

SOUTH AFRICA / JUDGMENT

Xaba v S (CA78/2019) [2022] ZANWHC 18 (3 May 2022)

[2022] ZANWHC 18

COURT

North West High Court, Mafikeng

BEFORE

Hendricks, Petersen

CASE / FILE NUMBER

CA78/2019

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Policy

IN

THE NORTH WEST HIGH COURT, MAFIKENG

CASE

NO: CA78/2019

Reportable: YES / NO

Circulate to Judges:

YES / NO

Circulate to

Magistrates: YES / NO

Circulate to Regional

Magistrates: YES / NO

In

the matter between:

LETLHOGONOLO

XABA

Appellant

and

THE

STATE

Respondent

CORUM: HENDRICKS DJP et PETERSEN J
DATE
OF HEARING
: 22 APRIL 2022
DATE
OF JUDGMENT
: 03 MAY 2022
FOR
THE APPELLANT
: MR MADIBA
FOR
THE RESPONDENT
: ADV GOLODA

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email. The date and time for hand-down is deemed to be 10h00 on 03 May 2022.

ORDER

Consequently, the following order is made:

- (i) Condonation for the late noting and prosecution of the appeal is granted.
- (ii) The appeal against the sentence succeeds.
- (iii) The sentence of life imprisonment imposed by the Regional Magistrate is set aside and is replaced with the following sentence:

“Thirty

(30) years imprisonment.”

Introduction

- [1] The appellant was charged in the Regional court, Klerksdorp with rape in contravention of the provisions of section 3 read with sections 1, 2, 50, 56(1), 56A, 57, 58, 59, 60 and 61 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 as amended. The charge was further read with sections 94, 256 and 261 of the Criminal Procedure Act 51 of 197 and section 51(1) and Schedule 2 of the Criminal Law Amendment Act 105 of 1997 as amended. The charge was also referenced with Section 120 of the Children's Act 38 of

2005. It is alleged that on the 15th July 2017 and at or near Orkney in the Regional Division of North West, the appellant unlawfully and intentionally committed an act of sexual penetration with the complainant N [...] N [...] 1 by penetrating her vaginally with his penis (when committed involving the infliction of grievous bodily harm), without the consent of the complainant.

[2] The appellant pleaded not guilty to this charge and in explanation of his plea tendered he stated, through his legal representative, that the sexual intercourse was consensual and that it happened around eight o'clock at night on the 15th July 2017. The State led the evidence of the complainant who testified through an intermediary including further. The evidence can be succinctly summarized as follows. E [...] K [...] is the complainant, N [...] N [...] 1's, sister, although they use different surnames. L [...] M [...] is their cousin. They were together on the 15th July 2017, when they proceeded to a taxi rank at around ten o'clock at night. Whilst walking, they were approached by two unknown men armed with open knives, who demanded their cellular phones and ordered them to take off their jerseys, which they complied with. The men then left with their jerseys. They screamed at the men who shortly thereafter returned E [...] and L [...] 's jerseys but not the jersey of N [...]. They then ran away from their assailants.

[3] E [...] and L [...] outran their assailants, whilst N [...] entered at a nearby home. Help was illicit. E [...] saw N [...] the following morning at the police station. N [...] was crying and sad. She was stabbed on her thigh and breast. Her clothes were bloodstained. She was taken to the hospital by the police and

when she returned home she made a report. The complainant, N [...] M [...] 1 testified and corroborated the evidence of E [...] up to the stage when they ran away from the two men. She ran in a different direction to that taken by E [...] and L [...] and was caught by one of the assailants who held her and dragged to a dilapidated house. When she resisted he stabbed her with the knife on her thigh. He forcefully undressed her trouser and panty whilst placing the knife against her neck. She was made to lie on a sponge on her back. He then sexual violated her. When he was done she dressed herself and left with her assailant walking in the direction of Orkney. Whilst walking, he wanted to engage in sexual intercourse again. When she refused, they fought and he stabbed her on the arm and the breast.

