



IN THE HIGH COURT OF SOUTH AFRICA, NORTHERN CAPE DIVISION, KIMBERLEY.

~~Reportable~~/Not reportable

Case no: CA & R 99/17

In the matter between:

ZABATHINI JONAS

APPELLANT

And

THE STATE

RESPONDENT

Heard: 06 May 2019

Delivered: 19 July 2019

Coram: Phatshoane J and Pakati J

JUDGMENT

PHATSHOANE J

Introduction:

- [1] On 30 March 2015 Mr Zabathini Jonas, the appellant, then 30 years old, was convicted by a Regional Court Magistrate, Ms A. Venter, sitting in the Regional Court Phillipstown, Northern Cape, on two counts of rape in circumstances where the provisions of s 51 of the Criminal Law Amendment Act, 105 of 1997 ("the minimum sentence legislation"), applied. The two counts were taken together for purposes of the sentence of life imprisonment imposed on each count.
- [2] This appeal lies against both the conviction and sentence in terms of s 309(1)(a) of the Criminal Procedure Act, 51 of 1977 ("the CPA"), which affords convicted and sentenced persons an automatic right to appeal. Section 309(1)(a) provides in part that if a person was sentenced to imprisonment for life by a Regional Court

under s 51(1) of the minimum sentence legislation he or she may note an appeal without having to apply for leave in terms of s 309B.

- [3] Before us it was contended, for the appellant, that the Magistrate misdirected herself in rejecting the appellant's version and convicting him on the two counts of rape. It was further argued that she erred in finding that there existed no substantial and compelling circumstances which justified a deviation from the imposition of the ordained sentence of life imprisonment.

The Background:

- [4] It was widely known in the small town of Petrusville that the 24 year old Ms RB, the complainant, openly led her life as a lesbian. Mr Jean Jantjies, the complainant's neighbour, added that she dressed-up and walked like a man. She had masculine short haircut and bore an uncanny male appearance. What happened to her on 12 June 2010 was purely motivated by her sexual orientation which the appellant was fully alive to.
- [5] At approximately 22h00 on 12 June 2010 the complainant left her niece's home, accompanied by her two nieces and other people, for Convo Sports Pub, a tavern situated in Petrusville. Later that evening, after her nieces had left the tavern, the complainant joined her neighbour, Mr Jean Jantjies, who was in the company of the appellant. She barely knew the appellant except by sight. At approximately 03h00, when the tavern was about to close for business, the complainant, Mr Jantjies and the appellant departed to find a place where they could purchase cigarettes. At a certain house Mr Jantjies sent the appellant to buy cigarettes. The appellant requested the complainant to accompany him.
- [6] Instead the pair went to Thembinkosi Township where they arrived just before 04h00. The appellant entered a three-roomed house through a window and opened the door for the complainant. She then enquired from the appellant whether that was the place where they were supposed to purchase cigarettes. The appellant pulled out a pocket knife and brandished it in her face. He commanded her to enter into the bedroom and to take off her pants. When she enquired "*wat is dit dan nou*" he ordered her not be childish because she was

accustomed "*to these things*". The complainant says she entered the bedroom as she feared that the appellant would harm her. He followed her still holding the knife. She sat on the bed. He grabbed her pair of denim trousers "hy het aan my broek geruk" with one hand while the other was still holding onto the knife. The trousers' button came loose and fell off. She says she submitted because he told her that he will push the knife into her genitalia and wielded it close to that part of her body.

- [7] The complainant lowered her pants and underwear to her knees and so did the appellant. He pushed her on the bed; he sat next to her and put on a condom; he pulled her pants further down, below her knees, with his knee to part her legs; he then penetrated her vaginally and had sexual intercourse with her while he laid on top of her with their feet on the floor. The act was painful. She told him that he was hurting her and was crying. At some point the appellant removed his penis from her genitalia. The condom he used was torn. He put on another one. At that stage she says she lost consciousness. When she regained it the appellant was still having intercourse with her vaginally. She continued crying as the act was very painful. During the act the appellant wanted to turn her around to penetrate her from behind. She managed to prevent him from doing so. However, he once more, for the third time, inserted his penis into her vagina.

