

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Appeal number: A292/2010

In the Appeal of:

SAMPI S HLAPHO

And

THE STATE

CORAM: RAMPAL, J *et* NAIDOO, J

JUDGMENT BY: RAMPAL, J

HEARD ON: 9 FEBRUARY 2015

DELIVERED ON: 19 MARCH 2015

- [1] These are appeal proceedings. The appellant appeals against the conviction and sentence. He was convicted on a charge of

rape and sentenced to life imprisonment. The respondent opposes the appeal.

- [2] On Sunday the 2 August 2009 an incident took place at Marabastad, Kroonstad. The scene of the incident was near a brickyard in the vicinity of the old cemetery on the outskirts of Seeisoville. The appellant and the victim were found together on the scene at or about 15:30.
- [3] Following that incident the appellant was arrested on the same day. He was subsequently charged with rape. The respondent alleged that he, in contraventions of section 3 Sexual Offences and Related Matters Act No 32 of 2007 read with specified statutory provisions, unlawfully and intentionally committed an act of sexual penetration with Ms M..... R..... C....., a 16 year old teenage girl born on the 9 March 1993 without her consent.
- [4] The appellant was released on R500,00 bail on 11 November 2009. His trial started in Kroonstad Regional Court on 4 May 2010. He pleaded not guilty to the charge. He explained in terms of section 115 of the Criminal Procedure Act No 51 of 1977 that he was detoxing by way of self-induced vomiting. While he was busy doing so, the complainant approached him; that she asked him to give her some money to buy snuff; and that he gave her some money. However, he denied the allegation that he sexually penetrated her in any manner whatsoever.
- [5] The appellant admitted in terms of section 220 of the Criminal of Procedure Act No 51 of 1977 that the complainant was a mentally

impaired woman; that medical form J88 concerned the complainant and that its contents were true and correct. The medical report was then handed up as exhibit “a”. Moreover, the defence also admitted the mental evaluation report in respect of the complainant. Dr L M Mosia described the condition of the complainant as severe mental retardation and found that she suffered from severe mental incapacity – exhibit “b”.

- [6] Two witnesses testified for the respondent, namely: Mr P... L... C..., the complainant’s brother and Ms M..... C.... the complainant’s mother.

In a nutshell the brother testified that he saw the appellant and the complainant having sexual intercourse under a tree in the veld at Marabastad on Sunday 2 August 2009 at ± or about 15:30. The appellant told him then and there that the complainant was his girlfriend. He had no idea as to how the complainant ended up on the scene.

The mother testified that the appellant admitted that he had sexual intercourse with the complainant but boastfully told her that he would win the case if she laid a criminal charge against him.

- [7] Both witnesses testified that the complainant was obviously a person who was mentally retarded. According to the mother, the appellant knew the complainant and was aware of her mental disability. From the scene the appellant and the complainant

went to V....'s, the complainant's aunt. They were instructed to go there by the first state witness, Mr P L C.....

- [8] The appellant also testified in his defence. His evidence was that he went out to buy maize meal. On his way back he felt nausea. He went out of the way and knelt down in the veld where he self-induced vomiting. The complainant appeared on the scene. She asked him to give her some money because she wanted to buy snuff. He gave her money.

- [9] Soon after giving her the money, her brother appeared on the scene. When she saw her brother she walked away. Her brother followed her but he remained behind. However, her brother turned back to him, and asked him to go home with him. He agreed. He denied the allegation that he had sexual intercourse with the complainant. During cross-examination he replied that there was a conspiracy to falsely accuse him of rape. The complainant's mother was behind it. At the end of the trial on the 4 May 2010 appellant was convicted as charged.

- [10] There rests no *onus* on the appellant to prove his innocence. The respondent is expected to prove the guilt of the appellant as an accused beyond reasonable doubt. (**S v Mhlongo** 1991 (2) SACR 207 (A) at 210c.)

- [11] The version of the accused must only be reasonably true. If it is, then he is entitled to his acquittal. (**Rex v Difford** 1937 AD 265 on 277.)

[12] In the instant appeal there was no submission made by counsel for the appellant about any irregularity or misdirection committed by the regional magistrate who tried the appellant. That being the case, we are bound by the credibility findings of the trial court since I am convinced that such findings were correct. (**S v Oliver** 1995 (2) SA 267 (A).)

