] The appeal against the sentence is to be considered with due regard to the facts that led to the conviction. Briefly, the evidence accepted by the court quo is that on 3 September 2016 at Witfontein farm in the Regional Division of the North West Province, the appellant unlawfully and intentionally committed an act of sexual assault by raping N[...] M[...] (“the complainant”), who at the time was 19 years old.

[11] In the early evening of 3 September 2016, the complainant was visiting her friend Selina at the latter's parental home on Witfontein farm. Whilst there, the two visited their friend Kabelo who lived at a hostel nearby. At that time, Kabelo was in the company of some other people, one of them being the appellant. While at Kabelo's place, the complainant and other people in attendance partook in merrymaking involving consuming traditional beer, and dancing well into the night.

[12] Sometime during the evening, the complainant was harassed by the appellant. The complainant reported this harassment to Selina, who then confronted him about this. Later on the complainant left Kabelo's place, and as she was leaving, the appellant grabbed her by her sweater and dragged her to a nearby abandoned school. The appellant then forced the complainant into an empty classroom where he undressed her, laid her down on the floor

and commenced the ghastly act of raping her. With the act completed, the appellant ran away with the complainant's clothes, and dignity, leaving her alone naked in the empty classroom.

- [13] Shortly thereafter, the complainant went to Jan Dani's place, which was one of the classrooms at the abandoned school. The complainant knocked on Dani's door. Upon opening the door, Dani noticed that the complainant was naked and crying. When Dani asked her what had happened and why she was naked, she reported to him that she had been raped by the appellant.
- [14] Dani proceeded to wake up his partner, Masabata, and informed her that the complainant was standing at the door naked and crying, and that she had reported to him that she had been raped by the appellant.
- [15] Masabata then grabbed a towel and approached the complainant to cover her. After covering her with a towel, the complainant was let into Dani's place where she was offered a bed to sleep.
- [16] Much later on after the incident had occurred and during the course of the same evening, the complainant's clothes were found by one of the complainant's friend, one Selina, left at the gate of the abandoned school.
- [17] The following morning, being Sunday 4 September 2016, Masabata questioned the complainant about what had happened. The complainant informed her that she was raped by the appellant at the abandoned school inside a classroom. Following this report of the incident, Masabata advised the complainant that she must go and seek help from Selina's mother.
- [18] The complainant proceeded to report the rape to Selina's uncle and grandfather, who then went to nearby farm where an overnight church vigil was being held.
- [19] The appellant, his girlfriend and some family members had attended the overnight church vigil. Upon arrival at the church, Selina's uncle and grandfather informed the appellant's family that the complainant had been raped by the appellant. Following this report, the appellant's girlfriend was taken to see the complainant.
- [20] The appellant's girlfriend engaged with the complainant and asked her what happened. The complainant informed her that she was raped by the appellant the previous night at the abandoned school. Following this report, the complainant reported her rape to the police and the appellant was arrested on 4 September 2016.

Evaluation of the Evidence

- [21] At the commencement of the trial and before the State could call its witnesses, a medical practitioner's J88 report was handed in by consent and was admitted into evidence. An affidavit deposed to by the Chief Forensic Analyst in terms of section 212 of the Criminal Procedure Act 51 of 1997, was admitted into evidence.
- [22] The doctor's clinical findings. and conclusions as per the J88 medical examination report are as follows:
- "No injuries noted ... normal gynaecological examination, but presence of semen like substance suggests there may have been penetration. Rape cannot be excluded".
- [23] DNA was obtained and sent for analysis.
- [24] Regarding the actual events that occurred after the complainant was dragged into the school and raped, the complainant was a single witness. However, regarding the preceding events and what occurred thereafter, the complainant's evidence is corroborated by the evidence of Selina, Dani and Masabata.
- [25] As a single witness, the complainant did not contradict herself in any significant respect. She gave evidence that the appellant is someone well known to her, the two having known each other since 2012.
- [26] The appellant's defence was that he was not the person who could have raped the complainant and that it was too dark at night for the complainant to be able to identify her attacker.
- [27] However, as correctly found by the Magistrate, there was a high mast light within 23 metres of the school and as the complainant testified, the door of the classroom had holes that allowed the exterior light to provide a clear visual of the appellant, whilst she was being dragged to the classroom and whilst he was on top of her. At least at this point there can be no doubt that the complainant had good sight of the appellant.
- [28] The evidence given by Selina that she found the complainant's clothes at the gate of the school and that she witnessed the appellant walking from the direction of the school towards the church, further corroborated the complainant's evidence.
- [29] The appellant's second witness, being his girlfriend, was not a credible witness. The learned Magistrate correctly found her testimony to be untruthful and that she had discussed the facts of the matter with the appellant as well as the timeframes she should tell the Court, with the intention of misleading the court and to provide a false alibi. The Magistrate also correctly considered the evidence about his alibi with due consideration of the totality of the evidence tendered.