- [8] At approximately 06h00 that morning, after the two horrific hours of the sexual encounter, they dressed up. The appellant, on his own accord, escorted the complainant up to an area called Greenpoint. She proceeded to her niece's house and reported the incident. Her eyes were swollen as a result of her constant cry; she could barely speak out, she was shivering and completely traumatised. Her niece, Riekie, took her home and the police were summoned.

- [9] The complainant says she did not give the appellant permission to have sexual intercourse with her because she is not interested in men. She was examined by Dr Jakobus Anton Liebenberg on the same day of the incident at 14h00. The doctor could not insert his finger inside her genitalia as it was injured and the pain was unbearable.

[10] The doctor's medical report (the J88 form) was admitted in evidence by consent. He observed, during the medical examination, that the complainant was hysterical, emotionally traumatised, and cried continuously. Although at the time she was not menstruating her underwear was blood stained. She had extensive vaginal injuries and her whole vaginal area, says the doctor, was traumatised. He found blood on her perineum which came from the vaginal anatomy but not the uterus; the posterior fourchette also had blood which trickled down from the clitoris. The clitoris and its surrounding area, the para-urethral folds and the labia minora, were swollen and red. The hymen was also swollen and bruised with a fresh tear at 07h00.

[11] The doctor explained that in his 23 years of experience as a physician the complainant was the most traumatised patient he ever examined due to the extensive pain that she endured. This was an exceptional case where he had to administer 10 mg of Valium intravenously to calm her down because she was in a state of emotional shock. The doctor intimated that with consensual sexual intercourse he would not have arrived at the clinical findings he made. The nature of the injuries he observed were strongly associated with forced penetration and said it was highly improbable that the intercourse was consensual. It was possible, he said, that the patient would have lost consciousness during the act.

The appellant's version

[12] The appellant's version is that when they could not find cigarettes they went to his residence because the complainant had already agreed to sleep over at his house. Under cross-examination he expanded that he told her that he loved her and her response was that "sy het nie 'n probleem nie". He confirmed having entered the house through the window because the front door was locked and had to open the door from inside for the complainant. She got inside the house; they smoked some tobacco; and both freely proceeded to the bedroom. She sat on the bed and they started talking about the complainant's sexual orientation. He says that he knew that she was a lesbian and he likes lesbians but wanted to correct their sexual orientation. There was a bit of a quarrel on the use of a condom because the complainant did not want him to wear it as it caused her

sores on her private parts. He nevertheless utilised it because this was their first sexual encounter and there were many sexually transmitted diseases. They had sexual intercourse once. Under cross-examination he intimated that when the complainant moaned that the intercourse was rough he fell asleep. The complainant then enquired about the many voices she heard inside the house. She told him that she did not trust the situation and that the appellant should escort her home. They left for the appellant's aunt's house where they slept in the room outside but did not engage in any sexual intercourse.

- [13] The appellant does not recall any incident involving a knife and never carries one. He denied having threatened the complainant. He says about 10h00 that morning the complainant requested him to escort her to Greenpoint which he did. She was not crying or looking upset. During the course of that day, while he was attending a funeral, one aunty Liz called him to inform him that the police were looking for him for rape.

The judgment of the Court *a quo*:

- [14] The Magistrate was of the view that the complainant made a favourable impression as a witness. She noted that it was traumatic for her to relive and recount the episode to the Court; that the complainant did not contradict herself or attempt to manufacture evidence. She was persuaded that the complainant told the whole truth about the incident.
- [15] As for the appellant, the Magistrate found that he contradicted the version as put to the complainant by his own legal representative; that the appellant was arrogant on the witness stand; he evaded questions; gave vague and sarcastic responses to questions posed to him. What weighed with the Magistrate against the appellant was his own version that he wanted to correct homosexual girls. The Magistrate gained the impression, correctly in my view, that the appellant boasted with regard to his misplaced and offensive powers to correct the lesbians' sexual orientation. In the overall the Magistrate styled him an infamous liar and rejected his evidence as false insofar as it was contradicted by that of the State.

