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IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

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

Appeal Nr: A109/2016

In the appeal between:

THAPELO ISAAC MAHLABA

Appellant

And

THE STATE

Respondent

CORAM: C. REINDERS, J *et* MD HINXA, AJ

JUDGMENT BY: HINXA, AJ

HEARD ON: 1 AUGUST 2016

DELIVERED ON: 19 AUGUST 2016

- [1] On 4 August 2011 the appellant was convicted in the Regional Court at Harrismith on one count of rape. The state alleged that the provisions of Sections 51(1) of the Criminal Law Amendment Act 105 of 1997 were applicable in that the victim was a 14 year old, mentally disabled child. On the same day of conviction, he was sentenced to life imprisonment.
- [2] The appellant, who was represented in the court a quo, pleaded not guilty to the charge and tendered admissions in terms of Section 220 of the Criminal Procedure Act 51 of 1977, which can be summarised as:
- 2.1 He had consensual sex with the complainant on the 23 March 2008.
- 2.2 He was dating with the complainant and the latter had told him she was 20 years old.
- [3] The facts underpinning the conviction were succinctly as follows: The complainant was a 14 year old mentally retarded child, such retardation being a common knowledge in the farming area of less than 50 inhabitants. In addition, the appellant would frequently visit the neighbours and sometimes her family since he (appellant) was working with the father of the complainant. Pursuant to such visits, he was more cognisant of the complainant's mental condition. Even the

investigating officer (Mr. Zimu) realised at first glance that complainant was gripped with a mentally related problem and could not proceed with his intended consultation. On the day in question (4 August 2011) the complainant visited her aunt within the farming area. Her non return sent distress signals, whereupon her mother (T M) set out for a searching spree. She met the appellant who, on enquiry, denied ever seeing the complainant. In vain, she returned home, only to find the complainant already there. On asking her where she had been, the complainant cried. She (the mother) solicited the assistance of the complainant's grandmother (S M). The latter's thorough inspection of the complainant uncovered grass on the complainant's panties which bore all the hallmarks of rape. Further information elicited from the complainant implicated the appellant of this offence, as a result of which he was arrested. During his subsequent bail application proceedings, he categorically refuted any sexual intercourse with the complainant. Bizarrely, he changed this version to that of consensual intercourse after the DNA results had positively linked him to the offence. In amplification of his defence, he contended that they had been dating with the complainant who assured him that she was 20 years old. Furthermore, he was not alive to the complainant's mental disability, continued his version.

- [4] I pause to mention that the state did not see it prudent to tender complainant's *viva voce* testimony, ostensibly due to the aforestated mental problem. On the contrary, the prosecutor brought the

complainant before the court for "observation" by the court to prove that she was, at first glance, conspicuously mentally disturbed. However, the court's "observation" yielded opposite findings in that the magistrate observed, "she looks fine to me". I venture to mention that this was not only irregular but also a violation of the complainant's rights to privacy, bodily integrity, and dignity (See **S v Mnguni** 2014 (2) SACR 595 at 620 para [21] – [23]). The state, in fortification of its case, then tendered (with consent) the following documents it seemed pertinent: birth certificate of the complainant; medical report from Prof. Calitz pertaining to the complainant's mental status; DNA results report; and medical report on complainant regarding rape (J88).

- [5] The appellant testified in amplification of his case and called no witness. In brief, he reiterate the contents of his Section 220 admissions: That the complainant deceived him into believing that she was 20 years old; that they were dating for 4-5 weeks before the date of this incident; that he never was, nor did he have any reason to be, cognisant of the complainant's mental state.
- [6] I interpolate at this juncture to state that the appellant also brought to the fore new crucial issues for the first time: That the complainant's mother knew about her love affair; that also one T knew about this affair and the aforesaid T would testify in strengthening the defence case; that he (appellant) used to give complainant money during his pay days which would sustain her entire family; this evidently exuded

implicit approval of the love affair by the complainant's mother; his (appellant's) abrupt cessation of the aforestated financial support elicited the family wrath, hence this accusation against him.

[7] It bears mentioning at this stage that the aforementioned T was not called as a defence witness. The appellant, in closing his case, placed on record that T would not take his case anywhere.

[8] In this appeal a high premium was placed basically on three questions by Adv. Kambi on behalf of the appellant:

8.1 Whether the court a quo complied with the provisions of section 193 and 194 of the Criminal Procedure Act 15 of 1977.

8.2 Whether the Appellant knew at the time of the commission of the offence that the complainant was incapable of making informed consent due to her age and her mental status.

8.3 Whether the Appellant had sexual intercourse with the consent of the complainant.

[9] Adv. Maphumulo, on behalf of the respondent contended in respect of questions 8.2 and 8.3 *supra* that the appellant was privy to the mental retardation of the complainant and the latter did not consent. He premised his submissions on a plethora of reasons which will hereunder unfold in the course of this judgment.

