

SOUTH AFRICA / JUDGMENT

Motlhajwe v S (CA 26/2008) [2013] ZANWHC 29 (28 March 2013)

[2013] ZANWHC 29**COURT**

North West High Court, Mafikeng

BEFORE

A M Kgoele, R D Hendricks

CASE / FILE NUMBER

CA 26/2008

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Source record**IN THE NORTH WEST HIGH****COURT****MAFIKENG****CA 26/2008****In the matter between:**

JACOB MOTLHAJWE

.....Appellant

and

THE STATE

.....Respondent

CRIMINAL APPEAL

HENDRICK J, KGOELE J

DATE OF HEARING : 22

February 2013

DATE OF JUDGMENT : 28

March 2013

FOR THE APPELLANT :

Adv. F.M. Hlahla

FOR THE RESPONDENT :

Adv. M.C. Nontenjwa

JUDGMENT**KGOELE J:**

- [1] The appellant was arraigned at the Regional Court held at Madikwe on a charge of housebreaking with intent to rape and rape which falls under Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997.
- [2] He was convicted after tendering a plea of guilty in terms of Section 112(2) of Act 51 of 1977 and sentenced to life imprisonment. He now appeals against the sentence only imposed by the trial court.
- [3] Allegations against him which were not in dispute were that he broke and entered into the house of Miriam Modisane, an 84 year old female and did there and then had sexual intercourse with her without her consent. It was further alleged that this offence falls under Part 1, Schedule 2 in that the rape in question was committed by more than one person (gang).
- [4] Appellant's counsel submitted that the sentence of life imprisonment stands to be interfered with because the trial court erred by not attaching a proper weight to the following mitigating factors which were in favour of the appellant:-

He was a first offender;

The absence of planning;

The age and personal circumstances of the accused;

The rehabilitative of the sentencing and or punishment;

He spent some time in custody awaiting trial.

- [5] The respondent's counsel supported the findings by the trial court that no exceptional and or compelling circumstances which warrant that a lesser sentence be imposed exist, and further that, the sentence imposed by it is appropriate.
- [6] The trial court in arriving at the above conclusion and sentence took into consideration the fact that there were aggravating factors which were:- that the offence was pre-planned, that the fact that appellant pleaded guilty is not a sign of remorse as the DNA results connected him to the offence and lastly, that the appellant admitted through the report of the probation officer that they further robbed the complainant of R300-00, although he was not charged with this offence.
- [7] In the case of *S v Anderson* 1964 (3) SA 494(A) at 495 C-E, the following was said:-

“The decisions clearly indicate that a court of appeal will not alter a determination arrived at by the exercise of a discretionary power merely because it would have exercised that discretion differently. There must be more than that. The court of appeal, after careful consideration of all the relevant circumstances as to the nature of the offence committed and the person of the accused, will determine what it thinks the proper sentence ought to be, and if the difference between that sentence and the sentence actually imposed is so great that the inference can be made that the trial court acted unreasonably, and therefore improperly, the court of appeal will alter the sentence. If there is not that degree of difference the sentence will not be interfered with”.

- [8] The Appeal Court restated the test in the case of *S v Malgas* 2001 (1) SACR 469 (SCA) 2001 (2) SA 1222 at paragraph 12 as follows:-

“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, and 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”.

- [9] The offences the accused was convicted of remains serious especially because the victim is an old woman who was living alone. Sight should also not be lost of the fact that the appellant committed two offences that is:- housebreaking and rape. However, I am of the view that the trial court over-emphasized the seriousness of the offence over the mitigating factors of the appellant, amongst others, that he was a first offender, and that the appellant pleaded guilty and did not waste the court's time.
- [10] Unfortunately I cannot agree with the trial court's finding that the offences were pre-planned. This is so because, the possibility that the appellant and his companions decided to rape the complainant after the house-breaking cannot be ruled out as they had also robbed the complainant. Furthermore, the statement made and accepted by the trial court of the appellant i.t.o Section 112(2) of Act 51 of 1977 did not reveal that the offence was pre-meditated. The state and the court accepted it without asking for clarification on this element.
- [11] In addition, the fact that the complainant was robbed R300-00 cannot add weight to the aggravating factors as the appellant were not charged and convicted of this offence.
- [12] I am of the view that the following are substantial and compelling circumstances which should have warranted the trial court to deviate from imposing the minimum sentence of life in this matter:-

that the appellant was a first offender;

that he pleaded guilty;

that his age of 34 years can serve as an indication that he can still be rehabilitated;

that the complainant did not sustain physical injuries on her body.

[13] Consequently the trial court misdirected itself in this regard.

[14] The following order is thus made:-

14.1 The appeal against sentence is upheld;

14.2. The sentence imposed by the trial court is set aside and substituted by the following:-

“Eighteen

(18) years imprisonment”.

A M KGOELE

JUDGE OF THE HIGH COURT

I agree

R D HENDRICKS

ATTORNEYS:

FOR THE APPELLANT : MAFIKENG JUSTICE CENTRE

FOR THE RESPONDENT : DDP

- MAFIKENG

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