

SOUTH AFRICA / JUDGMENT

Sehloho v S (CA18/2017) [2017] ZANWHC 66 (22 September 2017) [2017] ZANWHC 66

COURT

North West High Court, Mafikeng

BEFORE

Hendricks, Chiwaro

CASE / FILE NUMBER

CA 18/2017

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH

WEST DIVISION: MAHIKENG

CASE

NO: CA 18/2017

Reportable

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In

the matter between:

LAWRENCE

MOSWEU

SEHOLO Appellant

And

THE

STATE

CRIMINAL

APPEAL

CORAM:

HENDRICKS ADJP et CHIWARO AJ

JUDGMENT

CHIWARO AJ:

INTRODUCTION

[1] The appellant stood trial before Magistrate Du Toit in the Regional Court for the Regional Division of North West held at Atamelang

facing a charge of rape read with the provisions of section 51 (2) of the Criminal Law Amendment Act 105 of 1997. The appellant was found guilty as charged and sentenced to life imprisonment on 21 April 2008.

[2] The notice of appeal was filed out of time hence an application for condonation for the late prosecution of the appeal was simultaneously

filed with the said notice. After considering the reasons for the delay and the interests of justice involved, the appellant was

granted condonation.

[3] The brief facts relevant to this matter are that on or about 7 April 2007 and around 22h00 the complainant, who was then 13 years of age, attended to a local tavern known as Tandabantu at Setlagole village, in the company of five of her accomplices. At around 02h00 in the morning of 8 April 2007, they decided to retire to their respective homes when they were accosted by the appellant, who was in the company of two other gentlemen, only identified as Steve and Skepenso. The appellant grabbed the complainant and assaulted her several times. The complainant unsuccessfully tried to pull herself away from him. He dragged her to the bush near the river where he continued to rape her.

[4] The complainant's accomplices noticed a police vehicle passing by and they notified the police about the complainant's ordeal at the hands of the appellant. A search for the appellant and the complainant ensued but all in vain. After the rape ordeal, the complainant managed to reach her home where she reported to her aunt, K M, who then called the police. The complainant laid charges at the Setlagole Police Station and she was then taken to the hospital for medical attention.

[5] The investigating officer in the case, Constable Louw, based at the Child Protection Unit in Vryburg testified that he was assigned the case on 7 April 2007 after the complaint was registered at Setlagole Police Station. On the same day after registering the docket, he took the complainant to the hospital at Stella for examination.

- [6] A sample of the panty and vulva swab from the complainant was taken for possible DNA testing. He further testified that he could not immediately arrest the appellant as the latter had left Setlagole and was only arrested some few weeks after at Johannesburg following a tip-off from the complainant and her friend. Following his arrest, a control blood sample was drawn from the appellant for DNA analysis and to compare it with the sample previously taken from the complainant.
- [7] The test results compiled by the Biology Unit of the South African Police Service Forensic Science Laboratory revealed that the STR-profile of the DNA obtained from the panty and vulva swab is the same as the STR- profile of the DNA obtained from the control blood sample, indicating that the appellant had 99,9993 chance of exclusion as the person who raped the complainant. This means that the appellant is the person who raped the complainant on the day in question.
- [8] The trial court found the appellant guilty as charged. Since the trial court found that the prescribed minimum sentence was

applicable, it found that there were no substantial and compelling circumstances warranting a deviation from the imposition of the prescribed minimum sentence and the appellant was sentenced to life imprisonment. I deal more with this aspect later in this

judgment.

- [9] The appellant's grounds of appeal in respect of sentence are that:

9.1 He was nineteen (19) years old at the time of sentence;

9.2 He was a first offender;

9.3 He was gainfully employed as a plumber earning RS00-00 per week prior to his arrest; and

9.4 The State did not legally prove the age of the complainant for the imposition of life imprisonment.

- [10] The issues to be determined by this Court are:

10.1 Whether the trial court misdirected itself in sentencing the appellant to life imprisonment under circumstances where he was charged with and found guilty of rape read with the provisions of section 51 (2) of the Criminal Law Amendment Act[1];

10.2 Whether the imposition of life imprisonment was proper under circumstances where the appellant was not warned, at any stage before sentence was passed, of the possibility of being sentenced to life imprisonment; and

10.3 Whether that there were substantial and compelling circumstances to warrant a deviation from the imposing life imprisonment or any applicable prescribed minimum sentence.

