REPUBLIC OF SOUTH AFRICA

10/5/2016

CASE NO: A506/15

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DATE OF JUDGMENT: 10/5/16

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

In the matter between:-

ABRAM MALEFATSANE MAFORA Plaintiff

and

THE STATE Defendant

JUDGMENT

KOOVERJIE AJ:

A. **APPEAL:-**

1. The Appellant was charged with one count of rape read with Section 51(2) of Act 105 of 1997. He was convicted and sentenced to 20 years of imprisonment. The Appellant petitioned to this Court on both conviction and sentence. The petition was successfully in respect of the sentence only.

B. **CONVICTION:-**

2. The Complainant testified that on 21 March 2010 she was with her boyfriend at his home. At some stage, during the night he left the house. She then went to look for him. As she was walking outside, she became scared as there seemed to be some fighting in the vicinity. She entered the yard of the Appellant who then invited her into his house where she explained to him that she was scared. She asked him to accompany her home. They proceeded towards the graveyard, where he raped her twice on the ground. The Appellant then left and she sought help once again from a nearby house.

3. The Appellant's version is that he met the Complainant at a shebeen. He bought her some liquor and they stayed at the shebeen till late. He then invited her to his home. They ate dinner and had consensual sexual intercourse. At the time his sister was at home as well. The Complainant did not wish to stay overnight so he agreed to take her home.

4. The Court *a quo* found the accused guilty of raping the Complainant. More specifically, the Court stated at record page 122, lines 13-17 ***"It is clear, the evidence of the Complainant, to the effect that the way she was treated, the way she had sexual intercourse on the dirt ground in the graveyard, is corroborated by the clothing, which was seen by the doctor which was dirty."***

C. SENTENCE:-

5. The State's counsel, Advocate R Molokoane, argued that the sentence is appropriate. The Magistrate had not misdirected himself, neither was the sentence imposed shockingly or disturbingly inappropriate.

6. The Magistrate correctly found that there were no substantial or compelling circumstances justifying a departure from the prescribed minimum sentence.

7. The State referred to the aggravating factors, namely that:

7.1 he raped the Complainant twice without using a condom, exposing her to sexually transmitted disease;

7.2 the Complainant trusted the victim, she sought safety in his home;

7.3 rape is prevalent in this country;

7.4 the Court considered the interest of the community when passing a sentence;

7.5 he had a previous conviction;

7.6 there are no prospects of rehabilitation. His denial of raping the Complainant is indicative of his unwillingness to take responsibility;

7.7 he lacked remorse which is further indicative that there is no certainty that he will not commit the offence again.

8. The Appellant's counsel, Advocate H Steynberg contended that the Magistrate had misdirected himself in sentencing the Appellant to 20 years imprisonment.

9. The State submitted before sentencing, that the Magistrate consider a 10 year sentence that is, the minimum prescribed sentence in terms of Section 51(2) of Act 105 of 1997.

10. Section 51(2) of the Criminal Law Amendment Act, 105 of 1997, provides for a minimum sentence of 10 years imprisonment when an accused is convicted for rape and has no previous convictions for a similar offence. However the Court does have a discretion to increase the minimum sentence with a maximum period of 5 years imprisonment.

11. This Court was referred to ***S v Mathebula and Another*** **2012 1 SACR 374 SCA, para 10,** where it was found:

> *"A regional magistrate has a discretion to impose a sentence prescribed by the Act with an additional 5 years as provided for in the proviso to Section 51(2). Such a discretion must be exercised judicially and on reasonable grounds. Where a regional magistrate intends to depart from the prescribed minimum sentence, it is proper and fair that the regional magistrate gives reasons for such departure. Absent any such reasons, the conclusion becomes inescapable that such a decision is arbitrary or that the sentencing discretion was not executed judicially."*

12. The Appellant's counsel further contended that the Magistrate was obliged to give both parties notice of his intention to increase the prescribed minimum sentence and allow both parties to address him on this issue.

13. Having considered the Magistrate's decision on sentence this Court notes that he acknowledged that the prescribed minimum sentence in terms of Section 51(2) was applicable. He further acknowledged that he could not only reduce the sentence if there are substantial and compelling circumstances but also increase it, particularly if he was a second offender.

In conclusion he stated: (record page 132 lines 1-8)

> *"In this particular matter I don't see any compelling circumstances that I can give you a lesser sentence than 10 years. Instead I can increase ten years and add more ... and you are sentenced to twenty years imprisonment."*

14. It is trite law that the imposition of sentence is primarily at the discretion of the Trial Court and that an Appeal Court will only interfere with the imposed sentence if such sentence is violated by an irregularity, misdirection or is disturbingly inappropriate[1].

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[1] *S v Sadler* 2000 (1) SACR 331 SCA at 334E-F

15. In this instance, there was clearly a misdirection. As already alluded to above, the authorities are clear that the sentencing court, in the event of it considering imposing a sentence which exceeds the prescribed minimum, it should set out on record the aggravating circumstances and furnish an explanation why such circumstances justify a departure from the prescribed sentence.

16. It is further not proper for an Appeal Court to have to speculate what the Magistrate's reasons were which motivated him to increase the minimum sentence.

17. In ***S v Maake* 2011 (1) SACR 263 SCA at para 19,** the Court enunciated the principle:

> ***"It is not only a salutary practice, but obligatory for judicial officers to provide reasons to substantiate conclusions."***

In para 20, the Court stated:

> ***"When a matter is taken on appeal, a Court of Appeal has a similar interest knowing why a judicial officer who heard the matter made the order which he did. Broader considerations come into play. It is in the interests of the open and administration of justice that Courts state publicly the reasons for their decision. A statement of reasons gives some assurance that the Court gave due consideration to the matter and did not act arbitrarily."***

18. Moreover by virtue of the provisions of section 51(2) of the Criminal Law Amendment Act the court *a quo* only has a discretion to increase the sentence to a maximum of a further 5 years. In this instance the court *a quo* erred in increasing the sentence to a further 10 years, which it was not entitled to.

18. Therefore we find that the sentence of the Court *a quo* was premised on a misdirection.

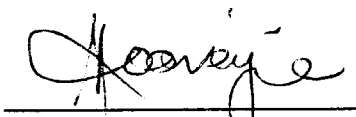
19. Having regard to all the factors in respect of the sentence, we find that the minimum prescribed sentence of 10 years is appropriate.

In the circumstances, I propose the following order:

1. The appeal against sentence is upheld and the sentence imposed by the court *a quo* is set aside and replaced with the following order:

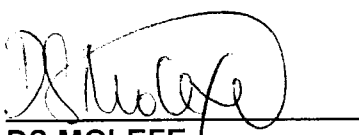
   "The appellant is sentenced to 10 years imprisonment."

2. In terms of section 282 of the Criminal Procedure Act 51 of 1977 the substituted sentence is antedated to 23 April 2010, the date of sentence.



KOOVERJIE AJ
Acting Judge of the High Court

I agree and it is so ordered



DS MOLEFE
Judge of the High Court