

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION: MTHATHA

CASE NO. CA&R 70/2014

SIYABULELA BUQWENI

Appellant

and

THE STATE

Respondent

APPEAL JUDGMENT

BROOKS J

[1] The appellant was charged in the Regional Court for the Regional Division of the Eastern Cape held at Sterkspruit with the crime of rape in contravention of the provisions of section 3 read with sections 1, 55, 56(1), 57, 58, 59, 60 and 61 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, read with sections 256, 257 and 281 of the Criminal Procedure Act 51 of 1977 (“the Act”) and sections 92 (2) and 94 of the CPA.

[2] The appellant was legally represented in the court *a quo*. After he had been warned that in the event of a conviction on the charge he would be sentenced in accordance with the provisions of sections 51(1), 52(2) and schedule 2 of the Act to life imprisonment unless there were substantial and compelling circumstances which justified the imposition of a lesser sentence, the appellant pleaded not guilty to the charge. In explanation of the plea in accordance with the provisions of section 115 of the CPA the appellant stated that his sexual intercourse with the complainant was with her consent.

[3] It is necessary to record that the appellant was one of two accused who were charged with the same offence in the court *a quo*. The appellant's co-accused also pleaded not guilty and tendered the same plea explanation. As the appellant's co-accused was a minor at the time of the occurrence of the sexual intercourse, upon conviction he was sentenced to a term of fifteen years' imprisonment. The appellant's co-accused has not appealed against either the conviction or sentence.

[4] The present appeal is directed against both the conviction of the appellant and the sentence of life imprisonment imposed upon him.

[5] In essence, the appeal against conviction is based upon a submission that the court *a quo* erred in finding that the state had proved the guilt of the appellant beyond a reasonable doubt. In particular, the submission is made that the complainant and the second state witness, Xatyiswa or Qabiswa Nigunwa, did not give evidence in a satisfactory manner and that there were contradictions in their evidence.

[6] It is clear from the judgment that the magistrate was alive to the need to treat the evidence of the complainant with caution as, in respect of the rape itself, she was a single witness.

[7] According to the complainant, she knew both the appellant and his co-accused. The appellant was in a romantic relationship with one Anelisa and his co-accused was in a romantic relationship with one Nashana. It is apparent that Anelisa was sometimes to be found at the complainant's home. On the night in question however, she was not there. The complainant was alone when the appellant and his co-accused called, together with another man, Makhosini, who had died before evidence was led in the court *a quo*. The complainant stated that the appellant did not believe her when she told him that Anelisa was not there and he proceeded to search the room for her. Makhosini told him that what he was doing was wrong and the appellant responded by assaulting him. The appellant's co-accused joined in and the complainant tried to intervene. The appellant then turned his attention to the complainant, assaulting her and tying her hands behind her back and her feet. She was then gagged before being carried away by the appellant over his shoulder and to the homestead of his co-accused.

[8] On the way, the appellant and his co-accused threatened the complainant. On arrival, the appellant threw her on the bed. Makhosini tried to alert the grandmother of the appellant's co-accused. An unhelpful exchange between the two of them seems to have occurred before Makhosini left. The appellant and his co-accused then removed the gag from the complainant's mouth and untied her feet. The complainant took the opportunity to urinate. Thereafter the appellant assaulted her on the back with a stick and caused her to fall. He then put her

back on the bed. The complainant explained that she did not raise the alarm because she feared that she would be killed if she did so.

[9] The appellant then proceeded to force himself upon the complainant and raped her. During the process he throttled her. She began to cry but was commanded by the appellant's co-accused not to make a noise. This caused her to remain silent. The appellant's co-accused then also raped her. It seems that both the appellant and his co-accused raped the complainant more than once again during the night. In the early morning they left, locking the complainant in the room. A couple of hours later she managed to release her hands from behind her back and climbed out of the window.

[10] The complainant went straight back to her homestead. She sat for some time on the stoep until she was discovered by Nigunwa, to whom she reported what had happened to her. Nigunwa in turn made a report, which led to the complainant being taken to Empilisweni Hospital for a medical examination.