[10] It is significant to record that no contention was advanced for the respondent as regards question 8.1 raised on behalf of the appellant *supra*.

[11] At this juncture I see it fitting to hereunder consider seriatim the questions posed as grounds of appeal on behalf of the appellant.

[12] It may serve a useful purpose to recite both sections since they are at the heart of the intrigue.

a) Section 193 reads as follows:

“The court in which criminal proceedings are conducted shall decide any question concerning the competency or compellability of any witness to give evidence”

b) Section 194 on the other hands provides:

“no person appearing or proved to be afflicted with mental illness or to be labouring under any imbecility of mind due to intoxication or drugs or the like, and who is thereby deprived of the proper use of his reason, shall be competent to give evidence while so afflicted or disabled”.

[13] In this connection, I see it meet to refer to **S v Katoo** 2005 (1) SACR 522. At 527(j) – 528(b) the court held:

“The Trial Court had a duty properly to investigate the cause of her imbecility before concluding that she was incompetent. Section 193 enjoins a trial court to enquire into this issue and decide whether a witness is in fact incompetent. This may be done by way of an enquiry whereby medical evidence on the mental state of the witness is led or by allowing

the witness to testify so that the court can observe him or her and form its own opinion on the witness's ability to testify. In the past the courts in this country have permitted persons suffering from mental disorders as well as imbeciles to testify subject to their being competent to do so... That approach is in harmony with the perception contained in S192 to the effect that someone is a competent witness..."

[14] I find the sentiments expressed in **Katoo** case *supra* not only apt but also instructive on the facts obtaining in this case. It is common cause that compliance with Section 193 and 194 by the court a quo, if there was any, did not conform to the requirements laid down in **Katoo** case (*supra*). It is further common cause as alluded at paragraph 10 *supra* that there was no explanation, let alone justification, advanced for the respondent for such glaring anomaly. It follows logically thus that the answer to the first question raised on behalf of the appellant should be answered in his favour, viz, the court a quo did not comply with the provisions of the aforestated sections.

[15] I turn next to consider the remaining two questions. I see it appropriate to deal with them simultaneously since they are closely related.

[16] In its judgment, the court *a quo* summarised its findings as regards the two questions in issue as follows:

"Uit die getuienis wat aangebied is, is dit duidelik dat die klaagster 'n geestesgestremde of 'n ... ja, 'n geestesgestremde persoon is en dat sy ook 'n kind was ten tyde die pleging van die misdryf. Die beskuldigde voer

aan dat hy onder die indruk was dat die klagster heeltemal normaal is en wel tot geslagsgemeenskap kon toestem. Volgens die getuienis wat aangebied is deur die Staat blyk dit egter dat die klaagster nie tot geslagsgemeenskap kon toestem nie. Na oorweging van die getuienis as 'n geheel aanvaar die Hof die getuienis wat deur die Staat aangebied is as bewys bo redelike twyfel. Volgens die Klaagster se moeder asook kapt. Zimu kan 'n mens duidelik agterkom dat die klaagster geestesgestremd is waneer daar met haar gesprekke gevoer word. Volgens die kind se moeder moes die beskuldigde daarvan bewus gewees het, want hy het gereeld besoek afgelê by hulle aan huis en hy het ook vriendskapverhouding met die kind se pa.”

[17] Adv. Maphumulo for the respondent, in support of the judgment, persuasively argued the two points in issue placing heavy reliance on the following facts:

- i) The appellant first denied sexual intercourse during bail application, only to change to consensual intercourse when the positive DNA results linking him were on hand.
- ii) It is incomprehensible how the appellant would not know the complainant's mental condition and her tender age yet he (appellant) was staying in the neighbouring farm with not so many inhabitants. This contention was further bolstered by the fact that the appellant used to occasionally visit the complainant's father and he (appellant) would not be oblivious to the complainant's plight, continued the submission.
- iii) The constant reference by the appellant to the complainant as a “child” during cross examination was also an indication that the appellant was fully aware that the complainant was a minor.

iv) If Captain Zimu at first encounter with the complainant for consultation purposes could immediately grasp that she was not mentally capacitated, it was quite strange how the appellant would not have realised this when he had conversation with the complainant to secure sexual intercourse.

[18] It follows on the view that I take of this matter that the findings by the court a quo on the two issues cannot be faulted. The findings are properly premised on, *inter alia*, the persuasive reasons advanced by Adv. Maphumulo for the respondent.

[19] Whilst on this point, it behoves me to record some observations underscoring the improbability of the appellant's version on the two issues under review. What one sees here is excessively innovatory versions by the appellant whenever he realized that the odds were heavily stacked against him. The hereunder are in addition to those already raised at paragraph 17 *supra*:

- a) Before his evidence in chief, he never divulged a crucial issue that one T was privy to their love affair with the complainant. At the risk of stating the obvious, he only mentioned this in his evidence in chief.
- b) Before cross examination by the prosecutor, he did not see it fit to mention that the complainant's mother was also aware of, and implicitly approved, the affair.

c] It only unfolded under cross examination that the appellant had been financially maintaining complainant's family and that he was only falsified for rape when he desisted from such.

