

SOUTH AFRICA / JUDGMENT

S v Mothapo (CC44/2019) [2019] ZAGPPHC 506 (1 August 2019)

[2019] ZAGPPHC 506

COURT

North Gauteng High Court, Pretoria

BEFORE

P D Phahlane

CASE / FILE NUMBER

CC44/2019

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: CC44/2019

1/8/2019

In the matter between:

THE STATE

V/S

TAU DANIEL MOTHAPO

ACCUSED

SENTENCE

PHAHLANE, AJ

- [1] The task of imposing a sentence in a criminal trial is not an easy one. As a point of departure, the court has to have regard to the three interconnected factors, which are sometimes referred to as the triad relevant to an appropriate punishment. This means that in considering an appropriate sentence, this court should be mindful of the so-called "triad" factors pertaining to sentence as enunciated in *S v Zinn* 1969 (2) SA 537 (A) namely: 'the crime, the offender and the interests of society'.

- [2] Having said this, the sentence to be imposed should be blended with an element of mercy. At the same time, sentencing the accused must also be directed at addressing the judicial purposes of punishment, which are deterrence; prevention; retribution and rehabilitation as stated in the case of *S v Rabie* 1975 (4) SA 855 (A).
- [3] In *S v Swart* 2004 (2) SACR 370 (SCA) NUGENT JA had the following to say:
- "in our law, retribution and deterrence are proper purposes of punishment and they must be accorded due weight in any sentence that is imposed. Each of the elements of punishment is not required to be accorded equal weight, but instead proper weight must be accorded to each according to the circumstances. Serious crimes will usually require that retribution and deterrence should come to the fore and that the rehabilitation of the offender will consequently play a relatively smaller role".
- [4] This court referred to, and with approval, the case of *R v Karg* 1961 (1) SA 231 (A) at 236A-B where the court held that:
- "while the deterrent effect of punishment has remained as important as ever, it is correct to say that the retributive aspect has tended to yield ground to the aspect of prevention and correction. That is no doubt a good thing. But the element of retribution, historically important, is by no means absent from the modern approach. Is it not wrong that the natural indignation of interested persons and of the community at large should receive some recognition in the sentences that courts impose, and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands".
- [5] It is on this basis that Advocate Fourie on behalf of the State submitted that Retribution should carry more weight because of the seriousness of the offences which the accused have been convicted of - when the court considers the aspects relating to the purpose of punishment.
- [6] I agree with his submissions because that is exactly what the Supreme Court of Appeal said in the case of *S v Swart* (supra)
- [7] The offences for which the accused has been convicted for are very serious. Mr Mothapo, it seems that wielding a knife at a vulnerable/defenceless woman and robbing her of her lawful possessions was not enough for you. You went ahead and stripped off the complainant of her dignity and sexually violated her.
- [8] The complainant who is a Lesotho citizen, came into the country - and it was only after 5 days of working for Mrs Molohe, as a domestic worker, that the accused went to attack her. She testified that she was doing laundry (hanging the washing) when the accused came and threatened her with a knife and demanded the items which are stated in count 1 of the indictment. The accused thereafter raped her. Under cross-examination, when she was asked about the mood of the accused when talking to her, she said the accused was violent and pointing her with a knife, but that the knife did not touch her. The complainant testified

that she sustained injuries in her genital area.

- [9] Her injuries are confirmed by the J88 which the accused and his counsel admitted and it was marked exhibit C. The doctor who examined her noted that there are abrasions and small tears on the Fossa Navicularis which are indicative of blunt penetrative trauma.
- [10] In your evidence Mr Mothopa, you also confirmed raping the complainant and you told the court that you don't know why you raped her - you just found yourself raping her.
- [11] What is disturbing in the evidence of the complainant is that she told the court that two days after the incident, she decided to go back home to Lesotho. The effect of which meant that she lost her employment because of the actions of the accused. She said that she has not found work since. She said she is afraid to stay alone and she gets more scared when someone opens the door without knocking.
- [12] The traumatic experience of the rape incident stayed with her for a while because she told the court that her relationship with her boyfriend was affected in that her boyfriend would constantly remind her of the rape. The pain was still visible in her eyes. I say this because the court also observed her as she was testifying. Her eyes were red as if she was crying and she looked scared. The court even had to ask her if she was okay and that she looked scared. She told the court that she went for counselling but she is not coping.
- [13] It is the duty of the courts to protect the society from the scourge of these violent actions, and to send a clear message that this behaviour is unacceptable.
- [14] Rape is a repulsive crime. The court in the case of *S v Chapman* called it a "humiliating, degrading and brutal invasion of the privacy, dignity and the person of the victim. This court held that: the courts are under a duty to send a clear message to the accused, to other potential rapists and to the community. That the court must protect the equality, dignity and freedom of all women".
- [15] Turning to the issue of the minimum sentences, it is important to note that because of these serious and violent crimes, Parliament saw it fit to step in and address the problem, hence the Legislature passed the Criminal Law Amendment Act 105 of 1997. This Act was intended to prescribe a variety of mandatory minimum sentences to be imposed by our courts in respect of a wide range of serious and violent crimes. In your case Mr Mothapo the relevant section is section 51(2) which has been explained to you at the beginning of the trial. In terms of Part II schedule 2 the offences referred to include aggravated robbery under section 51(2) where the sentence is 15 years imprisonment for a first offender; 20 years for a second offender and 25 years for repeated offender. Where the offence is of rape read with section 51(2) of the Act and Part III of Schedule 2, the conviction carries a penalty of 10 years imprisonment for a first offender; 15 years for a second offender and 20 years for a repeated offender.

