



THE HIGH COURT OF SOUTH AFRICA
FREE STATE PROVINCIAL DIVISION

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case No: A240/2017

In the matter between:

SETETELANE CHRISTIAN MEYA

Appellant

and

THE STATE

Respondent

Coram: Opperman, J et Moeng, AJ

Heard: 29 July 2019

Delivered: 29 August 2019

Summary: Appeal – conviction and sentence – vagueness of grounds of appeal - rape of minor – charges taken together for purpose of sentence

JUDGMENT

I CONTEXT OF THE APPEAL

[1] The appellant was convicted on 19 January 2017 of three counts of rape in terms of section 3 of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007*. The convictions were taken together for purpose of sentence and he was sentenced to life imprisonment in accordance with section 51(1) of the *Criminal Law Amendment Act 105 of 1997*. Two of the complainants were nine years old and the other six years

old at the time of the alleged rapes. He appeals against the convictions and sentence.

[2] Scrutiny of the case in all its facets demands the following aspects to be dealt with and adjudicated:

- 2.1 The delay in the appeal;
- 2.2 the grounds for appeal;
- 2.3 the dilemma in count 2;
- 2.4 the evaluation of the evidence by the court *a quo*;
- 2.5 the application of section 280 of the *Criminal Procedure Act 51 of 1977* (CPA) as opposed to the taking together of convictions for purpose of sentence, and;
- 2.6 the sentence.

II THE DELAY IN THE APPEAL

[3] Appellant was represented by Legal Aid South Africa in the court *a quo* and the appeal.

[4] The Notice of Appeal was served on the Director of Public Prosecutions: Free State and the Clerk of the Court: Bloemfontein on 25 January 2017. The appeal was only submitted to the Registrar: Free State High Court on the 17th of August 2017. The matter merely served before this court on 29 July 2019; two years and six months after the sentence. There is no record or explanation for the undesirable delay.

[5] The delay is to such an extent that it cannot be other than offensive towards the constitutional decree in section 35(3)(o) of the Constitution, 1996 that the appellant has a right to an appeal to, or review of, his conviction and sentence by a higher court. The Supreme Court of Appeal stated that delays of appeals negate that right either wholly or in part.¹ As I indicated in another case² that also served before us on the 29th of July 2019; the delay is water under the bridge. That said, it remains an irregularity.

¹ *S v MM* 2012 (2) SACR 18 (SCA).

² *Simon Lesesa Matroos v The State*: Case No: A69/2017.

- [6] The effect of the irregularity must be measured to the outcome of the case and might not be fatal, even so; it remains intolerable and will the judgement be forwarded to the Offices of the Director of Public Prosecutions: Free State, Legal Aid SA, Bloemfontein Justice Centre, Bloemfontein, Regional Court President: Free State, Bloemfontein as well as the Office Manager: Bloemfontein Magistrate's Court. The issue will also be brought to the attention of the Registrar of this court. Continued disregard of constitutional due process in this manner has the real potential to cause severe injustice and must be prevented.

III THE GROUNDS OF APPEAL

- [7] The convictions stem from the following charges:
1. In January 2011 the appellant allegedly raped "MM", a six-year-old girl by penetrating her genitally.
 2. In March 2012 the appellant allegedly raped "MpM", a 9-year-old girl "more than once" by penetrating her genitally.
 3. In March 2012 the appellant allegedly raped "LS", a 9-year-old girl "more than once" by penetrating her genitally.
- [8] The grounds of appeal are standard and vague in that the court *a quo* did not properly analyse the evidence in the State's case and did not give due regard to the improbabilities inherent to the versions of the witnesses. Further; the court should not have rejected the evidence of the appellant as not being reasonable possibly true.
- [9] The slightly more specific grounds of appeal were that in convicting the appellant the court erred in making the following findings:
1. That the State proved the guilt of the appellant on all three counts beyond a reasonable doubt;
 2. that there are no improbabilities in the State's version;
 3. that the state witnesses gave evidence in a satisfactory manner;
 4. that the evidence of the state witnesses can be criticized on matters of detail only whereas the evidence was contradictory in material aspects;

5. that the testimony of all three complainants was clear and that they were testifying from personal experience; and
6. that despite material contradictions between the second and third complainants the court found that the truth has been told.