The law

[30] It is trite that a court of appeal will not lightly interfere with the sentencing discretion of a trial court. This position is clearly set out in *S v Malgas*[1] where the Supreme Court of Appeal held that -

"[12] The mental process in which courts engage when considering questions of sentence depends upon the task at hand. Subject of course to any limitations imposed by legislation or binding judicial precedent, a trial court will consider the particular circumstances of the case in the light of the well-known triad of factors relevant to sentence and impose what it considers to be a just and appropriate sentence. 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. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate court is at large. 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". It must be emphasised that in the latter situation the appellate court is not at large in the sense in which it is at large in the former.

In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the

sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the difference is so substantial

that it attracts epithets of the kind I have mentioned. No such limitation exists in the former situation".

[31] The imposed sentence is assailed on the basis that the appellant was relatively young when he was sentenced; that it over emphasizes the public interest, seriousness of the crime and interests of society; the retributive element of sentencing and that the court a quo failed to consider the appellant's personal circumstances.

[32] A reading of the judgment on sentence imposed by the Court a quo reveals that the learned Regional Magistrate took into account the mitigating circumstances of the appellant, these being his age, level of education, the fact that he was employed, has two minor children one of them, being the eldest, was residing with him and his girlfriend.

[33] The appellant's heads of arguments and the submissions made do not assist this court. In brief, they address the mitigating factors as constituting to be substantial and compelling circumstances. No proposal is made as to what would have been an appropriate sentence, and no submissions about the appellant's rehabilitation or any regard for the fact that on the date of hearing this appeal, the appellant had already been imprisoned for a period of 6 years and 9 months.

[34] The question is raised as to whether the appellant's relatively young age and the fact that he is a father of two children constitute exceptional and compelling circumstances for a court to be inclined to deviate from the prescribed minimum sentence.

[35] In *S v Bailey*[2], the following was stated -

"[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'.

[36] In the more recent case of *Director of Public Prosecutions, KwaZulu-Natal Pietermaritzburg v Ndlovu*[3], the SCA said as follows -

"[73] Rape is an utterly despicable, selfish, deplorable, heinous and horrendous crime. It gains nothing for the perpetrator, save perhaps fleeting gratification, but inflicts lasting emotional trauma and, often, physical scars on the victim. More than two decades ago, Mohamed CJ, writing for a unanimous court, aptly remarked that:

'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 tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives' "[4].

[37] Our Courts have consistently held that the rights of women must be protected and treated with dignity and equality, and that an imposed sentence must serve the public interest. The imposition of an effective sentence will always depend on the facts and circumstances of each case and it is a court's duty to impose an appropriate sentence.

[38] Rape is a rampant crime in this country. It is a terrible scourge that needs to be dealt with decisively. If it does not demean the actor it certainly demeans the victim. And the scars it inflicts are irreversible. The public has a legitimate expectation that perpetrators of this crime should be punished adequately. Albeit that the courts have a duty to be mindful of the interests of society, and that this is not always achieved by imposing a lengthy sentence, yet must the message be sent: rape is a most invasive, demeaning and degrading crime with no place in a civilised society.

[39] As a mechanism to protect society against the rise of gender based violence and femicide, section 51 (2) read with Schedule 2 of the CLLA was introduced to curb such crimes. The section provides that a minimum sentence be imposed for the crime of rape.

