

SOUTH AFRICA / JUDGMENT

Ntande v S (CA62/2022) [2024] ZANWHC 193 (24 July 2024)

[2024] ZANWHC 193

COURT

North West High Court, Mafikeng

BEFORE

Mfenyana, Du Toit

CASE / FILE NUMBER

CA62/2022

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH

WEST DIVISION, MAHIKENG

CASE

NUMBER: CA62/2022

In

the matter between: -

SISEKO

NTANDE

Appellant

and

THE

STATE

Respondent

Coram:

Mfenyana J et Du Toit AJ

This

judgment was handed down electronically by circulation to the parties' representatives via email. The date for hand-down is deemed to be 14h00 on 24 July 2024.

ORDER

(i)

The appeal is dismissed.

JUDGMENT

MFENYANA J

- [1] The appellant was convicted by the regional court in Klerksdorp, on charges of malicious injury to property (count 1), theft (count 3), kidnapping (count 4) and rape in contravention of section 3 of the Criminal Law Amendment (Sexual Offences and Related Matters) Act 32 of 2007 (read with the provisions of section 51(1) of the Criminal Law Amendment Act (CLAA) [1] (count 6).
- [2] The convictions followed upon his plea of guilty on all charges in terms of section 112 of the Criminal Procedure Act (CPA)[2].
- [3] He was sentenced on 4 September 2019 to:
- 1) 4 years imprisonment in respect of malicious injury to property (count 1).
 - 2) 4 years imprisonment in respect of theft (count 2).
 - 3) 5 years imprisonment inspect of kidnapping (count 4), and
 - 4) Life imprisonment in respect of rape (read with the provisions of section 51(1) of the CLAA.) (count 6)
- [4] The sentences in respect of counts 1, 3 and 4 were ordered to run concurrently with the sentence of life imprisonment, in accordance with section 280 of (CPA).
- [5] By virtue of the fact that he was sentenced to life imprisonment, and in line with section 309(1)(a) of the CPA the appellant has an automatic right to appeal.
- [6] This appeal lies only against his sentence of imprisonment for life in respect of count 6.
- [7] The appeal is opposed by the respondent.
- [8] In his notice of appeal, the appellant sets out the grounds of appeal as follows:
- (i) That the court a quo over-emphasized 'public interest' over the personal circumstances of the appellant and did not consider his personal circumstances, particularly that at the age of 29 he was relatively young and a first offender.
 - (ii) That the sentence is out of proportion to the totality of the facts in mitigation.
 - (iii) That the court a quo did not consider the period of 1 year 11 months which the appellant spent in custody, and
 - (iv) that the sentence leaves no room for the appellant to be rehabilitated and integrated back to society.

[9] It is contended on behalf of the appellant that his plea of guilty is indicative of his remorse and that the court a quo failed to interrogate this. Curiously, this does not form part of the grounds of appeal and was raised for the first time in the heads of argument.

[10] It is further averred that the appellant's age and the fact that he was able to maintain a clean record well into adulthood

should work in his favour. In this submission lies a concession that the appellant cannot be regarded as a callous youth who by virtue of his age, had no appreciation of the effect of his actions.

[11] In the written submissions, Ms Mpulo- Merafe on behalf of the appellant avers that the sentence imposed is disproportionate to the totality of the mitigating factors. Thus, the trial court should have found that substantial and compelling circumstances exist, enabling it to deviate from the prescribed minimum sentence of life imprisonment.

[12] The appellant relies on the decision in *S v Rabie* for the proposition that "punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances." The appellant however does not say how the prescribed minimum sentence does not fit him, or how fairness to society could be achieved in the circumstances. Ostensibly, this should be gleaned from his personal circumstances. We deal with this later in this judgment.

[13] In opposing the appeal, the respondent avers that the appeal enjoys no prospect of success. It further contends that the personal

circumstances of the appellant cannot amount to substantial and compelling circumstances as to have caused the trial court to deviate

from the prescribed minimum sentence. The respondent highlights the fact that the complainant was taken by force from the comfort of her home by the appellant, the only place where she should feel safe. According to the respondent, out of selfishness, the appellant

ignored all this to satisfy his lust.

[14] With regard to the appellant's personal circumstances, the respondent avers that it was the appellant's responsibility to satisfy the court that substantial and compelling circumstances existed for it to deviate, but the appellant failed to do so. When looked at in conjunction with the seriousness of the offence and the interests of society, the respondent's contention is that the court a quo took a balanced approach and did not over-emphasize or under-emphasize one factor over others. Thus, the respondent contends that there was no misdirection by the court a quo in imposing a sentence of life imprisonment.

[15] When it comes to sentencing, the powers of the court of appeal are circumscribed. An appeal court will not lightly interfere with the trial court's exercise of its discretion.[3] It can only do so if there is a material misdirection by the trial court. Even so, such misdirection must be so glaring, and of such a nature that it impairs the decision of the trial court.

[16] In *S v Bogaards*[4], the Constitutional Court noted that a court of appeal can only interfere with a sentence imposed by the trial court,

"...where there has been an irregularity that results in the failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have

imposed it."[5]

[17] It is apposite to consider the provisions of section 51(1) of the CLAA on the basis of which the appellant was sentenced. The section prescribes a minimum sentence of life imprisonment for any person who is convicted of rape where the victim was raped more than once. It is common cause in this case that the complainant was raped twice by the appellant, after kidnapping her while she was trying to hide after the appellant broke into her boyfriend's house. This was admitted by the appellant.

