

SOUTH AFRICA / JUDGMENT

Raseroka and Others v S (CAF 04/2014)

[2014] ZANWHC 23 (22 May 2014)

[2014] ZANWHC 23**COURT**

North West High Court, Mafikeng

BEFORE

N Gutta, A.A. Landman, A.M. Kgoele

CASE / FILE NUMBER

CAF 04/2014

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IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

CASE NO: CAF 04/2014

DATE: 22 MAY 2014

In the matter between:-

PATRICK RASEROKA.....1st Appellant

JAMES MABUSA.....2nd Appellant

DAVID PHIRI.....3rd Appellant

And

THE STATE.....Respondent

CRIMINAL APPEAL – FULL BENCH

LANDMAN J, KGOELE J & GUTTA J

J U D G M E N T

GUTTA J:

A. INTRODUCTION

[1] The appellants stood arraigned before the Magistrate, Mr D D Mogotsi in the Regional Court of the district of Odi, held at Ga-Rankuwa on two counts, namely:

1.1 Rape

1.2 Kidnapping

- [2] On the 2 June 2000, the appellants were convicted on both counts.
- [3] The appellants were sentenced to 2 years imprisonment on the count of kidnapping by the Regional Court and the matter was referred to the High Court for sentencing in terms of section 52 of Act 105 of 1997 on the count of rape.
- [4] Mogoeng J (as he then was) on the 23 October 2000 sentenced the appellants to life imprisonment.
- [5] On the 7 February 2014 the appellants were granted leave to appeal the sentence of life imprisonment.

B. FACTS

- [6] The facts briefly are that the complainant was walking in the company of her boyfriend when the appellants who were in a motor vehicle stopped them. A firearm was pointed at the complainant's boyfriend and he subsequently fled. The complainant was dragged into the motor vehicle and was assaulted with an open hand and her necklace and earrings were removed. She was taken to a house where the appellants took turns to rape her.

C. GROUNDS OF APPEAL

- [7] The grounds of appeal raised by the appellants are the following:
 - 7.1 The trial court failed to advise the appellants at the outset of the trial of the implication of the Criminal Law Amendment Act 105 of 1997.
 - 7.2 The trial court did not adequately consider the personal circumstances of the appellants.
 - 7.3 There are substantial and compelling circumstances that would have justified a departure from the minimum sentence.

D. THE MINIMUM SENTENCE ACT

- [8] Counsel for the respondent, Mr Nontenjwa, correctly conceded that the Court a quo erred by relying on the provisions of section 51(2) of the Act when the indictment did not refer to the provisions of the Act, and that the appellants were not given any notice of the State's intention to rely on the provisions of section 51(2) and therefore, it cannot be argued that the appellants properly appreciated the possible consequences in this case.
- [9] It is apparent from the record of proceedings that it is only in sentencing that reference was made to the prescribed minimum sentence.

[10] In casu, the appellants in the court a quo were not represented and although the appellants were informed of their rights to legal representation and the importance thereof, they were not given information of the seriousness of the charge and the applicable minimum sentence to enable the appellants to make an informed decision regarding whether to seek legal representation.

See *S v Ndlovu* 2003

(1) SACR 331 (SCA); *S v Sibisi* 2005 (2) SACR 645 at 654d-e.

See also *S v Makatu* 2006 (2) SACR 582 (SCA).

[11] Where the State intends to rely upon the sentencing regime created by the Act, a fair trial will generally demand that its intention be pertinently brought to the attention of the accused at the outset of the trial. If this is not done in the charge sheet, then it must be done in some other form, so that the accused is placed in a position to appreciate properly and in good time the charge that she or he faces as well as the possible consequence. See *S v Ndlovu* supra and *S v Jacobs* 2011

(1) SACR 505 (ECG) at 509, paragraphs [10] – [13].

[12] The normal penal jurisdiction of the High Court was not in any manner affected by the implementation of the Act and this Court can invoke the normal inherent penal jurisdiction and consider the sentence afresh. See *Kganye v The State* (CAF 9/2010) [2013] SANWHC 25 (7 March 2013) at [9].

[13] In the circumstances, it is necessary to set aside the sentence and sentence the accused de novo.