[11] Nigunwa gave evidence which repeated the content of the report made to her by the complainant. In its content, the report was consistent with the complainant's evidence. Nigunwa stated that she could see that the complainant had sustained injuries. Her wrists were also swollen. Blood stains were evident on the nightdress which she was still wearing when Nigunwa found her. The witness confirmed that the appellant was in a romantic relationship with Anelisa and that his co-accused was in a romantic relationship with Nashana. Neither the appellant nor his co-accused was in a romantic relationship with the complainant.

[12] Under cross examination, several differences between the statement made by the complainant to the police and her later evidence in the court *a quo* were explored. In my view, none of the discrepancies exposed were material and it is not necessary to have regard thereto.

[13] After unsuccessful opposition on behalf of the appellant, the magistrate accepted into evidence the statement of the deceased Makhosini. The content thereof confirms in large measure the evidence of the complainant relating to the events of the evening up until the time that Makhosini left the appellant and his co-accused with the complainant shortly before she was raped.

[14] The appellant's evidence, and indeed the evidence of his co-accused, confirmed that Makhosini was with them up to a point in the evening. According to him, he evicted Makhosini forcefully, saying that Makhosini was going to bring trouble upon them. In the process Makhosini fell and injured his mouth. The appellant said that he refused Makhosini's invitation then to fight with him. The appellant then stated that it was the complainant's idea to move to the homestead of the appellant's co-accused. He claimed that she walked there freely and in her nightdress. On arrival she removed her nightdress and got under the blankets on the bed. The appellant joined her and fell asleep. No mention is made in his evidence in chief or his evidence under cross – examination of sexual intercourse with the complainant. An objection to an attempt to correct this under re-examination was objected to with success. The appellant claimed to have been in a romantic relationship with the complainant.

[15] The appellant's co-accused also claimed to have been in a romantic relationship with the complainant at the same time. He claimed to have had consensual sexual intercourse with the complainant whilst the appellant was asleep. He stated that he heard for the first time that the appellant had had sexual intercourse with the complainant when the complainant gave her evidence in court.

[16] Both the appellant and his co-accused confirmed that there was no bad blood between them and the complainant. Neither of them could give any explanation for the complainant's decision to lay charges against them.

[17] In my view, the failure on the part of the appellant to give evidence in accordance with his plea explanation diminishes substantially any creditworthiness which his version may otherwise have had. Moreover, his version offers no explanation for the injuries seen on the complainant by Nigunwa. It is completely different on salient points from the evidence given by the complainant. Whilst her evidence may contain some discrepancies on minor issues, it is clear and consistent on those issues which establish the elements of the offence of rape. It is not displaced by an application of the cautionary rule to those areas where the complainant was a single witness and substantial corroboration for her evidence of the events which occurred after the rape, and her condition after the rape, is provided by the evidence of Nigunwa. Accordingly, the magistrate was correct in accepting the evidence of the complainant and Nigunwa and in rejecting the appellant's version.

[18] It follows that the appeal against conviction cannot succeed.

[19] No previous convictions were proved against the appellant.

[20] After hearing argument both in mitigation and in aggravation of sentence, the magistrate delivered his judgment on sentence. He imposed life imprisonment upon the appellant.

[21] The correct approach to be adopted towards the appellant's appeal against the sentence of life imprisonment has been enunciated by the Supreme Court of Appeal ¹as follows:

“What is then the correct approach by a court on appeal against a sentence imposed in terms of the Act? Can the appellate court interfere with such a sentence imposed by the trial court exercising its discretion properly simply because it is not the sentence which it would have imposed, or that it finds shocking? The approach to an appeal on sentence imposed in terms of the Act should, in my view, be different to an approach to other sentences imposed under the ordinary sentencing regime. This, in my view, is so because the minimum sentences to be imposed are ordained by the Act. They cannot be departed from lightly or for flimsy reasons. It follows, therefore, that a proper enquiry on appeal is whether the facts which were considered by the sentencing court are substantial and compelling, or not.”

[22] Ultimately, the question to be answered is whether “the court below erred in failing to find that the circumstances of this case were so substantial and compelling as to justify a departure from imprisonment for life.”² In considering what response would be appropriate to such enquiry in the present

¹ S v P B 2013 (2) SACR 533 (SCA) par [20].