[20] The foregoing ineluctably drives one to an inescapable conclusion that the appellant's account of events is bordering absurd and palpably false. Consequently, it is my finding that the appellant was fully cognisant of the complainant's mental disability and there was no consensual intercourse between them.

[21] However, this is not the end of the matter. Another crucial issue has to be determined viz whether the conviction can still prevail despite the failure of the court a quo to comply with Sections 193 and 194.

In this regard I can do no better than refer to the case of **S v Chabalala** 2003 (1) SACR 134 (SCA) at 139 i-j where the court held,

"The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of the inherent strengths and weakness, probabilities and improbabilities on both sides and having done so, to decide whether the balance weighs in favour of State so as to exclude any reasonable doubt about the accused's guilt"

[22] The question that, however, stands to be asked *in casu* is whether applying the aforementioned test there remains any reasonable doubt

about the appellant's guilt pursuant to the trial court erring in regard to the provisions of facts 193 and 194.

- [23] In my view the evidence against the appellant is so overwhelming, and his version so inconsumable, as demonstrated above, that compliance with Sections 193 and 194 would, by no strength of imagination, strengthen his case. Though non-compliance therewith was, and still remains, an irregularity, the latter was not so gross as to vitiate the propriety of the conviction. There can thus be no prejudice to the appellant sparked exclusively by non-compliance with Sections 193 and 194 by the court a quo.

I am accordingly satisfied that the conviction cannot be faulted.

- [24] I now turn to deal with the appeal against sentence. It was contended on behalf of the complainant that there was no attempt by the state to elicit any evidence on the emotional impact of the offence to the complainant; there was no victim impact report and such report was relevant to cast some light on the impact of the offence to the complainant, continued the submission. In this regard reliance was placed in a substantial measure on **S v Thato Victorious Ntepe** (A151-2015) (2016) ZAFSHC 52 (22 March 2016) paragraph 8; the complainant did not suffer any injuries or serious injuries during the incident; the attack was not breathtakingly and brazenly brutal as envisaged in **S v Matyityi** 2011 (1) SACR 40 SCA.

In conclusion, it was submitted that the cumulative effect of the following factors constituted compelling and substantial circumstances: Appellant was a first offender; he was relatively young; he spent 12 months in custody pending finalisation of the case; the state did not submit victim impact report; the rape does not fall under the categories of the worse rape.

- [25] In considering an appropriate sentence to impose on the appellant in *casu*, the court a quo took into account the appellant's personal circumstances; the gravity of the offence, and the interests of the community. It admits of a finding that the court a quo adopted a well balanced approach in the determination of what it deemed to be a proper punishment, considering all the pertinent factors without under-or overemphasizing one at the expense of the other.
- [26] The personal circumstances of the appellant alluded to at paragraph 24 *supra* are indubitably relevant factors in determination of sentence. That is all the more so that he furthermore spent 12 months in custody pending finalization of the trial. Whilst on its point, it is timely to refer to **S v Fortune** 2014 (2) SACR 178 (WCC) at 188 e-f where the court held that the question that was to be asked is:

“Whether its effect, (time spent awaiting trial - my addition) taken together with the prescribed minimum sentence, would render a sentence so disproportionate to the offence of which the accused had been convicted as to amount in the context of all the relevant factors to substantial and compelling circumstances, warranting the imposition of a lesser sentence”.

[27] It is not open to doubt that aggravating circumstances are also extant in this matter:

The complainant was not only a child but also mentally retarded, facts which call for a minimum sentence of life imprisonment each; the appellant betrayed the trust implicitly bestowed by the complainant's parents since he (appellant) was a co-worker of the complainant's father and an occasional visitor to the latter; the rampant scourge of these types of offences in our country has reached not only astronomical but also alarming proportion; vulnerable groups of the complainant's calibre herein deserve utmost protection and their ultimate protectors are the courts.

[28] Weighing all the circumstances of this case, I am not persuaded that the sentence is shockingly disproportionate to the nature of the offences so that it can be typified as gross and thus constitutionally offensive (See **S v Vilakazi** 2009 (1) SACR 552 SCA).

If anything, the court *a quo* correctly concluded that there were no substantial and compelling circumstances justifying imposition of a sentence lesser than the one ordained by the legislature on the count of rape of a mentally disabled minor.

[29] Consequently, the following order is made:

“The appeal against conviction and sentence is dismissed”.

M. D. HINXA, AJ

I agree.

C. REINDERS, J

On behalf of the appellant: Miss. S. Kruger
Instructed by:
Legal Aid South Africa
BLOEMFONTEIN

On behalf of the respondent: Adv. R. B. Maphumulo
Instructed by:
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