

SOUTH AFRICA / JUDGMENT

Msiza v S (AA06/2023) [2024]

ZALMPPHC 108 (3 September 2024)

[2024] ZALMPPHC 108

COURT

Limpopo High Court, Polokwane

BEFORE

Mogale-Makinta, Tshidada

CASE / FILE NUMBER

AA06/2023

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REPUBLIC OF SOUTH

AFRICA

IN THE HIGH COURT OF

SOUTH AFRICA

LIMPOPO DIVISION,

POLOKWANE

Appeal Case No: AA06/2023

High Court No: CC65/2016

(1)

REPORTABLE: NO

(2)

OF INTEREST TO THE JUDGES: NO

(3)

REVISED: NO

DATE: 03 SEPTEMBER 2024

SIGNATURE:

In the matter between: THABANG LAWRENCE
 MSIZA
 APPELLANT
And
 THE STATE
 RESPONDENT

JUDGEMENT

MOGALE-MAKINTA, AJ

INTRODUCTION

[1] This is an appeal against the sentence handed down in the High Court Limpopo Division, Polokwane, by Kgomo J on 29 June

2018. The appellant was found guilty and sentenced as follows:

1.1. Count 1: Sexual assault (contravention of section 3 of the Criminal law Amendment Act 32 of 2007)- 10 years imprisonment;

1.2. Count 2: Theft- 6 years imprisonment;

1.3. Count 3: Rape (contravention of section 3 of the Criminal Law Amendment Act 32 of 2007)- Life imprisonment;

1.4. Count 5: Rape - Life imprisonment:

1.5. Count 6: Robbery with aggravating circumstances- 15 years imprisonment;

1.6. Count 7: Rape (contravention of section 3 of the Criminal Law Amendment Act 32 of 2007)- Life imprisonment;

1.1.1 The sentences in counts 1. 2. 3, 5. and 6 were ordered to run concurrently with the sentence in court 7; the effective sentence that the accused is to serve is one life imprisonment.

[2] Leave to appeal the sentence was granted by the court a quo of this division on 13 November 2019.

GROUND OF APPEAL

[3] The appellant raised the following as his grounds of appeal:

- a. The court erred and misdirected itself, having convicted the appellant of sexual assault on count 1 but pronounced that he was sentenced to 10 years imprisonment for Rape. Having convicted the appellant of theft on count 2 but pronounced that the appellant was sentenced to 6 years imprisonment for Robbery with aggravating circumstances.

- b. The court a quo erred in sentencing the appellant to life imprisonment in count 3, which is harsh, disproportionate, and unjust under the circumstances of this case and induces a sense of shock.
- c. The court erred in sentencing the applicant to life imprisonment despite the fact that the complainant's age was not proven.
- d. The court erred in imposing a sentence of life imprisonment on count
- 5. The applicable minimum sentence at the time of the commission of the offence was 10 years imprisonment.
- e. The court erred in imposing a sentence of life imprisonment in count 7, which is harsh and disproportionate and induces a sense of shock.
- f. The court erred in finding that there are no substantial and compelling circumstances by not considering the appellant's personal circumstances and the circumstances of this case cumulatively to constitute substantial and compelling circumstances.
- g. In imposing the sentence of life imprisonment on counts 5 and 7, the court misdirected itself in that it did not find or show any jurisdictional facts that justified the imposition of a sentence of life imprisonment. It is not enough that the state has charged and indicted the appellant in terms of section 51(1) of Act 105 of 1997; the court still needs to make a finding based on the facts which justify the imposition of such a sentence and that on the record it's not clear on what basis did the court impose the sentence of life imprisonment.

SUMMARY OF EVIDENCE

- [4] R[...] L[...] S[...], a complainant in counts 1 and 2, was walking from church to her home around 20:00 when an unknown man approached her, produced a knife, and placed it on her neck, demanding silence and compliance from her. She was dragged to the side of the road and thrown to the ground. The man inserted his penis inside her mouth until he ejaculated inside her mouth. The man took possession of her bag, which had some of her items, including her Samsung cellphone. She was able to recognize the appellant when his penis was inside her mouth as his face was not covered, and the following week, as she was walking from school, she met the appellant. She told her friend Sabata that "this is the man who raped me." She recognized her Samsung cell phone at Zihle's homestead and later informed the police.
- [5] P[...] M[...], a complainant in count 3, boarded a taxi from school and alighted where she was supposed to walk towards her home. It was around 18h30, and it was dark. As she was walking, she was grabbed from behind by her neck and violently thrown to the ground. She was dragged to the side of the road and threatened with death if she screamed. The man undressed her and inserted his penis into her vagina, and raped her. She recognized the appellant by his voice and called him by his name, "Thabang," which the appellant disputed. She knew the appellant very well as they attended the same

church choir and as a child who grew up and stayed together in the same village. She reported the matter to the police, and the

appellant was arrested.

