

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

REPORTABLE : NO
OF INTEREST TO OTHER JUDGES: NO
REVISED: YES

30 January 2015


SIGNATURE

30/01/2015
CASE NUMBER A183/14

In the matter between:

PATRIC RASTA MTYALA

Appellant

AND

THE STATE

Respondent

J U D G M E N T

MUDAU AJ

[1] The appellant Mr. Patrick Rasta Mtyala was convicted by the regional court, Pretoria North, of two counts of rape involving two young girls aged six and nine years at the time of the incidents. Consequently, he was sentenced to 2 life terms of imprisonment in terms of the provisions of s 51(1) read with Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997. He appeals against both his conviction and sentence with the leave of this court

(Fabricius J and De Klerk AJ). The issue in this appeal is whether the State has proved the crime of rape and if so, whether the trial court exercised its sentencing discretion properly.

[2] The facts underlying the conviction are briefly as follows. The appellant stays in the same neighbourhood as the two young children referred to as KM and TM in this judgment in order to protect their identity. The evidence by TM through an intermediary is essentially that she and her companion KM were, on the day of the incident, collecting tins at a dumping site next to the appellant's residence. This was in broad daylight. It was there that they met "Rasta" (the appellant) who she knew by sight. The appellant called them over and took them to a goat kraal. It was there that he undressed her (TM), covered her mouth with cello tape after which he put his penis inside her vagina. When he did so, he had made her lie on her back after which he came on top of her. Her legs were tied to a pole. Not only was she raped as per her vagina but that the appellant inserted his penis inside her anus.

[3] Whilst being violated KM was tied up and also had her mouth covered with cello tape. Once he was done with her (TM) the appellant did the same with KM. Thereafter he gave them peaches and instructed them to leave but not tell anyone. They went to KM's home after the rape. The reported the rape incidents to her (KM's) parents the same day. She (TM) was present when the appellant was arrested. They were also taken to the hospital for examination. Before the trial magistrate, she identified the appellant as the rapist.

[4] KM also testified through an intermediary and essentially confirmed TM's evidence. It is her evidence that she was on a bench and the appellant (Rasta) had tied her feet. However she did not witness appellant put his penis inside her companion's vagina as he had taken her to the back of the kraal. When he was busy raping her TM was tied up at that stage and was on the bench.

[5] The evidence of Mrs. MM, KM's mother, is to the effect that the report by the two young children was made to her and her husband on 2 January 2010. At that time she was busy in the kitchen when she overheard the two children who were playing outside under the tree, relating the rape incidents to each other. She immediately brought this to the attention of her husband VM. She and her husband went outside where the children were. Her husband enquired from them what they had been talking about. The two started crying but without being coerced reported the rape incidents by the appellant who they referred to by his name, Rasta. They also explained where the incidence occurred. TM's mother was contacted and in her presence the children repeated the rape allegations. Thereafter the children took them to the appellant's residence where they pointed him out.

[6] Upon being confronted by the allegations of rape, the appellant admitted the incident and apologized for his conduct. During cross-examination she denied that the appellant was assaulted first. It is Mrs. MM's evidence that members of the community only assaulted him after he admitted to the incident. Mr. VM also testified and confirmed his wife's testimony. According to Mr. VM, members of the police community forum were called to the scene. When the appellant was asked why he could do such a thing he responded and said "*I did not do it but only put it in a little*".

[7] Mrs. JM, TM's mother, also testified and confirmed that the appellant is a neighbour. It is her evidence that the appellant was not a member of the Community Police Forum ("CPF"). She disputed that there were any stolen copper cables that the appellant found at her premises.

[8] Dr Zikalala conducted a physical examination which was followed by a genital and anal test on both children but found no evidence of physical injuries. It is his evidence that his findings did not exclude other forms of sexual assault on the children. He explained that "*the reason being, in a female child, because of the estrogen, it makes the genital area more soft and more elastic. So, they might be a chance there might be no injuries because of that.*"

[9] Warrant Officer Sedibe is attached to the Forensic Science and Biology Laboratory section of the SAPS. It is his evidence that he had in the course of his duties received the relevant pediatric sexual assault kits regarding this matter. He, after breaking the seals evaluated and tested the contents which were: intra-vaginal, the rectal and vestibule swabs, amongst others. The rectal swabs tested positive for semen which was sent for further DNA analysis which is found in the sperm cells. However, for some men who undergo vasectomy or are naturally Azoospermia (misspelt on record as astammic is medically defined as the complete lack of sperm in the ejaculate), they do not have sperm cells. In this instance the DNA results were inconclusive.

[10] The appellant testified in his defence and denied the allegations of rape. It is his evidence that had he raped the minor children, they would have sustained serious injuries. Although they were neighbours, he only saw the children after 3 PM on 2 January 2010 when they pointed him out as the rapist. Earlier that day he had visited friends that included Thandi, with whom he spent about three hours. He returned home shortly before 3 PM. He

attributes the false allegations of rape to the fact that as a member of the CPF he had found stolen copper cables at the premises of TM's mother, Mrs. JM.

