

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE : YES ~~NO~~
(2) OF INTEREST TO OTHER JUDGES:
YES ~~NO~~
(3) REVISED: YES ~~NO~~

DATE

24/1/13


SIGNATURE

26/01/2015

CASE NUMBER A308/14

A952/2014

In the matter between:

VHUTSHILO MASILO MUNYAI

1st Appellant

TSUMBEDZO SIGIDI

2nd Appellant

And

THE STATE
Respondent

JUDGMENT

MUDAU AJ

[1] The two appellants appeared before a regional magistrate in Malamulele, Limpopo, on a charge of rape read with ss 51 (1) of the Criminal Law Amendment Act 105 of 1997. In addition, the first appellant was also charged with housebreaking with intent to rob and robbery. Consequent upon their conviction they were each sentenced to life imprisonment for the rape charge. The 1st appellant was in addition, sentenced to 10 years imprisonment in respect of the second charge. They now appeal to this court against their conviction and sentence on a variety of grounds. The crucial issue before this court in respect of both charges is whether the appellants were properly identified by the state witnesses as well as an alleged irregularity committed by the trial court in accepting the evidence of the child witness without determining whether she understood the nature and import of an oath. With regards to sentence, the dispute is whether the trial court should have found that substantial and compelling circumstances existed, justifying a departure from the mandatory minimum sentence of life imprisonment.

Summary of facts

[2] The evidence is essentially as follows. On 27 April 2010 and at about 17h30, the complainant in the rape charge whom I shall refer to as MM (in order to protect her identity) set off from Mokome Village to Phaphazela Village in the company of her friend Jeffrey Chauke ("Chauke"). Along the way they noticed the two appellants had approached them from behind. She knew both appellants as she grew up before them. The two appellants caught up but walked passed them. Not long thereafter at a ditch or dry riverbed the two appellants accosted them from the front. At this point the first appellant was armed with a knife and the second appellant was armed with a big stone. The first appellant approached and put his arm around her neck throttling her. The second appellant approached her companion who as a result ran away. The second appellant chased him for a short distance. She was pulled into the bush about 1 ½ km away by the first appellant with a knife still in his other hand. The second appellant had by then rejoined them.

[3] She was pushed to the ground and thereafter undressed. The first appellant proceeded to rape her by inserting his penis inside her vagina without any use of a condom after which the second appellant raped her as well. The second appellant did not make use of a condom as well. She cried during the sexual ordeal as the experience was painful. Once this was over, she was ordered to remove her T-shirt which the second appellant used to wipe her private parts. Thereafter they accompanied her and turned back 3 streets from her home. She found Jeffrey waiting for her at home. She also found her cousin Mavis to whom she reported the rape incident. The police were immediately contacted. Thereafter she was taken to the hospital where a medical examination was conducted.

[4] Chauke also testified and essentially confirmed the complainant's evidence with regards to the events surrounding the confrontation with the two appellants. It is Chauke's evidence that after being chased for a short distance by the second appellant, he returned to the scene to fetch his jacket. He had placed two cell phones inside the jacket pockets. The second appellant handed him his jacket without the cell phones. This was before the two appellants took the complainant away. Jeffrey also confirmed the report that the complainant made to Mavis in which she referred to the two appellants by their names.

[5] Dr Langa who examined the complainant testified and confirmed that the complainant explained to him that she had been assaulted and raped by two known persons earlier the same day. The examination he conducted on the complainant's genital area revealed fresh tears on the hymen and perineum. The injuries sustained by the complainant were consistent with forced sexual penetration.

[6] The evidence implicating the first appellant in the housebreaking and robbery charge is briefly as follows. It is Mrs. Myambo's (second complainant) evidence that she went to bed on the night of 30 June 2012 after ensuring that the windows of her shack were closed and the door locked. At about 6 AM the morning of 1 July 2012 she woke up to the sound of her cell phone ringing. It was only then after answering her cellphone that she realized that there was an intruder inside

the shack. The intruder was a man who proceeded to punch and grab the cellphone from her hand after which he fled through the door. She screamed whilst chasing after the intruder.

