

SOUTH AFRICA / JUDGMENT

Nogoli v S (CA & R 8/2018) [2018] ZANCHC 57 (18 June 2018)

[2018] ZANCHC 57

COURT

Northern Cape High Court, Kimberley

BEFORE

N Mbalo, CC Williams

CASE / FILE NUMBER

CA&R 8/2018

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IN

THE HIGH COURT OF SOUTH AFRICA

(NORTHERN

CAPE HIGH COURT, KIMBERLEY)

Case

no: CA&R 8/2018

HEARD

ON: 04-06-2018

DELIVERED:

18-06-2018

In

the matter between:

Frank

Nogoli

Applicant

And

The

State

Respondent

CORAM:

WILLIAMS ADJP et MBALO AJ

JUDGEMENT

MBALOAJ

INTRODUCTION

1. The appellant was convicted in the Regional court, Kimberley on a charge of rape in contravention of section 3 of Act 32 of 2007 on 24 November 2017. The complainant was a 15 year old girl thereby rendering the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997 (the Act) applicable.
2. Having considered all the merits and demerits of the case, the regional magistrate convicted the appellant as charged. With the evidence presented during the sentencing proceedings, the regional magistrate came to the conclusion that there were no substantial and compelling circumstances persuasive enough for the court to deviate from the imposition of life imprisonment.

FACTUAL**BACKGROUND**

3. The factual matrix of the case has to be documented and it goes thus:

The complainant was a 15 year old scholar doing grade 8 at the crucial time, 13 November 2013. By this time, she was about to write her school examination. As such, all pupils were furnished with an exam time table. Unfortunately for the complainant, she lost her time table and only realised this while already at home.

4. At home she resided with her aunt in Bloemanda, here in Kimberley. This aunt happened to be very strict with the complainant. Fearing that her aunt would castigate her for having lost the time table, the complainant resolved to do all her house chores and when she was done, to get the time table from her class mate. By the time that the complainant went to get the time table it was already about eight o'clock in the evening.
5. While on the way, the complainant came across the appellant whom she only knew by sight. She got pulled by her T-shirt by the appellant, simultaneously being threatened to be stabbed if she does not refrain from screaming. The pulling lasted till the complainant was taken to the back of the old creche building. Behind this building, the complainant was tackled to the ground and was sexually penetrated. The complainant was left to fend for herself and was luckily without any physical injuries except for the emotional scarring that eventually made her to repeat her school grade to a point of eventually dropping out of school.

6. After the rape, the appellant vanished from the scene and was untraceable to the law enforcement agencies. It was by chance that the appellant was arrested in another matter and got linked to this case by the DNA sample that was lifted at the crime scene. The date of this arrest is 17 February 2017.
7. During the trial, the appellant pleaded consent which got rejected by the trial court. In mitigation of sentence, the appellant's personal background was revealed as follows: He was 24 years old at the time of the commission of the crime and 29 years at the time of sentencing. His level of education is grade 11. He is married through Muslim Rights and out of this marriage, two children were born and they are 11 and 7 years old respectively. Both children reside with their maternal grandfather. Due to his incarceration, the wife of the appellant has since moved on with her life. Prior to his arrest, the appellant used to work at Shoprite as a trolley pusher and would generate an income of R780.00 per month. He had an additional income derived from the rental of his parental home. This rental of R3000, 00 would be shared amongst the siblings of the appellant.
8. The appellant spent 4 months and 11 days in custody while awaiting the finalisation of the case. He is not a first offender at court, there are the SAP 69 records revealing that: On 29 February 2012, the appellant was convicted of assault common and was cautioned and discharged. On 12 May 2016, he was convicted of robbery and was sentenced to a 3 year term of imprisonment with the provisions of sec 276(1) (i) incorporated into the sentence.
9. It is out of this total sum of summarised facts, some of which I shall later allude to in this judgment, that the regional magistrate found no substantial and compelling circumstances. The result of this finding was the imposition of life imprisonment.
10. Aggrieved by the finding of the regional court, the appellant moved an appeal to this court that the sentence be set aside and be replaced with a lesser sentence of direct imprisonment.

PARTIES'SUBMISSIONS

11. The major ground of the appeal which is in essence conceded by the state is that, the sentence of the regional court is shockingly

disproportional to the surrounding facts of the case. That the regional magistrate failed to accord due weight to the personal

background of the appellant, and that the imposition of life imprisonment was a mere compliance with section 51 (1) of the Act due to the complainant being under the age of 16 years. It is contended further that the court a quo failed to consider that the complainant in the case was merely five months away from being a 16 year old, and had she only been five months older this rape would have fallen within a 10 year term of imprisonment.

