

SOUTH AFRICA / JUDGMENT

S v Falo (CC13/2019) [2019] ZAE CGHC 37 (27 March 2019)

[2019] ZAE CGHC 37**COURT**

Eastern Cape High Court, Grahamstown

BEFORE

C Plasket

CASE / FILE NUMBER

CC13/2019

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****EASTERN****CAPE DIVISION, GRAHAMSTOWN****CASE NO: CC13/2019****DATE HEARD: 25-26/3/19****DATE DELIVERED:**

27/3/19

NOT

REPORTABLE

In

the matter between:

THE

STATE

and

SINETHEMBA

ELLIOT FALO

JUDGMENT**PLASKET J**

[1] The accused was charged with four counts of rape. He pleaded guilty to all four counts and, being satisfied that his plea admitted every element of each offence, I convicted him as charged. I now am required to impose appropriate sentences on the accused for his misdeeds. It is first necessary to set out how the accused committed these crimes.

- [2] Count 1 was committed on 16 July 2017 in Mlungisi Township, Stutterheim. On that day, the accused had been drinking in a tavern with the complainant in count 1, who I shall refer to as NM, and her boyfriend. Her boyfriend left and NM later asked the accused to escort her to her boyfriend's house. (NM said, in an affidavit that was admitted by consent, that she knew the accused well because she had gone to school with him, they both lived in the same area and he is a cousin of her boyfriend.)
- [3] On the way to NM's boyfriend's home, the accused tripped NM. When she fell, he strangled her and threatened to kill her. He then had sexual intercourse with her without her consent. He forced her to accompany him to his home where, during the course of the night, he raped her twice more.
- [4] The following morning, he accompanied NM to close to her home. Later that day her boyfriend confronted him about having raped NM. He was assaulted by a group of people who had gathered and thereafter was taken to a doctor. He was arrested but was released on bail of R300.
- [5] Counts 2, 3 and 4 were committed on 12 November 2017, also in or near Mlungisi Township, Stutterheim. I shall refer to the victims as TN, NT and BM.
- [6] The accused met the complainants at a tavern. From there they went to another tavern, where they had a beer each before he suggested going to a third tavern that remained open all night from six o'clock in the evening until six o'clock in the morning.
- [7] When the accused noticed that BM appeared to be reluctant to go this tavern he 'became aggressive' and hit her on the head. He drew a knife and forced all three complainants to go with him.
- [8] On the way to the tavern, he saw a partially built house. He forced the complainants into the house by threatening them with his knife. He forced them to lie down and to take off their clothes. He then raped BM.
- [9] He instructed the complainants to dress and they then left the house. He forced them to enter an open field. At a place where, he said, there were 'big stones', he instructed the complainants to empty their pockets. He took their cellphones. He told them that they were not to make any noise and that if they did, he would stab them. (This place appears from some of the photographs that were handed in by consent to have been on a hillside overlooking Mlungisi Township. Big boulders are evident in the photograph.)
- [10] The accused instructed TN to undress and proceeded to rape her. He ordered NT to undress and he raped her. He then raped TN again and NT again.
- [11] At about four o'clock in the morning, the accused returned the complainants' cellphones to them and accompanied them to close to their respective homes.

- [12] In summary, on 16 July 2017, the accused raped NM three times. On 12 November 2017, he raped TN and NT twice each and he raped BM, who was 16 years old at the time, once.
- [13] As a result of the fact that the accused raped NM, TN and NT more than once each, the prescribed sentence in each instance, unless substantial and compelling circumstances justify a less severe sentence, is life imprisonment. See s 51(1) of the Criminal Law Amendment Act 105 of 1997, read with Part I of Schedule 2. In respect of count 4, the minimum prescribed sentence is ten years imprisonment, in the absence of substantial and compelling circumstances. See s 51(2) of the Criminal Law Amendment Act read with Part III of Schedule 2.
- [14] In determining whether substantial and compelling circumstances exist to justify the imposition of a less severe sentence than that prescribed, all of the factors traditionally considered by courts in imposing sentence must be taken into account. See *S v Malgas* 2001 (1) SACR 469 (SCA) paras 9 and 25F. These involve, in broad terms, a consideration and balancing of the nature and seriousness of the crime, the personal circumstances of the accused and the interests of society. See *S v Malgas* para 22I.
- [15] I shall commence with a consideration of the nature and seriousness of the offences. Rape, involving as it does, an invasion of the dignity and security of the person of the rapist's victim in a most fundamental way, is by its very nature serious. I have described precisely what the accused did to his victims. Some of these features, as I will show, escalate the seriousness of the offences he committed.
- [16] What stands out in each instance is the gratuitous resort to violence on the part of the accused to force the complainants to comply with his orders. So, when he raped NM for the first time, he strangled her and threatened her with death. When he raped the three complainants on 12 November 2017, he first assaulted BM, then drew a knife and threatened to kill them if they did not comply with his orders. A further aggravating feature is that in both instances, he deprived the complainants of their liberty and held them against their wishes for considerable periods of time.
- [17] It is clear from the affidavits deposed to by the complainants and admitted by the accused that the harrowing, degrading and traumatic experiences they were forced to endure at the hands of the accused has had a profound, adverse emotional effect on all of them. All said that they feared going out of their homes at night and suffered from nightmares. In the case of NM, however, the nightmares stopped after counselling. The other complainants are still plagued with nightmares. All of them say that what they endured is an experience they will never forget and that it will stay with them for the rest of their lives. All of the complainants said that when they were told that they had to come to court to testify about their ordeal, 'all of the terrible memories came back' to them.
- [18] The personal circumstances of the accused were placed before me by Mr Stamper, who appeared for him. The accused was born on 9 January

