

SOUTH AFRICA / JUDGMENT

Motlhabane v S (A249/2017) [2017] ZAFSHC 233 (11 December 2017)

[2017] ZAFSHC 233

COURT

Free State High Court, Bloemfontein

BEFORE

Mathebula, Murray

CASE / FILE NUMBER

A249/2017

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IN

THE HIGH COURT OF SOUTH AFRICA,

FREE

STATE DIVISION, BLOEMFONTEIN

Case

number: A249/2017

In

the matter between:

KABELO
JACOB
MOTLHABANE
Appellant
and
THE
STATE
Respondent

CORAM:

MATHEBULA, Jet MURRAY, AJ
HEARD

ON:

11 DECEMBER 2017

JUDGMENT

BY: MATHEBULA,

DELIVERED ON: 11 DECEMBER 2017

[1] The appellant was arraigned in the Regional Court sitting at Botshabelo on a charge of rape. He pleaded guilty and was duly convicted. He was sentenced to life imprisonment in terms of section 51(1) of Act 105 of 1997. Further he was declared unfit to possess a firearm in terms of section 103 of Act 60 of 2000. He is aggrieved with the sentence and is now approaching this court on appeal against it.

[2] During 2011 until 2015 at N Section, Botshabelo, the appellant unlawfully and intentionally repeatedly committed acts of sexual

penetration with the complainant ([...]) against her will. As a result the complainant gave birth to a child. The appellant

started having sexual intercourse with the complainant when she was seventeen (17) years old. These are the undisputed and admitted

facts

upon which the appellant pleaded guilty to the charges and appropriately convicted.

[3] The crux of the appeal before us is that the Court a quo erred in not finding the existence of compelling and substantial circumstances enabling it to deviate from imposing the prescribed

minimum sentence. The basis of the submission is that the appellant was a first offender; the complainant did not sustain any injuries or violence exerted on her, the accused was incarcerated for one year before the commencement of the trial and that he pleaded guilty to the charge. Those factors, so the submission goes, viewed individually and cumulatively constituted substantial and compelling

circumstances thus justifying the imposition of a lesser sentence.

[4] The respondent is vehemently opposed to the appeal and support the sentence imposed by the court a quo. The submission is that the aggravating factors far outweigh the mitigating factors, particularly given the circumstances under which the offence was committed by the appellant.

[5] It is the prerogative of the court a quo to impose sentence. A court of appeal will only interfere with any sentence in limited circumstances see *S v Pieters* 1987 (3) SA 717 (A) at 728 B - C and *S v Pillay* 1997 (4) SA 531 A at 535 E-G. Such interference will be in situations whereby the court a quo misdirected itself or committed an irregularity or the sentence is shockingly inappropriate. In that case the court a quo would have exercised its discretion wrongly.

[6] The test of what constitute substantial and compelling circumstances was articulated in *S v Malgas* 2001 (2) SA 1222 (SCA). The court in that matter emphasised that the Legislature has ordained the prescribed minimum sentence that should in the

normal course be imposed in the absence of weighty justification to depart from. In *S v Matyityi* 2011 (1) SACR 40 (SCA) it was held that the court should not depart from the provisions of Act 105 of 1997 for flimsy or unconvincing reasons. I am of the view that the court a quo exercised its discretion properly and reasonably.

[7] The court applied the triad principle as laid in *S v Zinn* 1969 (2) SA 537 (A). The appellant was a 51 year old widower with five (5) children. He survived by doing odd jobs bringing home an income of R2 000 per month. His highest scholastic achievement is grade 7. He was a first offender and had been in custody for a year prior to his

conviction

[8] The court a quo considered the offence perpetrated by the appellant namely rape against [...]. This has been the modus operandi of the appellant for a protracted period of time. It even resulted in the birth of a child. All this took place in the home environment where the complainant was supposed to be safe. In addition her assailant was the person expected to protect and love her.

[9] The court a quo considered the fact that the offence was prevalent in its district and the community expected stern and decisive action from the court. It is incumbent on the courts to act as the last line of defence against those who prey on vulnerable members of the community. The best eloquent manner to deal with them is lengthy terms of imprisonment. The appellant's religious or cultural beliefs on rape cannot be allowed to operate in his favour. Taking all factors individually and cumulatively, the court found that there were no substantial and compelling circumstances to deviate from the prescribed minimum sentence. In my view this approach was correct. The appeal ought to be dismissed.

[10] Accordingly, I make the following order:

10.1.1 The appeal is dismissed.

10.1.2 The sentence is confirmed.

MATHEBULA, J

I concur

MURRAY, AJ

On behalf of applicant: Adv. S Kruger

Instructed by:

Bloemfontein Justice Centre

On behalf of respondents: Adv. C Z Nameka

Instructed by:

The Director of Public Prosecutions

/roosthuizen

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