



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 829/13
Not reportable

In the matter between:

TAKALANI ERIC NTHABALALA

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Nthabalala v The State* (829/13) [2014] ZASCA 28 (28 March 2014)

Coram: Ponnan and Petse JJA and Legodi AJA

Heard: 14 March 2014

Delivered: 28 March 2014

Summary: Appeal against sentence – appellant convicted of culpable homicide and rape – sentenced to 16 and 45 years' imprisonment respectively – trial court committing misdirection in determining appropriate sentence – appeal court at large to interfere.

ORDER

On appeal from Limpopo High Court, Thohoyandou (Hetisani J sitting as court of first instance):

1 The appeal against sentence is upheld.

2 The sentences imposed by the court a quo in consequence of the appellant's conviction of one charge each of rape and culpable homicide are set aside and substituted as follows:

'2.1 On the rape, the accused is sentenced to 20 years' imprisonment.

2.2 On the culpable homicide, the accused is sentenced to ten years' imprisonment.

2.3 Five of the ten years' imprisonment imposed on the accused in respect of the culpable homicide is ordered to run concurrently with the 20 years on the rape charge. The effective sentence imposed on the appellant is 25 years' imprisonment.

2.4 The sentences are hereby ante-dated to 30 August 2000 being the date on which the appellant was sentenced.'

JUDGMENT

LEGODI AJA (PONNAN and PETSE JJA CONCURRING)

[1] This is an appeal against the imposition of terms of imprisonment of 16 and 45 years imposed upon the appellant, Mr Takalani Eric Nthabalala pursuant to his plea of guilty on charges of culpable homicide and rape, respectively. The sentences were imposed on 30 August 2010 by the then Venda High Court (now Limpopo High Court, Thohoyandou (Hetisani J)). The appeal is with leave of this Court.

[2] The facts of this case are set out in the appellant's statement in terms of s 112 of the Criminal Procedure Act 51 of 1977 filed in support of his plea of guilty and his evidence adduced in mitigation of sentence. The appellant was originally charged with murder and rape, but his plea of guilty to the competent verdict of culpable homicide in respect of murder was accepted by the State.

[3] The appellant's s 112 statement reads:

'AD COUNT I

Accused tenders a plea of guilty to culpable homicide and admits the following facts:-

- (a) That he caused the death of the deceased by holding her by the throat in a struggle when he was forcing her to have sexual intercourse with him.
- (b) His intention of holding her by the throat was to subdue her to have sexual intercourse with him and not to kill her.
- (c) He admits that he should have realised that he could cause the deceased's death by holding her in the manner he did on the throat.
- (d) That the deceased died as a result of being held by the throat in the manner he did on the date of the incident.
- (e) That the incident took place on the date and at the place as alleged in the indictment.

AD COUNT II

- (a) The accused admits that he was in the company of the deceased and other persons as alleged in the summary of substantial facts.
- (b) That he was left behind walking with the deceased when the group left the shebeen.
- (c) Along the way when he was with the deceased, he asked the deceased to have sexual intercourse with him but the deceased refused.
- (d) The accused was highly aroused as he had been drinking and dancing with the deceased at the shebeen and he as a result thereof, pulled the deceased aside into a mealiefield and tripped her.
- (e) The deceased fell on her face when he tripped her and he struggled to pull off her panty whilst she was resisting.
- (f) When the accused turned the deceased around to make her to lie on her back so that he could have sexual intercourse with her, the deceased started scratching him on his face with nails and hitting him with clenched fists.

- (g) The accused had by then already pulled down his pants and was ready for sexual intercourse.
- (h) The accused then went for the deceased's throat in order to subdue her as she was too powerful and was hitting very hard.
- (i) The intention of holding her by the throat was to subdue her to have sexual intercourse with her and she accordingly weakened as he was holding her throat.
- (j) The Accused continued having sexual intercourse with her whilst holding the throat.
- (k) After he had ejaculated he released the throat and realised that the deceased was then breathing slowly and with difficulty.
- (l) The accused ran after other members of the group who were walking in front but could not find them and he again went back to the deceased and tried to make her stand up in vain.
- (m) The accused became scared and left the deceased lying in the field and went home.
- (n) The accused knew that it was unlawful to have sexual intercourse with a woman without her consent but was just overcome by emotion.'

[4] I am satisfied that the court below misdirected itself in the exercise of its sentencing discretion in the following respects:

First, during his evidence in mitigation of sentence the appellant's evidence unfolded as follows:

'How do you feel having caused the death of the deceased? --- I feel hurt about this because I did this unintentionally and because of drinks I had.'

That taken together with the appellant's guilty plea appeared to reflect genuine remorse on the part of the appellant. However, the trial court dismissed that expression of remorse in these terms:

'I am afraid that the fact that you are remorseful of what you did is too late. That person has died and will never come back again.'