[4] They entered a certain house where he ordered her to undress again. The assailant's friend arrived and reprimanded him. He ordered her to get dressed. As there was a blanket on the floor, the friend said that they should not leave but rather sleep. She sat on the blanket and later requested permission to go relieve herself which was granted. She looked for a way to escape and returned to the house. At some time between four o'clock and five o'clock the following morning she realized that the men were fast asleep. She then managed to escape and proceeded to the police station where she reported the incident. She proceeded with three police officers to the house where the appellant and his friend were still found sleeping. The appellant was then arrested.

- [5] DNA forensic evidence in the form of a report accompanied by an affidavit in terms of section 212 of the Criminal Procedure Act 51 of 1977 was handed in by agreement. The DNA from the vaginal swap taken during the medical examination of the complainant matched the DNA

control sample taken from the appellant as a suspect. That concluded the evidence tendered by the State. The appellant elected not to testify and closed his case without presenting any evidence. The appellant was consequently convicted on the charge of rape. No appeal lies against the conviction. The appeal lies only against the sentence of life imprisonment.

- [6] An application for condonation for the late noting and prosecution of the appeal has been made. In an affidavit deposed to by the appellant in support of the condonation application, the appellant states that he was not advised by the trial court nor his erstwhile legal representative of his right to appeal and the time frame involved. As

a lay person, after being sentenced, he went to prison and started serving his sentence. He only learnt from fellow prisoners about

appeals and that he could appeal. This is not correct. After sentence was handed down, the following appears from the record:

“COURT: Lastly because you have been sentenced to life imprisonment you do not have to apply for leave to appeal you have got an automatic right to appeal to the High Court if you are not satisfied with conviction as well as sentence.

MR NEETHLING: Thank you your worship may I approach the accused?

- [7] The appellant was informed by the trial court about his right to appeal. Whether his erstwhile legal representative informed him about his right to appeal is not clear from the record. However, despite this, there is also no detailed explanation regarding the delay from the 21st May 2019 when the matter was finalized in the court a quo and the 12th November 2021 when the Notice of appeal was filed. It is not sufficient that the appellant/applicant merely stated:

“As I was still emotional and hysterical I could not think properly so I took time to digest and accept my situation as a prisoner. Ultimately I decided to institute appeal against my sentence and unfortunately at the time there Covid 19 pandemic which hit the world including our country and as a result it was difficult to get hold of the relevant people who could process my application because movement of people was generally prohibited. In the circumstances, I submit that the delay is not due to fault on my part, and was due to circumstances beyond my control.”

- [8] The appellant/applicant states in paragraph 6:

“I further submit that there are reasonable prospects of success are on my side.”

This is indeed correct. It is trite that good or reasonable prospects of success on appeal may compensate for lack of a detailed explanation about the delay that occurred. On the basis that there are reasonable prospects of success on appeal, I am inclined to grant the requisite condonation for the late noting of the appeal as well as the prosecution thereof.

- [9] The Regional Magistrate found that there are no substantial and compelling circumstances present in this matter that warrant imposing a lesser sentence than the prescribed sentence of life imprisonment. The grounds of appeal are that the Regional Magistrate erred in this regard and that life imprisonment “over emphasizes the public interest and negates the personal circumstances of the appellant.” That Section 51(1) read with Schedule 2 of the Criminal Law Amendment Act 105 of 1997 is applicable behoves no argument, in that in committing the rape, grievous bodily harm was inflicted in that the complainant was stabbed with a knife on her thigh, arm and breast. The following statement by the Regional Magistrate in passing judgment on sentence can, however, not be overlooked:

“Unfortunately, the complainant could not outrun you, you took her to what I may call a lion’s den where you preyed on her by raping her. It is not that you just raped her in order to subdue her you inflicted serious injuries on her body. You were just callous when you rape her I assume she was bleeding and you did not care. Furthermore, if one looks at Exhibit E where you rape her besides her dignity being taken away that place is filthy you just drag her also there. I wonder how many people have been raped in that place. It could be that there are many it is only that you have been detected.”