[16] The Magistrate was satisfied that there were two acts of sexual penetrations as opposed to three. She reasoned that the complainant was subjected to brutal acts of rape where she sustained serious bodily injuries and concluded that this was a typical "corrective rape" which fell within the ambit of s 51(1) of the minimum sentence legislation because the victim was raped more than once and sustained serious bodily injuries. As already alluded to, she found the appellant guilty on both counts of rape.

[17] The Magistrate noted that, although the appellant was a first offender in respect of the sexual offences, he did not show any contrition. She held that the appellant violated the complainant's right to privacy and dignity. Having observed the complainant in Court she doubted whether the complainant would ever recover from the psychological trauma she experienced. She was unable to find any substantial and compelling circumstances justifying a departure from the imposition of the minimum prescribed sentence. Resultantly, she took Count 1 and 2 together for purposes of the sentence and imposed a sentence of life imprisonment.

The analysis:

[18] What arises for consideration is whether that the Magistrate misdirected herself in rejecting the appellant's version and convicting him on the two counts of rape. It should also be determined whether she erred in finding that there existed no substantial and compelling circumstances which justified a deviation from the imposition of the sentence of life imprisonment.

[19] An appellate Court would invariably be reluctant to upset the findings of a trial court. In the oft quoted dictum in *R v Dhlumayo and Another*¹ the Court listed the following as one of the principles which should guide an appellate court in an appeal purely upon fact:

'The trial judge has advantages-which the appellate court cannot have - in seeing and hearing the witnesses and in being steeped in the atmosphere of the trial. Not only has he had the opportunity of observing their demeanour, but also their appearance and whole personality. This should never be overlooked.'

¹ 1948 (2) SA 677 (A) at 705

- [20] The Magistrate did not make any adverse credibility findings against the complainant. With the benefit of having perused the record that finding cannot be faulted. As for the appellant, his version was hopelessly untruthful and contrived. To demonstrate this, his counsel in the Court *a quo* put to the complainant that in the week prior to the sexual intercourse in issue the complainant and the appellant had a sexual encounter at some place near the Town Hall of Petrusville. When the appellant realised that he had painted himself into a corner by giving his attorney mendacious instructions he changed course to say that the instruction to his attorney was that two weeks prior to the incident in issue he had sexual intercourse with another, as he puts it, "tomboy", because he loves lesbians.
- [21] The appellant went so far as to say he had already turned a lesbian into a heterosexual, who now have children. He nonchalantly bragged that he put her on the right path and no longer "bumps", which he explained to mean that she no longer walks like a man. He hopes that if he engages in sexual intercourse with lesbians they will turn into heterosexuals: "*Ek hoop ek gaan haar reg maak.*" He also says that he hoped that if he had sexual intercourse with the complainant she would turn into a heterosexual.
- [22] When probed on the place where he had the inventive intercourse with the "tomboy", purportedly two weeks prior to the incident in issue, he said it was at the same house he had intercourse with the complainant. Clearly, he had forgotten that his instruction to his legal representative was that it was at a place near the Town Hall. When he started comprehending the dilemma with his self-destructing version his excuse was that there was a misunderstanding between himself and his attorney.
- [23] The appellant's witnesses did not add anything of value to his case. For instance Mr Philemon Siya Afrika says that on one morning around 04h00 he found the appellant and the complainant in his (Siya's) bedroom sitting next to each other on the bed. He does not recall what day of the week or a month or season of the year this was. He told the appellant and the complainant to leave and they immediately did so. The probative value of his evidence became even further

debased when he intimated that on that day, that he could not recall, he was extremely under the influence of alcohol to the extent that he requested someone to escort him home, whom he had to lean against, as he could not walk steadily. He says that his state of intoxication had a serious impact on his sight and comprehension. Mr Vincent Jogum, a police officer, was surprised that the appellant called him as a witness. He does not know anything about the incident and was also not involved in the arrest of the appellant. He never at any stage discussed the case with the appellant or the complainant.