[11] The cables had been stolen by her son. This happened approximately a month before the alleged incidents of rape. However, he conceded that he never had problems with the two minor children. During cross-examination he also conceded that the version to the effect that the cables were stolen by Mrs. JM's son was never put her. It is his version that this was unnecessary as the cables were found in her presence. Furthermore, that the adult state witnesses also participated in his assault.

[12] It is with this evidence that the trial court convicted the appellant as charged. In rejecting the appellant's evidence as improbable and not reasonably possibly true, the trial magistrate found that the evidence by the two minor children materially corroborated each other. It is trite that the evidence of children must be treated with circumspection. The children were single witnesses in respect of the rape incidents themselves. In addition, the learned magistrate dismissed the appellant's version that these are trumped up charges at the instance of TM's mother since the first report was made to someone else. In his approach, the magistrate, to his credit took into account the totality of the evidence.

[13] The thrust of the appellant's attack against the conviction before this court concerned the question whether the State had proved beyond reasonable doubt that there had been penetration to constitute the offences of rape. In this regard, the appellant's counsel relied heavily on Dr Zikalala's inconclusive findings. However, section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 provides that "*any person ("A") who unlawfully and intentionally commits an act of sexual penetration with a complainant ("B"), without the consent of "B", is guilty of the offence of rape*". In addition "*sexual penetration*" is defined as "*any act which causes penetration to any extent whatsoever by - (a) the genetical organs of one person into or beyond the genetical organs, anus, or mouth of another person*".

Therefore the fact that there were no visible injuries in the private organs of the two minor children on its own, does not help the appellant's course as any penetration no matter how slight constitute sexual penetration, and therefore rape. The expanded definition in terms of s3 is applicable to all forms of sexual penetration without consent.

[14] It is common cause in this matter that identity is not in dispute. The appellant and the children are neighbours. The cautionary rule requires that the court having warned itself of the danger inherent in the acceptance of such evidence, must look for some safeguards like corroboration in order to reduce the risk of wrong conviction (See also **R v Manda 1951 (3) SA 158 (A)**).

[15] The alibi raised by the accused must be considered in the context of the totality of the facts of this matter. In **S v Liebenberg 2005 (2) SACR 355 (SCA)** para 15 the Supreme Court of Appeal held:

"Where a defence of an alibi has been raised and the trial court accepts the evidence in support thereof as being possibly true, it follows that the trial court should find that there is a reasonable possibility that the prosecution's evidence is mistaken or false. There cannot be a reasonable possibility that the two versions are both correct. This is consistent with the approach to alibi evidence laid down by this Court more than 50 years ago in R v Biya 1952 (4) SA 514 (A). At 521C-D Greenberg JA said:

'If there is evidence of an accused person's presence at a place and at a time which makes it impossible for him to have committed the crime charged, then if on all the evidence there is a reasonable possibility that this alibi evidence is true it means that there is the same possibility that he has not committed the crime'.

(See also **S v Van Aswagan 2001 (2) SACR 97 (SCA)** para 8; **S v Trainor 2003 (1) SACR 35 (SCA)** para [8]–[9]; **S v Crossberg [2008] 3 ALL SA 329 (SCA)** para [121]).

[16] In **S v Mathebula 2010 (1) SACR 55 (SCA)** at para 11 the court cautioned that:

"[T]he 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".

[17] In this case the appellant's alibi defence is inherently contradicted by his version that he had seen the children playing which would have been before he was confronted about the allegations of rape at about 3 PM. Neither was his version supported by any independent witness or persons whom he claims he was with.

[18] The trial court's findings that the children and their parents were honest, credible and trustworthy witnesses are in my view unassailable. There was in my view sufficient

corroboration for each child's testimony by the other in material respects. I do not think it is necessary to analyse the evidence on record any further. The conviction of the appellant for both charges is correct.

[19] It remains to deal with the appeal on sentence. In a carefully reasoned and detailed judgment the court below had regard to the fact that the appellant had shown no remorse. The court had regard to his personal circumstances which are as follows. The appellant was born in the Eastern Cape. His parents are deceased. The appellant was approximately 49 years of age at the time of sentencing. He had minimal education as he is a grade 2 drop – out. He had no formal employment but survived on odd jobs. He is a member of the United Apostolic Church in Zion, where he is, according to him, a pastor. Although he is a father of two, he is not married. He is a first offender.

[20] The victim impact report was in this matter was disclosed in court. According to the said report, the rape incident had affected KM emotionally. Since the incident, she wets herself. She would scream at night and when woken up by her mother she would indicate that she was dreaming about the accused trying to kill her. She is afraid to play with other children as they tease her about the rape incident. TM was not affected differently. She too has been emotionally and academically affected by the incident of rape. Her school performance has since deteriorated. In a well-motivated judgment the trial court found no substantial and compelling circumstances to deviate from the prescribed minimum sentence of life imprisonment for the rape of each child.

