

IN DIE HOOGGEREGSHOF VAN SUID-AFRIKA
(ORANJE VRYSTAATSE PROVINSIALE AFDELING)

Saak nr: A311/2004

In die saak tussen:

ELIAS DITHEBE POLELO

Eerste Appellant

THABO LEHLWESA Tweede Appellant

en

DIE STAAT

Resondent

CORAM:

BECKLEY, R *et* CILLIé,
et C.J. MUSI, RR

UITSPRAAK:

BECKLEY, R

AANGEHOOR OP:

14 NOVEMBER 2005

GELEWER OP:

17 NOVEMBER 2005

- [1] Appellante het as beskuldigdes 2 en 3 saam met 'n mede-beskuldigde tereggestaan tydens 'n sitting van die Rondgaande Hof te Virginia op klagtes van poging tot verkragting en huisbraak met die opset om te verkrag en verkragting. Hulle is beide skuldig bevind aan onsedelike

aanranding en huisbraak met die opset om te verkrag en verkragting. Beide klagtes is saamgeneem vir doeleindes van vonnis, en albei beskuldigdes is op 26 Augustus 1999 gevonnissen tot lewenslange gevangenisstraf. Hulle kom nou in hoër beroep teen die opgelegde vonnis met die verlot van die Hof *a quo*.

- [2] Op die stadium toe voormelde vonnis opgelê is, was die rigtinggewende gerapporteerde uitspraak met betrekking tot wesenlike en dwingende omstandighede die beslissing van **S v MOFOKENG AND ANOTHER**, 1999 (1) SASV 502 (W) waarin Stegmann, R, die volgende benadering ten opsigte van wat wesenlike en dwingende omstandighede daarstel, voorhou te 523c – 524d:

“...for ‘substantial and compelling circumstances’ to be found, the facts of the particular case must present some circumstance that is so exceptional in its nature, and that so obviously exposes the injustice of the statutory subscribed sentence in the particular case, that it can rightly be described as ‘compelling’ the conclusion that the in

possession of a lesser sentence than that prescribed by Parliament is justified.

It is not easy to see how, in relation to the crime of rape, when a group of young men, acting in concert, have seized a woman, and each of them has repeatedly raped her, there can ever be circumstances that can honestly be described as be so 'substantial and compelling' as to justify the in possession of a sentence that is less severe than that which Parliament has seen fit to prescribe as the statutory sentence that is to result from the perpetration of the crime of rape in the manner and in the circumstances referred to in Part I of Schedule 2... The absence of previous convictions, the comparative youthfulness of the prisoners, the unfortunate factors in their backgrounds, the probable effect upon them of the liquor they have taken, the absence of dangerous weapons, and the fact that complainant had not suffered serious injury, are all factors that a court sentencing a convicted rapist in the ordinary course, would weigh up as substantial factors relevant to the assessment of a just sentence, and as tending to mitigate the severity of the punishment to be imposed. However in my judgment, these factors, 'substantial' they, are matters that parliament must have had in mind as every day circumstances that would be found present in many or most of the crimes referred to in Part I of Schedule 2 of Act 105 of 1977. Without emasculating the legislation, they cannot be thought as 'compelling'. The conclusion that a sentence lesser than that prescribed by Parliament should be substituted for the prescribed sentence... As I understand this legislation, 'substantial and compelling' circumstances must be factors of an unusual and exceptional crime that Parliament cannot be supposed to have had in contemplation when prescribing standard penalties for certain crimes committed in circumstances described in Schedule 2."

[3] Die hof *a quo* het die benadering van Stegmann, R, *supra*, toegepas op die feite in die onderhawige saak en derhalwe tot die volgende bevinding geraak:

"Na my mening is daar geen wesenlike of dwingende omstandighede wat my regverding om beskuldigdes 2 en 3 ligter te straf as wat die Wetgewer voorgeskryf het nie. Wat in hulle guns aangevoer kan word, is die

sogenaamde, ‘normale versagtende omstandighede’ wat in baie gevalle aanwesig is, soos die feit dat daar geen toespaslike vorige veroordelings is nie; dat die klaagster nie ernstig beseer is nie; dat sy sy op die oog-af geen ernstige psigiese nagevolge oorgehou het nie; dat hulle moontlik of selfs waarskynlik, tot ‘n mate onder die invloed van drank was, ensovoorts.”

Met voormelde bevinding van die Hof *a quo*, inaggenome die uitspraak van **STAAT v MOFOKENG EN ANDERE,** *supra*, kan nie fout gevind word nie.