THE LAW

12. The starting point is to acknowledge that an appeal court will interfere with the sentence only where such sentence is shown to be inappropriately harsh and or is as a result of a material misdirection. See *S v SHAPIRO* 1994(1) SACR 112 (A) 119J-120C.
13. Further one must be alive to various legal authorities that the minimum sentences are not to be departed from out of any flimsy

reasons, the converse holds true that, the same minimum sentences are not to be followed blindly. The sentencing court is still duty bound to apply its mind fully during sentencing. With the minimum sentencing regime the sentencing court must search with due diligence for factors that are substantial and compelling.

14. Since the prescribed minimum sentence legislation is applicable to this case it is apposite to refer to: *S v VILAKAZI* 2012(6) SA 353(SCA) par 15 that:

"It is clear from the terms in which the test was framed in *Malgas* and endorsed in *Dodo*[*S v DODO* 2001(3) SA 382 (CC)] that it is incumbent upon a court in every case, before it imposes a prescribed sentence, to assess, upon a consideration of all the circumstances of the particular case, whether the prescribed sentence is indeed proportionate to the particular case, whether the prescribed sentence is indeed proportionate to a particular offence. The Constitutional Court made it clear that what it meant by the "offence" in that context (and that is the sense in which I will use the term throughout this judgment unless the context indicates otherwise)-

'Consists of all factors relevant to the nature and the seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence and the culpability of the offender'

If a court is indeed satisfied that a lesser sentence is called for in a particular case, thus justifying a departure from the prescribed

sentence, then it hardly needs saying that the court is bound to impose that lesser sentence. That was also made clear in *Malgas*,

which said that the relevant provision in the Act-

'Vests the sentencing court with the power, indeed the obligation, to consider whether the particular circumstances of the case require a different sentence to be imposed. And a different sentence must be imposed if the court is satisfied that substantial and compelling circumstances exist which 'justify'

...It. "

ANALYSIS

15. From the legal position cited in *Vilakazi supra*, it behoves this court to determine if the court a quo necessary determination in concluding that there are no substantial and compelling circumstances to deviate from the life imprisonment. In the exercise of her discretion, the

regional magistrate held the view that, "Accused's personal circumstances are not the only aspects or factors to be considered, specifically his previous convictions, I am specifically pointing out the previous convictions, because in my view from his nothing stands out in his favour."

With regard to the crime and its impact on the victim, the regional magistrate stated *inter alia* that, "Rape not only affects the individual physically, but as indicated emotionally and otherwise and most of the time when we read articles written from rape survivors and so forth, one finds in different magazines and articles, one finds that the victims take longer to process and move on from these types of incidents. I indicate that Complainant wanted to take her life, because we know when a person cuts herself, as she did in this instance, the self-inflicted wounds, they wish to take their lives from what or after what happened."

16. Gleaning from the reasoning of the regional magistrate as truncated, there are a series of serious misdirection she committed, namely there is nowhere from the record evidence by the complainant that she attempted to commit suicide. The J88 medical report also noted these self-inflicted injuries but without noting if these injuries were either fresh, healing or old injuries. The remarks of basing her knowledge from reading magazines, is also unacceptable as magazines are for leisure reading with no legal authority. It was quite a quantum leap for the learned magistrate to assume that we all know why a person will self-inflict injuries. These remarks are a serious misdirection, as a court is only to base a remark on proven facts before court and not to simply generalise and even be creative. There was no victim impact report placed before court nor any evidence by a psychologist being presented at court to support the remarks of the regional magistrate.
17. The second misdirection was the reference to appellant's previous convictions which is also not entirely correct. The appellant has only one previous conviction of assault common out of which he was cautioned and discharged on 29 February 2012. The subsequent

conviction of robbery dated 12 May 2016 is not a previous conviction. This view is supported by the dictum of *R v ZONELE AND OTHERS* 1959(3) SA 319 A at 330. This dictum was quoted with approval in an unreported case of *MAHLASE v THE STATE* (255/2013) [2011] ZASCA 191 (29 May 2013) at par 8 that, a previous conviction may be described as one which occurred before the offence under trial. The subsequent robbery crime was committed on 10 November 2015, and the crime in issue was committed on 14 November 2013.

18. Granted, the sentencing court is entitled to view the subsequent convictions so as to take a wide range of issues into account,

including the bad or good character, the apparent possibilities of rehabilitation and any other factor. See *R v OWEN* 1957(1) SA 458 (458) AD at 462 F- G. However in this case, the court has to consider that the assault common conviction had a lenient sentence, a caution and discharged. This would lead to the reasonable inference that the offence was not of serious nature. Likewise with the subsequent conviction of robbery, the sentence of 3 years with correctional supervision under Section 276(1) (i) also suggests a lesser degree of seriousness. This Court is alive to an

inescapable fact that the appellant displays some tendencies towards violence and this is an aggravating factor against him. However it is still the duty of the sentencing court to be seen to have duly weighed up all the relevant factors.

