

SOUTH AFRICA / JUDGMENT

Nkopane v S (A185/2019) [2020] ZAGPPHC 799 (11 December 2020)

[2020] ZAGPPHC 799

COURT

North Gauteng High Court, Pretoria

BEFORE

T.A. Maumela, C M Sardiwalla

CASE / FILE NUMBER

A185/2019

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

(NORTH

GAUTENG HIGH COURT, PRETORIA)

(1) REPORTABLE: YES /

NO.

(2) OF INTEREST TO OTHER

JUDGES: YES / NO.

(3) REVISED.

DATE

11/12/2020

Case No: A 185/2019

In

the matter between:

Thuntsi
Francis Nkopane
Appellant
And
The
State

JUDGMENT

Maumela J.INTRODUCTION.

1. This is an appeal against sentence only. The Appellant is Thuntsi Francis Nkopane, a male who was 46 years of age at the time he was arrested. Before the Regional Division of North Gauteng held at Sebokeng, (the court a quo), Appellant who was legally represented was charged with the following two counts. 1.1. Count 1: Attempted Rape. Contravening section 3, read with sections 1, 55, 56, 57, 58, 59, 60, 61 and 71 (1), (2), and (6) of the Sexual Offences Act: (Act No 32 of 2007), read with sections 92 (2), 94, 256, 257, and 281 of the Criminal Procedure Act: (Act No 51 of 1977). Attempt to commit a sexual offence. 1.2. Count 2: Rape. Rape in contravention of section 3, read with sections 1, 56(1), 57, 58, 59, 60 and 61 of the Sexual Offences and Related Matters Amendment Act 2007: Act No 32 of 2007, read with the provisions of Section 51 and Scheduled 2 of the Criminal Law Amendment Act 1997:(Act No 105 of 1997).THE ALLEGATIONS.
2. 2.1. In Count 1, the allegations against the Appellant were that during 2016, in Evaton in Gauteng, the accused did unlawfully and intentionally attempt to insert his penis into the vagina of S[....] M[....], a 10-year-old girl. 2.1. In Count 2, the allegations against the Appellant were that upon or about the 26th of June 2016, and at or near Evaton in the District of Gauteng, the accused did unlawfully and intentionally commit an act of sexual penetration with the complainant to wit, S[....] M[....], a 12-year-old female.
3. Before the court a quo, the charges were put. The Appellant understood the charges put. He also understood the implications of section 51 (1) and Schedule 2 of the Criminal Law Amendment Act being read with Count 2 where it concerns sentence. The Appellant understood them. After his legal representative consulted with him, he pleaded Guilty to both counts. He submitted a statement encompassing his guilty plea in terms of section 112 (2) of the Criminal Procedure Act. Appellant was convicted on both counts. The age of the victim at the time each of the two offences was committed namely 10 and 12 years of age respectively, was common cause among all parties.
4. Appellant was sentenced to 15 years' imprisonment on count 1 and life imprisonment on count 2. Appellant is entitled to an automatic right of appeal in terms of the Judicial Matters Amendment Act: (Act No 42 of 2013). This appeal is specifically against sentence. SUMMARY OF

FACTS.

5. In his statement made in terms of S 112(2) of the Criminal Procedure Act, the Appellant outlined the merits of the case, albeit through his legal representative. Appellant admitted that the complainant, S[....] M[....], is his stepdaughter and was 10 years old at the time the offence in Count 1 was committed in 2016. On the day of commission, he and the complainant was home alone. They were watching television. He called the complainant to

the bedroom and instructed her to take off her panty. He admitted that he then attempted without success to insert his penis inside her vagina. Failing to penetrate her, stopped and both of them put their clothes on.

