SOUTH AFRICA / JUDGMENT

Radebe v S (A117/2022) [2023] ZAFSHC 41 (16 February 2023)

[2023] ZAFSHC 41

COURT
Free State High Court, Bloemfontein

BEFORE
Loubser, Tsangarakis

CASE / FILE NUMBER
A117/2022

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IN
THE HIGH COURT OF SOUTH AFRICA
FREE
STATE DIVISION, BLOEMFONTEIN
Appeal
No: A117/2022

Reportable:	YES/NO Of interest to other Judges: YES/NO Circulate to Magistrates: YES/NO In
the matter between:	LEFU RADEBE Appellant and THE STATE Respondent
CORAM:	LOUBSER, J et TSANGARAKIS, AJ HEARD
ON:	6 FEBRUARY 2023 DELIVERED ON: 16 FEBRUARY 2023

JUDGMENT

BY: TSANGARAKIS, AJ

INTRODUCTION

[1] The appellant was convicted in the Regional Court, Frankfort of the following counts:

1.1 Count 1: Housebreaking with intent to Rape and Rape as described in Section 3 of the Criminal Law Amendment Act (Sexual Offences and Related Matters), Act 32 of 2007, read with Sections 1, 15(1), 55, 56, 56A, 57, 58, 59, 60, 61 and 67 of Act 32/2007, as well as read with Sections 92(2), 94, 256, 257 and 261 of the Criminal Procedure Act (Act 51/1977), read with Section 51(2) of Act 105/1997, as amended by Section 1, Act 38/2007.

On this count the appellant was sentenced to 10 years imprisonment;

1.2 Count 3: Rape as described in Section 3, read with Sections 1, 2, 56(1), 56A as amended, 50(2)(a) and 50(2)(b), 57, 58, 59, 60 and 61 of the Criminal Law Amended Act (Sexual Offences and Related Matter), Act 32 of 2007, further read with the provisions of Section 83, 84, 94, 256, 261, 270 and 299A of the Criminal Procedure Act, 51/1977, further read with the provisions of Section 51(2) Part 1 of Schedule 2 of the Criminal Law Amendment Act 105/1997 (as amended), furthermore read with Section 1, 2 and 120 of the Childrens' Act, 38/2005.

On this count the appellant was sentenced to life imprisonment; and

1.3 Count 4:Housebreaking with intent to Rape and Rape as described in Section 3 of the Criminal Law Amendment Act (Sexual Offences and Related Matters), Act 32 of 2007, read with Sections 1, 15(1), 55, 56, 56A, 57, 58, 59, 60, 61 and 67 of Act 32/2007, as well as read with Sections 92(2), 94, 256, 257 and 261 of the Criminal Procedure Act (Act 51/1977), read with Section 51(2) of Act 105/1997, as amended by Section 1, Act 38/2007.

On this count the appellant was sentenced to 10 years imprisonment.

[2] This appeal, which lies only against the sentence of the appellant, serves before this Court by virtue of the appellant having exercised his automatic right of appeal.

[3] It is the appellants' case that the Court a quo erred in finding that no substantial and compelling reasons existed, justifying the imposition of a lesser sentence. The appellant

moves for an order that the Court a quo's judgment should be set aside and substituted with the following sentence:

3.1 Count 1:Ten years imprisonment;

3.2 Count 3:Eighteen years imprisonment;

3.3 Count 4: Ten years imprisonment;

3.4 That the sentence imposed on Counts 1 and 4 runs concurrently with the sentence in Count 3; and

3.5 That the sentence be antedated to 25 October 2019.

[4] The appellants statement, in terms of Section 112 of the CPA, reveals that:

4.1 On or about 12 July 2015 and at or near Mafahleni in the district of Tweeling, the appellant unlawfully and intentionally and with the intent to commit a sexual offence, broke open and entered the house of the 40 year old complainant and raped her (Count 1);

4.2 On or about 15 November 2014 and at or near Mafahleni in the district of Tweeling, the appellant raped the 40 year old complainant (Count 3); and

4.3 On or about 7 February 2015 and at or near Mafahleni in the district of Tweeling, the appellant unlawfully and intentionally and with the intent to commit a sexual offence, broke open and entered the house of the third complainant, aged 62, and raped her (Count 4);

[5] It is further apparent from the record that the appellant:

5.1 Was 27 years old at the time of sentence;

5.2 Attended upon odd jobs generating an income of approximately R1 000.00 per week;

5.3 Has no dependants;

5.4 Has three previous convictions in respect of malicious damage to properly and theft;

5.5 Highest standard of education is Standard 6 / Grade 8; and

5.6 Was arrested on 1 January 2019 pursuant to which the proceedings in the Court a quo were finalised on 25 October 2019 i.e. he spent ten months in custody awaiting the finalisation of the matter.