[6] H[...] K[...] N[...] M[...]. a complainant in counts 4, 5 and 6. alighted from the taxi at around 19h00. Walking towards her home, she became aware that someone was following her. She decided to run, but this person caught up, grabbed her, and demanded money. However, she did not have money, so she gave this person her cellphone, who she recognized by a male voice as a person. The man told her that because she didn't have money, she would have to - pay with her body. She was

threatened with a knife, undressed, and ordered to bend forward while naked. The man raped her. She later reported the matter to the police. She took the police to the scene, and they found her stocking that the man had used to wipe his private parts with after raping her.

[7] M[...] K[...] was coming from her boyfriend when she came across a man wearing sangoma cloth on his waist and wrist and some dreadlocks on his head. As she wanted to board a taxi, she asked the man for money to board a taxi. The man suggested they walk together to his house to get the money. On the way, the man produced a knife, undressed her, and inserted his penis into her vagina. He raped her but ejaculated outside on the ground. He raped her on the second occasion but could not ejaculate. She made the report to the police and was examined at the hospital.

[8] During cross-examination, the appellant's evidence was a bare denial on counts 1 to

3. In counts 4 to 7, the appellant raised an alibi by stating that he was training in Thembisa as a Sangoma during the alleged period. There was no witness called to corroborate his alibi. The appellant was linked by the DNA in the rape counts and Identification parade. Complainants in counts 1 to 3 knew the appellant well before the incidents.

MITIGATION OF SENTENCE

[9] The appellant, at the time of sentence, was 23 years old. Count 1 to 3 was committed when he was 17 years old count 5 to 6 was committed in 2014 when he was 19 and count 7 in 2015 when he was 20. He placed his personal circumstances on record that he has a minor child who depends on him for support, parents who are pensioners, and the mother of his minor child, who is also unemployed. He trained and worked as a sangoma and was the sole provider to his family.

[10] The State did not prove any previous convictions against the appellant. The appellant did not submit the pre-sentencing report in mitigation of the sentence, and the respondent submitted victim impact reports in aggravation of the sentence.

COMMON CAUSE FACTS

- [11] From issues raised as grounds of appeal, the following are common cause between the parties. The appellant's counsel conceded that the sentence of 10 years imprisonment was imposed on count 1 after the appellant was convicted of sexual assault, not rape. The sentence of 6 years imprisonment for Robbery with aggravating circumstances on count 2 after pronouncing the conviction on theft is a misdirection. The child's age in count 3 was not proven by either the birth certificate or the parent's testimony confirming the minor child's age. The appellant was sentenced to life imprisonment in count 5, whereas the applicable minimum sentence at the commission of the offence was 15 years imprisonment. Therefore, imposing a sentence of life imprisonment on counts 3 and 5 is a misdirection that needs interference.
- [12] Based on these concessions, the appeal court finds that interference is justified in counts 2 and 3, as alluded to by counsel.

THE RECORD

- [13] Reading from the trial records, the appeal court became aware of the miscarriage of justice relating to the appellant's age during the commission of counts 1 to 3. Counts 1 and 2 relate to the complainants, R[...] L[...] S[...], and count 3 is P[...] M[...]. The trial record established that the appellant was 17 years old when offences in counts 1 to 3 were committed between 11 April 2012 and 18 April 2012[1].
- [14] Based on this evidence on record, it is clear that the trial court did not consider the age of the appellant when dealing with counts 1 to 3 and also erred by not dealing with the appellant in terms of the Child Justice Act[2].
- [15] These issues were not the subject matter of the appeal or raised by the appellant in their grounds of appeal. Since the intention of the Court of Appeal is to dispense justice, this appeal court cannot close its eyes to a patent injustice simply because the injustice is not the subject of the appeal.[3]
- [16] "Section 322(1)(a)[4] empowers the appeal court to allow the appeal if it thinks that the judgment of the trial court should be set aside on the grounds of a wrong decision of any question or law or that on any ground, there was a failure of justice." Therefore, it is necessary to deal with the law applicable when the courts deal with young offenders.