[13] The trial court found, among others, that Mr C..... was an impressive single witness whose evidence was credible and satisfactory. The trial court gave sound reasons of its finding.

The trial court found that the evidence of the appellant was not reasonably possible and gave sound reasons why it had to reject his version.

[14] The complainant's brother saw a man and a woman having sexual intercourse. According to his observation, the copulation appeared normal. There was nothing to suggest that the one was raping the other. The sexual movements of the woman created the impression that she was a willing party to the whole sexual act. The witness observed no form of resistance from the woman. When the mating couple saw him, they stood up and dressed up. The woman, who appeared emotionally normal, must have recognised the intruder as her brother. However, she did not report to him that the man had raped her. She did not yell or cry.

[15] Because the man was caught red-handed with his pants down, he told the witness that the woman was his girlfriend. The woman

did not deny the man's claim. It would appear that she embraced the appellant's advances. Given all these facts, I am inclined to find that factual consent appeared to have been given by the complainant to the appellant to sexually penetrate her. However, it does not end there. That completes the first leg of the inquiry.

[16] The second leg of the inquiry revolves around a legal question. Since there was factual consent, we now have to determine the legal efficacy thereof in the light of the complainant's mental condition. On the strength of the evidence before us, the complainant's factual consent was rendered null and void by her severe mental retardation. Since she was legally incapable to give consent – there was no legal consent to legitimise her sexual penetration by the appellant. Lack of legal consent overrides factual consent – **AC v S** [2015] JOL 32785 (GP).

[17] The trial court found that there was sufficient evidence that the appellant had sexual intercourse with the complainant notwithstanding his denial. It also found that the complainant was so severely mentally retarded that she could not have consented to sexual intercourse with the appellant. I have already found that although she factually consented she legally did not.

[18] I am in respectful agreement with the trial magistrate in respect of all those findings. In this regards I am fortified by the submission made by counsel for the appellant. At par 3.5 of the appellants heads of argument counsel made the following concession:

“Gesien in die lig van die getuienis soos gelewer asook die geloofwaardigheidsbevinding wat gemaak is en die staving wat te vinde is vir die weergawe van die Staatsgetuies, kan skrywer egter geen verdere submissie maak waarom die Landdros fouteer het in sy bevinding nie.”

[19] During the course of oral argument counsel for the appellant affirmed the aforesaid concession. I am indebted to counsel for his responsible stance. The concession was correctly made. I would, therefore, dismiss the appeal as regards conviction.

[20] On 4 May 2010 the appellant was sentenced to life imprisonment in terms of section 51 Act No 105 of 1977. He was aggrieved by the sentence as well. Sitting as we are in an appellate mode, we can only interfere with the sentence imposed on the appellant if we are convinced that the trial court committed a misdirection or that the sentence was shockingly inappropriate.

S v Pieters 1987 (3) SA 717 (A) at 728B – C.

S v Mothube 1977 (3) SA 823 (A) at 830D.

S v Pillay 1977 (1) SA 531 (A) at 535E – F.

[21] In sentencing the appellant the trial court took into account that he was 59 years of age; that he was a married man; that his four children were economically independent; that he was unemployed; that he was suffering a back injury; that he was receiving social pension in the form of a disability grant; and that he did not inflict bodily injuries on the victim. Those then were the mitigating factors the trial court considered in profiling the appellant.

[22] In sentencing the appellant the trial court also took into account the following aggravating factors:

22.1 that rape is a serious crime;

22.2 that the crime of rape was very rife;

22.3 that the complainant was a young teenage girl, 16 years of age;

22.4 that her physique was tiny; and

22.5 that she was mentally retarded.

[23] Given those mitigating factors on the one hand and aggravating factors on the other hand, the question is whether substantial and compelling circumstances exist to justify deviation from the prescribed minimum sentence of life imprisonment.

[24] The trial court came to the conclusion that no deviation from the prescribed minimum sentence of life imprisonment was justified.