[6] On 12 August 2022 the appellant filed a notice of appeal, premised on the following grounds:

"(i) The Court a quo erred by not giving proper consideration to the appellant's personal circumstances;

(ii) The Court a quo erred by not giving consideration to the element of mercy;

(iii) The sentence of life imprisonment is shockingly inappropriate and out of proportion;

(iv) The Court a quo over-emphasised the interest of the community and the seriousness of the crime;

(v) The Court a quo erred in not finding the existence of substantial and compelling circumstances to deviate from minimum sentence of life imprisonment."

[7] It is trite that a Court of Appeal will only interfere with a sentence if it is of the opinion that such sentence is unreasonable, unjust or is vitiated by irregularity or that the trial Court has misdirected itself.[1]

[8] In S v Malgas 2001 (1) SACR 469 (SCA) Marais JA remarked at paragraph 12 as follows:

"...A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion an appellate Court is of course entitled to consider the question of sentence afresh. ..."

[9] In S v Vilakazi 2009 (1) SACR 552 (SCA) Nugent JA introduced the Court's judgment with the followings words:

"Rape is a repulsive crime. It was rightly described by counsel in this case as 'an invasion of the most private and intimate zone of a woman and strikes at the core of her personhood and dignity'. ..."

[10] The ultimate test, in matters of this ilk, is whether the sentences imposed induce a sense of shock; in other words, whether, objectively considered, they strike us as being clearly disproportionate in the circumstances.[2]

[11] If they are not, it does not matter that we might, instead, have imposed a lengthy determinant sentence had we been sitting at first instance. As Rodgers J observed in the Full Court's judgment in S v GK 2013 (2) SACR 505 (WCC) at paragraph [14], it is not enough to justify interference by an Appellate Court for it just to feel "unease at the imposition of a life sentence ... [it must] have a conviction that such a sentence would be unjust, i.e. disproportionate to the crime, the offence, and the legitimate needs of the community."

[12] The record reveals that the trial court had due regard to all the relevant mitigating factors and aggravating circumstances. These included, but were not limited to, the appellant's personal circumstances (as detailed herein above), the scenarios of the offence, the interest of the community, the appellant's previous convictions as well as the period of time the appellant had already spent in prison awaiting trial. The trial court, having regard to all of the circumstances aforesaid, held that a departure from the prescribed minimum sentence will be unjust and disproportionate to the crimes at issue.

[13] Moreover, the Court a quo was correct in finding that the appellant did not commit the offences in issue on a whim. All three of them were well-planned, executed and consisted of no less than three counts of rape and two counts of housebreaking over a period of approximately 8 months.

[14] But for the DNA evidence, which was the chief reason for the appellant's confession of his guilt, and the fact that these offences were unabated, the appellant would still be terrorising the community with these most heinous crimes, to which he had to unavoidably confess. Sight is not lost of the fact that one of the complainants was a sixteen-year-old minor child.

[15] The crimes at issue are of a most serious and abhorrent nature and do, in our view, not justify a deviation from the prescribed minimum sentence of life imprisonment in respect of Count 3 or a setting aside of the imposed sentence in any other respect whatsoever. The appeal must fail.

ACCORDINGLY, I MAKE THE FOLLOWING ORDER:

1. The appeal against sentence is dismissed.

S. TSANGARAKIS, AJ

I agree.

P.J. LOUBSER, J

On behalf of the Appellant: Mr S. Kruger

Instructed by:

Legal Aid South Africa

On behalf of the Respondent: Adv S.M. Mthethwa

Instructed by:

The Director of Public Prosecutions, Bloemfontein

[1] S v Pillay 1977

(4) SA 531 (A) at 535D – G.

[2] S v Vilakazi ibid

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Prepared on 13 October 2026 · Esheria