

SOUTH AFRICA / JUDGMENT

Motsoko v S (A57/2016) [2019] ZALMPPHC 18 (29 April 2019)

[2019] ZALMPPHC 18

COURT

Limpopo High Court, Polokwane

BEFORE

MF. Kganyago, MV Semenya

CASE / FILE NUMBER

A57/2016

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REPUBLIC
OF SOUTH AFRICA
IN THE HIGH COURT
OF SOUTH AFRICA
LIMPOPO DIVISION,
POLOKWANE
CASE
NUMBER: A57/2016
29/4/2019
(1)

REPORTABLE: YES/NO
(2)
OF
INTEREST TO THE JUDGES: YES/NO
(3)
REVISED.
In

the matter between: ENOCK
MOTSOKO
APPELLANT
AND
THE
STATE
RESPONDENT

JUDGEMENT**KGANYAGO J**

- [1] The appellant Mr Motsoko was convicted by the Regional Magistrate, Senwabarwana on a charge of rape of a 10 year old girl in contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, read with the provisions of section 51(1) and Part I of Schedule 2 of the Criminal Law Amendment Act 105 of 1997.
- [2] The appellant has pleaded guilty to the charge and in his statement in terms section 112(2) of the Criminal Procedure Act 51 of 1977 (the CPA), he admitted to having had sexual intercourse with the complainant who was a young girl at the time of the incident. He was duly convicted based on his guilty plea and was sentenced to life imprisonment. Since the appellant has been sentenced to life imprisonment by the Regional Court, he is having automatic right of appeal.
- [3] The appellant has directed his appeal against both conviction and sentence. The relevant grounds of appeal are set out in the appellant's notice of appeal. In the notice of appeal the appellant is alleging that he had pleaded not guilty to the charge and that the court a quo convicted him using a skeleton docket and sentenced him without evidence. However, during the hearing of the appeal, his counsel conceded that the appellant has pleaded guilty to the charge and that his conviction is in order.
- [4] In relation to sentence, the other ground upon which the sentence is been challenged even though it was not stated in the appellant's notice of appeal and heads of argument, but raised from the bar, is that the State has failed to prove the age of the complainant. The State has conceded that it has failed to prove the age of the complainant.
- [5] It is trite that in a section 112(2) statement, an accused person must admit all the elements of the offence in question. The written statement must detail the facts upon which the guilty plea is premised. The appellant's counsel has correctly conceded that the appellant in his section 112(2) statement has admitted all the elements of the offence and she does not find anything to fault his conviction. The court is satisfied that the appellant in his section 112 (2) statement has admitted all the elements of the offence and has been correctly convicted.
- [6] Turning to sentence, it is trite that sentencing is the prerogative of the trial court, and should not lightly be interfered with. An appeal in which the interference with the sentence will be justified is when it is found that the trial court has misdirected itself in some respect or if the sentence imposed was so disturbingly disproportionate that no reasonable court would have imposed it. The test is not whether the trial court was wrong, but whether it exercised its discretion properly. (See *S v Romer*[1]).

- [7] The appellant was sentenced to imprisonment for life on the basis that the victim was under the age of 16 years at the time she was raped. In this case as per the charge sheet the victim was aged 10 years. The appellant in his section 112 (2) statement merely stated that he realised after the sexual intercourse that the complainant is a young girl. There is nowhere in his statement where he has made an admission as to the age of the complainant.
- [8] Despite that short coming in the appellant's statement, the State never proved the age of the complainant. The age of the complainant has to be proved beyond reasonable doubt, because it is a vital element in the determination by the trial court whether a prescribed minimum sentence has to be imposed. It is trite that the age of the complainant could be proved by the evidence of her mother or someone else present at her birth or by the production of her birth certificate. (See *Lubando v The State* [2016] ZASCA 4 (1 March 2016)). In my view the court a quo erred in sentencing the appellant to life imprisonment despite the State failing to prove the age of the complainant.
- [9] In the light that the State has failed to proof the age of the complainant, the rape which the appellant was convicted of falls within the ambit of Part III of Schedule 2 wherein the prescribed minimum sentence for a first offender is 10 years, second offender 15 years, and third offender 20 years. Counsel for the appellant has submitted that appellant is having two previous convictions for rape. Counsel for the appellant could not advance any argument showing that there were substantial and compelling circumstances that warrant a deviation from the prescribed minimum sentence.

[10] In the result the following order is made.

10.1 The appeal against conviction is dismissed

10.2 The appeal against the sentence of life imprisonment is upheld. The sentence is set aside and replaced with the following:

"The accused is sentenced to 20 years imprisonment ante dated to the 23rd May 2017".

MF. KGANYAGO

JUDGE OF HIGH COURT OF SOUTH AFRICA, LIMPOPO DIVISION, POLOKWANE

I AGREE

MV SEMENYA

JUDGE OF THE HIGH COURT OF SOUTH AFRICA, LIMPOPO DIVISION, POLOKWANE

APPEARANCE:

COUNSEL FOR THE APPELLANT : Ms MOHLAKA

INSTRUCTED BY

: LEGAL AID SA

COUNSEL FOR THE RESPONDENT : Adv. JJ KOTZE

INSTRUCTED BY

: DPP

DATE OF HEARING

: 22 MARCH 2019

DATE OF JUDGEMENT

: 29 APRIL 2019

[1] 2011(2) SACR 153(SCA) at Para 22 & 23

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