[18] Regarding the contention by the appellant that the court a quo failed to consider his plea of guilty, in sentencing the appellant, the court considered with reference to decided cases that a plea of guilty does not constitute substantial and compelling circumstances. The court dealt with the constitutional implications of such a requirement, which it stated would impact on the rights of accused persons.

[19] In the present case, can it be said that the trial court deviated from what could be regarded as the norm "in a properly

conducted criminal trial"? We think not. There is nothing in the features of this case that could be viewed as causing alarm that the appellant's rights to a fair trial were violated in any way. We also do not understand this to be the appellant's case. He pleaded guilty to the offence. His case is simply that the sentence, the sentence imposed by the trial, is disproportionate when viewed in light of his personal circumstances and facts in mitigation.

[20] Nothing in our view stands out in the appellant's personal circumstances as to warrant a deviation from the prescribed minimum sentence. Sight must not be lost that his personal circumstances should be looked at together with the nature of the offence committed as well as the interests of society. It is trite that in those circumstances, the court must seek to strike a balance between these competing interests.

[21] In our considered view when the specific circumstances of this case are considered, it cannot be gainsaid that for a first offender, the appellant committed an offence of such gravity that it far outweighs any consideration that the court could have in relation to him being a first offender. The totality of the evidence before the court a quo, as admitted by the

appellant in his statement in terms of section 112(2) cannot be overlooked. It paints a picture of a nightmarish and gruelling encounter by the complainant at the hands of the appellant. Being a first offender as he was, he quickly elevated himself to the most serious of crimes.

[22] There can be no doubt that the offence committed by the appellant is serious. The fact that the complainant was attacked in the sanctity of her home, taken against her will and subsequently violated repeatedly by the appellant dissipates any doubt about the seriousness of the offence committed by the appellant. In my view, it waters down the personal circumstances of the appellant, including the fact that he was a first offender.

[23] In *S v Malgas*[6] the court held that in serious crimes the personal circumstances of the offender, by themselves must recede to the background and are in themselves, largely immaterial to what the period of imprisonment should be. They are in our view not a decisive factor in determining what period of imprisonment should be imposed.

[24] As to the time spent by the appellant in detention, it is trite law that on its own, this is not determinative of the sentence to be imposed but is one of the factors to be taken into account, along with the specific circumstances of the detention of a specific

offender. In this case, all the appellant says is that the period of 1 year 11 months he spent in detention should be taken into account, presumably in a manner that it ought to tamper with the prescribed minimum sentence of life imprisonment. This cannot be. The consideration is whether in all the prevailing circumstances of the case, including the time spent in detention, the sentence is a just one. On its own, it is not sufficient to lead to a departure from the prescribed minimum sentence.

[25] The appellant's averment that the sentence imposed leaves no room for rehabilitation is in our view, without merit. Rehabilitation

is a component of imprisonment. Nothing prohibits the appellant from benefitting from the rehabilitative programs offered by the

Department of Correctional Services while serving his punishment.

[26] It bears restating that in the absence of a misdirection by the trial court, it is not open to the court of appeal to appropriate the discretion of the trial court, by substituting the sentence imposed for the one it prefers.[7] The observations of the Supreme Court of Appeal (SCA) in *S v Matyityi*[8] still ring true, that the prescribed minimum sentences ordained by the legislature for the specific categories of crimes cannot be subverted by the courts by simply resorting to "vague and ill-defined concepts" to fit the particular sentencing

officer's personal notion of fairness. They are not to be departed from for flimsy reasons[9].

[27] None of these circumstances as contemplated in the above authorities, and generally set out in our case law, can be said to exist in the circumstances of this case. In the circumstances of this case, and in respect of this specific offender, no substantial and compelling circumstances exist to warrant a departure from the prescribed minimum sentence of life imprisonment.

[28] We agree with Mr Ndhlovu on behalf of the respondent, that the court a quo gave proper consideration to all the relevant factors in this case. In the prevailing circumstances, the personal circumstances of the appellant, taken as a whole, are far outweighed by the seriousness of the offence committed and the interests of society, viewed holistically. In these circumstances, it is our considered view that there is justification to upset the sentence imposed by the court a quo.

[29] In the result the following order is made:

(i) The appeal is dismissed.

S MFENYANA

JUDGE OF THE HIGH COURT

NORTHWEST DIVISION, MAHIKENG

I agree.

S DU TOIT

ACTING JUDGE OF THE HIGH COURT

APPEARANCES

For the appellant: T Mpulo- Merafe Instructed by: Legal Aid South Africa Mmabatho mpulo.merafe@counsel.co.za For the respondent: W. P Ndhlovu Instructed by: Director of Public Prosecutions, Mmabatho wndhlovu@npa.gov.za Date reserved: 20 June 2024 Date of judgment: 24 July 2024

[1] Act 105 of 1997 (as amended).

[2] Act 51 of 1977 (as amended)

[3] See in this regard: S v Hewitt 2017 (1) SACR 309 (SCA); S v Livanje 2020 (2) SACR 451 (SCA).

[4] 2013(1) SACR 1 (CC).

[5] Para 41.

[6] S v Malgas 2001 (1) SACR 469 (SCA); See also: S v Vilakazi 2009 (1) SACR 552 (SCA), para 58.

[7] See in this regard: E du Toit et al, Commentary on the Criminal Procedure Act, (Jutastat, RS 66, 2021), ch30-p42A; Also, S v Mathekga and another 2020

(2) SACR 559 (SCA).

[8] 2011

(1) SACR 40 (SCA).

[9] See: S v Malgas, ibid n 6.

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