- [24] The Magistrate correctly found that the doctor's evidence corroborated the complainant's evidence. As it shall be recalled, the doctor explained that he could not have arrived at the clinical findings he made had the intercourse been consensual. He also observed that the injuries sustained by the complainant were strongly associated with a forced penetration. The appellant could not say why the complainant would plot against him. Mr Van Tonder, for the appellant, conceded that he was unable to formulate any convincing argument why the appellant's version should be found to be reasonably possibly true. In the end, no cogent criticism can be sustained against the Magistrate's conclusion that the complainant was raped twice by the appellant. The upshot of this is that the appeal against the conviction should fail.
- [25] I now turn to the sentence imposed. The appellant was raised by his elder sister because his mother left them when he was still young. He completed grade 12 at school. During the sentencing proceedings he was 30 years old and unemployed. He has two minor children aged 11 and 4 years, who were cared for by his sister. He has one previous conviction of housebreaking with intent to steal and theft dated 21 July 2009. Following which he was sentenced to 30 months imprisonment wholly suspended for a period of four years on certain conditions.
- [26] Mr Van Tonder argued that the complainant was threatened with a knife and therefore minimal force of violence was used. He submitted that this was not the worst kind of rape imaginable and that there was no evidence that the complainant suffered lasting physical trauma. He contended that these were

mitigating circumstances which, when considered cumulatively with his personal circumstances, constituted substantial and compelling circumstances which would justify the imposition of a lesser sentence.

[27] The offences the appellant was convicted of fall within the ambit of Part I Schedule 2 of the minimum sentence legislation which attracts life imprisonment². Insofar as the appellant sought to argue that there were no serious physical injuries inflicted on the complainant it should be remembered that the appellant used a knife to subdue and instil fear on her. She feared for her life and was intimidated by him. Therefore, the purported absence of physical injuries on the body of the complainant was not because the appellant had been benevolent towards her. Apparent from the record the complainant was disconsolate when she testified in Court. Very often she was requested to take a deep breath and to drink some water. She had since her encounter with the appellant left Petrusville for the Western Cape because she could not come to terms with the episode. She says it was better for her to express her sexuality in the Western Cape as opposed to a small town such as Petrusville. With this in mind, it can hardly be argued, as Mr Van Tonder sought to do, that the offence had no enshrined psychological impact on the complainant.

[28] Gender based violence has no place in our constitutional dispensation. The gay and lesbian community are entitled to equal enjoyment of all rights and freedom as entrenched in our Constitution like all other South Africans. They should be treated with dignity and respect. They are entitled to be who they are and express themselves in any manner they wish without fear of being ostracised and violated. The so-called "corrective rape" is evil and cannot be countenanced. Our Courts will continue with their concerted effort to protect the lesbian, gay, bisexual and transgender (LGBT) rights. What the appellant did to the complainant was to pulverise her sense of belonging and self-expression. This is quite repulsive and unpardonable.

² See s 51(1) of the Criminal Law Amendment Act, 105 of 1997 (minimum sentence legislation)

[29] Nothing that was placed before the Magistrate, considered cumulatively, engender one to a conclusion that there were substantial and compelling circumstances justifying the deviation from the imposition of life imprisonment. It follows that the appeal against the sentence should also fail.

I make the following order:

1. The appeal against both the conviction and sentence is dismissed.

A handwritten signature in black ink, consisting of a large, stylized 'M' followed by a 'V' and a 'J', with a horizontal line underneath.

MV Phatshoane J

Pakati J concur in the judgment of Phatshoane J

APPEARANCES:

FOR THE APPELLANT:

Adv A. Van Tonder

Instructed by Legal Aid South Africa.

FOR THE RESPONDENT:

Adv Q.H. Hollander

Instructed by the Director of Public Prosecutions, Northern Cape.