
SOUTH AFRICA / JUDGMENT

Motaung v S (A659/2016) [2017] ZAGPPHC 627 (12 September 2017) [2017] ZAGPPHC 627

COURT

North Gauteng High Court, Pretoria

BEFORE

Tlhapi, Van der Westhuizen

CASE / FILE NUMBER

A659/2016

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

SAFLII

Note: Certain

**personal/private details of parties or witnesses have been
redacted from this document in compliance with the law
and SAFLII**

Policy

IN THE HIGH COURT OF

SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

CASE

NUMBER: A659/2016

Not

reportable

Not

of interest to other judges

Revised.

In

the matter between:

JAJA
SAMUEL
MOTAUNG APPELLANT
And
THE
STATE RESPONDENT
TLHAPI J

[1]

The appellant appeared before the Regional Court in Vereeniging of charges of House Breaking with Intent to Rob; Rape in terms of section 3 Act 32 of 2007 read with section 51 Schedule 2 of Act 105 of 1997 and, Robbery with Aggravating Circumstances in terms section 51 of Act 105 of 1997. He was sentenced respectively, to 5 years imprisonment; life imprisonment and 15 years imprisonment. The appellant by virtue of his sentence to life imprisonment has an automatic right of appeal derived from section 309(1)(a) of Act 51 of 1977.

[2]

The appellant was legally represented throughout the trial. When the charges were put to the appellant and before he pleaded, the magistrate required that the correct sections be referred to because the charge sheet per se did not stipulate which subsections of section 51 of Act 105 of 1997 were applicable to sentencing. With regard to the rape the court was informed that the sentence applicable was that prescribed in Part 1 of Schedule 2 and, for the robbery that which is prescribed in Part 11 Schedule 2. The appellant first confirmed to the court that the provision of Act 105 of 1997 and the implications of the minimum sentences had been explained to him and he understood. He pleaded not guilty to all three counts and the court was informed that there would be no plea explanation. Thereafter the prosecutor informed the magistrate that there was an agreement between the state and defence not to call any witnesses but that the state would rely on earlier statements made by the complainant and her witness and that the defence had sight of the statements. This arrangement was confirmed by Mr Christie, legal representative for the appellant. The complainant and her witness were therefore not subjected to cross examination and the statements relating to the rape were read into the record and handed in as exhibits.

[3]

The statements of the complainant N Z and her witness which were made to the police at Meyerton on 13 March 2013 state the following:

Complainant:

"On

Saturday 2013/3/09 at about 00,40 my boyfriend and I were lying on the bed, the candle was still lighting in my shack as we do not have

electricity. While lying on the bed we heard people on the door trying to open the door of the shack. My door does not have

a key. When closing I use a chain and a lock, but on Saturday I did not use a lock. I only used the chain. We then stood up and pushed the door from the inside to prevent them from opening. They then kicked the door from outside. By that time I was naked, I only had a bra on, I then decided to go and put something on but by that time they managed to kick the door open.

While

I was in the bedroom they came with my boyfriend (T M) driving him to the bedroom. They ordered us to lie of the bed, covered him with

blankets over the head. Took my phone and his money which I don't know how much was it. My phone is a Samsung GTE 2222, and later my boyfriend told me he had R100.00 plus rands but he does not also remember how much was it.

After

that I heard one of them saying lets kill these dogs and one of them refused. They pulled me with my legs while my head was facing down and one of them inserted his penis in my vagina and started raping me. By that time I was crying but did not make a loud noise because I

saw one of them having a small gun in his hand, and I was afraid they will kill us.

It

was three of this unknown males who entered my shack and all three of them raped me. Each one after raping me, I would hear that the other

one started because they were not saying anything to each other that I am finish is your turn. I

would feel that the next one is starting by holding my legs different from the first one. I cannot tell how

long did they take to rape me,

but what I can say is that they left immediately when each took his tum raping me. They did not say anything when they were finished, they just left.