- [11] Mr Gonyane, for the appellant submitted that over and above the grounds of appeal articulated above, this Court should interfere with the sentence of the trial court in the sense that the appellant was never warned of the possibility of the imposition of life sentence at any stage of the proceedings. In his view, an appropriate sentence will be a term of 10 years imprisonment.
- [12] Mr Nontenjwa, for the respondent, conceded that the trial court failed to properly consider the personal circumstances of the appellant in considering sentence and agreed with the submissions made on behalf of the appellant to the effect that taken cumulatively, there were indeed substantial and compelling circumstances justifying a departure from the imposition of prescribed minimum sentence. In the respondent's view, a term of 25 years imprisonment will be appropriate under the circumstances.
- [13] I now turn to deal with an aspect that was not addressed by either counsel relating to the charge which was preferred against the appellant in accordance with the charge sheet. Though this matter was not raised as a ground of appeal by the appellant, I am of the view that it is in the interests of justice that it must be ventilated as it stands stark on the face of the record of the proceedings.
- [14] The appellant was charged with an offence of rape read with the provisions of section 51 (2) of the Criminal Law Amendment Act though the age of the complainant was recorded as 12 years on the charge sheet. This, on the face of it, amounted to an incorrect charge being preferred against the appellant, to which he pleaded guilty. He was duly convicted and sentenced to life imprisonment as if the charge sheet was amended.
- [15] It is trite law that where an accused person is charged with an offence of rape where the victim is under 16 years of age, the charge sheet should reflect that such an offence be read with the provisions of section 51 (1) and not 51 (2) of the Criminal Law Amendment Act. Throughout the trial until judgment was handed down, there was no application made in terms of section 86 of the Criminal Procedure Act 59 of 1977 to amend the charge sheet so as to correct an obvious mistake and to the extent relevant, accord it with the evidence of the complainant, especially regarding her age. In delivering the judgment, the trial court stated thus:
- "The Court is satisfied that the state has proved the guilt of the accused beyond reasonable doubt. It can be said without a doubt that the accused was the person that had intercourse with the complainant. The intercourse took place without her consent. THE ACCUSED IS FOUND GUILTY AS CHARGED "[2]
- [16] It follows that the appellant, who was legally represented throughout the proceedings, was found guilty in accordance with the charge sheet, which detailed the offence of rape read with the provisions of section 51 (2) of the Criminal Law Amendment Act.

"In the light of this, I can do naught but conclude, inexorably, that the Regional Court did not have jurisdiction to impose life imprisonment in terms of section 51 (1) of the Minimum Sentencing Act. Mr Ndlovu was convicted of rape, read with section 51 (2); accordingly, the Regional Court was required in terms of section 51 (2) to impose a minimum sentence of 10 years (as he was treated as a first offender). The Regional Court's jurisdiction was limited in terms of section 51

(2) to imposing a maximum sentence of 15 years"

[18] In line with the authority cited above, I am of the view that the sentence of life imprisonment imposed by the trial court falls to be set aside and replaced with an appropriate sentence which accords with the legislative prescripts, to wit, section 51 (2) of the Criminal Law Amendment Act. The ultimate sentence to be imposed by this Court will be dependent on whether it is found that there were substantial and compelling circumstances that would have necessitated an imposition of a lesser sentence.

[19] Having regard to the view that I have taken on the matter, it becomes unnecessary to deal with the other grounds of appeal.