The law applicable when dealing with young offenders

- [17] Section 77 of the Child Justice[5], states that:
- (3) A child who is 14 years or older at the time of being sentenced for the offence may only be sentenced to imprisonment if the child is convicted of an offence referred to in (a) Schedule 3(b) Schedule 2 if substantial and compelling reasons exist for imposing a sentence of imprisonment.

- (c) Schedule 1, if the child has a record of relevant previous convictions and substantial and compelling reasons exist for imposing a sentence of imprisonment
- (4) A child referred to in subsection (3) may be sentenced to a sentence of imprisonment –
 - (a) for a period not exceeding 25 years; or
 - (b) envisaged in section 276 (1) of the Criminal Procedure Act.
- [18] The Constitution prescribes that it is an established law that child offenders should be given special treatment and sentences that

are more lenient than those imposed on adults. Section 28(2) provides that the best interests of the child are paramount in every matter concerning them, and section 28(1)(g) states that children should not be imprisoned except as a measure of last resort.

[19] In *S v N and Another*[6] Binns-Ward J held as follows:

"When a person commits an offence while under the age of 18, their conduct falls to be judged in the context of these considerations. It would make no sense then to treat them as adults for sentencing simply because the intervening passage of time has resulted in them being adults when sentencing occurs. That would mean punishing them for what they had done as children as if it had been done when they were adults. That such an approach would impinge on the substance of the rights provided in terms of s 28 of the Constitution is axiomatic."

[20] The Child Justice Act protects Children's Constitutional Rights when children conflict with the law. The challenge to the sentence of this court is based on how the trial dealt with the child offender and by sentencing the appellant in terms of the Minimum Sentencing Act instead of the Child Justice Act. The trial court's failure to apply the applicable legislature when dealing with the appellant as the child offender constitutes an irregularity. Therefore, due to the irregularity committed, the appeal court must set aside the sentence imposed in counts 1 to 3.

[21] The other misdirection established from the trial record concerns count 6. The appellant was convicted and sentenced for robbery with aggravating circumstances, whereas evidence in count 6 proves that an offence of theft was committed.

[22] The evidence of Ms. K[...] N[...] M[...] the complainant in count 6, is summarized as follows:

"As I was walking behind the clinic, I noticed that there was someone following me.

Then I started to run; he was closer. When he arrived, he grabbed me from behind and said I should give him my phone. I gave him the phone and then he said I should give him money. I told him that I did not have money, and after I told him that I did not have money, he said that I would pay with my body.[7]

[23] The record of the proceeding shows that no aggravating circumstances were present when the complainant's phone was taken from her possession. Therefore, a conviction and sentence for robbery with aggravating circumstances is a misdirection that warrants interference. Thus, this court is obliged to impose an appropriate sentence relevant to the crime of theft.

AD SENTENCE

[24] There are well-established principles governing the hearing of appeals against sentences. In short, punishment is pre-eminently a matter of the trial court's discretion, and the court of appeal should be careful not to erode that discretion. Interference is only warranted if it is convincingly shown that the discretion has not been judicially and properly exercised. The test is whether an irregularity or a material misdirection vitiates the sentence imposed or is disturbingly inappropriate.

[25] This principle was echoed in *S v Van Wyk and Another*[8] the SCA held that:

“it would interfere with sentences imposed by a trial court only where the degree of disparity between the sentence imposed by the trial court and the sentence the appeal court would have imposed was such that interference was competent and required. But then, the court cautioned, the appellate court needed to have a definite view of what sentence it would have imposed, even if it could only identify a particular range within which it would have imposed the sentence.”

[26] The imposition of a sentence is pre-eminently a matter for the trial court's discretion. The trial court is free to impose whatever sentence it deems appropriate if it exercises its discretion judicially and properly. In *S v Pillay*,[9] the court said:

"As the essential enquiry in an appeal against sentence, however, is not whether the sentence was right or wrong but whether the Court in imposing it exercised its discretion properly or judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence, it must be of such a nature, degree or seriousness that it shows, directly or inferentially, that the court did not exercise its discretion at all or exercised it improperly or unreasonably. Such misdirection is usually and conveniently termed one that vitiates the court's decision on the sentence."

