



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, (PRETORIA)

2/3/15

CASE NO: A366/2014

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

2 MARCH 2015

In the matter between

ZUNGULA, FEZILE MATHEWS

APPELLANT

and

THE STATE

RESPONDENT

J U D G M E N T

MUDAU AJ:

- [1] The appellant, a male aged 50, was convicted in the regional court, Ventersdorp, on 3 counts of rape in contravention of the provisions of section 3 of the Criminal Law Amendment Act (Sexual Offences and Related Matters), Act 32 of 2007, of a female person, aged 15. Consequently, he was sentenced to life imprisonment. He was declared unfit to possess a firearm. In

addition, the trial court ordered that his personal particulars be entered on the register for sexual offenders. He appeals to this court to overturn the conviction, and failing that, his sentence. The sole issue for determination by this Court is the reliability and acceptability of the complainant's evidence with regard to the allegations of rape.

- [2] From the onset, the appellant who was legally represented at his trial had pleaded guilty to the charge of rape in that, at 15 years of age, the complainant could not have given consent to sexual intercourse. A number of admissions were by consent recorded inter alia, the complainant's age, the J88 report in which, it was noted that the complainant had a "tear *inside the vagina which is consistent with forceful intercourse*". There was "slight" bleeding of the vagina. According to the medical report the injuries were "*consistent with sexual assault*".
- [3] The evidence by the complainant, AM, briefly stated is as follows. On 17 December 2010, she went to visit her sister, MM, where she stays with the appellant in Goedgevonde, North-West Province. Upon her arrival, she found the appellant only. The appellant explained that her sister was around and would be home shortly. After putting away her luggage, the complainant went to visit a neighbouring friend, Palesa. When she returned later during the evening with Palesa and the latter's friend, her sister was still not yet back. Instead, she found the appellant in the company of his friend, Dangwe, and the latter's wife. They all had dinner. After dinner, she informed the appellant that she was going to spend the night with her friend Palesa as her sister was not yet back. However, the appellant refused and excused Palesa and her friend.
- [4] Not long thereafter, Dangwe and his wife also left. The complainant remained alone with the appellant. In the meantime, she had changed into her sleepwear and sat on a sofa whilst watching TV in the living room. The

appellant closed the door which he then locked and put away the key. He thereafter approached her where she was seated, covered her mouth, and dragged her into his bedroom. He put her on the bed. Thereafter, he took off her underwear and sleepwear. She screamed, but he increased the volume of the DVD that was playing. The appellant thereafter raped her by inserting his penis inside her vagina. It was painful and she cried. She was a virgin at the time she was raped. As she cried, he covered her mouth. The attempts to push him away failed. Once he was done, he slept for a while. In the meantime she again put on her underwear and sleepwear.

- [5] A few minutes later, he wanted to have sex with her. She again refused. Again he took off her underwear and sleepwear after which he raped her for the 2nd time. At about 5 AM, she requested him to open the door for her, which he refused. Again he raped her for the 3rd time. Once more, she asked him to open the door for her. He told her that, his friend Dangwe, left with the keys. Shortly thereafter, her friend, Palesa, came and knocked at the door whilst calling out her name. When she wanted to answer, the appellant covered her mouth. The appellant told her that her sister, MM, owed a lot of people in the neighbourhood, which is why he was reluctant to open the door. However, the appellant opened the door shortly thereafter. After she had had breakfast, the appellant told her he was leaving to see his friend, Dangwe. She refused his offer for money to buy school requirements.

- [6] After the appellant had left, she too left to call her friend, Palesa, to accompany her. On the way, she sent her other sister, MCM, a "please call me" message using her cell-phone. MCM obliged and called her back. She then reported to MCM that the appellant raped her. The latter told her to return to Tshing, where she had visited the day before. Thereafter, the matter was reported to police and she was referred to the hospital for medical examination which, was conducted.

- [7] The appellant's erstwhile girlfriend, MM, testified and confirmed that she was not home (where she stayed with the appellant) at the time of the alleged rape incidents. She was away visiting a friend and returned a few days later. It is her version that complainant had phoned previously and requested to visit during the holiday period. She disputed a suggestion made by the defence on behalf of the appellant that, she would only visit him occasionally, and did not live with him.
- [8] The 1st report witness, MCM, confirmed in her evidence that the complainant who was crying, informed her that the appellant had raped her after she had responded to her request for a "please call me" message. According to the report received, the complainant was raped while she slept on the sofa. In my view however, this apparent contradiction does not help the appellant, for in his version, the intercourse took place in the bedroom. One can therefore, not rule out an honest misunderstanding.
- [9] The appellant's version, briefly stated, that he had a relationship with the complainant's sister, MM, which endured until October 2010 when she left him. The complainant had requested if she could visit him during the holidays. She again notified him of the proposed visit during December 2010. By then, he had already notified the complainant's family in October that, MM, had left him. However, MM did not stay with him permanently, she only visited him occasionally. When the complainant visited him on 17 December 2010, she knew already, that MM was not there.
- [10] Sometime later, after Palesa and his visitors had left, the complainant who was already in her sleepwear went to sleep in his bedroom. He later joined her in bed. She started touching him. He proposed to have a relationship with her. She agreed to his proposal. When he suggested that they should have sex, she asked him if he had a condom. She told him that she was still a virgin. He did not have a condom with him. However, he continued and