6. On Count 2, Appellant admitted that on the 26th June 2018, he had sexual intercourse with the complainant who was 12 years old at the time. He stated that on that day, he was home alone with the complainant while the latter's mother had gone to Sharpeville. He stated that he carried the complainant to the bedroom where he took off her jeans pants and panty. He then took off his trouser and underwear. He admitted that he wore a condom and then inserted his penis inside complainant's vagina and he had sexual intercourse with her without her consent. After he had sexual with her, the complainant who was crying, put on her clothes and dashed to the neighbour's house where she reported what had happened to her. The applicable J88, as well as the complainant's birth certificate were handed in by consent as exhibits.
7. Given the nature of the offences committed, the circumstances of the Appellant and the interests of the society, the court is to determine the appropriateness of the sentences imposed by the court a quo on the Appellant. It is trite that appellate courts do not enjoy a free hand with which to interfere with sentences imposed by lower courts. They have to take into regard the offences of which the appellants stand convicted, the interests of the accused and the interests of the

community. In doing so, they have to look closely at the sentences imposed upon the appellants. They then have to contrast that with the offences committed, the personal circumstances of the appellants and the interests of the community. Our law dictates that Appellate courts may only interfere with sentences imposed by lower courts if such sentences prove to be a result of misdirection on the part of the lower courts. PRE-SENTENCE REPORT.

8. Ms. D. Ramoolla compiled a pre-sentence report relevant to this case. In the report, the following personal circumstances of the Appellant were outlined: - The appellant was 46 years old;- He is the 8th child of his parents' 9 children;- Both his parents are deceased;- He got married in 2003. He separated from his wife in 2010 but the two have not obtained a decree of divorce.- Appellant has two children from the marriage aged, 14 years old and 10 years old. The children reside with their mother;- From 2013, Appellant and the complainant's mother resided together. He has no children with the complainant's mother;- The complainant's mother is unemployed and she and her two children depended on the Appellant financially;- Appellant is employed as a reservist under the South African National Defence Force;- He earns R 6000- 00 per month;- He pleaded guilty and - He is a first offender.
9. Our courts have held the view that sentences imposed on offenders should always be tinged with mercy. In the case of *S v Rabie*[1], at page 861D et seq, Holmes JA stated: "Then there is the approach of mercy or compassion or plain humanity. It has nothing in common with maudlin sympathy for the accused.

While recognising that fair punishment may sometimes have to be robust, mercy is a balanced and humane quality of thought which

tempers one's approach when considering the basic factors of letting the punishment fit the criminal, as well as the crime and being fair to society." The concept of mercy has been recognised by the courts of this country.

MITIGATION.

10. Towards mitigation of sentence, the following was submitted on behalf of the Appellant:
10.1. That he is a first offender. 10.2. That before his arrest, he was employed and he is a soul bread-winner. 10.3. That Appellant pleaded guilty and therefore showed contrition for the crimes committed. 10.4. That he is a good candidate for rehabilitation. 10.5. That Appellant spent over 6 months in custody awaiting trial. AGGRAVATION.
11. The state on the other hand submitted the following towards aggravation of sentence: 11.1. That the offences that were committed are very serious. 11.2. That on the occasion of the commission of both counts, the victim was a very little child. 11.3. That the Appellant was in a love relationship with the mother to the victim and was therefore placed in a position of trust which he abused. 11.4. That the negative effect of the crimes on the child victim is likely to be life-long. 11.5. That crimes of the nature of the ones in this case are very rife locally, nationally and internationally.
12. In the case of *S v Zinn*[2], the court stated that in imposing sentence, the court has to take into consideration, the crime committed, the interests of the accused, and the interest of the community. The three aspects to be taken into regard for purposes of determining a fitting sentencing are referred to as the 'sentencing triad'. In the case of *S v Kumalo*[3], the court stated the following: "Punishment must fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances".
13. The appellant does not have any previous convictions. He is a first offender. Appellant does not appear to be a hardened criminal who is beyond rehabilitation. That he pleaded guilty may indicate that he is remorseful and is a candidate for rehabilitation. However, rape is a very serious offence. The complainant was a notable minor at the time of the incident. The physical, emotional and psychological trauma sustained by the complainant cannot be ignored. The court is mindful

that in sentencing, it ought to stop short of taking revenge. In the case of *S v Vilakakazi*[4], the court stated: "Punishing a convicted person should not be linked to taking revenge. It must have all the elements and purposes of punishment prevention,

retribution, individual and general deterrence and rehabilitation." THE CRIMINAL LAW AMENDMENT ACT.

