

SOUTH AFRICA / JUDGMENT

# Sebitso v S (CA 30/2019) [2024] ZANWHC 177 (10 July 2024)

[2024] ZANWHC 177

## COURT

North West High Court, Mafikeng

## BEFORE

Mfenyana, DJ Joubert

## CASE / FILE NUMBER

CA 30/2019

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## Source record

IN

THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION,

MAHIKENG

CASE NUMBER: CA

30/2019

Reportable: NO

Circulate to Judges: NO

Circulate to Magistrates:

NO

Circulate to Regional

Magistrates: NO

In the matter between:-

HENDRICK

SEBITSO

Appellant

and

THE

STATE

Respondent

Coram:

Mfenyana J et DJ Joubert AJ

This judgment was handed

down electronically by circulation to the parties'

representatives via email. The date for hand-down is deemed to

be 10 July 2024.

ORDER

1)

The appeal against sentence is dismissed.

## JUDGMENT

MFENYANA J

- [1] The appellant was convicted by the Regional Court, Klerksdorp on a count of rape (read with the provisions of section 51(1) and Schedule 2 of the Criminal Law Amendment Act 105 of 1997, as amended) - Count 1, and housebreaking with intent to commit an offence unknown to the State – Count 2.
- [2] He was sentenced to life imprisonment in respect of count 1, and 6 years in respect of count 2.
- He has an automatic right of appeal in respect of the sentence in count 1, by virtue of being sentenced to imprisonment for life. This appeal lies against the sentence of life imprisonment in respect of count 1 only.
- [3] In his notice of appeal, the appellant relies on two grounds of appeal, namely:
- 3.1. That the court a quo erred in finding that there were no substantial and compelling circumstances to deviate from the prescribed minimum sentence. In this regard, the appellant avers that his age, as well as the fact that he had no previous convictions comprise “possible compelling and substantial circumstances” (sic), as they may indicate that he has a chance of rehabilitation.
- 3.2. That the sentence imposed over-emphasizes “public interest” (sic) and negates the personal circumstances of the appellant. In support of this ground, the appellant avers that the sentence is out of proportion to the totality of accepted facts in the matter and leaves no room for rehabilitation.
- [4] In his submissions, Mr Nyoka submitted on behalf of the appellant, that the appellant was reluctant to participate in the commission of the offence but succumbed to peer pressure. He contended that this much is clear from the evidence of the complainant’s daughter who testified that the appellant was initially not keen to participate in the rape.
- [5] Mr Nyoka further submitted that the fact that the appellant moved away from the complainant’s daughter, into the other bedroom, showed some form of respect towards the complainant’s daughter. He further averred that as it appears from the record that the appellant was a first offender, who has not been in and out of the courts, this signifies that he is a suitable candidate for rehabilitation. He submitted that a sentence of 15 to 25 years imprisonment would be appropriate in the circumstances.
- [6] In opposing the appeal, Mr September argued on behalf of the respondent that the court a quo considered all the relevant mitigating factors pertaining to the appellant in assessing what would be an appropriate sentence. He averred that the court a quo duly considered that the appellant was 24 years old when he committed the offences; that he had a minor child who was five years at the time, and that he was a first offender.

- [7] As far as aggravating factors are concerned, the respondent's contention is that the court a quo also considered that the appellant and his accomplice broke into the residence of the complainant while she was asleep and took turns to rape her next to her daughter. This illustrates the appellant's total disregard for 'human life', he further argued.
- [8] It was further the respondent's contention that this also shows that the rape was planned. He further contended that the appellant and his accomplice had weapons, which fact had been admitted by the appellant.
- [9] Regarding the appellant's reluctance to participate, Mr September averred that this is immaterial, as the fact of the matter is that the appellant did not take the court into his confidence. These circumstances warrant the ultimate sentence of life imprisonment, he further averred.
- [10] As far as the contention that the appellant is a suitable candidate for rehabilitation, the respondent retorted that this is speculation as there is no indication to that effect.
- [11] Placing reliance on the well-known authority in *S v Malgas*[1], counsel argued that once it becomes clear that the crime is deserving of a substantial period of imprisonment, questions regarding the appellant's personal circumstances, are in themselves, largely immaterial to what the period of imprisonment should be. They recede to the background. We agree. We should add that in such circumstances, the appellant's personal circumstances are not a decisive factor in determining what period of imprisonment should be imposed. What is required is for the court to strike a balance between the triad of factors comprising the seriousness of the offence, the personal circumstances of the appellant and the interests of society, and weigh them up against each other, taking care not to over-emphasize one above the other.
- [12] The respondent avers that the essence of the crime of rape is that it is an assault on the bodily integrity of a woman and her femininity and is degrading and dehumanizing. We agree with this contention.
- [13] In a Zimbabwean judgment[2] relied on by the respondent, the court referred to the crime of rape as "a crime of the utmost gravity". This of course, accords with our own domestic authorities[3] that rape is a loathsome crime.
- [14] The question is whether in the specific prevailing circumstances and

## **facts**

of this case, the court a quo misdirected itself in imposing a sentence of life imprisonment.