repeatedly asked to have sex with her. She eventually took off her sleepwear. He thereafter had sexual intercourse with her. The complainant screamed when he penetrated her vagina with his penis. She also told to stop. He again asked her if they could try to have sex once more. She said nothing. He continued asking until she responded that he could proceed to have sex with her but should stop when she told him to do so. He again had sex with her. He was about to ejaculate when she told him to stop. He assured her that, she should not worry as he was about to finish having sex. Once he was done, she again got dressed in her sleepwear. Once more, he had sexual intercourse with her between 6 and 8 AM for the last time. Before he left for work, he told her that he left her R500-00. She did not respond, however when he returned from work, the money was no longer where he had left it.

- [11] During cross-examination, when it was suggested to the appellant that he had sexual intercourse with the complainant without her consent he responded thus: " *I did not know your honour that I did not have permission because she did not say to me no, neither did she refuse or cry* ". This response inherently contradicts the appellant's version in his evidence in chief that, she agreed he could have sexual intercourse with her. In my view, this amounts to a material contradiction in the appellant's case.

- [12] The State had sought to introduce bail proceedings into evidence at the trial of the appellant which the court below admitted in terms of the provisions of section 60 (11B) (c) of the Criminal Procedure Act 51 of 1977 (the Act). Section 60 (11B) (c) of the Act relied upon reads thus:

"(c)

The record of the bail proceedings, excluding the information in paragraph (a), shall form part of the record of the trial of the accused following upon such bail proceedings: Provided that if the

accused elects to testify during the course of the bail proceedings the court must inform him or her of the fact that anything he or she says, may be used against him or her at his or her trial and such evidence becomes admissible in any subsequent proceedings."

[13] The following jurisdictional facts must be apparent from the warning to an accused person to constitute full compliance with the section:

13.1 The accused's rights in this regard are only explained to him after he/she has elected to testify in the bail proceedings;

13.2 The accused is then informed that the bail proceedings (excluding the fact that he/she has previous convictions and the fact that there are further charges pending against him/her) shall form part of the record at his/her subsequent criminal trial;

13.3 The accused is further informed that anything he says may be used against him/her at the subsequent criminal trial;

13.4 He or she is also informed that the evidence so given will become admissible at the criminal trial: except the offending portions of the evidence contained in subsection (a) (i) (the previous convictions) and (a) (ii) (the pending other cases) of section 60 (11B).

[14] In *S v Chavulla en andere* 1999 (1) SACR 39 (C) at 41d-j (Lategan J), it was stated thus:

"(T)he determination of whether something was reasonable and fair could not be done within the frame of reference of one party's interests only. There had to be a simultaneous, even-handed assessment of the interests of both parties involved. In a criminal trial this required that the interests of the accused, on the one hand, and the interests of the State (i.e., of the community represented by the State), on the other, had to be considered. Since the implementation of the Constitution (200 of 1993, and afterwards 108 of 1996) an accused in any criminal case was entitled to, and was invariably upon request furnished with, the State's entire docket of evidence. The question arose whether a corresponding duty did not rest upon the accused, in an even-handed process, to make available to the State such statements as he, the accused, had made outside the trial court, for the purposes of testing his viva voce evidence during the trial). The interests of justice could only be determined with reference to honest evidence which led to the determination of the truth. A person, who, during a bail application, relied on statements which contradicted what he proposed to say at his trial, could not appeal to reasonableness for protection against the revelation of inconsistencies between his evidence during the bail application and his evidence at the trial. That would amount to unilateral protection of his interests against the opposing interests of the State and of the administration of justice. It would also create a real opportunity for accused persons to mislead a court during bail applications with evidence designed to secure an advantage, without fear that they would later be confronted with that mendacious evidence, should it be in conflict with what was advanced by them at the trial.

(T)he Botha judgment (S v Botha and others 1995 (2) SACR 605 (W)) created the untenable situation that a person would be permitted to rely on a dilemma which he had himself created by his decision to change his version of the facts, in accordance with the advantage which he sought to secure for himself. (T)he evidence had to be admitted, subject only to the provisos (a) that it had to be relevant for the purposes of the trial, and that

it had to be admissible against the accused in terms of the ordinary rules of the law of evidence."