- [16] Advocate Sano on behalf of the accused submitted, and rightly so, that the accused have been convicted of serious offences which are prevalent in the whole country. The accused said he ask for forgiveness from the court, the people he violated and from the complainant. Advocate Sano argued that having pleaded guilty and asking for forgiveness is an indication of genuine remorse and appreciation of your actions Mr Mothapo. She also pleaded with the court to have mercy on you and that the court should find in your favour - that there are substantial and compelling circumstances that justifies this court to depart from imposing the prescribed minimum sentence.
- [17] The State on the other hand submitted that a guilty plea cannot work to benefit the accused and that the court should be mindful of the purpose of punishment.
- [18] This court is enjoined with the powers to depart from imposing the prescribed minimum sentence where substantial and compelling circumstances exist. However, the specified sentences are not to be departed from lightly, and for flimsy reasons as stated in *S v Ma/gas* 2001 (1) SACR 469 (SCA).
- [19] The general principles governing the imposition of a sentence in terms of the Minimum Sentences Act as enunciated by the Supreme Court of Appeal in *Malgas* (supra) cannot be ignored. MARAIS JA held that:

"The Legislature has however deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored."

And

"The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick (substantial and compelling) and must be such as cumulatively justify a departure from the standardised response that the legislature has ordained.

"If the sentencing court an consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence".

- [20] *S v Matyityi* 2011 (1) SACR 40 SCA, referring to *Malgas* supra reaffirmed that:

"the starting point for a court that is required to impose a sentence in terms of Act 105 of 1997 is not a clean slate on which the court is free to inscribe whatever sentence it deems appropriate, but the sentence that is prescribed for the specified crime in the legislation".

- [21] The decision whether the circumstances of this case call for the imposition of a lesser sentence than the prescribed minimum sentence, means the mitigating factors would have to be weighed with the aggravating factors

[22] S v Sikhipha 2006 (2) SACR 439 (SCA) at para 16 where the court held that:

"in deciding whether the particular circumstances of a case called for the imposition of a lesser sentence than the prescribed minimum sentence ordained by the legislature, the traditional mitigating factors would have to be weighed with the aggravating factors.

[23] The personal circumstances of the accused placed on record are as follow:

1. That he was born on the 28 February 1991 - meaning that he is 28 years old
2. Stays in Olivenhuthbosch with his parents and his sibling
3. The highest standard he has passed is Grade 10. The accused informed the court that he could not proceed with his education because his parents had problems and had to divorce.
4. The accused is not married but has one child who is 1 year and 7 months old. The mother of the child is not working
5. The accused said he has never worked in his life before.

[24] What works against you Mr Mothapo is that you are not a first offender. Your record, which you have admitted shows that you have one previous conviction of Robbery - where you were convicted in January 2012 and sentenced to 9 years imprisonment. You told the court that you served only 4 years and 6 months and you were released in 2016. You also confirmed that when you committed these offences (for which this court has convicted you for-, you were on parole which is supposed to lapse/end in 2020.

[25] The accused was asked under cross-examination why he committed the offences and he responded by saying it was because of the circumstance at his home which led him to commit these offences. When asked about the reason why he committed the rape, the interpretation given to the court at first was couched in the manner which says - 'I did not have the intention to do it'. However, a proper interpretation was given when the accused explained that - 'he does not know why he raped the complainant, he just found himself doing it'. Fortunately, the court has the benefit of fully understanding the language spoken by the accused and the proper interpretation as given to the court was that 'he does not know why he raped the complainant' (not that he did not have the intention)

[26] The State submitted that the time served by the accused in prison for his previous conviction did not have any effect on him and thus meaning, he was not rehabilitated.

[27] I am inclined to agree with the State, because not only did the accused commit a degrading, humiliating act and a violation on the person of the complainant by raping her at a place where she was supposed to have been safe, but he is also a danger to the society. There is no justification for the actions of the accused and this court is duty bound to impose a sentence which will send a clear message and be a lesson to the accused that, when you are given an opportunity of being released on parole, you are given a second chance to mend your ways.

- [28] In *S v Ro and Another* 2010 (2) SACR 248 (SCA) the majority of the supreme court of appeal found that: "to elevate the personal circumstances of the accused above that of society in general and the victims in particular would not serve the well- established aims of sentencing, including deterrence and retribution".
- [29] I am bound by this finding. This court has earlier indicated that, not only will it make a balance between the interest of the accused visa vis those of society as well as the offence, but it will also look at the purposes of punishment.
- [30] Having considered all the circumstances of the case and having heard arguments and submissions from both parties, I am of the view that the aggravating factors far outweigh the mitigating factors and that there are no substantial and compelling circumstances which warrants a deviation from the imposition of the prescribed minimum sentence.

In the circumstance, the following sentence is imposed:

1. Count 1 (Robbery) = 20 years imprisonment
2. Count 2 (Rape)= 10 years imprisonment
3. In terms of section 103 of The Firearms Control Act 60 of 2000, the accused is declared unfit to possess a firearm.

P. D PHAHLANE

Acting Judge of the High Court Gauteng, Pretoria

Heard on

: 29 July- 01 August 2019

For the State : Adv Fourie

: Adv Roos

Instructed by : Deputy Director of Public Prosecutions

For the Defendant : Adv Sono

Instructed by : Legal Aid South Africa

Date of Sentence : 01 August 2019

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