When

we heard that it was quiet then we, myself and my boyfriend we were shocked, and I was still crying when my mother came to

see whether we
are still alive she said she thought that I were dead since she never
heard us talking.
My
mother (I Z) took me to her house next to my place and she phone the
police which came immediately. One of the police lady took
me to the
van and took my statement, the male one obtained the statement of my
boyfriend. I cannot identify the suspects even is
I can see them or
meet them. I did not give anybody permission to harm me or rape me, I
would like further investigation in this
matter.
Complainant's

mother I Z stated:

"I
am an adult female I am
the mother of N and on Saturday 2013/9/09 at
about I was at my house when N and his boyfriend T at my house to
their place next door. I then went to sleep but I
was struggling to sleep. Then came night at about twelve, then I hear
a noise coming from N and T's
shack as they are staying next door. I then phone the police and
informed them that my children are
being robbed at their shack and I
am afraid to go out and
investigate. Then after the noise, I went to the
door. I then hear people passing at the street and I peep on my shack
hole. I then saw three black male passing my shack
on the street and
then turn at the corner. After they disappear I have open the door
went to S. On my arrival I have found their
door broken and they told
me that Suzan had been raped by three suspects and they also robbed
their money R100 and S's cellphone
(Samsung). I then took S into my
shack then the police had arrived and took their statements".

[4]

The court was further informed that complainant in counts 1 and 3,
one Shadrack Malinga was not in Court and that in as far
as these

counts were concerned there was a possibility that two trials
-within- a -trial were to be held. This matter was
then

postponed to the 3 April 2014. There is no record of what transpired
on this day. Thereafter, the record reflects that
the trial proceeded on 11 June 2014, on which date the state applied
for the charge sheet in respect of count 1 to be amended,
in order to

reflect that it was a charge of Housebreaking with Intent to Rob only
and not as initially reflected, that it was with

'intent to rob and robbery'. There was no objection from the defence.

[5]

The court was then informed that the appellant wished to make certain admissions in terms of sections 220 of the Criminal Procedure Act 51 of 1977 before close of the state's case and he confirmed that the application of the said section was explained to him, that formal admissions meant that there were no longer issues placed in dispute which the state had to prove. The admission related to all the three counts even where no statements were submitted for counts 1 and 3 from the complainant Shadrack Malinga. The admissions state the

following:

Count

1:

"I

admit that I am guilty of the offence of housebreaking with the intent to rob. On 9 March 2013 I was at Meyerton in the Regional Division of Gauteng.

I

admit that I did wrongfully and unlawfully entered and broke into the house of Shadrack Malinga with intent to rob. I had no right or

permission to act in such a manner and I knew at the time that my actions were wrongful, unlawful and therefore, punishable by law. I had the necessary intention to act in such a manner. On the day in question I was from a local tavern with my

friends Josef Mokete. Whilst on our way home, Mokete suggested that we break into one of the shacks and rob the occupants of their

belongings. That is when Mokete kicked the door of one of the shacks. We all entered the said shack where there were two occupants inside, a male and a female."

Count

2

"I

am guilty of the crime of contravening the provisions of section 3 read with sections 1, 55, 56(1), 57, 58, 59, 60 and 61 of Act 32 of 2007 read with the provisions of section 51 of the Criminal Law Amendment Act 105 of 1997 as amended and also read with sections 92(2), 94, 256, 257, 281 of Act 51 of 1977. On 9 March 2013 I was at Meyerton in the Regional Division of Gauteng. I did unlawfully and intentionally commit

an act of recurrent sexual penetration with the complainant to wit N Z a female person age 20 by inserting my penis into her vaginal without her consent. I had no right or permission to act in such a manner and I knew at the time that my actions were wrongful, unlawful and therefore punishable by law.

I wish to place on record that on the day after breaking open the door and entered the house of Shadrack Malinga as contained in ad

count 1 above, Mokete ordered the said Shadrack Malinga to lie on the floor facing downwards, leaving his girlfriend N Z on top of the bed.

Mokete started having sexual intercourse with N without her consent. Joseph followed and I was the last and at all times she never gave any of us consent to have sexual intercourse with her."

Count

3

"I

am guilty of the crime of robbery with aggravating circumstances read with the provisions of sections 51 of Act 105 of 1997.

I

admit that I did unlawfully and intentionally assault Shadrack Malinga and then did force take the following items from him to wit

1x cellphone and cash in the amount of R160.00 his property and his lawful possession, aggravating circumstances being the use of a

firearm. I had no right or permission to act in such a manner, I knew at the time that my actions were wrongful and therefore punishable by

Jaw. I wish to state that on the day in question Mokete who was in possession of the firearm pointed at Shadrack

Malinga demanding money

and cellphone. Shadrack then informed his girlfriend to hand over her cellphone and money since he did

not have a phone. Joseph then

forcefully took the cellphone and money and we all fled the scene. I

further admit that we shared

the cash amongst ourselves and Joseph

kept the cellphone to himself since he does not have a cellphone. I

admit that I do not have

a valid defence in Law hence I plead guilty

to the charges preferred against me.....I was in my sound and sober senses all the

time.

The

state and defence cases were then closed after the statements were read into the record, and conviction followed."

