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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case Number: A865/14

In the matter between:

JOHANNES MADLA MKHATSHWA APPELLANT

And

THE STATE RESPONDENT

Coram: HUGHES J ET DE VRIES AJ

JUDGMENT

Delivered on: 29 May 2015 Heard on: 26 May 2015

HUGHESJ

1. The appellant , Johannes Madia Mkhatshwa, was charged with three counts as follows:

Count 1- Rape read with the provisions of section 3 read with section 1, 56(1), 57, 58 59, 60 and 61 of the Criminal Law Amendment Act (Sexual Offences and related matters) Act 32 of 2007. Statutory rape read with the provisions of section 51, 52 and schedule 2 of the Criminal Law Amenc'men* Act 105 of 1977;

Count 2- Attempted Rape, contravention of the provisions of section 55(A) read with chapters 2, 3, 4, section 1 55, 56, 57, 58 59, 60, 61 and 71(1), (2) and (6) of the Criminal Law Amendment Act (Sexual Offences and related matters) ACT 32 of 2007; and

Count 3- Theft read with the provisions of section 51(2) of the Criminal Law Amendment Act 105 of 1977.

2. Throughout the trial, the appellant was legally represented. On 5 May 2014, he pleaded guilty to all the charges preferred against him in the Regional court Ermelo. On the very same day, he was sentenced to life imprisonment in respect of count 1, 10 years

imprisonment in respect of count 2 and 1 year imprisonment in respect of count 3. The sentences were to run concurrently.

3. Count 1 of rape is in fact that of statutory rape, in that on 13 June 2012 the appellant raped the complainant, D…… V……, a 14-year-old girl. Count 2 of the attempted rape took place on 21 October 2013 in that the appellant attempted to rape L……. J…… M…….. a 22-year-old female and Count 3, on the same day, the appellant stole L……'s Nokia cellphone.

4. Automatic leave to appeal against the sentence in respect of count 1 was granted.

5. I am of the view that it is pertinent to set out what the appellant states in his section 112(2) of Act 51 of 1977 statement. He admits that the minimum sentence of life imprisonment in respect of count 1 was explained to him. Regarding count 1 he admits that the complainant was 14 years of age and she was walking on the footpath on her own and as she drew closer he grabbed her. She bit him on his finger. The appellant tripped the complainant and she fell on her back. This is when he climbed on top of her, pulled down her panties from under her dress and inserted his penis and into her vagina penetrating her. He was linked to the rape via his DNA.

6. As regards count 2 and 3, this occurred the year thereafter and in the same complainant's home, L……., eariier. He returned knowing that she was alone. On him entering the home of the complainant, he found her taking a bath. He grabbed her but she managed to get loose and ran out of the house. He took her cellphone from the house and pursued her outside. He attempted to grab her again with the intent intention to rape her. He forced her to the ground and tried to remove her panties. She screamed and said her father was on his way and this is when he left her and ran away.

7. Mr Alberts, for the appellant, argued that if one looked at the J88 of the complainant in count 1, which was admitted, it is evident that she was fully developed. As such, the court failed to consider this when sentencing the appellant.

8. From the record of the proceedings this factor was not argued before the trial court and on my perusal of the appellant's notice to appeal, he acknowledges that he "regrets what I did to the innocent girl". Therefor in my view, he was aware that the complainant was an innocent child. He was not confused, as Mr Alberts would like this court to believe that she was a girl over the age of 16 years.

9. Mr Alberts argued further that the trial court placed much emphasis on the appellant's previous convictions and the fact that he was on parole for rape when he committed these

offences. The trial court failed to consider these factors in light of all the other mitigating factors and weigh them up proportionally. Mr Pienaar, for the State, in reply to this argument, stated that the trial court had done just that and that the trial court did a complete and balanced assessment of all the relevant factors before sentencing.

10. The mitigating factors advanced and that the trial court took into account are categorised as general mitigation. The appellant pleaded guilty and did not waste the courts time. He was 27 and 28 years respectively when he committed the offences, he had a standard 4 level of education and had been working as a farm labourer earning R1 500.00 per month. He was released on paroie on 3 August 2011 having severed half of his ten-year sentence for rape.