Second, the trial court stated:

'Now, this court will not let the country or that community down, where this thing happened, because *that community was shocked to learn, on the following day, the 29th, that someone staying there had been raped and murdered.*' (My emphasis.)

There was no evidence placed on record about the reaction of the community. It is thus not clear what the factual foundation for that conclusion is. The court engaged in similar speculation when it stated:

'Who knows, perhaps you throttled her after you had raped her, trying to prevent her from reporting you.'

Third, the previous convictions proved against the appellant were for theft. At the time of sentencing they were more than ten years old. The trial court with reference to those convictions stated:

'You are a person who has had collision with the law several times, without taking heed thereof.'

The inference is inescapable that the trial court considered the previous convictions as aggravating despite the fact that they were irrelevant and had occurred a long time ago.

[5] The personal circumstances of the appellant are as follows: He was born in 1963. He was about 37 years old at the time of the commission of the offences on 10 February 2000. He is married with two children. Both children were attending school. At the time of sentencing they were in the process of completing Standards 5 and 2 respectively. He was self-employed in a building construction business, constructing foundations. His wife was taking care of the business in his absence. She was, however, experiencing problems with the employees. Ordinarily, the appellant's business made a net profit of about R5 800 per month.

[6] In mitigation of sentence the appellant tried to explain himself as follows:

'Why did you have to rape the deceased, do you have any explanation for that? --- It is because we had been dancing together with the deceased and I took it that through that action, she would allow me to do anything with her and the one thing is that I failed to get control of my emotions.'

The simple act of dancing with the appellant could never have been considered by the appellant as the complainant consenting to have sexual intercourse with him. Clearly the appellant was not prepared to accept 'no' from the deceased.

[7] The offences in question are very serious. As it was said in *S v Chapman* 1997 (3) SA 341 (SCA) 345B-D and repeated in *S v Vilakazi* 2012 (6) SA 353 (SCA) para 1, 'rape is a . . . humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. Women in this country . . . have a legitimate claim to walk peacefully on streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives'.

[8] As Nugent JA put it, '[r]ape is a repulsive crime . . . [It is] an invasion of the most private and intimate zone of a woman and strikes at the core of her personhood and dignity . . .' (see *Vilakazi supra* para 1). What is worse, in the circumstances of the present case the deceased was killed whilst trying to resist the appellant. To overcome her resistance the appellant throttled the complainant so that he could engage in sexual intercourse with her in circumstances where it was quite clear to him that she was not consenting.

[9] Society expects that serious offences must be punished. But society also expects that mitigating circumstances should be taken into consideration and that the accused's specific position be afforded consideration in the determination of sentence (see *S v Holder* 1979 (2) SA 70 (A) at 81A-B).

[10] In *S v Du Toit* 1979 (3) SA 846 (A) this Court observed that where the nature of the offence and the interests of society are considered, the accused to a certain extent is still in the background. But, when he as a culpable human being is considered, the spotlight must be focussed fully on his person in its entirety, with all its facets. He is not regarded with a primitive desire of revenge, but with humane compassion which demands that extenuating circumstances be investigated in each case, however serious.

[11] Taking into account all of the relevant factors to which I have referred, I consider the following terms of imprisonment to be appropriate: for the rape, 20 years' imprisonment; and, for culpable homicide, ten years' imprisonment.

Due to the fact that the offences were part of the same transaction, a portion of the ten years' imprisonment should be ordered to run concurrently with the 20 years' imprisonment. The appellant has been serving his sentence since 30 August 2000. The sentences should therefore be ante-dated to the 30 August 2000.

Order:

- 1 The appeal against sentence is upheld.
- 2 The sentences imposed by the court a quo in consequence of the appellant's conviction of one charge each of rape and culpable homicide are set aside and substituted as follows:
 - '2.1 On the rape, the accused is sentenced to 20 years' imprisonment.
 - 2.2 On the culpable homicide, the accused is sentenced to ten years' imprisonment.
 - 2.3 Five of the ten years' imprisonment imposed on the accused in respect of the culpable homicide is ordered to run concurrently with the 20 years on the rape charge. The effective sentence imposed on the appellant is 25 years' imprisonment.
 - 2.4 The sentences are hereby ante-dated to 30 August 2000 being the date on which the appellant was sentenced.'

M F LEGODI
ACTING JUDGE OF APPEAL

APPEARANCES:

For appellants:

M J Manwadu

Instructed by:

Thohoyandou Justice Centre, Thohoyandou
Bloemfontein Justice Centre, Bloemfontein

For respondents:

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Instructed by:

The Director of Public Prosecutions,
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