[20] In imposing sentence, the trial court should have been alive to the principles established through numerous courts decisions that the introduction of prescribed minimum sentences did not take away the discretion of the sentencing court to decide, in the final analysis, as to whether the circumstances of a particular case justify a departure from what the legislature has prescribed. In its discretionary powers, a court will decide whether there is "weighty justification" to depart. In *S v Malgas*[4] the court put it thus:

"That it [the legislature] has refrained from giving such guidance as was done in Minnesota from whence the concept "substantial and compelling circumstances" was derived is significant. It signals that it had deliberately and advisedly left it to the courts to decide in the final analysis whether the circumstances of any particular case call for a departure from the prescribed sentence. In doing so, they are required to regard the prescribed sentences as being generally appropriate for crimes of the kind specified and enjoined not to depart from them unless they are satisfied that there is weighty justification for doing so"

[21] In the *Malgas* decision quoted above, the court stated the position as follows regarding the test to be applied by the sentencing court:

"If the sentencing court on 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."[5]

[22] There are no numerus clausus of circumstances that may be regarded as "weighty justification" to enable a sentencing court to depart from the prescribed minimum sentences. This much was stated in the *Malgas* decision quoted above where the court stated:

"It would be an impossible task to attempt to catalogue exhaustively either those circumstances or combinations of circumstances which would rank as substantial and compelling or those which could not"[6].

[23] Similarly, our courts have also been repeatedly warned since the Malgas decision above, that the departure from imposing prescribed minimum sentences should not be taken without any justification for it is not business as usual[7].

[24] The approach to sentencing established in Malgas dictates that a court conducting an enquiry into whether substantial and compelling circumstances are present or not, must still consider the long established test of the triad in respect of the nature of the offence in question, the personal circumstances of the accused person and lastly the interests of society in general.

[25] It is without doubt that rape is one of the most invasive, humiliating and degrading crime that can be committed on a victim

with its emotional scars and accompanied trauma being immeasurable by any standard[8].

However, it is equally trite that in considering punishment for a particular offence, despite its form and nature, one must always find a balance of ensuring that such punishment is proportionate to the offender.[9]

[26] In balancing the personal circumstances of the appellant at the time of the commission of the offence, that he was 19 years at the time of sentencing, his potential to be rehabilitated and the general interests of society, it is my considered view that the trial court misdirected itself by not finding that there were indeed substantial and compelling circumstances in this case. There was no evidence placed before the court a quo which suggested that the appellant would offend again[10] and that he would not be rehabilitated given his age at the time.

[27] In the premises, it is my view that taking the cumulative personal circumstances of the appellant, the nature of rape as an offence and its prevalence, the aggravating factors, including that it was committed after the complainant was assaulted, the interests of society in protecting women in general against sexual offences and the need to instil punishment that would serve as a deterrent and the need to afford young offenders a second chance in life, it is my considered view that a term of imprisonment would be justified under the circumstances .

[28] In conclusion, I need to mention that if indeed the complainant's age was below 16 years as reflected on the charge sheet, it is regrettable that a correct charge was not preferred against the appellant so as to ensure that an appropriate sentencing regime is made applicable. This aspect ought to have been picked up by both the presiding Magistrate and the prosecutor. The administration of justice and victims of sexual offences have been failed.

[29] In the premises, the following order is made:

29.1. Condonation for the late prosecution of the appeal is granted.

29.2. The appeal against sentence is upheld.

29.3. The sentence of the court a quo is set aside and it is substituted with the following:

"1. Accused is sentenced to 9 years imprisonment "

29.4. This sentence is antedated to 21 April 2008.

O K. CHWARO

ACTING JUDGE OF THE HIGH COURT

I agree.

R. D. HENDRICKS

ACTING DEPUTY JUDGE PRESIDENT

DATE OF HEARING: 01 September 2017

DATE OF JUDGMENT: 22 September 2017

COUNSEL FOR THE APPELLANT: Mr T.G.Gonyane, Legal Aid South Africa, Mahikeng Justice Centre

COUNSEL FOR THE RESPONDENT: Adv M.C. Nontenjwa, Director of Public Prosecutions, North West

[1] Act 105 of 1997

[2] Original page 77 of the record, line 5-11

[3] 2017 (2) SACR 305 {CC} at para 46

[4] 2001 (1) SACR 469 (SCA) at para 18

[5] Ibid at para 25

[6] Ibid at para 20

[7] S v Matyityi 201 1 (1) SACR 40 (SCA) at par 23

[8] See S v Chapman 1997 (2) SACR 3 (SCA)

[9] S v Dodo 2001 (1) SACR 594 (CC)

[10] See S v Vilakazi 2012 (6) SA 353 (SCA) at para 58

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