- [15] In *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat* 1999 (4) SA 623 (CC) Kriegler summed up the position as follows at page 674D–E:

"In the narrow context of the right to be released from detention the crux of the issue is that ss 60(11B)(C) not only makes the record of the bail proceedings part of the subsequent trial record, but makes any evidence the accused elects to give at the bail hearing admissible against him or her at trial provided the court hearing the bail application had warned the accused of the risk of such use. The first part of ss (11B)(c), which automatically incorporates the bail record into the trial record, is an unremarkable procedural provision which merely allows a shortcut: under s 235 of the CPA a certified copy of the bail record can in any event be handed in at the trial."

In argument before us, counsel for the appellant was constrained to concede that the versions by the appellant are at least 3, and regarding the same issue.

- [16] In my view, there is no prejudice where an accused person who is legally represented, asks that his affidavit be admitted as evidence in bail proceedings as the appellant did in the instant case. It therefore stands to reason that, the appellant's bail proceedings in the court below were correctly admitted as evidence against him. To rule otherwise, would not only have been unfair to the state, but was likely to bring the administration of justice in these circumstances, into disrepute. His denial that he had no sexual intercourse with the complainant in his affidavit, which was admitted as evidence, can only stand to discredit him as a witness. This is particularly so when viewed against his volte- face during the trial that he had sexual

intercourse with the complainant but, with her consent. (cf S v Snyders and others [2000] JOL 7273 (NC)). In my view, the state in this case managed to discharge the onus they had in proving the appellant's guilt beyond a reasonable doubt regard being had to the totality of the facts. It follows therefore, that the appellant was correctly, convicted.

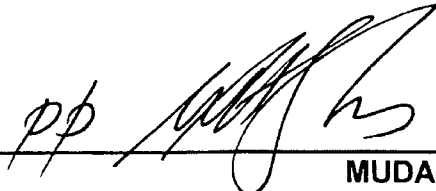
- [17] It remains to deal with the appeal on sentence. In terms of the provisions of s 51(1) read with Part 1 of Schedule 2 of the **Criminal Law Amendment Act 105 of 1997**, the appellant qualified for the mandatory minimum sentence of life imprisonment on 2 grounds (a) the complainant was at the time a girl below the age of 16 and (b) that he raped her more than once (in this case, 3 times). The trial court found no substantial and compelling circumstances to deviate from the prescribed minimum sentence of life imprisonment for the rape of the complainant and imposed that sentence on the appellant.
- [18] It is trite that this court can only interfere with the sentence imposed by the trial court where it is vitiated by a material misdirection or where the disparity between the sentence of the trial court and the sentence that the appellate court would have imposed, had it been the trial court, is so marked that it can be described as 'shocking', 'startling', or 'disturbingly inappropriate' (see S v *Malgas* 2001 (1) SACR 469 SCA at 478 E-H).
- [19] At the time of sentencing, the appellant was 51 years old. He had 4 children of which 3 were minors aged 15, 14 and 7 years of age respectively. The children were staying with their grandmother, in Mafikeng (now Mahikeng). His highest standard of education is grade 10. He worked for SA Oil SA as a truck driver. He earned R8000-00 per month. He admitted to 2 records of previous convictions in respect of dealing in liquor without a licence for which he paid fines. Both of them are unrelated to the matter under consideration.

[20] The complainant must have held the appellant in high regard and as a father figure from whom she expected protection considering that the appellant often helped her when she needed money. As an adult with responsibilities to the minor children who were dependent on him for their livelihood and welfare, he showed scant regard for these obligations when he raped the complainant with whom he had a relationship akin to a father and daughter. In essence, he betrayed the trust bestowed on him when he violated her as he did in the absence of MM, the complainant's sister.

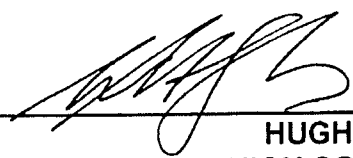
[21] Even though no victim impact evidence was led, there is no doubt that the complainant, a virgin at the time, would have endured post-traumatic stress. The rape was, inherently, a violent and traumatic infringement of the complainant's fundamental right to be free from all forms of violence and not to be treated in a cruel, inhumane or degrading way (*Mudau v S* (2013 (2) SACR 292 (SCA); *S v Chapman* **1997 (3) SA 341** (SCA) at 344 I-J).

[22] I am accordingly satisfied that no substantial and compelling circumstances are present to justify the imposition of a sentence less than the prescribed minimum sentence of life imprisonment. In the circumstances, I propose the following order:

22.1 The appeal against the conviction and sentence is dismissed.


MUDAU TP
ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered.



HUGHES J
JUDGE OF THE HIGH COURT

DATE OF HEARING: 26 FEBRUARY 2015

DATE OF JUDGMENT: 2 MARCH 2015

APPEARANCES:

For the appellant: Adv. M F Sibulela (instructed by legal Aid South Africa)

For the respondent: Adv. M T Moetaesi (NPA)