11. The trial court took into account the appellant's previous convictions of assault 2'i 2C34 sr.a c: \r.i 2006, which he had been granted

parole. Of importance the trial court, correctly in my view, considered the period in which, whilst on parole, the appellant committed the offences in count 1 to 3. On 3 August 2011, the appellant was released on parole. The offence in respect of count 1 was committed on 13 June 2012. On 8 October 2013, the matter was struck off the roll, reason being the State did not have sufficient evidence against him, that being the DNA evidence. He is again released into society. On 21 October 2013, he commits the attempted rape and theft. His parole would have ended on 3 July 2016.

12. From the above careful analysis of the factors above, the trial court concluded that "...die beskuldigde begin nou om tekens te toon van 'n lewenwyse maak om vrouens te verkrag." (Page 22 lines 20 to 23 of the record. I concur with the conclusion of the trial court. It would seem that every opportunity that the appellant was allowed to be in the midst of society he found use this opportunity to rape or attempt to rape a women. This indication that he was clearly making a career out of raping females and could not go long without attempting to do so. Whilst on parole I might add for rape having only served half of his sentence.

13. Mr Pienaar argued that the cases quoted by Mr Alberts were distinguishable from this case. Those cases dealt with first offenders, in some cases the complainant was an adult who was raped and in another, the offender was a youth, school attending and it did not involve a non-consensual scenario, like in this case.

14. The guidelines as regards the use of decided cases was dealt with in S v D 1995 (1) SACR 259 (A) at 263g-h:

"Decided cases dealing with sentence may be of value as providing guidelines for the trial court's exercise of discretion (see S v S 1977 (3) SA 830 (A)) and they sometimes provide useful guidance where they show a succession of punishments imposed for a particular type of crime. (See R v Karg 1961 (1) SA 231 (A) at 236G.) But it is an idle exercise to try to match the colours of the case at hand and the colours of other cases with the object of arriving at an appropriate sentence. 'Each case should be dealt with on its own facts, connected with the crime and the criminal. . . .' (Karg's case ubi cit.) See S v Fraser 1987 (2) SA 859 (A) at 863C-D.

Further, the commentary in Commentary on Criminal Procedure Act by Du Toit is useful in this case:

"'Ultimately', said Petse JA in S v Kwanape 2014 (1) SACR 405 (SCA) at [16], 'each case must be decided in the light of its peculiar facts'. However, at [16] the following statements by Marais JA in S v

Malgas 2001 ;1) SACR ^59 (SCA) at [21] were also citea:

'It would be foolish of course, to refuse to acknowledge that there is an abiding reality which cannot be wished away, namely, an understandable tendency for a court to use, even if only as a starting point, past sentencing patterns as a provisional standard for comparison when deciding whether a prescribed sentence should be regarded as unjust. To attempt to deny a court the right to have any regard whatsoever to past sentencing patterns when deciding whether a prescribed sentence is in the circumstances of a particular case manifestly unjust is tantamount to expecting someone who has not been allowed to see the colour blue to appreciate and gauge the extent to which the colour dark blue differs from it. As long as it is appreciated that the mere existence of some discrepancy between them cannot be the sole criterion and that something more than that is needed to justify departure, no great harm will be done.' ”

15. I align myself with the principle set out in the preceding paragraphs. In my view, the consideration of each case on its own merits is paramount. Past cases are but only a guideline to ensure uniformity and consistency.

16. In this case, we have a repeat offender on parole that continues to disregard the law and persists in engaging in the same transgression. Clearly, he is an offender who flagrantly disregards the law and does not appreciate the lifelines provided when he is released early on parole and when the case in respect of count 1 is struck off the roll.

17. In the circumstances, I can only but conclude that there was no misdirection on the part of the trial court when it imposed the sentence that it did for count 1, in these circumstances.

18. In conclusion I make the following order:

18.1 The appeal in respect of sentence on count 1 is dismissed.

WV Hughes

Judge of the High Court

I agree and it is so ordered

De Vries

Acting Judge of the High Court