[27] The appellant raised the ground of appeal that the court erred by not giving its reasons for imposing the sentence of life imprisonment in count 7. It is evident from the trial court that the appellant in count 7 was charged and convicted for raping M[...] K[...] more than once, which falls within the purview of Section 51(1) of the Criminal Law Amendment Act 105 of 1997.

[28] The general approach to impose sentences in terms of the Minimum Sentencing Act was considered in *S v Malgas*, and the relevant principles were summarized:

"[25] What stands out quite clearly is that the courts are a good deal freer to depart from the prescribed sentences than has been supposed in some of the previously decided cases and that it is they who are to judge whether or not the circumstances of any particular case are such as to justify a departure. However, in doing so, they are to respect and not merely pay lip service to the legislature's view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of the specified kind are committed".

Section 51[10] has limited but not eliminated the courts' discretion in imposing sentences in respect of offences referred to in Part 1 of Schedule 2. The courts are also required to approach the imposition of sentence conscious that the Legislature has ordained life imprisonment as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.[11]

The Legislature has, however, deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored. The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yard-stick, compelling, and substantial circumstances. It must cumulatively justify a departure from the standardized response that the Legislature has ordained."

[29] The trial court considered his youthfulness, personal circumstances, and the crime and weighed against the aggravating circumstances of this matter. The court a quo also finds that the appellant failed to show remorse because a remorseful person would not go out when his case is running and commit a similar offence. Although the appellant was still relatively young, his modus operandi during the commission of these offences indicates that the appellant needed help that could only be obtained in the correctional facility to be rehabilitated.

[30] After considering and contrasting the circumstances against the aggravating circumstances, the trial court found that no substantial and compelling circumstances warranted deviation. The appeal court agrees with the findings of the court a quo on the lack of substantial and compelling circumstances justifying the imposition of a lesser sentence other than the one prescribed by the Act.

[31] Consequently, the following order is made;

31.1. The appeal against the conviction and sentence in counts 1-3 is hereby upheld.

31.2. The appellant's conviction and sentence is set aside on counts 1-3, and the appellant is found not guilty and discharged.

31.3. The sentence of the trial court in counts 5 and 6 is set aside and replaced with the following order:

31.4. Count 5: Rape- The sentence of life imprisonment is substituted by a sentence of 15 years imprisonment

31.5. Count 6: Theft- The sentence of 15 years imprisonment is substituted by a sentence of 3 years imprisonment.

[32] The sentences in counts 5 and 6 run concurrently with the sentence in count 7. Thus, the appellant is effectively sentenced to life imprisonment.

MOGALE-MAKINTA

ACTING JUDGE OF THE HIGH COURT,

LIMPOPO DIVISION, POLOKWANE.

TSHIDADA

JUDGE OF THE HIGH COURT,

LIMPOPO DIVISION POLOKWANE

MONENE

Electronically submitted.

Delivered: This judgment was prepared and authored by the judges whose names are reflected and handed down electronically by circulation to the parties/their legal representatives by email. The date for hand-down is deemed to be 03 September 2024

DATE OF HEARING : 31 May 2024 DATE OF JUDGEMENT : 03 September 2024 APPEARANCES
FOR THE APPLICANT : DJ Nonyane INSTRUCTED BY : The Legal Aid SA FOR THE DEFENDANT :
R E Masutha INSTRUCTED BY : The Director of Public Prosecutions

[1] See record volume 3 of 4, page 320, para 13-21

[2] Act 75 of 2008

[3] S v Toubie 2012 (4) ALL SA 290

[4] Criminal Procedure Act 51 of 1977

[5] Act 75 of 2008

[6] (WCC) (unreported case no SHE 59/14, 9-1-2025) (Binns-Ward J)

[7] See Record Volume 1 of 4, page 78, para 5-10

[8] 2015(1) SACR 584 (SCA) at 31-32

[9] 1977(4) ALL SA 713(A) 717 535 F-G

[10] Minimum Sentencing Act 51 of 1997

[11] See Malgas supra

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