- [10] This in my view amounts to a gross misdirection on the part of the Regional Magistrate as it illustrates that his mind was clouded with the notion that this was not the first and only rape that the appellant perpetrated at the dilapidated house where the complainant was dragged to against her will. There was no evidence presented to substantiate this unfortunate remark which is akin to a finding. No previous conviction or convictions for rape was proven by the State. The appellant is in fact a first offender for purposes of sentence.

- [11] In *S v Bogaards* 2013 (1) SACR 1 (CC) the following is stated:

“[14] Ordinarily, sentence is within the discretion of the trial court. An appellate court’s power to interfere with sentence imposed by courts below is circumscribed. 37 It 36 see [49] below where section 35(3) is set out in full. 37 S v Anderson 1964 (3) SA 494 (AD) (Anderson) at 495C-H. See also S v Salzwedel and Others 1999 (2) SACR 586 (SCA) at para 10. KHAMPEPE J 20 can only do so where there has been an irregularity that results in a failure of justice; 38 the

court below misdirected itself to such an extent that its decision on sentence is vitiated; 39 or the sentence is so disproportionate or shocking that no reasonable court could have imposed it. 40 A court of appeal can also impose a different sentence when it sets aside a conviction in relation to one charge and convicts the accused of another.”

- [12] In *S v Matyityi* 2011 (1) SACR 40 (SCA) the following is stated:

“[23] Despite certain limited successes there has been no real let-up in the crime pandemic that engulfs our country. The situation continues to be alarming. It follows that, to borrow from Malgas, it still is ‘no longer business as usual’. And yet one notices all too frequently a willingness on the part of sentencing courts to deviate from the minimum sentences prescribed by the legislature for the flimsiest of reasons-reasons, as here, that do not survive scrutiny. As Malgas makes plain courts have a duty, despite any personal doubts about the efficacy of the policy or personal aversion to it, to implement those sentences. Our courts derive their power from the Constitution and like other arms of state owe their fealty to it. Our Constitutional order can hardly survive if courts fails to properly patrol the boundaries of their own power by showing due deference to the legitimate domains of power of the other arms of state. Here parliament has spoken. It has ordained minimum sentences for certain specified offences. Court are obliged to impose those

sentences unless there are truly convincing reasons for departing from them. Courts are not free to subvert the will of the legislature

by resort to vague, ill-defined concepts such as ‘relative youthfulness’ or other equally vague and ill-founded hypotheses

that appear to fit the particular sentencing officer’s personal notion of fairness. Predictable outcomes, not outcomes based on the whim of an individual judicial officer, is foundational to the rule of law which lies at the heart of our constitutional order.”

[13] As alluded to earlier, this misdirection is material and it vitiates the entire sentencing procedure. That being the case, the sentence ought to be set aside and this court is at liberty to impose a suitable sentence. The following mitigating circumstances were placed on record. The appellant was 33 years of age; he has two minor children aged 12 years and 2 years respectively; he is unmarried; he is a first offender; he supports his minor children as and when he has money. These are the only personal circumstances which were placed on record. The aggravating features of this case by far outweigh the personal circumstances of the appellant and any mitigating features. This calls for a hefty sentence to be imposed within the jurisdiction of the Regional Court. This is more so, as grievous bodily harm was inflicted on the person of the complainant in that she was stabbed with a knife on her thigh, arm and breast. In deviating from the mandated sentence of life imprisonment, a Regional Court may impose a sentence of up to thirty (30) years imprisonment, in lieu thereof. I am of the view that a term of imprisonment for

thirty (30) years would be a fit and proper sentence under the circumstances of this matter.

Order

[14] Consequently, the following order is made:

(i) The appeal against sentence succeeds.

(ii) The sentence of life imprisonment imposed by the Regional Magistrate is set aside and is replaced with the following sentence:

R D HENDRICKS

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT,
NORTH WEST DIVISION, MAHIKENG

I agree

A H PETERSEN

JUDGE OF THE HIGH COURT

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