



**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

Case number: A150/2016

In the matter between:

Appellant

PEDDY SEPEPE SESING

and

THE STATE

Respondent

CORAM:

REINDERS, J *et* JACOBS, AJ

JUDGMENT BY:

JACOBS, AJ

HEARD ON:

17 NOVEMBER 2016

DELIVERED ON:

24 NOVEMBER 2016

INTRODUCTION

- [1] The appellant is a 50 year old male, who appeared before the Regional Court, Kroonstad from 22 February 2013 to 31 March 2016. He was charged on five counts of rape. The rape brings the

conviction within the purview of section 51 and schedule 2 Part III of the Criminal Law Amendment Act 105 of 1997 (CLA). The appellant was legally represented throughout the proceedings and pleaded not guilty on all five counts of rape.

[2] On 09 March 2016 the trial court found him guilty on one count of rape and acquitted him on the others. On 31 March 2016 he was sentenced to 10 years of imprisonment. The appeal before us is against the conviction and sentence with leave to appeal being granted by the trial court.

[3] The trial against the appellant was occasioned with a serious of misfortunes that resulted in him being incarcerated for four years pending the finalisation of the trial. In addition, the regional magistrate did not express himself clearly on the objections during the trial, in the judgment as well as the sentence. Consequently this necessitates a revisit of the evidence presented.

THE EVIDENCE

[4] The complainant's evidence can be summarised as follows:

She testified that she knew the appellant since 2008 when she met him as a result of the fact that she was living on the same premises as his sister where he would regularly visit. In that same year she joined the appellants' church where he was the pastor

and participated in the church choir. The appellant was her pastor and she also acted as his hairdresser.

The appellant played a huge role in the life of the complainant in that he was aware that her mother earned a measly salary on which she had to maintain herself and her entire family which resulted in the appellant intermittently assisting with groceries, electricity and other essentials. This assistance was regarded a gift. There was a very good relationship between the appellant and the complainant.

[5] At his behest, the complainant assisted the appellant at his home in that she cleaned his house, cooked for him and the church feeding scheme and also sold bibles. These services were rendered without remuneration on Wednesdays and Fridays when she returned early from school. At a certain stage the church moved from the residential area to the town and whereas the appellant initially would leave the key to his house at the house of the complainant, he later provided her with her own key when the church was housed in town. The appellant gave the complainant taxi fare of R20 in order for her to travel home at the end of the day after she completed her duties.

[6] On the day of the incident the complainant was at the church playing computer games in the office, waiting on the appellant to provide her with taxi fare. She had finished her duties. She requested the taxi fare from the appellant on his return from his duties of worship at the prison facilities. The witness testified the

appellant firstly, left the church to fetch the church sign board which that was standing outside the building to the inside, then locked the gates and doors of the church.

[7] The appellant approached her, made her to stand up, lifted her dress, lowered her pantyhose and underwear, lifted her against the wall and because she is much shorter than him balanced her thighs on his knees and proceeded to have sexual intercourse with her. She resisted but due to his strength the appellant was able to continue his actions. She managed to get away when the items on the table which consisted of a computer and bibles were about to fall off. During the ordeal she asked the appellant what his reaction would be if someone did the same to his child and when the appellant stopped what he was doing she informed him that she will report his actions. His response was to indicate that she would not be believed and that if she would do so he would demand all the money he had given and spend on her family from her mother. The appellant thereafter gave her, her usual taxi fare and she went home.

[8] After the incident the complainant no longer attended the church of the appellant and relocated to Qwa Qwa at the end of that year. She moved because she was living in the same road as the appellant which meant that she had to see him on a daily basis and this aspect disturbed her. As a result of the incident she was unable to focus at school which resulted in grades slipping. She failed the year.

- [9] The complainant did not tell anyone about the incident as she did not want people to know about what happened. She felt ashamed as she had trusted the appellant and she was scared that her mother would have to reimburse the appellant, something her mother, would not be able to do.
- [10] During 2012 three police officers including one female arrived at her house in Qwa Qwa and questioned her about her relationship with the appellant. They informed her that they were investigating allegations of inappropriate behaviour of the appellant. She was initially reluctant to speak to them, but later indicated that she would talk to the female officer present. She informed the female officer that the appellant had raped her but was unable to completely relay the whole incident due the fact that she did not know how to open up. On this day in question the officers did not take down a written statement as it was late in the day and they had to return to office. The two male officers returned at a later stage to take down her statement and even on this day she did not relate the whole incident.
- [11] The complainant was taken for a medical examination but because the incident had taken place a while ago, the medical report is of no assistance. She no longer experiences any physical pain as she had done during the incident. However, she is still emotionally affected as she still cannot come to terms with what the appellant had done to her.