[7] Her screams must have alerted her neighbours for they came out and joined in the chase. Some of them overtook her during the chase but some approached from the front. By the time she caught up with them the first appellant had already been apprehended. A search of the first appellant yielded her cellphone which was then handed back to her. It is Mrs. Mambo's evidence that whilst chasing after the first appellant she noticed that the attire he was wearing. Except for the brief period when people had overtaken and surrounded the appellant she had him within sight. This was the same person (the first appellant).

[8] The second complainant's neighbour, Mr. Smuts Chauke Mabasa ("Mabasa"), who had also joined in the chase, confirmed her evidence. It is Mabasa's evidence that the first appellant was searched in his presence by a man named Robert who removed a cellphone from the appellant's pocket which the complainant identified as hers. The complainant was handed the same cellphone which she identified as hers. Before the trial court Mr. Mabasa identified the same cellphone that had been recovered.

[9] Briefly stated, the first appellant's evidence regarding the first count is that he spent the entire day at work. Shortly after 6 PM he arrived home where he spent time with his family and never left the house. Although he knew the complainant as well as the second appellant, he denies that he participated in the crime. Regarding the allegations of housebreaking and robbery in the second count, his evidence is that at about 3 AM that day he was at Mokome in the vicinity of the complainant's home when he heard screams. He was later accosted by members of the public who confronted him about the break-in and robbery which he disputed. Although members of the public assaulted him, he was never searched. Neither was any cell phone recovered from him.

[10] The second appellant also testified and denied any participation in the rape. It is his version that at about 5 PM that day he had soccer practice with others at

a village called Dididi which endured until about 6:30 pm. He returned home in the company of three others with who he was in soccer practice with. Although he knew the first appellant they were not together that day.

[11] The trial magistrate accepted the State's version and rejected the appellants' alibi defences as false beyond reasonable doubt. He found the State witnesses' identification of the appellants as not only credible but reliable. He was satisfied that the identification occurred in circumstances where there was adequate opportunity for a reliable identification in respect of both counts. It remains to deal with the merits of this appeal which I deal with below.

[12] It is common cause that complainant in respect of the rape charge was 14 years of age at the time of the incident. By the time she testified she was two days short of her 18th birthday. In this regard it was contended on behalf of the two appellants that the trial magistrate committed a fatal irregularity in administering the oath without determining whether she understood the nature and import of the oath. In this regard this court was referred to ***S v Matshivha 2014 (1) SACR 29 (SCA)***. In this case, it is common cause that the oath was administered by the interpreter in open court and in the presence of the trial magistrate as s165 permits. Section s162 of the Criminal Procedure Act 51 of 1977 (the Act) provides that no one can be examined as a witness unless the oath has been administered, except where the provisions of ss 163 and 164 apply. It is trite that in the absence of an objection by a witness the oath must be administered (see ***S v Ndlela 1984 (1) SA 223 (N)***). Section 163 deals with making an affirmation in lieu of an oath by a witness who objects thereto.

[13] Section 164 (1) of the Act provides as follows:

“Any person, who is found not to understand the nature and import of the oath or the affirmation, may be admitted to give evidence in criminal proceedings without taking the oath or making the affirmation: Provided that such person shall, in lieu of the oath or affirmation, be admonished by the presiding judge or judicial officer to speak the truth.”