² NOTE 1 (supra) par [22].

matter, I have had regard to the following useful restatement ³of the nature of the enquiry:

“Substantial and compelling circumstances means truly convincing reasons. There must not be marginal differences in personal circumstances or degrees of involvement. At the end of the day, the ultimate cumulative impact of the circumstances must be such as to justify a departure.”

[23] The appellant’s personal circumstances were disclosed in the argument in mitigation of sentence. They can be listed shortly as follows:

- the appellant was twenty-six years of age at the time of the commission of the offence;
- he has a five year old daughter who is in the custody of her mother;
- the child’s mother is unemployed;
- the appellant dropped out of school after grade 10 (standard 8) as he was unable to cope with his studies;
- he suffers from epilepsy, for which he receives treatment;
- the appellant last worked in 2009, when he was employed on a mine in Klerksdorp;
- the appellant is a first offender;

[24] In argument before the magistrate, the appellant’s legal representative stressed the personal circumstances to which I have referred. She submitted that although there was no evidence on the point, the magistrate could safely assume that the appellant was “a person of sub-intellect”. In my view, in the absence of specific evidence, that conclusion cannot be

³ S v MAHLANGU AND OTHERS 2012 (2) SACR 373 (GSJ) 377 (g)–(h).

drawn simply from the fact that the appellant dropped out of school because he found his studies difficult. The appellant's legal representative also submitted that the appellant enjoyed good prospects of rehabilitation. Once again, in the absence of specific evidence on the point, this conclusion does not emerge readily from the evidence. Notably, the appellant did not take the court into his confidence, thereby demonstrating insight into the effect of his crime upon the complainant and demonstrating contrition. No evidential basis having been laid for the submission that the appellant enjoyed good prospects of rehabilitation, this cannot simply be inferred from the relative youthfulness of the appellant.

[25] In the charge sheet the complainant is referred to as a fifteen year old girl. No evidence was led on the point. In his address, and in the magistrate's judgment, reference is made to the complainant as a sixteen year old.

[26] The prosecutor argued that there were no substantial and compelling circumstances present in the matter. It was his submission that the facts demonstrated aggravating circumstances which militated against any prospect of a finding that substantial and compelling circumstances could be identified in the matter. These included the facts that the complainant was only sixteen years of age and that she was assaulted by the appellant. It is evident from her evidence that she was bound and gagged before being taken by force from her home to the place where the rape occurred, and that her hands remained tied behind her back throughout the ordeal. She stated that both the appellant and his co-accused raped her more than once during the night. She was then left in a locked room, obliging her to escape through a window in the early morning. In my view, the fact that the appellant and his co-accused were known to the complainant, who was a member of their local community, is a further aggravating factor. There was no demonstration of remorse on the part of the appellant during his trial.

[27] In my view, the complainant was subjected to an horrific and demeaning experience which must have left deep emotional scarring in its wake. The vulnerability of the younger members of society to abuse, usually by those who think they can get away with it, is of the

utmost concern in the times in which we live, particularly in the Eastern Cape.⁴ It is right that our courts set their faces against this scourge as vehemently as possible. In my view, the magistrate cannot be faulted for his failure to find that substantial and compelling circumstances exist in this matter and for the resultant imposition of the prescribed minimum sentence of life imprisonment upon the appellant.

[28] In the circumstances, the appeal against the sentence imposed upon the appellant must fail.

[29] The following order will issue:

- “1. The appeal against both the conviction and sentence imposed upon the appellant is dismissed.
2. The conviction and sentence imposed by the magistrate upon the appellant are confirmed.”

RWN BROOKS

JUDGE OF THE HIGH COURT

ALKEMA J:

I agree.

S ALKEMA

JUDGE OF THE HIGH COURT

⁴ S v P N 2010 (2) SACR 187 (ECG).

Appearances:

For the appellant: Mr Kuzane
 Mthatha Justice Centre

For the respondent: Adv Triesch,
 The Director of Public Prosecutions
 Mthatha

Date heard: 25 November 2016

Date delivered: 29 November 2016