[6]

The appeal was based on grounds that the trial court had failed to consider the appellant's personal circumstances; that he spent time

in prison awaiting trial; that he showed remorse by admitting all the elements-of the offences he was charged with;

by not considering the

element of rehabilitation and by not finding that substantial and

compelling circumstances were present; and by over emphasizing the seriousness of the offence in as far as it related to the prevalence of the offence, the interests of society and the deterrent effect of the sentence.

[7]

It is trite that a trial court's sentencing discretion is circumscribed as provided for in section 51 of Act 105 of 1997, that courts may deviate from the sentences prescribed by the Legislature only when in terms of section 51(3) substantial and compelling circumstances are found to be present. The approach to be followed by the Court is aptly described in *S v Vilakazi* 2009(1) SACR 552 at

[15]:

"

....it is incumbents upon a court in every case, before it imposes a prescribed sentence, to assess, upon a consideration of all the circumstances of the particular case, whether the prescribed sentence is indeed proportionate to the particular offence."

In

S v PB 2013 (2) SACR 539 (SCA) at [20]:

"What

then is the correct approach by a 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's exercising its discretion properly, simply because it is not the sentence which it would have imposed or that it finds 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 or compelling."

[8]

Mr Steynberg for the appellant conceded that the offence was a serious one and the fact that the appellant was party to a gang rape.

He argued that the learned magistrate should have found as a factor to be considered, that no serious injuries were found together with

the appellant's personal circumstances.
Another consideration was the fact that the appellant of his own accord had informed the court of his theft conviction many years ago during 1999, where the state did not call for such previous conviction to be proved. Ms Williams argued that there had been no material misdirection by the court in sentencing and that this appeal be dismissed.

[9]

The appellant did not testify under oath neither was a presentencing report made available and the trial court took into account the representations from the bar by his legal representative. The following personal circumstances were recorded that, he was 36 years old and married with two children ages 12 and 2; that he was unemployed at the time of his arrest but that his wife was employed as a domestic helper; that the appellant had shown remorse when he gave instructions for admissions to be tendered into evidence wherein he pleaded guilty in respect of all the counts; that he revealed that he had a previous conviction of theft during 1999 and had not had any brushes with the law since then; that the appellant could be rehabilitated; that he had been in custody for a period of 18 months awaiting trial.

[10]

The approach to time spent in custody awaiting trial was stated in *OPP v Gwala and Others*, 295/13 [2014] ZASCA 44 (31 March 2014):

" in all cases where a court is considering the justness of the sentence to be imposed: the sentencing court should consider in all cases whether the period of imprisonment proposed is proportionate to the crime committed, taking into account for that purpose, the period spent in custody awaiting trial"

The period awaiting trial is therefore but one of the factors which, together with mitigation, and other factors if present, are to be cumulatively considered to determine whether substantial and compelling circumstances do indeed exist, it cannot be considered apart from the other factors, *S v Hadebe* 2013 (2) 165 (SCA). In this instance the aggravating circumstances are of relevance in the determination of whether substantial and compelling circumstances

were present. The complainant's residence was broken into and besides the robbery perpetrated on her and her boyfriend she was gang raped by the appellant and his friends. The complainant's boyfriend was rendered helpless and threatened and the complainant testified that she was afraid to scream aloud because one of the assailants was in possession of what looked like a firearm. The complainant's mother heard some noise and was afraid to leave her house lest she too was attacked. The prevalence of rape and robberies in our communities cannot be ignored. In this instance the fact that no injuries were proved should not be of relevance in determining whether substantial and compelling circumstance are present, because the gang rape was the most cruel of acts of sexual depravity by a group of men upon a complainant, found in the privacy of her home. I therefore do not find that there was a misdirection by the trial magistrate in finding that no substantial and compelling circumstances were present.

[11]

In the result I recommend that the following order:

1. The appeal on sentence is dismissed.

THLAPI VV
(JUDGE OF THE HIGH COURT)
I
agree,
VAN
DER WESTSHUIZEN C J
(ACTING JUDGE OF THE HIGH COURT)
MATTER
HEARD ON: 12 SEPTEMBER 2017

JUDGMENT

RESERVED ON: 12 SEPTEMBER 2017

ATTORNEYS FOR THE APPELLANT: PRETORIA JUSTICE CENTER

ATTORNEYS FOR THE RESPONDENT: THE DIRECTOR OF PUBLIC PROSECUTIONS

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPPHC/2017/627.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/motaung-v-s-unknown-topic-agpphc-2017>

Prepared on 24 October 2026 · Esheria