

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG, PRETORIA**

29/4/16

CASE NUMBER A 532/15

Reportable

Of interest to other judges

Revised

In the matter between

SIPHO MOSES DUBE

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

THULARE AJ

[1] Appellant, a 39 year old male was convicted of contravention of section 3 read with sections 1, 55, 56(1), 57, 58, 59, 60, and 61 of the Criminal Law Amendment Act {Sexual Offences and Related Matters} Act, 2007 {Act No. 32 of 2007} read with sections 92(2), 94, 256, 257 and 281 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) and further read with sections 51(1) and Part I of Schedule 2 of the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997) as amended and sentenced to life imprisonment in the Regional Court in Benoni.

The appellant was represented in the court *a quo*.

[2] The appeal against both his conviction and sentence is before us as automatic appeal seen against the light of the life imprisonment imposed on the appellant by the court *a quo*.

[3] The State alleged that the appellant was guilty in that during the period 2009-2011 and at or near Etwatwa, in the Regional Division of Gauteng the appellant did unlawfully and intentionally commit an act of sexual penetration with a female person, to wit, S[...] (10-14 years) by inserting his penis into her vagina, and had sexual intercourse with her without her consent.

[4] After the charge was put, the magistrate asked the appellant if he understood the charge, and appellant indicated that he understood the charge. When asked how did he plead, appellant's answer was:

"I dispute the rape but I did have sex with her."

Appellant's legal representative asked leave to approach the appellant. Thereafter she indicated that appellant misunderstood the charge and requested that it be repeated whereupon appellant pleaded guilty.

[5] The legal representative further indicated that the plea was in accordance with her instructions and that she had prepared a statement in terms of section 122(2) of the Criminal Procedure Act, which she asked for and was allowed to read into the record. The seven bullets of the statement read as follows:

"IN THE REGIONAL DIVISION OF GAUTENG

HELD AT THE MAGISTRATE'S COURT OF BENONI

CASE NO: RC 52/13

THE STATE

AND

SIPHO DUBE

THE ACCUSED

STATEMENT /TO SEC 112(2) OF ACT 51 OF 1977

- *I Siphon Dube am the accused in this case and wish to confirm that I, voluntarily and without being unduly influenced thereto, plead guilty to the charge of Rape, as it is my wish to take this court into my confidence. I deeply regret my actions.*
- *My attorney explained the nature of the charge and the consequences of this plea to me. I was also made aware of the sentence options.*
- *I admit the offence was committed during the period of 2010 and 2011 and at Barcelona, Daveyton which is within the jurisdiction of this Honourable Court.*
- *I did unlawfully and intentionally have sexual intercourse with the complainant, S[...] (14 years old), by inserting my penis in to her vagina without her consent.*
- *We had sexual intercourse once and a child was conceived.*
- *I knew my actions were unlawful and I have no legal excuse.*
- *I also knew that I was committing an offence for which I could be punished in a court of law.*

Signed on the 13th day of August 2013."

Both the appellant and the attorney signed the statement.

[6] The Attorney asked to hand up the statement. The appellant was asked if he confirmed the statement, which he did. The State accepted the plea. The Court pronounced that it was satisfied that the appellant admitted all the elements of the charge, and he was found guilty as charged.

[7] The State then introduced a section 212(4)(a) and (8)(a) Act 51 of 1977 statement in which basically it is confirmed that appellant is the biological father of a child, N[...]. Appellant had no objection to the handing in of the statement.

[8] The previous convictions of the accused were put to him. He disputed the one of theft and admitted the robbery. The State accepted his admission and did not pursue the other previous conviction which he disputed. The matter was postponed for a probations officer's report at the request of the appellant.

[9] At the next appearance, Ms Clarence asked leave to withdraw as attorney of record, which was allowed. When interviewed by the probation officer, the appellant said that the intercourse was consensual. He had no intention of raping the complainant. He never intended to plead guilty to the charge and that Ms Clarence had forced him to plead guilty. Upon learning of these allegations, which were also contained in the probation officer's report, she was advised not to take further instructions from the appellant and to withdraw.

[10] Legal Aid South Africa then appointed Mr Twala on behalf of appellant. At his first appearance, the following is recorded:

"MR TWALA: Thank you, our Worship. Your Worship, I do confirm my instruction on behalf of the Legal Aid Board on behalf of the accused and further Your Worship, that I would like to place on record that the accused Your Worship, informed me that he unconditionally and unreservedly Your Worship, apologises for the misunderstanding that he communicated to the probation officer regarding my learned colleague, Ms Clarence, and as such Your Worship, he wishes to apologise for such. As such Your Worship, my instructions Your Worship, are to proceed with this matter as it was initially proceeded by my colleague Your Worship, that the report that was prepared by the probation officer be hondded in as the report and that the matter proceeds Your Worship, as per the record, Your Worship.

PROSECUTOR: [indistinct].