It therefore goes without saying that the provisions of s164 kick in and are operational in the event of a finding that the witness does not “*understand the nature and import of the oath or the affirmation*”. Section 164 (1) is a vehicle through which evidence of a young child is permitted or for that matter any other person, who, because of their condition is unable to understand the nature and import of the oath or the affirmation. At almost 18 years of age at the time of giving testimony, it cannot be argued that she was a young child. Neither was it conveyed back by the interpreter that she does not understand the nature and import of the oath or affirmation. In the **Matshivha** case *supra*, the complainant and her brother were 8 and 13 years old respectively when they testified. It is therefore clear that this case is distinguishable from that of **Matshivha** because of the difference in the ages of the children involved. It follows accordingly that the evidence of the complainant in this matter was, in my view, properly admitted.

[14] In this matter both the denial of complicity and the alibi defence rested solely on the two appellant’s say-so with neither witnesses nor objective probabilities to strengthen them. In **S v Mathebula 2010 (1) SACR 55 (SCA)** at para 11 the court put it as follows:

“ *the vulnerability of unsupported alibi defences is notorious, depending, as it does, so much upon the court’s assessment of the truth of the accused’s testimony*”.

I can find no fault with with the trial court’s findings that the identification of the appellants is reliable. With regard to the rape charge the complainant and her companion (Chauke) had ample opportunity to observe the appellants who were not covered. Similarly, in the robbery charge, the first appellant was identified and arrested shortly after the incident of the crime whilst in possession of the stolen cellphone.

[15] In addition hereto, the identification of the appellants undoubtedly passes muster when measured against the cautionary approach enunciated in a long line of cases (see **S v Ngcamu 2011 (1) SACR 1 (SCA)** para 10, where the court made reference to an earlier *locus classicus* on identification evidence, **S v Mthetwa 1972 (3) SA 766 (A)** at 768A-C as the trial magistrate did. The cumulative weight of the factors enumerated by Holmes JA in **Mthetwa** such as

'lighting, visibility and eyesight; the proximity of the witness[es] . . . opportunity for observation, both as to time and situation . . . the [appellant's] face,' were in both instances favourable in this matter. Any criticism on the merits of both charges against the conviction of the two appellants in light of the evidence as a whole lacks merit.

[16] The appeal against the sentence of a life imprisonment imposed against the two appellants is, firstly, that, they were not warned by the trial court that the offence charged attracts such a sentence at the beginning of the trial. It is trite that an accused faced with life imprisonment must from the outset know what the implications and consequences of the charge are. The question is whether the appellants knew what the charges were and what possible sentence they would get if they were convicted. According to ***S v Ndlovu 2003 (1) SACR 331 (SCA)*** the accused must be alerted of the possible sentence at the outset of the trial, *'if not in the charge-sheet then in some other form'*. However, in ***S v Legoa 2003 (1) SACR 13 (SCA)*** at para 21 it was stated that "the matter is one of substance and not form" (see also ***Makatu 2006 (2) SACR 582 (SCA)*** as well as ***Mashinini and Another v S 2012 (1) SACR 604 (SCA)***).

[17] In my view however, the facts of this case are distinguishable from the cases in which the accused's substantive fair trial rights were impaired for the reason that reference is made in the charge sheet to section 51 (1) of the Criminal Law Amendment Act. In addition, the appellants were, throughout their trial legally represented. This is borne out by the fact that in mitigation of sentence their legal representative asked the court to *"deviate from the applicable sentence of life"* (at page 140, line 10 of the record.) I am therefore satisfied that the proceedings were conducted fairly.

[18] Secondly, the attack against sentence is that the trial court should have deviated from imposing the life terms given the cumulative factors such as youth, the absence of previous convictions, lack of grievous bodily injuries, lack of victim impact evidence and lastly that the complainant was already sexually active. It is convenient to deal with the last aspect regarding sexual history. It is quite simply irrelevant.

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[19] Both accused were 24 years at the time of the rape incident according to the charge sheet. Approximately three years later during the trial it was placed on record that they were 24 years old. This fact was not contradicted. The first appellant was married and a father to a seven year old child, his wife was unemployed. He ran a tuck-shop from which he made approximately R500 -00 a month and no previous records of convictions were proved against him.