[21] In ***S v Chapman 1997 (3) SA 341 (SCA)*** at 344 I-J, it was said: "*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*". Despite the introduction of the minimum sentence regime, there is no sign that these kinds of incidents are on the decline. In ***S v Jansen 1999 (2) SACR 368 (C)*** at 378G-379B, the learned judge aptly put it as follows:

"Rape of a child is an appalling and perverse abuse of male power. It strikes a blow at a very core of our claim to be a civilized society..."

"The community is entitled to demand that those who perform such perverse acts of terror be adequately punished, and that the punishment reflect the societal censure It

is utterly terrifying that we live in a society where children cannot play in the streets in any safety; where children are unable to grow up in the kind of climate which they should be able to demand in any decent society, namely in freedom and without fear. In short, our children must be able to develop their lives in an atmosphere which behoves any society which aspires to be an open and democratic one based on freedom, dignity and equality, the very touchstones of our Constitution. The community is entitled to demand of the police that they bring those who subvert these minimum aspirations before the courts and that the courts, in punishing such persons, should ensure that the sentence adequately reflect the censure which society should and does demand, as well as the retribution which it is entitled to extract".

[22] In **Mudau v S 2013 (2) SACR 292 (SCA)** at para 19 it was said:

"Life imprisonment is the most severe sentence which a court can impose. It endures for the length of the natural life of the offender, although release is nonetheless provided for in the Correctional Services Act 111 of 1998. Whether it is an appropriate sentence, particularly in respect of its proportionality to the particular circumstances of a case, requires careful consideration. A minimum sentence prescribed by law which, in the circumstances of a particular case, would be unjustly disproportionate to the offence, the offender and the interests of society, would justify the imposition of a lesser sentence than the one prescribed by law".

[23] It is trite that even in the context of minimum sentencing legislation; each case has to be assessed on the basis of its own peculiar facts and circumstances. To this extent what the Supreme Court Appeal stated in **S v Vilakazi 2012 (6) SA 353 (SCA)** is also apposite:

"[15] It is clear from the terms in which the (determinative) test was framed in Malgas and endorsed in Dodo that it is incumbent upon a court in every case, before it imposes a prescribed sentence, to assess, upon a consideration of all the circumstances of the particular case, whether the prescribed sentence is indeed proportionate to the particular offence".

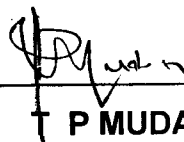
[24] The SCA also held in **S v Abrahams 2002 (1) SACR 116 (SCA)** para 29 that: ...*“...some rapes are worse than others, and the life sentence ordained by the Legislature should be reserved for cases devoid of substantial factors compelling the conclusion that such a sentence is inappropriate and unjust.* It is trite that courts should not deviate from a prescribed minimum sentence for flimsy reasons (See **S v Matyityi 2011 (1) SACR 40 (SCA)**). In this matter, however, the seriousness of the offences committed make the appellant’s personal circumstances pale in comparison to competing interest. Neither did appellant exhibit nor express any remorse before the trial court.

[25] The peculiar facts of this case show that the rapes (as distinguished from the Mudau case above) had a devastating impact on the two minor complainants as described above. Courts have a legal duty to protect the most vulnerable members of our community and in particular, children. Accordingly, I am of the view that the learned magistrate exercised his sentencing discretion properly. In my view the prescribed sentence imposed is proportionate to this offence upon a consideration of all the circumstances. To find otherwise would amount to an unwarranted interference with a discretion properly excised.

[26] In the result the following order is proposed:

1. The appeal against conviction and sentence is dismissed.

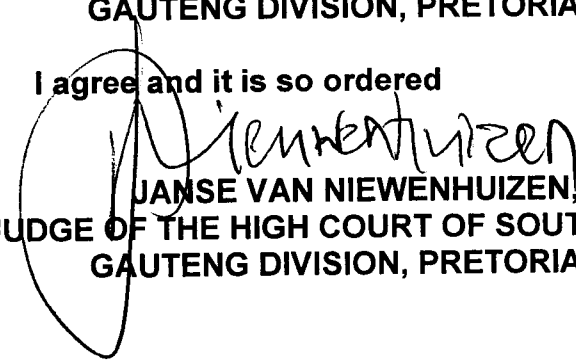
30 JANUARY 2015



T P MUDAU

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

I agree and it is so ordered



JANSE VAN NIEWENHUIZEN, N
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

APPEARANCES

For appellant: Adv Albertyn Nel

Instructed by Legal Aid Board

For respondent: Adv MNC Menigo

Instructed by: NPA Pretoria