COURT: Are you ready to start addressing the court on mitigation of sentence? Or perhaps before we proceed ... Mr Dube, do you confirm what your attorney is saying?

ACCUSED: Yes, I confirm, Your Worship.

COURT: Mr Twala, you may proceed.

MR TWALA ADDRESSES THE COURT: thanks, Your Worship. Your Worship, before I even proceed with the mitigation the accused Your Worship, upon explaining the contents of the statement Your Worship, especially paragraph 12 of the report, he made mention Your Worship, that such sexual intercourse was without consent as it appears on the report Your Worship, it says there was no consent, but he informed me that it was without consent, Your Worship."

Mr Twala then proceeds to address the court in mitigation of sentence.

[11] The basic concept is that appellant must be fairly tried (*S v Xaba* 1983 (3) SA 717 (A) at 7280. Generally speaking, an irregularity or illegality in the proceedings at a criminal trial occurs whenever there is a departure from those formalities, rules and principles of procedure with which the law requires such a trial to be initiated and conducted (*S v Fethum* 1991 (1) SACR 461 at 486).

[12] Appellant, from the moment the charge was put to him, admitted sexual intercourse with the child under the age of 16 years, whilst he was 36 years old.

[13] The court bears in mind the difficulties experienced by legal practitioners in making sure that their clients understand the existing and applicable legal position in a cause, especially when such clients are lay persons, more so when they are illiterate or semi-literate. Statutory provisions add to the difficulties of untangling this reality. When the language barrier is added to the equation, the task is one of the most challenging. Added to this, is the nature of the agency of a legal practitioner, who is first and foremost approached for his or her training, skill and competency to guide the presentation of a case before a court of law. It must be borne in mind that it is the role of the attorney to advise his client.

[14] A lay person's view by a client on a technical matter, differing from that of a legally trained mind of his legal representative, cannot amount to an irregularity, where the client, after the nature and import of the presentation is discussed with him, confirms in open court to the magistrate that what is presented are his instructions. In my view, the

test to be applied to determine whether there has been a failure of justice is simply whether we consider, on the evidence unaffected by the irregularity or defect before us, that there was proof of guilt beyond reasonable doubt. In my view, there was no resultant failure of justice (*5 v Tuge* 1966 (4) SA 565 (A) at 568 F-G; *S v Nkata and Others* 1990 (4) SA 250 (A) at 257E - F). Both Ms Clarence and Twala, after unleashing their training, skill and talent on the matter at hand, carried out what were in essence the instructions of the appellant, to the court. In my view, the magistrate was not wrong in proceeding as he did under the circumstances.

[15] In *S v Mbuyisa* 2012 (1) SACR 571 (SCA) at paragraph 7-8 it is said:

"[7] However, while it is no doubt undesirable for allegations contained in the charge-sheet to merely be repeated in a s 112(2) statement, there is no inflexible rule that an accused who uses certain of the phraseology in a charge cannot be convicted. Each case is to be considered in the light of its peculiar facts and circumstances. What s 112(2) requires is a written statement in which the accused sets out the facts upon which he or she admits guilt. Where these facts do not cover the essential elements of the charge - for example, in Chetty's case where on a charge of fraud it was not clear whether the person had been induced to act to his or her prejudice as a result of the accused's admitted representation - a conviction should not follow. Thus in Mshengu's case, in which the offender's age was such that he was rebuttably presumed not to be criminally responsible, it was held that a simple regurgitation of the contents of the charge did not establish that he was indeed capable of forming the necessary criminal intent.

[8] There are no such difficulties in the present case. ..."

Bosiello JA put it this way in *S v Makatu* 2014 (2) SACR 539 (SCA) at paragraph 13:

"The appellant is 23 years old. In his plea explanation that was prepared by his legal representative and which he confirmed as correct, he freely and voluntarily used the phrase 'sexual intercourse'. Furthermore, he admitted that the sexual intercourse was without her consent and, importantly, that he knew that it was wrong. To argue that he did not understand what sexual intercourse means, thus

implying that he pleaded guilty under a misapprehension of the proper charge, is disingenuous to say the least. There is no substance to this submission."

[16] The statement is indeed lacking in detail and does not measure up to what it should have contained. It did not set out with full particularity what had occurred on which the State relied. Against the background of the circumstances in this case, it did not set out the facts personal to the complainant. The facts set out cover the essential elements of the charge. The appellant is 39 years of age. He freely and voluntarily used the phrase "rape" and "without consent". He pleaded guilty fully aware of the proper charge. The appellant was correctly convicted.

[17] In terms of section 51(1) of the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997), it was peremptory for the magistrate, after the conviction of the appellant for an offence referred to in Part I of Schedule 2, to sentence the appellant to life imprisonment. The question is whether substantial and compelling circumstances exist which justified the imposition of a lesser sentence than the sentence prescribed.