[10] There is not much to be done with the above. Counsel should take care to be more specific when drafting notices. More often than not will it happen during the appeal that the matter cannot be taken further than where it stands by counsel for the appellant or that new issues come to light in the Heads of Argument.

[11] In the Heads of Argument, appellant conceded that he cannot take the arguments on counts 1 and 3 further than his instructions from the appellant. The position remained the same during the hearing of the appeal.

“3.8 It is writer’s hereof instructions that the Court erred in finding that the version of the Complainant was credible, taking above into consideration writer hereof also do not have any further submissions to make in this regard.

3.9 It is however submitted that penetration on Count 2 was not properly proven by the State and that the conviction on this charge must be reversed and Appellant acquitted.

3.4 The Court found however that penetration was proven by testimony of Complainants. This aspect was raised by attorney for the Appellant during address to Court without much success. This matter was not properly discussed in the court’s judgement on merits, there is a question surrounding penetration on Count 2 due to lack of injuries sustained by the complainant. The case law on this issue is clear, that the State must proof penetration and the court cannot just accept that it has taken place.

In this matter 2nd complainant testified that Appellant inserted his thing into her. This evidence is without any corroboration as there was no mention of injuries on the vagina of this Complainant. See P 231.”

IV THE DILLEMMA IN COUNT 2

[12] The dilemma that to a certain extent, slots in with the above and that was not realised by either counsel for the State or appellant, is that the complainant’s evidence in count 2 was not concluded. On page 66 of the record it shows that the complainant became tired during cross-examination and the matter was postponed. She was never called back. This is a fatal mistake and

irregularity that cannot be cured since the trial has taken its course. In result the conviction must be set aside.

V THE EVALUATION OF THE EVIDENCE

- [13] The principles according to which a court of appeal should consider the case are set out in *R v Dhlumayo* 1948 (2) SA 677 (A). The court of appeal must bear in mind that the trial court saw the witnesses in person and could assess their demeanour. That was stated seventy years ago and it is still true; especially in cases where sexual offences are involved. If there was no misdirection of facts by the trial court, the point of departure is that its conclusion was correct. In *S v Hadebe* 1997 (2) SACR 641 (SCA) at 645 G – H it was held that the credibility findings and findings of fact of the trial Court cannot be disturbed unless the recorded evidence shows them to be clearly wrong.

- [14] The succinct factual finding of the trial court is that the appellant lured the complainants to his room and there and then raped them. They were not raped more than once as alleged in the charge sheet.

- [15] In scrutinising the judgment of the magistrate and the conclusions reached by him, we can find no reason to interfere; but for the issue in count 2, with the court *a quo*'s factual and credibility findings. The court found that the State witnesses were honest and reliable and they corroborated one another on all material aspects. The magistrate was, in fact, impressed by their evidence.

- [16] The trial court was also specifically careful in the evaluation of the evidence. He stipulated the burden of proof that lies on the State and took the judgement from there. The complainants were, in essence, single witnesses as to their experiences but their evidence, all in all, directs to the trustworthiness of the facts found proven.

- [17] The appellant was well known to the complainants and the detail of their evidence is good and unique. Collusion and bias were considered and correctly rejected on solid reasoning. The version of the appellant was feeble and ambiguous in the face of the totality of the evidence against him.
- [18] The discrepancies in the evidence were dealt with appropriately by the magistrate. The witnesses were cross examined at length. The nature of the discrepancies did not negate the identity of the perpetrator.
- [19] Counsel for the appellant correctly submitted that he cannot take the matter for the appellant any further than the issue in count 2.

