

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION: MTHATHA

CASE NO. CA&R 46/2016

SOBAHLE MACIMELA

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 Mount Frere 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 CPA”), the provisions of sections 51(1), 51(2) and schedule 2 of the Criminal Law Amendment Act 105 of 1997 (“the Act”) and sections 92 (2) and 94 of the CPA.

[2] At the outset, the prosecutor indicated to the magistrate that he had established that the complainant was mentally retarded and requested that this fact be inserted on the charge sheet. The magistrate advised the appellant that this fact had been placed on record by the prosecutor. In due course the charge sheet was amended without opposition.

[3] The appellant was legally represented in court *a quo*. After he had been warned that in the event of a conviction on the charge, being rape of the complainant on more than one occasion, he would be sentenced in accordance with the provisions of sections 51(1), 51(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.

[4] Outlining the basis of his plea in accordance with the provisions of section 115 of the CPA, the appellant indicated that the sexual intercourse with the complainant had occurred with her consent.

[5] It is apparent from the evidence of the complainant that the appellant is a member of her family. It is also apparent that she is intellectually challenged, often giving simplistic answers to questions and omitting detail in the result. She confirmed that she had not proceeded beyond sub A at school and that she had been rejected by her father. This led to her moving to the appellant's homestead where she had resided for a long time before the incidents concerning the appellant occurred. She was unable to tell the magistrate any

details about her date of birth. In due course, the evidence of another member of the family, K. M., confirmed that the complainant was mentally challenged and in receipt of an appropriate government grant accordingly. M. confirmed that the appellant was aware of the fact that the complainant was mentally challenged. This condition had also been noted on the J88 form completed by the doctor who examined the complainant after she had reported the incidents of rape.

[6] In her evidence the appellant identified the appellant as the person who raped her on three occasions. The first occurred at a homestead other than that occupied by the complainant and the appellant. The complainant had gone there to stamp mealies. The second incident occurred in the garden at the appellant's homestead. On the third occasion the appellant raped the complainant in his bedroom. It is not clear whether these three incidents occurred on the same day or not. Be that as it may, it is clear from her evidence that she was raped on three separate occasions. On the second occasion, in the garden, the appellant had throttled her. The appellant refused to listen to her request that he stop what he was doing to her and, according to the complainant, proposed a romantic relationship with her. The complainant told the appellant's wife what was happening to her. Initially angry with the complainant, she in turn was prompted to buy a pregnancy test for the complainant.

[7] In his evidence, M. stated that he was informed telephonically by the complainant that she had been raped by the appellant. He was shocked and contacted the complainant's father, who thereafter joined him and accompanied him to the police station where they made a report. He further stated that after reporting to the police, he and the complainant's father spoke to the

complainant about the incidents. What she told them had occurred is consistent with the evidence she gave before the magistrate. M. expressed concern to the magistrate that after these incidents the complainant appeared to regard such behaviour by a man as normal. Hitherto she had been sexually naïve.

[8] In his evidence the appellant confirmed that the complainant lived in his homestead. He maintained that the complainant had consented to sexual intercourse with him. He explained that he and his wife had quarrelled, which had led to them occupying separate bedrooms. This had prompted him to take the complainant as a wife. He claimed that on the first occasion he had heard the sound of mealies being stamped at the neighbour's house and had discovered that it was the complainant at work. He approached her and told her that he wanted to "follow up" on what they had agreed upon. According to him she did not respond. He then took a sack that was in the room and laid it down, presumably on the floor. The complainant removed only her skirt. He did not penetrate the complainant but satisfied himself using her legs. The next occasion he described does not appear to be alluded to by the complainant. According to the appellant the complainant contacted him telephonically and invited him to "come around". This he did and consensual sexual intercourse occurred whilst his wife was in church. Two days later he and the complainant met again. He claimed that they agreed to have sexual intercourse in the garden. This appears to be the incident referred to by the complainant in her evidence as the second occasion upon which she was raped. As to the third occasion referred to in her evidence, the appellant claimed that the complainant had crept out of the bedroom which she shared with the appellant's wife and came to spend the night with the appellant. The appellant claimed that although he knew that the complainant received a government grant he did not know why

this was the case. He stated that he didn't "notice" that she was mentally challenged "because she was doing the house chores".

[9] Under cross examination the appellant admitted that it was not normal to have sexual intercourse on a sack placed on the ground. He claimed that it was normal to have sexual intercourse on the grass in the garden "if you are in the outskirts" and explained that he had not wanted the children to watch him and the complainant. He could give no explanation for the claim made by the complainant that the sexual intercourse with him had occurred on each occasion without her consent.

[10] In my view, the magistrate was correct in finding, on the evidence before him, that the complainant was mentally retarded. Given the close ties between the complainant and members of the extended family which include the appellant, I am unable to accept the appellant's assertion that he did not know that the complainant received a government grant because of this condition. In my view, the claim made by him in this regard is intended to bolster his version that the complainant had agreed to accept his sexual advances. All the evidence given by the complainant is mentally challenged, the complainant's evidence was satisfactory in all material respects. If the appellant was telling the truth, no reason emerges from the evidence to explain why the complainant made a report of rape to M. and, indeed, to the appellant's wife. Nor would there be any explanation should have come to court and given false evidence.

[11] It follows that in my view the magistrate was correct view accepting the evidence given by the complainant and M. and in rejecting the appellant's version. Accordingly, the appeal against the conviction of the appellant must fail.

[12] 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.”

[13] 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.” In considering what response would be appropriate to such enquiry in the present matter, I have had regard to the following useful restatement of 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.”

[14] The personal circumstances of the appellant are the following:

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

- the appellant is fifty-five years of age;
- he is married and has six children;
- he is unemployed and in receipt of a disability grant;
- the appellant suffers from tuberculosis;
- he has a previous conviction of Assault GBH.

[15] In argument in mitigation of sentence the appellant's legal representative placed reliance upon the personal circumstances of the appellant for the circumstances of the appellant for the submission that substantial and compelling circumstances exist which would permit the court to deviate from the prescribed minimum sentence of life imprisonment and to impose a lesser sentence.

[16] In argument in aggravating of sentence the prosecutor stressed the seriousness of the offence, particularly where the complainant is a person who is mentally retarded and who is a member of the appellant's family. The prevalence of the offence of rape within the region was also highlighted. The prosecutor submitted that the medical condition from which the appellant suffers is treatable.

[17] In considering all the facts before him, including the personal circumstances of the appellant, the magistrate found that no substantial and compelling circumstances emerged therefrom. In my view, he cannot be faulted in his approach. In the circumstances, the appeal against the sentence cannot succeed.

[18] The following order will issue:

- “1. The appeal against the conviction and sentence imposed by the magistrate is dismissed.
2. The conviction and sentence of life imprisonment imposed by the magistrate are confirmed.”

RWN BROOKS

JUDGE OF THE HIGH COURT

ALKEMA J:

I agree.

S. ALKEMA

JUDGE OF THE HIGH COURT

Appearances:

For the appellant: Mr Sakwe

Mthatha Justice Centre

For the respondent: Adv Joubert,

The Director of Public Prosecutions

MTHATHA

Date heard: 25 November 2016

Date delivered: 29 November 2016