[18] On the appeal against the sentence, the function of the court of appeal was set out by Holmes JA as follows in *S v De Jager and Another* 1965 (2) SA 616 (A) at 628fin to 6298:

"It would not appear to be sufficiently recognized that a Court of appeal does not have a general discretion to ameliorate the sentences of trial courts. The matter is governed by principle. It is the trial court which has the discretion, and a court of appeal cannot interfere unless the discretion was not judicially exercised, that is to say unless the sentence is vitiated by irregularity or misdirection or is so severe that no reasonable court could have imposed it. In this latter regard an accepted test is whether the sentence induces a sense of shock, that is to say if there is a striking disparity between the sentence passed and that which the court of appeal would have imposed. It should therefore be recognized that appellate jurisdiction to interfere with punishment is not discretionary but, on the contrary, is very limited."

[19] Appellant as earlier mentioned, was 39 years old. He is single with two minor children, N[...] who was 12 years old and A[...] who was 6 years old. They both living with their mothers. He has two siblings, N[...] and J[...]. His highest academic achievement is a grade 5. He worked as a car washer at Linmed Hospital and he made between R250 and R280 per day. He had been in custody since his arrest in January 2013. A child was conceived and born out of the incident. He is remorseful. His fitness to be licenced to possess a firearm was left in the hands of the court he had no objections to the endorsement of his name in the National Register of Sexual Offenders. Mr Twala asked that the court also consider the probation officer's report. After Mr Twala's address, the State led evidence in aggravation.

[20] E. S. is the mother of the complainant. She confirmed that arising out of the rape of her daughter, a child was conceived and was then 2 years 3 months old. The complainant was 16 at the time of her testimony. The complainant is not coping. She was doing well before the incident. After the rape she runs away from home and does not want to go to school on a regular basis, although she is a registered student. The complainant talks and shouts back at her. The previous year she had to go to her school, where she was advised that the complainant was chased away from the school and no reasons were given to her. She was in grade 8 at that time. The complainant does not help with household chores. The complainant did attend counseling at Daveyton but the sessions have ended. The counseling worked when she still attended the sessions.

[21] The probation officer's report, which was handed in at the instance of the State just before Ms Clarence was excused, and marked exhibit C. The report shows that appellant was raised by his grandmother, who died in 1983, and he does not know the identity of his father. After the death of the grandmother, who financed his education, he dropped out of school. His mother survived on grants and the appellant assisted her and the rest of his family. The complainant is the child of the appellant's girlfriend, with whom he stayed. When the fiancée left for work, he took the complainant to his uncle's house where he had sexual intercourse with her without using a condom. It is to the probation officer that he said it was by consent and the complainant did not cry during the

intercourse. This was in 2011 and the complainant was 14 years old. A neighbour noticed that the complainant was pregnant 3 months after they had intercourse. The mother took the victim for medical tests and the pregnancy was confirmed.

The appellant reported that his girlfriend did not want to have intercourse with him. She had another boyfriend but would assault appellant's other girlfriend. Appellant then decided to sleep with the victim. The probation officer did not consult with the complainant as her whereabouts were unknown. The complainant's school work deteriorated and she presented with behavioural problems since she was raped. The complainant took a few clothes and left the house after she was reprimanded for her behavior. The complainant only told her mother about the identity of the father of her child after the child was born.

The appellant reported to be a member of the African Catholic Church, attended church regularly and that he was active on the men's association.

[22] Appellant was the complainant's step-father. The appellant placed himself in a position of trust to the complainant and her mother. He was the boyfriend of the mother, who was trusted such that the mother left the complainant in her care when she left for work. The complainant looked up to him as the father figure. Appellant abused a position of trust. I agree with the probation officer that the removal of the child from the home to the house of the uncle, where the offence was committed, is an indication that the offence was planned. I also agree that the conduct of the complainant after the rape, presenting with behavioural problems and falling back on her school work, is a clear demonstration that the rape adversely affected the child. I cannot find it wrong for the probation officer to submit that the child is emotionally ruined. The probation officer recommended a sentence that would be preventive to the society and deter potential offenders.

[23] A careful consideration of the appellant's report to the probation officer, in my view, suggests that the complainant, as the child of the mother, was used, through this rape, for punishing the mother for refusing to have intercourse with the appellant whereas she has another boyfriend but assaults appellant's other girlfriend. He had intercourse with the child for he could not get it right with the child's mother.

[24] The personal circumstances of the appellant, which were placed before the trial court, including through the pre-sentence report by the probation officer, under these circumstances, cannot outweigh the seriousness of the offence and the interests of the community. Having regard to all the aggravating factors, I am unable to conclude that there are substantial and compelling circumstances present that would justify a departure from the prescribed minimum sentence.

[25] In my view there is no basis for this court to interfere with the sentence. I would make the following order:

The appeal against both sentence and conviction is dismissed.

DM THULARE
ACTING JUDGE OF THE HIGH COURT

I agree

AJ BAM
JUDGE OF THE HIGH COURT