- [15] The record shows that in sentencing the appellant, the court a quo took into account the appellant's personal circumstances, his age, that he was a first offender, the fact that he had a minor

child, his level of education and the fact that he was employed. The court a quo weighed up these factors against the factors which were not in favour of the appellant, including the details of how the offences were committed by the appellant and his accomplice. Having done that, it concluded that there were no substantial and compelling

circumstances. Notably, the trial court pointed out that the appellant's co-perpetrator was at large, having fled the scene

on the night of the commission of the offence.

[16] In our considered view the criticism levelled against the trial court is without merit. We also do not understand the contention by the appellant to be saying that his personal circumstances were not considered, but that they ought to have been regarded as constituting substantial and compelling circumstances, enough to justify a departure from the prescribed minimum sentence of life imprisonment.

[17] The difficulty with this contention by the appellant, is that it suggests that his personal circumstances alone should be taken heed of. This cannot be, as it goes against the very basis of the triad established in *S v Zinn*[4], which forms the cornerstone of our criminal jurisprudence.

[18] Interestingly, the appellant is mum about the other factors which form part of the triad, or what their influence should be in the sentence imposed by the trial court. The interests of society and the seriousness of the offence stand at odds to the appellant's personal circumstances. These factors, in our view, make for the aggravation of the heinous crime perpetrated by the appellant together with his co-accused to among the most serious category of rape cases. These have been alluded to by the respondent. The complainant ought to be safe in the comfort of her own home which right was intentionally violated by the appellant.

[19] It is necessary, in our considered view, to duly appreciate and consider the following factors as well. First, the complainant was raped in the sanctity of her own home after the appellant and his accomplice broke into the complainant's home while she and her daughter were asleep. Second, the complainant was raped more than once, whether by the appellant or his accomplice with whom he acted in fulfilment of a common purpose. Third, the complainant was raped

next to her daughter. Fourth, the psychological damage it caused, not only to the complainant, but also to her daughter, who was made to witness her mother being violated, cannot be discounted.

[20] To our mind, the appellant is well aware of the gravity of these factors, and that they far outweigh his personal circumstances. It does not therefore justifiably lie in the mouth of the appellant to suggest that the trial court over-emphasized the seriousness of the offence or that it is out of proportion with the totality of the accepted and undisputed facts of this case.

- [21] Linked to the issue of the appellant's personal circumstances is a further averment by the appellant that they should demonstrate that he is a good candidate for rehabilitation. These personal circumstances are his age of 26 and the fact that he has no previous convictions.
- [22] It is trite that imprisonment involves rehabilitation and deterrence. These elements are infused in the programs offered by the Department of Correctional Services, the purpose of which is to rehabilitate offenders and reduce the recurrence of their wayward behaviour. There is no reason in our considered view, why the appellant cannot benefit from these rehabilitative programs, mend his ways while serving his punishment.
- [23] It cannot be overstated that sentencing is pre-eminently within the discretion of the sentencing court, and a court of appeal will not interfere lightly with the trial court's exercise of its discretion.[5] Such interference is reserved for instances where there is a material misdirection by the trial court.
- [24] In *Mathekga and another v S*[6] the Supreme Court of Appeal (SCA) cited with approval the views of the Constitutional Court in *Bogaards*[7] with regard to the powers of an appeal court and noted:

*"...a court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, assess the appropriateness*

*of the sentence as if it were the trial court and then alter the sentence arrived at by that court, simply because it disagrees with it. To do so would be to usurp the sentencing discretion of the trial court..."*[8]

- [25] The contention that the court a quo misdirected itself with regard to the sentence imposed, is without any merit or substance in the prevailing circumstances. The appeal falls to be dismissed.

[25] In the result the following order is made:

- i) The appeal is dismissed.

S MFENYANA

JUDGE OF THE HIGH COURT

NORTHWEST DIVISION, MAHIKENG

I agree.

DJ JOUBERT

ACTING JUDGE OF THE HIGH COURT

APPEARANCES

For the appellant: X Nyoka Instructed by: Legal Aid South Africa Mmabatho For the respondent:  
T September Instructed by: Director of Public Prosecutions, Mmabatho Date reserved: 06  
December 2023 Date of judgment: 10 July 2024

[1] 2001

(1) SACR 469 (SCA).

[2] S v S 1995 (1) SACR 50 (ZS).

[3] S v Chapman

[1997] ZASCA 45; 1997 (2) SACR 3 (SCA); S v Ncheche

[2005] ZAGPHC 21; 2005 (2) SACR 386 (W); S v Mqikela 2010 (2) SACR 589 (ECG).

[4] 1969

(2) SA 537 (A).

[5] See in this regard: S v Hewitt 2017 (1) SACR 309 (SCA); S v Livanje 2020 (2) SACR 451 (SCA).

[6] 2020

(2) SACR 559 (SCA).

[7] 2013

(1) SACR 1 (CC).

[8] Para

19. See also in this regard: S v Malgas 2001 (1) SACR 469 (SCA).

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