[12] Agosi Charles Motimi (investigating officer) is a retired police officer and the investigating officer in this case. He went to Qwa Qwa to interview the complainant as he was informed that she frequented the appellant's house and could have been a victim of rape. He was in the company of Constable Nyangwa (the Constable) and Warrant Officer Jawa (the Warrant officer) when they went to interview the complainant. He as well as the Constable confirmed the evidence of the complainant as to what transpired on the first visit. The Constable did not return when the complainant's statement was taken. The appellant was in custody on allegations pertaining to other complainants when the docket was opened for the complainant. He confirmed the evidence of the complainant that she was absent at both the occasions when the appellant was arrested pertaining to these charges. He further corroborated the complainant's evidence with regard to the board that is kept outside the church of the appellant and indicated that on the day he arrested the appellant at his church, the appellant told members of his congregation to place the board inside the church before they locked up.

[13] Motapello Florence Nkosani assisted at the church of the appellant in that she cleaned the church, cooked for the street children and sold bibles for the appellant. She corroborated the evidence of the complainant that they both assisted the appellant at different times and that the complainant was in possession of a church key which they shared on instruction of the appellant. She also corroborated the complainant's evidence regarding the board outside the church. She stated that the people in the hairdresser

would not be able to hear anybody cry out from the church as the music being played at the hairdresser is loud.

[14] Disema Samuel Thomas Mokoena works at the department of Correctional services at Kroonstad. His evidence related to the visits the appellant made at the prison and he did not add to the evidence that was presented.

[15] The regional magistrate evaluated the version of the appellant and highlighted various contradictions on his own version and his evidence in relation to that of defence witnesses. Counsel conceded to this and submitted that the appellant was not a good witness. The appellant on material issues presented a version for the first time when he testified in court, clearly adapting his evidence as the shoe pinched. The appellant further conceded that he gave his legal representative instructions contrary to what he testified in court. The defence witnesses did not corroborate the evidence of the appellant and did not confirm his alibi.

CONVICTION

[16] Amongst the grounds of appeal are those grounds directed at the regional magistrate's findings of fact and credibility. It is well known that a court of appeal will not ordinarily depart from such findings unless they are vitiated by irregularity or unless an examination of the evidence reveals that they are patently

wrong.¹ The regional magistrate in evaluating the evidence of the complainant indicated correctly in my view that her evidence must be viewed with caution as she is a single witness² and proceeded to evaluate her evidence as such.

- [17] The appellant attacked the trial court's finding firstly, on the basis that the report was not made voluntarily. In **S v T**³ the court made reference to the English decisions of **Rex v Osborne**, 1905 (1) K.B.551, and **Rex v Norcott**, 116 L.T. 576 where it was held that:

“...a complaint in a sexual case is not inadmissible merely because it is made in reply to a question, but that it cannot be admitted if elicited by questions of a leading or intimidating character.”

The evidence of the complainant, the Investigating Officer and the Constable were that the complainant was questioned with regard to her relationship with the appellant. The complainant freely informed the officer that she was raped by the appellant. I am therefore satisfied that the report was made voluntarily.

- [18] The second ground on which the appeal is based is the late reporting of the incident. Mr. Reyneke on behalf of the appellant indicated that section 59 of Criminal Law (sexual offences and related matters) Amendment Act 32 of 2007 determines that no

¹ *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 705. See also *S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 645 and *S v Francis* 1991 (1) SACR 198 (A) at 204c – f.

² Section 208 of the Criminal Procedure Act 51 of 1977. See also *S v Snyman* 1968 (2) SA 582 (A) at 585C–H and *R v Mokoena* 1932 OPD 79

³ *S v T* 1963 (1) SA 484 (A)

negative conclusion may be reached based on the late reporting of an incident of rape. The fact of a report or any length of a delay is but only a factor which must go into the scales. These factors form part of the totality of the evidence against which it must be decided whether there is proof of guilt beyond reasonable doubt⁴.

[19] In the present matter the complainant explained that she was scared about the fact that the appellant indicated that if she informed on him, her mother would have to pay back all the money that was spend on them. The complainant was aware of the fact that her mother earned a meagre salary from which she had to sustain a family of five people and that her mother would not be in a position to repay the appellant. The trial court found this explanation acceptable and this court is unable to fault that decision.