1990. He was therefore 27 years old when the offences were committed. His father died when he was very young and his mother died when he was 14 years old. He is single and the father of an 11 year old child. He left school in grade 10.
- [19] The accused lived, before his arrest, with his grandmother and two younger nephews. He is unemployed but manages to earn a little bit of money by doing odd-jobs as and when he can. He, his grandmother and nephews live on his grandmother's old age pension of R1 700 per month and an approximate R300 per month that he earns from odd-jobs.
- [20] The accused has involved himself in crime awareness programs and has been a motivational speaker at community-based events and schools at which people are exhorted to turn their backs on crime, including, ironically, gender-based violence and violence against children.
- [21] The accused is not a first offender. On 4 April 2009, he was convicted of theft and sentenced to a suspended term of imprisonment of 12 months. On 13 May 2011, he was convicted of two counts of assault with intent to do grievous bodily harm and sentenced to three years imprisonment in respect of each count. He was also, on the same day, convicted of five counts of robbery for which he was sentenced to 12 years imprisonment in respect of each. These sentences were ordered to run concurrently, so the accused was sentenced to an effective 12 years imprisonment.
- [22] All of these previous convictions, apart from the theft conviction, are relevant because they involve the infliction of violence or the threat to inflict violence. They thus indicate that the accused is a person who has a propensity for violence. The accused had been released on parole when the offence in count 1 was committed. He was released on bail and, while on bail, committed the offences in counts 2, 3 and 4.
- [23] It is so that the accused played open cards with the court by pleading guilty to all four counts and providing a full, detailed explanation of what he did. That saved the court's time but, more importantly, it spared the complainants from having to testify and relive the horrific experiences that they had endured at the hands of the accused.
- [24] Rape, and violence against women generally, is pervasive in our society. Their prejudicial effects are corrosive of the type of society that we envisaged for ourselves when we adopted our present Constitution – a society based, inter alia, on the rights to freedom, dignity and security of the person. In *S v Chapman*
- [1997] ZASCA 45; 1997 (2) SACR 3 (SCA) at 5b-c, Mohamed CJ, Van Heerden JA and Olivier JA stated, in a case in which a man had raped three women who had been simply going about their daily business:

‘Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives.’

- [25] In a case such as this, the legitimate interests of society come strongly to the fore: right-thinking members of society – who, I venture to suggest, make up the overwhelming majority – want to see the attainment of the type of society envisaged by our Constitution where everyone can live without the fear that is currently ever-present for so many women as a result of the scourge of rape. In the criminal context, that interest includes an interest in effective sentences being imposed by the courts to punish wrongdoers appropriately and to deter those who may wish to follow the same path.
- [26] As I have shown, the crimes committed by the accused are extremely serious and were aggravated by his gratuitous use or threat of violence. The emotional trauma he inflicted on his victims continues to haunt them. His propensity for violence, inferred from his previous convictions and confirmed by his conduct in this case, signals that he is a serious danger to people generally and women in particular. The fact that he committed the offences while on parole, in respect of count 1, and on bail, in respect of counts 2, 3 and 4, indicates that he has little insight and poor prospects for rehabilitation. The fact that he acts as a motivational speaker in crime awareness projects, but at the same time, and four months apart, committed four heinous rapes, indicates a disturbing level of hypocrisy that is also inimical to his prospects of rehabilitation.
- [27] In *S v Malgas* at para 8, Marais JA made it clear that the sentences prescribed by the Criminal Law Amendment Act are to be regarded as the sentences that are ordinarily appropriate, unless there are and can be seen to be ‘truly convincing reasons for a different response’. In other words, departures from prescribed sentences are not to be made lightly and for flimsy reasons (at para 9).
- [28] I take into account the fact that the accused pleaded guilty, and the consequences of that, which I outlined above. I accept that that is mitigatory. As against that, however, the aggravating factors that I have listed – the violence used and threatened; the previous convictions for crimes of violence; the fact that the first offence was committed while the accused was on parole and the others while he was on bail; and so on – all outweigh the few favourable personal circumstances. I am unable to find that substantial and compelling circumstances exist that justify a less severe sentence than life imprisonment in respect of counts 1, 2 and 3.

[29] A minimum sentence of ten years imprisonment applies to count 4. Given the fact that the accused's victim was young and the manner and context in which the offence was committed, I am of the view that the prescribed sentence would be altogether inappropriate. A sentence of 20 years imprisonment in respect of count 4 would, I believe, reflect a proper balance between the crime, the criminal and the legitimate interests of society.

[30] I accordingly sentence the accused as follows:

- (a) In respect of count 1, the accused is sentenced to life imprisonment.
- (b) In respect of count 2, the accused is sentenced to life imprisonment.
- (c) In respect of count 3, the accused is sentenced to life imprisonment.
- (d) In respect of count 4, the accused is sentenced to 20 years imprisonment.

C Plasket

Judge of the High Court

APPEARANCES

For the State:

H Obermeyer,

Director of Public Prosecutions, Grahamstown

For the accused:

C Stamper

Instructed by:

Grahamstown Justice Centre

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