

SOUTH AFRICA / JUDGMENT

Radebe v S (A202/16) [2017] ZAGPPHC 969 (6 November 2017)

[2017] ZAGPPHC 969

COURT

North Gauteng High Court, Pretoria

BEFORE

M I Mangena, HJ Fabricius

CASE / FILE NUMBER

A202/16

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REPUBLIC OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

APPEAL CASE NO: A202/16

DATE OF HEARING: 6 NOVEMBER 2017

(a)

NOT REPORTABLE.

(b)

NOT OF INTEREST TO OTHER JUDGES

(c)

REVISED.

In the matter between:

THEMBA MESHACK RADEBE

Appellant

and

THE

STATE

Respondent

JUDGMENT

MANGENA, AJ:

INTRODUCTION

[1] The appellant was found guilty of rape of a 9 year old minor child

and was sentenced to 25 years imprisonment. He was granted leave to appeal after he filed a petition to the Judge President of the Gauteng High Court.

[2] The appeal against sentence is on the basis that the trial court imposed a sentence which is disturbingly inappropriate.

[3] The principles governing sentencing are trite. The imposition of sentence is pre-eminently a matter within the discretion of the trial judge. The position was explained in *S v Rabie*, 1975 (4) SA 855 (A) at 857D-E by Holmes JA as follows:

"1. In every appeal against sentence, whether imposed by a magistrate or a judge, the court hearing the appeal -

- (a) should be guided by the principle that punishment is pre-eminently a matter for the discretion of the trial court and
 - (b) should be careful not to erode such discretion, hence the further principle that the sentence should only be altered if the discretion has not been judicially and properly exercised.
2. The test under (b) is whether the sentence is vitiated by irregularity or misdirection or disturbingly inappropriate."

[4] A rape of a minor child below the age of 16 falls within the purview of the prescribed minimum sentence legislation. In terms of the Act, the court is ordained to impose life imprisonment unless there are substantial and compelling circumstances warranting a deviation from the prescribed minimum sentence.

[5] Counsel for the appellant referred us to a long list of cases in an attempt to persuade us to interfere with the imposed sentence of 25 years.

[6] The Supreme Court of Appeal has stated that such a comparison is of little value and should not be elevated to a status of a precedent which is intended to bind all the courts which have to consider

sentences whilst sentencing an accused who has been convicted of rape, read with section 51(1) of the Act. The SCA further held that it would be improper and a dereliction of duty on the part of the court to slavishly follow the trend and not impose life imprisonment when same is warranted. *P B v State*, 2013 (2) SACR 533 (SCA). See also *S v D* 1995 (1) SACR 259 (A) at 263g-h.

[7] Commenting on the approach by an appellate court on appeal against a sentence imposed in terms of the Act, the court said that the approach should be different to other sentences imposed under the

ordinary sentencing regime. This is so because minimum sentences should not be departed from lightly or for flimsy reasons. The proper enquiry on appeal is whether the facts which were considered by the sentencing court are substantial and compelling or not.

[8] The trial court considered all the relevant facts for purpose of determining an appropriate sentence, including the personal circumstances of the appellant, the aggravating circumstances as well

as the mitigating factors and arrived at a decision that 25 years direct imprisonment will be a suitable punishment.

[9] In my view there is nothing in this matter which suggests that the trial court has misdirected itself or failed to take into account any of the mitigating factors counsel has drawn our attention to.

[10] It should always be remembered that punishment does not only need to suit the offender. It should also fit both the offence and the interest of the society.

[11] Society needs to be protected against people who have no respect for women and children. The courts need to send out a clear and unequivocal message that any form of violence against women and children will not be tolerated. In this regard we will do well to remember what the court said in *Director of Public Prosecutions, North Gauteng v Thabethe*, 2011 (2) SACR 567 SCA at 577

'Rape of women and young children has become cancerous in our society. It is a crime which threatens the very foundation of our nascent democracy which is founded on protection and promotion of the values of human dignity, equality and the advancement of human

rights and freedoms. It is a serious crime that it evokes strong feelings of revulsion and outrage amongst all right-thinking

self-respecting members of society. Our courts have an obligation in imposing sentences for such a crime- particularly where it involves young, innocent, defenceless and vulnerable girls, of the kind which reflects the natural outrage and revulsion felt by the law abiding members of society. A failure to do so would regrettably have the effect of eroding the public confidence in criminal justice system'.

[12] The appellant meted out the cruellest form of violence against an innocent child, young enough to be his daughter. To be exact, she was a playmate of his daughter. He pre-meditated the sexual assault on the young girl by luring him into his house, sent his daughter to the shop and violated her in the most gruesome manner imaginable.

[13] In the circumstances, it will be inappropriate of the appeal court to erode into the judicial exclusivity of the trial court and tamper with a sentence which in all fairness accounts for all factors traditionally taken into account when an imposition of sentence is considered. In the seminal judgment of *S v Malgas*, 2001 (1) SACR 469 (SCA) Marais JA expressed the position emphatically and with profound clarity when he stated that:

"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."

[14] We are consequently unable to find any misdirection and the following order is made:

14.1 The appeal against sentence is dismissed.

M I MANGENA

ACTING JUDGE OF THE HIGH COURT

It is agreed and so ordered.

HJ FABRICIUS

JUDGE OF THE HIGH COURT GAUTENG DIVISION, PRETORIA

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