[40] In *S v Matyityi*[5], the Court considered the age of the accused at the time that he was sentenced and held:

"[14] Turning to the respondent's age: What exactly about the respondent's age tipped the scales in his favour was not elaborated upon by the learned judge. During the course of the judgment reference was made to the respondent's 'relative youthfulness' without any attempt at defining what exactly that meant in respect of this particular individual. It is trite that a teenager is prime facie to be regarded as immature and that the youthfulness of an offender will invariably be a mitigating factor, unless it appears that the viciousness of his or her deeds rule out immaturity. Although the exact extent of the mitigation will depend on all of the circumstances of the case, in general a court will not punish an immature young person as severely as it would an adult. It is well established that the younger the offender the clearer the evidence needs to be about his or her background, education, level of intelligence and mental capacity in order to enable a court to determine the level of maturity and therefore moral blameworthiness. The question, in the final analysis, is whether the offender's immaturity, lack of experience, indiscretion and susceptibility to being influenced by others reduces his blameworthiness. Thus whilst someone under the age of 18 years is to be regarded as naturally immature the same does not hold true for an adult. In my view a person of 20 years or more must show by acceptable evidence that he was immature to such an extent that his immaturity can operate as a mitigating factor. At the age of 27 the respondent could hardly be described as a callow youth. At best for him his chronological age was a neutral factor. Nothing in it served. without more. to reduce his moral blameworthiness. He chose not to go into the box and we have been told nothing about his level of immaturity or any other influence that may have been brought to bear on him to have caused him to act in the manner in which he did". (own underlining).

[41] In *S v Vilakazi*[6], the SCA held that -

"[58] The personal circumstances of the appellant, so far as they are disclosed in the evidence, have been set out earlier. In cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment the questions 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 that period should be, and those seem to me to be the kind of 'flimsy' grounds that Malgas said should be avoided. But they are nonetheless relevant in another respect. A material consideration is whether the accused can be expected to offend again. While that can never be confidently predicted his or her circumstances might assist in making at least some assessment. In this case the appellant had reached the age of 30 without any serious brushes with the law. His stable employment and apparently stable family circumstances are not indicative of an inherently lawless character'.

[42] In this case, the only mitigating factors placed before the court are the appellant's relatively young age and the fact that he is a first time offender. However, regard must be had for the flagrant manner in which the crime was committed and his disregard for the physical integrity of the complainant which he violated as he did. He acted in a manner that has no place in any civilised society.

[43] In my view, the trial Court struck a perfect balance between the personal circumstances of the appellant, the crime and the interests of society. There are no substantial and compelling circumstances present that warranted a departure from the prescribed minimum sentence. In fact, this is the type of instance that the legislature had in mind when it enacted the minimum sentencing provision. The imposed sentence does not constitute an injustice, nor is it disproportionate to the crime and the legitimate interests of society.

[44] To paraphrase Holmes JA in *S v V* [7], the period of imprisonment meted to the appellant is but only a decade of which seven years are happily behind him. By the time he regains his freedom in three years' time, he shall no doubt have had sufficient time to mull the follies of his youth, rein in a galloping and uncontrolled urge that took away 10 of his years, and in a few years' time, hopefully sufficiently purged, be rendered fit again for release back to society.

Order

[45] Consequently, the following order is made -

45.1. The appeal against the sentence is dismissed.

45.2. The sentence of 10 years imprisonment is confirmed.

K D Ramolefe AJ

Acting Judge of the High Court,

North West Division, Mahikeng

I agree.

R D Hendricks JP

Judge President of the High Court,

Appearances:

For the appellant: Adv B Riley

Instructed by: Legal Aid

For the respondent: Adv T Koloti

Instructed by: Office of the Director of Public Prosecutions

Date of hearing: 21 June 2024

Date of judgment: 24 October 2024

- [1] (117/2000) [2001] ZASCA30; [2001] 3All SA220 (A) (19 March 2001) at paragraph 12.
- [2] 2013 (2) SACR 533 (SCA) at paragraph 20.
- [3] (888/2021) 12024] ZASCA 23 (14 March 2024) at para [73] and [74].
- [4] S v Chapman [1997] ZASCA 45; 1997 (3) SA 341 (SCA) (Chapman) paragraphs 3 - 4.
- [5] (695/09) [2010] ZASCA 127; 2011(1) SACR 40 (SCA); [2010] 2 All SA 424 (SCA) (30 September 2010) at paragraph 14.
- [6] (576/07) [2008] 1 ZA5CA 87; [2008] 14 All SA 396 (SCA); 2009 (1) SACR 552 (SCA); 2012 (6) SA 353 (SCA) (3 September 2008) at paragraph 58.
- [7] 1972 3 SA 611 A.

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