[20] The second appellant was also married at the time and a father to 2 young children. His occupation was never disclosed but he was described as a breadwinner. He was on medication for asthma. He too was a first time offender.

[21] The offence of rape has often been considered by our courts and remains as one of the most serious crimes that should attract severe punishment. In **S v Chapman 1997 (3) SA 341 (SCA)** at p344/5 the Court remarked as follows:

'Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, to privacy and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilization.'

In *DPP, North Gauteng v Thabethe* 2011 (2) SACR 567 (SCA) 577G-I it was stated:

'Rape of women and young children has become cancerous in our society. It is a crime which threatens the very foundation of our nascent democracy, which is founded on protection and promotion of the values of human dignity, equality and the advancement of human rights and freedoms. It is such a serious crime that it evokes strong feelings of revulsion and outrage amongst all right thinking and self-respecting members of society. Our courts have an obligation in imposing sentences for such a crime, particularly where it involves young, innocent, defenseless and vulnerable girls, to impose the kind of sentences which reflect the natural outrage and revulsion felt by the law-abiding members

of society. A failure to do so would regrettably have the effect of eroding the public confidence in the criminal justice system.'

[22] However, as it has been held in ***S v Vilakazi* 2009 (1) SACR 552 (SCA)** and ***S v Mahomatsa* 2002 (2) SACR 435 (SCA)** , life imprisonment should be reserved for more serious cases of rape.

[23] With regard to the application of mandatory minimum sentences, Ponnar JA, in ***S v Matyityi* 2011 (1) SACR 40 (SCA)** at para 23, with reference to ***S v Malgas* 2001 (1) SACR 469 (SCA)** stated:

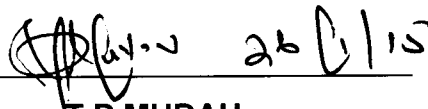
'As Malgas makes plain, courts have a duty, despite any personal doubts about the efficacy of the policy or personal aversion to it, to implement those sentences. Our courts derive their power from the Constitution, like other arms of state owe their fealty to it. Our constitutional order can hardly survive if courts fail to properly patrol the boundaries of their own power by showing due deference to the legitimate domains of power of the other arms of State. Here Parliament has spoken. It has ordained minimum sentences for certain specified offences. Courts are obliged to impose those sentences unless there are truly convincing reasons for departing from them. Courts are not free to subvert the will of the legislature by resort to vague, ill-defined concepts such as 'relative youthfulness' or other equally vague and ill-founded hypotheses that appear to fit the particular sentencing officer's personal notion of fairness. Predictable outcomes, not outcomes based on the whim of an individual judicial officer, is foundational to the rule of law which lies at the heart of our constitutional order.'

[24] I cannot imagine a worse case than the gang raping of a young girl as the complainant in the instant case. Not only did she sustain injuries in a genitalia but must have been humiliated when a T-shirt was used to wipe her genitalia after the rape. Even though no victim impact evidence was led, I have no doubt that the complainant would have endured post-traumatic stress. The rest of the aspects raised are common place. As in *Kwanape* case where a sentence of a

lifetime imprisonment was confirmed in respect of the rape of a 12-year-old by a 24-year-old offender, (*Kwanape v S 2014 (1) SACR 405 (SCA)*) the rape in this matter had not been perpetrated in a family setting. Consideration being had to all the material factors I do not find that the magistrate did not exercise his sentencing discretion properly in imposing the mandatory life terms against both appellants. The sentences imposed do not leave me with any sense of shock. It accordingly follows that there are no reasons for interference with the sentences imposed on both appellants.

[25] In the result the following order is made:

The appeal against the conviction and sentence by appellants is dismissed.



T P MUDAU

ACTING JUDGE OF THE HIGH COURT, GAUTENG, PRETORIA

I agree



FABRICIUS, H J

JUDGE OF THE HIGH COURT, GAUTENG, PRETORIA