- [4] In die uitspraak van die Hof *a quo* met betrekking tot die aansoek om verlof om te appelleer, spreek die geleerde Regter President hom as volg uit:

“Toe vonnis opgelê is, was daar nog nie veel regspraak op die Strafwysigingswet, Wet nr. 105 van 1997 nie. Ek het my grootliks laat lei deur die uitspraak deur die uitspraak van Stegmann, R in **STAAT v MOFOKENG EN ANDERE,** 1999 (1) SASV 502 (W) vir my bevinding dat daar geen wesenlike of dwingende omstandighede teenwoordig was

wat die oplegging van 'n mindere vonnisse regverdig nie. Sedert vonnisoplegging meer as 5 jaar gelede is die bekende uitspraak in **STAAT v MALGAS**, 2001 (1) SASV 469 (A) gelewer wat skerp verskil van die Mofokeng-uitspraak. In die lig van die gesaghebbende uitspraak in die Malgas-saak, is dit wel moontlik dat 'n ander Hof mag bevind dat die sogenaamde normale versagtende omstandighede wat ek bevind het, wesenlike of dwingende omstandighede daarstel, daarom behoort verlov verleen te word om teen die opgelegde vonnis te appelleer.”

- [5] In die beslissing **STAAT v MALGAS**, *supra*, meld Marais, AR die volgende te bladsy 481 paragraaf 25:

“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. ... The Legislature has however deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While

the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored. All factors ... traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process.”

In ‘n latere beslissing van die Hoogste Hof van Appèl, **STAAT v ABRAHAMS**, 2002 (1) SASV 116 te 127, d – f handel Cameron, AR as volg met die oplegging van die verpligte lewenslange vonnis:

“...I agree with Foxcroft J that this is not one of the worst cases of rape. This is not to say that rape can ever be condoned. But some rapes are worse than others, and the life sentence ordained by the Legislature should be reserved for cases devoid of substantial factors compelling the conclusion that such a sentence is inappropriate and unjust.”

In **STAAT v MAHOMOTSA**, 2002 (2) SASV 435 te 443

handel Mpati, AR, verder met die klassifisering van verkragtings:

“The rapes that we are concerned with here, though very serious, cannot be classified as falling within the worst category of rape. According to the probation officer – she interviewed both complainants – they do not suffer from any after-effects following their ordeals. I am sceptical of that but the fact remains that there is no positive evidence to the contrary. These factors need to be taken into account in the process of considering whether substantial and compelling circumstances are present justifying a departure from the prescribed sentence. There should be no misunderstanding about this: they will all be serious but some will be more serious than other and, subject to the *caveat* that follows, it is only right that the differences in seriousness should receive recognition when it come to the meting out of punishment.”

Wanneer gelet word op die feite in die onderhawige saak, blyk die volgende, naamlik, dat die klaagster ‘n 31-jarige volwasse vrou was, wat aan drie kinders die lewe geskenk

het, wat die aand deur die appellante en die derde persoon verkrag is nadat hulle haar die nag na 'n huis agtervolg het en die deur oopgeskop het en haar daarna verkrag het. Alhoewel die appellante met messe gewapen was, is sy nie met die messe beseer nie. Trouens, sy het slegs bytmerke aan haar wang opgedoen.

Dit volg derhalwe na mening dat, alhoewel die bevinding dat daar geen wesenlike en dwingende omstandighede bestaan nie, die korrekte bevinding van die Hof *a quo* was kragtens die Mofokeng beslissing, die “normale” versagtende omstandighede, naamlik dat appellante nie relevante vorige veroordelings gehad het nie, dat die klaagster nie noemenswaardige beserings opgedoen het nie, en dat die appellante in alle waarskynlikheid tydens die voorval onder die invloed van drank was, wel volgens die beslissings wat daarna gevolg het, as wesenlike en dwingende omstandighede bestempel moes word, en dat die Hof *a quo* by gevolg fouteer het, luidens laasgenoemde beslissings, deur te bevind dat geen wesenlike en

dwingende omstandighede bestaan nie.

[6] In die lig van voormelde bevinding, moet bepaal word wat 'n gepaste vonnis is. Alles inaggenome, meen ek dat 'n vonnis van 20 jaar gevangenisstraf gepas sal wees. Die aanvanklike vonnis is opgelê so lank gelede as 26 Augustus 1999. Uiteraard moet die vervangende vonnis geag word op daardie datum opgelê te gewees het.

[7] Bygevolg slaag die appèl teen die opgelegde vonnis. Die lewenslange vonnis wat opgelê is ten opsigte van elk van die appellante word tersyde gestel en vervang met 'n vonnis van 20 (twintig) jaar gevangenisstraf, welke vonnis moet geag word opgelê te gewees het op 26 Augustus 1999.

A.P. BECKLEY, R

Ek stem saam.

C.B. CILLIÉ, R

Ek stem saam.

C.J. MUSI, R

Namens die applikante:

Adv. G.J.M. Wright
In opdrag van:
Die Regshulpraad
BLOEMFONTEIN

Namens die respondent:

Adv. E. Liebenberg
In opdrag van:
Die Direkteur:
Openbare Vervolgings
BLOEMFONTEIN

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