[20] The third ground of appeal is that the first report witness compiled her statement two years after the report was made to her. Mr. Reyneke submits that the Constable compiled her statement out of the complainant's statement found in the docket. This court is not sure on what this premise is based especially as he submits that the Constable denied that the complainant indicated that the goods were falling from the table. One would have expected that if the Constable did not have independent recollection of the incident that she would have copied the evidence of the complainant. The circumstances in this case are unique in that a

⁴ Booysen v S [2015] JOL 34385 (ECG) para [55]

clergy was accused of various counts of sexual impropriety against a number of children and they had to travel a distance to QwaQwa to interview a possible victim. It is thus highly probable under those circumstances that the Constable would remember the detail of the case.

- [21] The fourth ground of appeal is based on the improbable conduct of the complainant after the incident. The complainant explained her conduct fully and the trial court found her explanation acceptable. This court cannot fault the explanation as not only did the complainant not contradict herself but the explanation provided is clear and make sense in relation to the evidence that was presented.
- [22] The fifth ground of appeal relates to the complainant as a single witness. The appellant submits that the trial court did not evaluate the complainant's evidence as a single witness with caution. This submission is devoid of substance as the trial court made a clear analysis in this regard. Further, on the evidence presented I am satisfied that the complainant did not contradict herself on any material aspect. No motif was presented as to why she would falsely implicate the appellant. It is important to note that it is the evidence of the complainant and that of the appellant that they had a good relationship and that he assisted her family financially. Though the complainant were no longer living in the area of the appellant at the time she made the report she was still assisted by the appellant who provided her with a cell phone, on her version.

She stood nothing to gain by making false allegations but everything to lose in that the much needed financial support to her family would come to an end. Circumstantial evidence pertaining to the church board and the key is corroborated by other state witnesses. The trial courts finding of credibility can therefore not be faulted.

- [23] The last ground on which this appeal is based is that the trial court misdirected itself when it concluded that MM and PFL corroborates the complainant that she worked at the church. The correct position is however that Miss Nkosani corroborated the complainant's evidence on this aspect. This misdirection can therefore not be regarded as so serious so as to vitiate the finding of guilt on behalf of the appellant as it is clear that there are corroboration on the evidence presented by the complainant with regard to the board and the key.

Sentence

- [24] A court's power to interfere with a sentence on appeal is circumscribed⁵ and this position was summarised in **S v Bogaards** a Constitutional Court judgement that detailed the circumstance where an appellate court's could interfere with sentences imposed by lower courts :

"It can only do so where there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent

⁵ *S v Bogaards* 2013 (1) SACR 1 (CC) para 41

that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it⁶.”

[25] The sentence of 10 years imprisonment imposed was done pursuant to the provisions of section 51⁷. The only basis upon which a court may impose a lesser sentence than that prescribed sentence is if substantial and compelling circumstances are found to exist in terms of section 51 (3) of the Criminal Law Amendment Act.⁸ The test set out in **S v Malgas**⁹ has been restated on many occasions. In essence the court must take into consideration the normal principles in sentencing.

[26] The trial court took into consideration the personal circumstances of the appellant and found the only relevant factor that is substantial and compelling is the fact that the appellant spent four years as an awaiting trial detainee before the matter was finalised. The court then proceeded to evaluate the aggravating factors present and concluded that the aggravating factors far outweighed the mitigating factors. The result conceded by Mr. Reyneke, is that the trial court considered a sentence in excess of 10 years but because of the inordinate long delay in the finalisation of the sentence concluded that a sentence of 10 years would be appropriate. Even if my analysis of the trial court’s intention is wrong due to the fact that the regional magistrate did

⁶ Ibid

⁷ Criminal Law Amendment Act 105 of 1997.

⁸ ZF v S [2016] JOL 34751 (KZP) at para 41

⁹ S v Malgas 2001 (1) SACR 469 at para 25.

not express himself clearly, I am satisfied that a sentence of 10 years is an appropriate sentence under the circumstances.

[27] In the premises I would make the following order:

The appeal against the conviction and sentence is dismissed.

S. JACOBS, AJ

I concur.

C. REINDERS, J

On behalf of the appellant: JD Reyneke
Instructed by:
Regsentrum
BLOEMFONTEIN

On behalf of the respondent: Adv. A. Ferreira
Instructed by:
The Director: Public Prosecutions
BLOEMFONTEIN