E. THE SENTENCE

[14] The following mitigating factors are on record:

1st Appellant

16.1 He was 19 years of age;

16.2 His highest educational qualification was standard 6;

16.3 He supports his mother by doing odd jobs;

16.4 He has no previous conviction .

2nd Appellant

16.5 He was 18 years old;

16.6 He was doing standard 8 at the time of commission of the offence;

16.7 He has no previous conviction.

3rd Appellant

17.8 He was 18 years old at the time of the offence;

17.9 His highest educational qualification was standard 5;

17.10 He is a first offender.

[15] Counsel for the appellants, Ms Segone submitted that the appellants because of their age are good candidates for rehabilitation and a lesser sentence than life imprisonment should be imposed. She submitted that a sentence of 15 years imprisonment is appropriate in the circumstances.

[16] Counsel for the State, conceded that when looking at the age of the appellants, that they were first offenders and were all unrepresented, that the sentence of life imprisonment should be set aside and substituted with a sentence of 15 years.

[17] It is trite that a court when sentencing, should consider the triad, namely the interest of society, the seriousness of the offence and the personal circumstances of the appellant. See *S v Zinn* 1969 (2) SA 537 (A).

[18] The complainant was a young woman, 19 years of age. Rape is a violent crime and the fact that the appellant had firearms and the complainant was gang raped is aggravating.

[19] In the case of *DPP, North Gauteng v Thabethe* 2011 (2) SACR 567 (SCA) 577g-I, the Court held that:

“Rape of women and young children has become cancerous in our society. It is a crime which threatens the very foundation of our recent 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 such a serious crime that it evokes strong feelings of revulsion and outrage amongst all right thinking and 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, to impose the kind of sentences which reflect 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 the criminal justice system.”

[20] The serious nature of this offence calls for a long term of imprisonment. However the question is whether the court should impose life imprisonment. In the case of *S v Vilakazi* 2009 (1) SACR 552 (SCA) and *S v Mahomotsa* 2002 (2) SACR 435 (SCA), the courts held that life imprisonment should be reserved for more serious cases of rape. This case in my view, although serious does not fall in the category of the most serious case of rape to warrant a sentence of life imprisonment especially when considering the factors hereinbelow.

[21] There is no evidence that the complainant sustained serious injuries. Furthermore the appellants were 18 and 19 years of age and accordingly they were young offenders whose level of maturity and moral blameworthiness are not the same as older offenders.

[22] It is trite that being a first offender and a youthful offender are mitigating factors as far as sentencing is concerned and courts generally did not punish first offenders and young persons as severely as they did with adults.

See *S v Nkomo* 2007

(2) SACR 198 (SCA).

[23] In *S v Mabuza and Others* 2009 (2) SACR 435 at paragraph 23, the Supreme Court of Appeal stated the following with regard to youthful offenders:

“However, in requiring a sentencing court to depart from the prescribed sentence in respect of offenders who have attained the age of 18 only if substantial and compelling circumstances justify this departure, the legislature has clearly intended that youthfulness no longer be regarded as per se a mitigating factor. So while youthfulness is, in the case of juveniles who have attained the age of 18, no longer per se a substantial and compelling factor justifying a departure from the prescribed sentence, it often will be, particularly when other factors are present. A court cannot, therefore, lawfully discharge its sentencing function by disregarding the youthfulness of an offender in deciding on an appropriate sentence, especially when imposing a sentence of life imprisonment, for in doing so it would deny the youthful offender the human dignity to be considered capable of redemption.”

[24] In *Mabuza’s* case supra the Supreme Court of Appeal the appellants were respectively 20, 19 and 18 years of age at the time that they committed the offences.

[25] The purposes of punishment, namely deterrence, retribution, rehabilitation and punishment are further considerations in the Zinn triad and although there are no probation officers reports on record, when one considers the appellant’s age and the factors mentioned supra, in mitigation of their sentence, there may be some prospects of rehabilitation to which this court cannot turn a blind eye.

F. CONCLUSION

[26] When considering all the mitigating factors and circumstances and bearing in mind all the factors relevant when imposing an appropriate sentence, I am of the view that an eighteen years term of imprisonment will be an appropriate sentence.

G. ORDER

[27] Consequently, the following order is made:-

(i) The appeal is upheld

(ii) The sentence imposed by the trial court is set aside and substituted with the following:-

Eighteen (18) years imprisonment.

(iii) The sentence is antedated to 23 October 2000.

N. GUTTA

JUDGE OF THE HIGH COURT

I agree

A.A. LANDMAN

A.M. KGOELE

APPEARANCES

DATE OF HEARING: 02 MAY 2014

DATE OF JUDGMENT: 22 MAY 2014

FOR THE APPELLANTS: MS B. SEGONE

FOR THE RESPONDENT: ADV NONTENJWA

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