

SOUTH AFRICA / JUDGMENT

Senosi v S (CA45/2013) [2017] ZANWHC 33 (13 April 2017)

[2017] ZANWHC 33

COURT

North West High Court, Mafikeng

BEFORE

J T Djaje, Samkelo Gura

CASE / FILE NUMBER

CA45/2013

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IN

THE NORTH WEST HIGH COURT, MAHIKENG

CASE

NO.: CA 45/2013

In

the matter between:

KEOAGILE

ERNEST

SENOSI APPELLANT

And

THE

STATE RESPONDENT

CRIMINAL

APPEAL

GURA

J AND DJAJE AJ

DATE

OF HEARING: 24 MARCH 2017

DATE

OF JUDGMENT: 13 APRIL 2017

COUNSEL

FOR THE APPELLANT: MR GOONYANE

COUNSEL

FOR THE RESPONDET: ADV MOETAESI

JUDGMENT

DJAJE AJ

- [1] The Appellant was arraigned before the Regional Court, Lehurutshe, charged with one count of rape. He was convicted and sentenced to fifteen (15) years imprisonment. He now appeals with leave of the Court a quo, the sentence imposed upon him.
- [2] The facts can be summarized as follows. On 1 November 2008 the complainant and her friend, L. were on their way home from a club. They met the Appellant who pelted stones at them. They both ran and in the process of running the complainant fell. The Appellant caught up with her and pulled her to the nearby tree where he undressed her of her jean. After she was undressed she managed to break loose and ran away. As she was running she fell on a thorny tree and the Appellant pulled her back to the tree where he had undressed her. At that tree, the Appellant undressed her panty, struck her with a stone on her mouth, unzipped his trouser and had sexual intercourse with her without her consent. After the sexual intercourse the complainant ran away leaving her clothes at the scene of the rape.
- [3] The complainant was able to identify the Appellant as the person who raped her. Immediately after the incident she reported to her mother that it was the Appellant who raped her. She later went to collect her clothes at the scene of the incident with L. and her mother. The Court a quo quite correctly convicted the Appellant.
- [4] In mitigation of sentence, it was stated amongst others that the Appellant was twenty two (22) years of age; single with no children and unemployed. He was a first offender and that this was not the worst case scenario on the part of the victim.
- [5] In aggravation of sentence, the State submitted that there were no compelling and substantial circumstances for the Court a quo to deviate from the prescribed minimum sentence as the Appellant showed no remorse. Further that the Appellant had pelted the complainant with stones before the sexual intercourse.
- [6] The learned Regional Magistrate, in imposing sentence, remarked as follows:

“There is therefore I mean the court is therefore compelled to impose the prescribed minimum sentence which is between 15 years and 20 years the minimum sentence 15 but the maximum which the court can impose in terms of the act it is 20.

and also

“Now after considering all these personal circumstances especially those of the accused I find that the appropriate sentence will be the minimum sentence of 15 years he is therefore sentenced to 15 years as contemplated in Section 51(2) of Act 105 of 1997.”

- [7] It is quite apparent that the learned Regional Magistrate relied on the provisions of section 51(2) of the Criminal Law Amendment Act 105 of 1997 (“the Act”). The said section provides:-

“51 Discretionary minimum sentences for certain serious offences

(1)

(2) Notwithstanding any other law but subject to subsections (3) and (6), a

Regional court or a High Court shall sentence a person who has been convicted of an offence referred to in-

(a).....

(b) Part III of Schedule 2, in the case of-

(i) a first offender, to imprisonment for a period not less than 10 years;

(ii) a second offender of any such offence, to imprisonment for a period not less than 15 years;”

PART III of Schedule 2 states

[Part III substituted by s. 68 of Act 32 of 2007.]

Rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law

[8] In terms of section 51(2) of the Act the court was obliged to sentence the Appellant to a minimum term of ten years imprisonment

unless there were compelling and substantial circumstances which justified deviation from the prescribed minimum sentence. The Court a quo in finding that the minimum sentence for rape as contemplated in section 51(2) of the Act is fifteen years was clearly an error and misdirection justifying interference by the Appeal Court.

[9] Counsel for the Appellant argued that in considering a suitable sentence the following factors constitute substantial and compelling

circumstances:

9.1 The Appellant was 18 years of age at the commission of the offence and 22 years during sentence;

9.2 He achieved standard 5 and left school at standard 6;

9.3 He was a first offender and further that he is a candidate for rehabilitation.

[10] The Respondent submitted that there are no compelling and substantial circumstances justifying deviation from the prescribed minimum sentence of ten years when the following factors are taken into consideration:

10.1 The Appellant was not remorseful for what he has done;

10.2 The complainant was fairly a young lady of 18 years;

10.3 The offence was premeditated;

10.4 The complainant was assaulted with a stone on the mouth;

10.5 She tried several times to break loose from the Appellant but he kept chasing her and dragging her back to where he raped her;

10.6 He did not use a condom when raping the complainant.

[11] In *S v Malgas* [2001] ZASCA 30; 2001 (2) SA 1222 (SCA), the correct approach to establishing whether or not substantial and compelling circumstances exist was set out in para 25 as follows:

“What stands out quite clearly is that the courts are a good deal freer to depart from the prescribed sentences than has been supposed in some of the previously decided cases and that it is they who are to judge whether or not the circumstances of any particular case are such as to justify a departure. However, in doing so, they are to respect, and not merely pay lip service to the Legislature’s view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of the specified kind are committed.....”

[12] Sentence is a matter for the discretion of the court burdened with the task of imposing it. A Court of Appeal will be entitled to interfere with the sentence imposed by the trial court if the sentence is disturbingly inappropriate or out of proportion to the seriousness of the offence. See: *S v Romer* 2011 (2) SACR 153 (SCA) para 22

[13] In imposing the appropriate sentence the court should always balance the nature and circumstances of the offence, the personal

circumstances of the offender and the impact of the crime on the community, its welfare and concern. See: *S v Banda and Others* 1991(2) SA 352 (BGD) at 355.

[14] The Appellant in this matter was convicted of a serious offence which carries a minimum sentence of ten years imprisonment. The Appellant first pelted the complainant with stones before dragging her to a tree and undressing her. The complainant was assaulted with a stone on her mouth after having fallen on a thorn tree. The Appellant showed no respect for the complainant as she had to run away from the scene leaving her clothes behind. This experience must have been humiliating for the complainant to arrive at home without her panty and trouser. Rape remains the most heinous crime which invades the victim’s right to privacy and dignity.

[15] Having regard to the personal circumstances of the Appellant, the aggravating factors and the nature of the offence, there are no substantial and compelling circumstances present, that warrant a deviation from the imposition of the prescribed minimum sentence of ten years imprisonment.

Conclusion

[16] In my view, the appeal against sentence must be upheld and the sentence should be set aside and be substituted with an appropriate

sentence.

Order

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

1. The appeal against sentence is upheld.
2. The sentence imposed by the trial Court is set aside and is substituted with the following sentence:

“Ten

(10) years imprisonment”.

3. The sentence is ante-dated to 18 November 2010.

J T DJAJE

ACTING JUDGE OF THE NORTH WEST HIGH COURT

I agree

SAMKELO GURA

JUDGE OF THE NORTH WEST HIGH COURT

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