14. In Count 2 Appellant was charged with the offence of contravening the provisions of the Sexual Offences Act. The charge is read with the provisions of Section 51 (1) of the Criminal Law Amendment Act. Under this section and relevant to this case, this subsection prescribes Life Imprisonment in the event of conviction on offences falling under schedule 2. In that regard this sub-section reads as follows: “51. (1). Notwithstanding any other law but subject to subsections (3) and (6). a High Court shall, if it has convicted a person of an offence referred to in Part I of Schedule 2, sentence the person to imprisonment for life.”
15. In prescribing minimum sentences to be imposed in the event of conviction on offences listed in Schedule 2, the Legislature provided lee-way towards avoiding the imposition of minimal prescribes sentences. In that regard, Section 51 (3) (a) of the Criminal Law Amendment Act provides the following: “If any court referred to in subsection
 - (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence: Provided that if a regional court imposes such a lesser sentence in respect of an offence referred to Part 1 of Schedule 2, it shall have jurisdiction to impose a term of imprisonment for a period not exceeding 30 years.
16. The essence of the above is that where the court is satisfied that in the event of conviction on an offence the culprit of which is liable for a minimum prescribed sentence, the court may determine whether substantial and compelling circumstances are attendant to the person of the accused on the basis of which the court may be justified in avoiding the imposition of such a sentence.
17. It is common knowledge that in our law there is no closed list of personal circumstances that are regarded to constitute substantial

and compelling. The legislature has left it to be the call of the trial judge in every case to determine whether the circumstances of the accused do, or do not rank as substantial and compelling. In the case of *S v Malgas*[5], at page number 1233G-1234A, the court held as follows: “the absence of any pertinent guidance from the legislature by way of definition or otherwise as to what circumstances should rank as substantial and compelling or what should not, does not make the task any easier...it has deliberately and advisedly left it to the courts to decide in the final analysis whether circumstances of any particular case for a departure from the prescribed sentence. In so doing, they are required to regard the prescribed sentence as being generally appropriate for crimes of the kind specified and enjoined not to depart from them unless they are satisfied that there is weighty justification for doing so. A departure must be justified by reference to circumstances which can be seen to be substantial and compelling as contrasted with circumstances of little significance or of debatable validity or which reflect a purely personal preference unlikely to be shared by many.”

18. The legislature has determined that where the court opts to deviate from the prescribed minimum sentence, it ought to list those of the circumstances of the accused which it regards as ranking in the fold of what can be regarded as substantial and compelling.[6]
19. It is trite that it can happen that where the circumstances attendant to the person of the accused on an individual basis do not rank as substantial and compelling, they may do so, when weighed up cumulatively. In the matter of *S v Blignaut*[7] the court held that the cumulative effect of mitigating factors constitutes substantial and compelling circumstances and a departure

from the prescribed minimum sentence was justified on the basis that such a sentence would be disproportionate to the crime, the criminal and the legitimate interest of the community.

20. However, it has to be kept in mind that courts have been warned against deviating from the imposition of prescribed minimum sentences on the basis of 'flimsy' reasons. In the case of *S v Malgas*[8], the court stated as follows: "Courts are required to approach the imposition of sentence conscious that the Legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances. Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts. The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded. 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. All factors (other than those set out above) traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process. 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 yardstick ('substantial and compelling') and must be such as cumulatively justify a departure from the standardised response that the Legislature has ordained."
21. Whether taken individually or cumulatively, none of the personal circumstances of the Appellant can be seen to be substantial and compelling. They come across as any circumstances that are ordinarily attendant to the persons of people who appear before courts on a daily basis that get convicted of offences. The court finds no basis on which to avoid the imposition of the prescribed minimum sentence.

22. In the result, the appeal against sentence stands to be dismissed, The following order is made:ORDER1. The appeal against sentence is dismissed.T.A. MAUMELA.Judge of the High Court of South Africa.

and

C M SARDIWALLA

Judge of the High Court of South Africa.

[1]. 1975 (4) SA 855 (A).

[2]. 1969 (2) SA 537 (A).

[3]. 1973 (3) SA 697 (A), at 698 a.

[4]. 2009(1) SACR 552 (SCA).

[5]. 2001 (2) SA 1222 (SCA).

[6]. See Subsection 51 (3), noted under paragraph 13 above.

[7]. 2008(1) SACR 78 (SCA).

[8] . 2001 (2) SA 1222 (SCA).

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