“Uit u persoonlike omstandighede soos wat aan my voorgehou is ek tevrede is daar eintlik niks wat aangemerkt kan word as wesenlik en dwingend van aard nie, u is ‘n bejaarde persoon, maar aan die anderkant verwag ‘n mens darem weer van ‘n bejaarde persoon dat indien hy op daardie ouderdom nog sulke drange het dat hy liever sy drange by sy huis sal bevredig en nie kinders wat weerloos in die straat loop sal gryp om hulle aan sy drange op te bevredig nie. Verder is ek tevrede is (sic) daar geen ander aspek wat ek kan vind wesenlik en dwingend van aard is nie en is ek dan tevrede dat die gepaste straf onder hierdie omstandighede een is van (sic) in terme artikel 276(1)(b) word u gevonnissen tot LEWENSLANGE GEVANGENISSTRAF.”

[25] On behalf of the appellant Mr Van der Merwe submitted that the trial magistrate erred in finding that there were no substantial and compelling circumstances to justify the imposition of a sentence less than the prescribed minimum sentence of life imprisonment. Counsel submitted that in those circumstances the punishment of life imprisonment was shockingly inappropriate. Accordingly he urged us to uphold the appeal – **S v GN** 2010 (1) SACR 93 (T).

[26] Ms Giorgi, counsel for the respondent, was in agreement. The respondent did not support the sentence. She too submitted that the sentence of life imprisonment, in those circumstances, was shockingly severe and thus inappropriate – **S v Pieters** *supra*.

[27] I am persuaded that the trial court erred by finding that there were no substantial and compelling circumstances to warrant departure from the prescribed minimum sentence of life imprisonment.

I am mindful of the principle that the sentencing of an offender is the prerogative of a trial court – **S v Kgosimore** 1999 (2) SACR 238 (SCA). However, where the trial court has over-emphasised the aggravating factors at the expense of the mitigating factors, appellate interference is warranted in order to restore the balancing act. In this instance, I am persuaded that punishment does not fit the criminal - **S v Zin** 1969 (2) SA 735 AD.

[28] The aggravating factors, serious though they are, do not exceed the mitigating factors by a very wide margin. It is disgraceful for a man to rape an adult woman. It is reprehensible for a man to rape a teenage girl knowing her unfortunate condition. It is

appalling for a man to rape a mentally retarded teenage girl. Notwithstanding the appellant's appalling conduct, I am of the view that he was not adequately individualised. I proceed to tabulate facts that, in my view, militate against the imposition of the ultimate and severest form of punishment imposed on him.

[29] The following factors have to be accentuated:

- 29.1 The appellant was born on 15 September 1950. He was therefore almost 59 years of age at the time he raped the complainant;
- 29.2 He had a clean criminal record. This was remarkable bearing in mind his advanced senior age. This strongly mitigating factor was apparently not considered.
- 29.3 The complainant sustained no serious injury, except for a small tear of her vagina. This was so because the appellant did not use violent means to achieve his criminal objective.
- 29.4 The instant case is not the worst of the rape cases. Quite often rape victims are not only sexually violated but also violently brutalised.
- 29.5 The appellant does not enjoy good health. It appears that he was involved in an accident in which he sustained a back injury so severe that he can no longer fend for himself.
- 29.6 He now lives on a disability grant from the department of social welfare.

[30] The aforesaid factors cumulatively considered together with the appellant's personal circumstances as set out in paragraph 21 above, in my view constitute substantial and compelling circumstances. With respect, the trial court erred in finding

otherwise. As regards sentence I am therefore inclined to interfere. Both counsel were *ad idem* that a sentence of 20 years imprisonment would be an appropriate punishment for the appellant. I am inclined to agree. There was substance in those submissions.

[31] Accordingly I make the following order:

31.1 The appeal fails as regards conviction. The conviction is confirmed.

31.2 The appeal succeeds as regards sentence. The sentence of life imprisonment is set aside and it is substituted with the sentence as set out below.

31.3 The appellant is sentenced to a custodial sentence of 20 years imprisonment.

31.4 The substituted sentence must be deemed to have been imposed on 4 May 2010.

M. H. RAMPAL, AJP

I concur.

S. NAIDOO, J

On behalf of the appellant: Adv. S. Kruger
Instructed by:
Bloemfontein Justice Centre
BLOEMFONTEIN

On behalf of the respondent: Adv. S. Giorgi
Instructed by:
The Director: Public Prosecutions
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