VI THE TAKING TOGETHER OF CONVICTIONS FOR PURPOSE OF SENTENCE

- [20] Hiemstra³ with reference to case-law correctly stated that the taking together of convictions for the purpose of sentencing is related to concurrent running but is not the same thing. It is normally undesirable to take offences together for the purposes of sentencing. In *S v Swart* 2000 (2) SA 566 (SCA) paragraphs [17] to [28] it was held that two rapes committed four hours apart are not sufficiently closely related to justify taking the convictions together for sentence.
- [21] The first rape *in casu* was committed in January 2011 and the next incident was in March 2012. During the March 2012-incident the one complainant was made to wait behind a curtain whilst the other was raped. The offences were perpetrated against two different individuals. It demands two separate sentences. Sentences of life imprisonment automatically run concurrently⁴ and was it not necessary to sentence in the manner the court *a quo* did.
- [22] Hiemstra⁵ therefor correctly concluded that concurrency can also lead to iniquity when one or more convictions is set aside on appeal. Any determinate sentence of imprisonment runs concurrently with a sentence of life imprisonment. A court cannot order that a determinate sentence does not

³ *Hiemstra's Criminal Procedure*; Albert Kruger, Last Updated: May 2019 at section 280.

⁴ *Supra* at section 280.

⁵ *Supra* at section 280.

run concurrently with a sentence of life imprisonment. (*S v Mashava* 2014 (1) SACR 541 (SCA)).

- [23] In this instance the effect is theoretical and without any consequence to the terms of life imprisonment to be served. The custom in law to take convictions together for purposes of sentence is moot in the light of the legislative and more effective option that courts have in terms of section 280 of the *Criminal Procedure Act 51 of 1977* to order sentences to run concurrently. The result is legal certainty and the complications *in casu* could have been avoided.

VII THE SENTENCE

- [24] The words of the complainants in their victim impact statements say it all when adjudicating the effect and seriousness of the crimes for purpose of sentence.

The complainant in Count 1:

"It hurt me a lot because every time when I see a male person calling me, I will ask myself should I go or not. Then I will be afraid. When I am at school and they talk about abuse it seems as if my classmates see me only as an abused person. So, I will always think about this thing and feel bad. Is like they are doing it deliberately; I so wish this thing could not had happened to me. Then I will start asking myself why people are doing this thing. My friends will explain how abused people are feeling. When I am supposed to sleep, I will be afraid."

The complainant in Count 3:

"It's unfair!

I had to leave Bloem because of just a stupid rape. Am always dreaming about it and sometimes I think it's happening in real life and now I don't trust any stranger man ever. When male teacher sends me, I will tell him I don't feel like going and that's disrespecting.

Performance

Am losing lot of marks because sometimes I don't concentrate in class and always think about what happened to me and I drop marks.

Abuse

When my teacher talks about the sexual thing I go out because I feel like they are talking about me while the teacher doesn't know so some learners will ask some questions and I will not answer them."

- [25] The above must be weighed against the personal circumstances of the appellant.

- [26] At the time of sentencing the appellant was 25 years old. The offences were committed when he was 19 years old. He lured the girls that were familiar with him and trusted him, into his room with a promise to watch movies. The deeds were premeditated. The lapse of time between the first and second-and-third charges was more than a year. There was ample opportunity for him to reconsider his actions but, again with premeditation, he perpetrated a similar heinous crime.
- [27] His only child, a girl of three years old, was and is in the primary care of the grandmother. Appellant was still in school at the time of his arrest and his level of education; grade 9. He was incarcerated for two years awaiting trial because he failed to attend the trial after release on bail. He was arrested on a warrant and further release was refused. The appellant is a first offender but repeatedly raped with a time-lapse of more than a year between the crimes.
- [28] Nothing in the personal circumstances of the appellant raises any grounds to interfere with the minimum sentences as prescribed. He might have been young when he perpetrated the crimes but the pendulum swings against him. He had the opportunity to cease his heinous conduct; he re-offended and added two more very young victims to his list.

VIII ORDER

- [29] In result of the above:
1. The convictions of rape on counts 1 and 3 are confirmed.
 2. The conviction on count 2 is set aside.
 3. The appellant is sentenced to a term of life imprisonment on each of counts 1 and 3.

M. OPPERMAN, J

I concur.

L. B. J. MOENG, AJ

On behalf of the appellant: PL van der Merwe
Bloemfontein Justice Centre
BLOEMFONTEIN

On behalf of the respondent: M Strauss
Director of Public Prosecutions: Free State
BLOEMFONTEIN