

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER:

A236/2010

5 DATE:

10 SEPTEMBER 2010

In the matter between:

MXOLISI PHONDOYI

1st Appellant

THEMBINKOSI PHONDOYI

2nd Appellant

10 And

THE STATE

Respondent

J U D G M E N T

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FOURIE, J:

The appellants, who are brothers, appeared in the Regional Court at Parow on charges of raping two 14 year old girls. The State alleges that first appellant had raped the complainant, named Thandiwe, twice and that second appellant had raped her friend, one Babalwa, on three occasions. Both the appellants pleaded not guilty, alleging that the intercourse with the two complainants was consensual. After hearing evidence, the regional magistrate found both the accused

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guilty as charged and sentenced each of them to 17 years imprisonment. They now appeal, with the leave of the court *a quo*, against their convictions and sentences.

5 At the outset, I should draw attention to the fact that the regional magistrate granted appellants leave to appeal on the basis that “n appèl moontlik argumenteerbaar is”. This is not the test for the granting of leave to appeal. It is trite that, as a normal rule, leave to appeal should only be granted in
10 circumstances where the presiding officer is of the view that there is a reasonable prospect of success on appeal.

The incidents which gave rise to the charges against the appellants took place on 23 December 2007 at Delft, when the
15 two complainants visited appellants' sister, one Bulelwa. The girls partook of intoxicating liquor and were joined by the appellants, as well as one Andile, the boyfriend of Bulelwa. Eventually first appellant and Thandiwe remained behind at his (first appellant's) residence, whilst second appellant and
20 Babalwa ended up at a nearby residence. Both the appellants admit that they then had intercourse with the complainants, in fact first appellant admits that he had intercourse with Thandiwe on two occasions, whilst second appellant admits having had intercourse with Babalwa on three occasions. The
25 crucial issue to be decided is whether the intercourse took
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place with consent or not.

In a thorough judgment, the regional magistrate carefully analysed the relevant evidence and concluded that the two
5 complainants were satisfactory witnesses. She took into account the fact that both complainants were only 14 years old at the time of the incident and 15 years when they testified. She accordingly approached their evidence with the necessary caution that it deserves. She found that Thandiwe was a
10 particularly reliable witness, more so than the more outgoing Babalwa. The magistrate also dealt with certain differences in the evidence of the two complainants, but correctly, in my view, concluded that such differences are not material.

15 The two appellants did not impress the magistrate as witnesses. She pointed to various discrepancies in their versions and rejected both versions as not only highly improbable, but clearly false. The main thrust of the submissions on behalf of appellants in the heads of argument
20 in this court, is that their versions should be accepted as reasonably possibly true, while the versions of the complainants should be rejected as improbable and accordingly false. I do not agree. On the contrary, I fully concur in the finding of the magistrate, that the versions of the
25 appellants are highly improbable.

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At the time of the incident the two appellants were much older than the complainants and both involved in serious relationships with other women. At that time the complainants did not even know the appellants and the version of the appellants that both the complainants virtually pounced upon them and started kissing them and thereafter consented to intercourse on several occasions, seems highly unlikely. In fact, the evidence shows that Thandiwe, on more than one occasion, told first appellant that he was too old for her. It should be borne in mind that Thandiwe was a virgin at the time of the incident and, as found by the magistrate, she is a shy and retiring young girl, whom one would certainly not expect to have acted in this manner. Babalwa, on the other hand, was sexually active, but she also did not know the second appellant and it seems highly unlikely that she would immediately fall in love with him and then have sex with him on three occasions that night.

The conduct of the complainants the next morning is also totally foreign to what one would expect from them, had they been involved in consensual sex with the appellants. On the very first occasion that they met up the next morning, they told each other that they had been raped. Thereafter they informed their friend, Zindli, what had happened to them. Why, on the version of the appellants, did the consenting complainants the

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next morning label themselves as rape victims? As submitted by Mr Theron on behalf of the State, if they did consent and wished to keep it a secret, there was no reason at all to tell Zindli and they would certainly have acted as if nothing had
5 happened.

The failure of the complainants to tell their mothers what had happened to them, cannot, in my view, be regarded as a factor impinging negatively upon their credibility. It is clear from the
10 evidence that Babalwa was scared to tell her mother, as she had been forbidden to be on the streets at night. Thandiwe testified that she wanted to tell her mother, but that Babalwa begged her not to do it.

15 Turning to appellants' version, there are, as pointed out by the magistrate, various discrepancies between the evidence of the defence witnesses and what was put to the State witnesses in cross-examination. These are material discrepancies, particularly in regard to the wayward conduct allegedly
20 displayed by Thandiwe and Babalwa. As mentioned previously, such conduct on their part would appear to be totally out of character and the discrepancies in this regard, as pointed out by the magistrate, further strengthens the conclusion that the appellants and their witnesses rather
25 attempted to cover up improper conduct on the part of the
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appellants.

I am satisfied that on a conspectus of the evidence as a whole, the magistrate correctly concluded that the version of
5 appellants and their witnesses is to be rejected as false. Put differently, I am satisfied that the magistrate did not misdirect herself in any respect in her approach to, and in evaluating, the evidence as a whole. I, therefore, conclude that the appeals against conviction fall to be dismissed.

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This brings me to the sentences imposed by the magistrate. It is trite that a court of appeal will only interfere with the exercising of a sentencing discretion by a trial court if such discretion was not exercised judicially, or in circumstances
15 where the sentence imposed differs substantially from the sentence which the court of appeal would have imposed, had it been the court of first instance. In view thereof that the complainants were only 14 years old and had each been raped on more than one occasion by the respective appellants, the
20 provisions of Act 105 of 1997 apply. The Act provides for a sentence of life imprisonment in such event, unless the court finds that there are substantial and compelling circumstances justifying a lesser sentence.

25 The magistrate carefully considered all the relevant mitigating

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and aggravating circumstances and concluded that substantial and compelling circumstances are present justifying a lesser than the prescribed sentence. There is, in my view, no basis for a finding that she misdirected herself in any respect in
5 imposing a sentence of 17 years imprisonment for each of the appellants. In fact, this sentence does not differ substantially from the sentence which I would have imposed had I been the court of first instance. I accordingly conclude that the appeals against sentence also fall to be dismissed.

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In the result I propose that the appeals of both the appellants be dismissed and that their convictions and sentences be confirmed.

15 WEBSTER, AJ: I agree.

WEBSTER, AJ

20 FOURIE, J: It is so ordered.

FOURIE, J

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