19. Though the court a quo found that: "the accused is young enough, and even given a long term of imprisonment, to can hopefully rehabilitate and be or do something better with his life or himself',this statement appears to be mere lip service since the regional magistrate proceeds to find that "From the circumstances of this case, all factors placed before Court through the arguments by the State and the Defense, the evidence before sentence and all this that the Court had dealt with to investigate whether there are substantial and compelling circumstances, the Court had come to the conclusion that there are none." The trial court omitted to weigh if the sentence of life imprisonment is proportional or not to the facts at hand. She merely suggested that the life imprisonment is meant only for the appellant to rehabilitate, simultaneously turning a blind eye on the surrounding facts that the rape in issue is not so serious. The complainant was sexually penetrated once; violence used was a mere threat to stab but no knife got produced; the victim suffered no physical injuries.

From these facts as a standalone, the rape could have resorted under Part 3 of Schedule 2, but for the age of the complainant.

20. The complainant was 15 years old at the crucial time. She was short of seven months and sixteen days so reach the age of sixteen.lwas

able to calculate this from the birth certificate of the complainant. She was a teenager or a young girl not a child so to speak.

21. The trial court overlooked these factors. It merely made reference to decided cases of this court but with no specific circumstances of each case. This attempted comparison was no help to this appellate court either.

What was done by the regional court was a failure to recognise that Malgas also cautions that:

When it comes to sentence, the trial court had a clean slate on which to inscribe whatever sentence it thought fit. Therefore the sentencing court has its untrammelled right to decide on an appropriate sentence and that, the prescribed minimum sentences are a mere benchmark that is set by the lawgiver. See also *S v Malgas* 2001(1) SACR 469, par 25

22. The dictum of *S v SMM* 2013 (2) SACR 292(SCA) at 300 clearly warns that:

"Life imprisonment is the most severe sentence which a court can impose. It endures for the length of the natural life of the offender, although release is nonetheless provided for in the Correctional Services Act 111 of 1998.Whether it is an appropriate sentence, particularly in respect of its proportionality to the particular circumstances of a case, requires careful consideration. A minimum sentence prescribed by law which, in the circumstances of a particular case, would be unjustly disproportionate to the offence, the offender and the interests

of society, would justify the imposition of a lesser sentence than the one prescribed by law. As I will presently show, the instant case falls into this category. This is evident from the approach adopted by this court to sentencing in cases of this kind." I fully subscribe to these remarks.

23. In view of all the pinpointed shortcomings, this court is at liberty to interfere with the sentence of the regional court.
24. I had earlier on hinted that, both parties are in ad idem that the sentence of the court a quo is disproportionate to the crime in issue.
25. It is trite that when the court has to consider an appropriate sentence, it is enjoined to consider the purpose of punishment which is inter alia rehabilitation, reformation, deterrence, retribution and punishment. Mercy is an element that has to be factored in.
26. Rape is a crime humiliating as well as degrading to the complainant, and its impact is immeasurable to the survivor. The complainant in this case luckily escaped from physical injuries; she has seemingly moved on with her life, besides the fact that she dropped out of school. The community deserves to live in peace and tranquility, free from any form of violence and those who violate the laws of the Country, especially by raping the vulnerable groups of the society, need to be punished. The impact of the crime on the complainant left her traumatised to an extent of fearing to venture alone in the streets. While the appellant is about 29 years old, a repeat offender for assault common; a father to two minor children now raised by his father in law; would earn a living out of pushing the trolleys at Shoprite; would maintain his children out of his income; he committed this crime with a minimum force or violence, all these considered factors are to be balanced in such a fashion that the offender is not rendered a sacrificial lamb at an altar of deterrence. See also *S v Chapman* [1997] [1997] ZASCA 45; 1997 (3) SA 341(SCA) (345A-B).
27. With all of the above stated, bearing in mind that the purpose of this sentence is largely to punish the appellant and to deter the like - minded; to demonstrate the Court's sensitivity as well as its disapproval of committal of rape crimes, especially against women and children. The following is the order of this court.

ORDER

1. The appeal succeeds.
2. The sentence of life imprisonment is hereby set aside and substituted with the following:
"The accused is sentenced to 15 years imprisonment."
3. The sentence is ante dated to 28 November 2017.

N MBALO

Acting Judge

Northern Cape Division

I concur

CC WILLIAMS

JUDGE

For Appellant: Mr P Fourie

Legal Aid

For Respondent: Adv J Rosenberg

Office of the OPP

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