

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: A921/2011

DATE: 19 February 2015

Not reportable

In the matter between:

JOSEPH MALEKA

Appellant

and

THE STATE

Respondent

JUDGMENT

MUSHASHA AJ

INTRODUCTION

[1] Appellant was convicted of Rape of a 7 year old child, in the Regional Court, Rustenburg, on 24 April 2001. The appellant was not legally represented in the Regional Court.

[2] The proceedings were stopped in terms of section 51(l)(b) of the Criminal Law Amendment Act No. 105 of 1997 and referred to the High Court North Gauteng Division for sentence.

[3] On 18 February 2002 the conviction was confirmed, and the appellant was sentenced to life imprisonment by Mlambo J as he then was. In the High Court the appellant was legally represented.

[4] On 19 June 2009 the appellant was granted leave to appeal against both conviction and sentence to a full court of the High Court.

THE EVIDENCE

[5] The State evidence can briefly be sketched out as follows:

5.1 On the 27 March 2000 in the morning, T[...] N[...] (the complainant), a girl child who was 7 years of age at the time, she was lying sick on her mother's bed.

5.2 The complainant's brother E[...] N[...] went to their mother's workshop with a view to fetching money so that he could take her to the clinic.

5.3 On his return he entered the house and saw appellant alighting from the bed where the complainant was. He chased the appellant and apprehended him with the help of other people.

5.4 The mother of the complainant and the police were called and the complainant was subsequently taken to the hospital where she was examined by a Dr Smit.

5.5 According to the medical report (J88) the complainant's labia minora was found to be normal, hymen normal, no swellings, no fresh tears, no bleeding.

5.6 Accordingly, the doctor concluded that the complainant was not injured in any way.

5.7 The appellant's version was that he did not commit the offence. He was passing next to E[...] house and E[...] accused him of wanting to steal from their place. E[...] called some people and appellant ran away but was later apprehended.

POINTS IN LIMINE

[6] In argument on appeal it was argued on behalf of the appellant that the trial court failed to inform the appellant of his constitutional rights to have a legal representative of his own choice or a legal representative at State expense.

[7] Accordingly, it was argued that a failure of justice had occurred.

[8] **Section 73(2) of the Criminal Procedure Act 51 of 1977** provides that:

"An accused shall be entitled to be represented by his legal advisor at criminal proceedings..."

Every accused shall at his or her first appearance in court be informed of his right to be represented at his or her own expense by a legal advisor of his or her own choice and if he or she cannot afford legal representation that he or she may apply for legal aid and of the institutions which he or she may approach for legal assistance".

[9] In the present case the record shows that appellant went on record saying "*Edelagbare ek wil nog steeds my eie saak behartig en indien ek gestraf word dit is toe dat ek my familie sal vra om namens my 'n regsverteen woordiger te bekom om vir my appêl aan te teken.*"

[10] From appellant's response quoted above, I am satisfied that the appellant adequately understood the rights to legal representation as explained to him by the Magistrate.

The issue is also further canvassed by the learned Magistrate. See record p. 12 -13.

[11] I am also in full agreement with the view that it is also evident from the nature of cross-examination by the appellant when conducting his defence that appellant was a very intelligent person who would "put some lawyers to shame".

[12] I cannot agree more with Mlambo J that having regard to the trial as a whole the proceedings were in accordance with justice and that no substantial injustice had occurred.

[13] I, accordingly I propose that the point in ***limine*** should fail.

AD CONVICTION

[14] The crisp issue which remains to be decided is whether the complainant was raped by the appellant.

[15] During her testimony the complainant was asked to demonstrate with the aid of two dolls as to what happened to her.

[16] The complainant specifically demonstrated the male doll penetrating the female doll.

[17] The complainant further testified that the appellant had applied Vaseline on her vagina, and lay on top of her. She testified *“ja, het die ding ingedruk in my privaat deel.”* She further testified that in the process she felt pain as if she was being cut by a knife. In my view, the complainant's explanation corroborates penetration and accords with other evidence.

[18] It may well be so that the medical report (J88) did not show fresh tears or hymen tears however, Dr Smit confirmed in evidence that the hymen would not necessarily have perforated following penetration.

[19] In **S v F 1990 (1) SACR 238 (A) at 244 g-h** the court held that minimal or even the slightest penetration is sufficient to sustain a charge **of** rape.

[20] Having regard to the fact that the complainant was only 7 years old at the time of the rape coupled with her indication of severe trauma, that to me provides sufficient safeguards to drive me to the conclusion that her evidence was credible and reliable.

[21] On the other hand the evidence of the appellant was clearly less than credible. The trial court correctly found, in the view which I hold, that the appellant version was demonstrably false and inherently improbable as to be rejected as false.

See: **S v Munyai 1986 (4) SA 712 (V) at 715 G**

AD SENTENCE

[22] In the present case the appellant was convicted of the offence contemplated in section 51 of the Criminal Law Amendment Act 105 of 2007. It is an offence described in part I of Schedule 2 being the rape of a child under the age of 16 years.

[23] It was argued that the sentence of life imprisonment imposed on the appellant induces a sense of shock.

[24] It was further argued that the trial court misdirected itself by not finding that the following factors ***inter alio*** cumulatively taken constituted substantial and compelling circumstances:

24.1 The fact that complainant did not sustain injuries;

24.2 the fact that there was no evidence that complainant suffered trauma;

24.3 the fact that appellant was still young, only 26 years of age; and

24.4 the fact that appellant was convicted on the 24 April 2001 and has been in custody since then.

[25] In **S v Petkar 1988 (3) SA 571(A)** at 574 C- D, the court held:

" The court's powers to interfere with a sentence on appeal are circumscribed. It may only do so if the sentence is vitiated by irregularity, misdirection or is that which no reasonable court could have come to..."

[26] In the present case the complainant was only 7 years old. In the circumstances the provisions of section 51(1) of Act 105 of 1997 which prescribe a minimum sentence of life imprisonment is applicable unless

substantial and compelling circumstances are found to be present.

[27] In as much as courts are free to depart from the prescribed sentences in doing so courts are to respect and not merely pay lip service to the legislature's view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of the specified kind are committed.

See: S v Malqas 2001(1) SACR 469 (SCA) at 481 paragraph 25

S v Dodo 2001(1) SACR 594 (CC) at 603 J

[28] In the present case the court is disturbed by the barbaric and abhorrent violation of the seven year old innocent little girl.

[29] What is significant is that the appellant committed the offence against the complainant within the sanctity of her own home where she lay sick on the bed.

[30] Regarding the seriousness of the rape as an offence I cannot agree more with the following sentiments expressed by the late Chief Justice Ismail Mahomed in S v Chapman 1997(2) SACR 3 (SCA) at 5 C:

"... Women in this country and I may add children are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets to enjoy their shopping and their entertainment, to go and come from work and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives".

[31] In light of the foregoing, I find that Mlambo J, (as he then was) correctly found that there are no compelling and substantial circumstances justifying departure from the prescribed minimum sentence.

[32] After taking all the circumstances into account, I am of the view that the sentence of imprisonment for life is appropriate.

[33] In the circumstances I propose the following should ensue:

33.1 The appeal against conviction and sentence is dismissed.

33.2 The conviction and sentence of life imprisonment imposed by the Gauteng High Court is confirmed.

M J MUSHASHA

ACTING JUDGE OF THE HIGH COURT

I agree

N. RANCHOD

JUDGE OF THE HIGH COURT

I agree

W.R.C PRINSLOO

JUDGE OF THE HIGH COURT