

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

Appeal Number: A209/2014

In the appeal of:

THABO TEELE

Appellant

versus

THE STATE

Respondent

CORAM:

VAN ZYL, J and WILLIAMS, AJ

JUDGMENT BY:

WILLIAMS, AJ

HEARD ON:

20 APRIL 2015

DELIVERED ON:

14 MAY 2015

[1] Appellant was charged in the regional court, Bloemfontein, for contravening section 3 read with the provisions of section 1, 55, 56(1), 57, 58, 59, 60 and 61 of act 32 of 2007 in that he allegedly raped M[...] M[...] (age 9) on 6 June 2010 at Bloemfontein. He unlawfully and deliberately sexually penetrated the complainant without her permission.

[2] The appellant was represented in the court a quo by Mr Sujada. He pleaded not guilty, based on a total denial. He was convicted of rape.

He was then sentenced to life imprisonment in terms of section 276(1)(f) of Act 51 of 1977 as amended, read with Act 105/1997 as amended.

Appellant sought leave to appeal which was refused. Leave to appeal against the conviction and sentence was thereafter granted on petition to this court.

[3] The grounds of appeal are as follows:

3.1 Ad conviction:

- a. That the court a quo erred by not approaching the evidence of the complainant with caution since she was a single witness;
- b. That the court a quo erred by accepting the evidence of the third state witness that the complainant was unable to

walk, since the medical evidence did not support such finding;

- c. That the court a quo erred by relying on a medical report that the complainant was raped;
- d. That the court a quo erred by not accepting the version of the appellant and not giving him the benefit of the doubt.

3.2 Ad sentence:

- a. A sentence of life imprisonment is shockingly inappropriate since the court a quo did not pay proper attention to the appellant's personal circumstances and mitigating factors;
- b. That the court a quo erred by not finding that the appellant's personal circumstances and mitigating factors could be considered compelling and substantial.

[4] The evidence tendered by the prosecution can be summarised as follows:

4.1

4.1.1 The complainant, M[...] M[...], a 9 year old girl, testified that on the day of the incident she was sent by her guardian, M[...], to the appellant's house to ask for maize meal. The appellant was dressed only in his underpants. He pulled her into a bedroom where he proceeded to rape her vaginally as well as anally. He thereafter gave her R20, 00 to give to M[...] and she returned home, reported the incident to M[...],

who did not believe her. M[...], however took the money from the complainant. Thereafter, presumably the following day, the uncle of the complainant was informed of the incidents by a neighbour, M[...] M[...]. He contacted the police who arrested the appellant. M[...] was thereafter taken for a medical examination to doctor J.M. Coetzee.

4.1.2 During cross-examination the complainant testified that it was the first time to be sent to the appellant's house and that she had never before entered his premises. According to her, there was some liquor on a table but that the appellant was not drunk. She testified that the house comprised of three rooms, which appellant had shown her. This was not canvassed any further by Mr Sujada, and therefore stands uncontested.

4.2 The uncle of the complainant, K[...] S[...] M[...], testified that he heard from Me M[...] about the incident. He enquired from M[...] as to why she did not inform him accordingly and last mentioned denied that the rape incident took place. M[...] was confronted in the presence of M[...]. According to him, M[...] did not have permission for the complainant to stay with her. The complainant relayed the version to him and according to him the complainant could not walk properly. This witness testified during cross-examination that M[...] only told him that she was raped anally.

4.3 The neighbour of the complainant, M[...] M[...], testified that she did not know the appellant. She had been woken up by M[...] during the morning after the incident and was informed by her that

the complainant was raped, that she had called the police but was informed that the police did not have transport to assist. She further testified that she informed the uncle of the complainant about the incident, although M[...] was not present then. During cross-examination it was put to her that M[...] would deny telling the witness that the complainant was raped. Instead, M[...] would tell the court of an incident where appellant was seen whispering to M[...] at the fence of M[...]’s property. According to M [...], the complainant told her that the appellant had offered her R20,00 in exchange for sex. M[...] denied this. Importantly, she did confirm that M[...] had informed her about the R20, 00 that was handed over by the complainant. This piece of evidence is of vital importance and I will deal with it during the analysis of the evidence. It was furthermore put to the witness that the uncle wanted custody of the complainant and that the rape incident was a fabricated story, although this was never put to the uncle for his comment.

4.4 The last state witness is doctor Coetzee who testified that there were not extra genital abnormalities and that the development of the complainant was at Tanner Stage 1. The Gynaecological and anal examination was normal. Her finding was one of possible child abuse according to the Adams classification. According to the witness the redness observed in the fossa navicularis, was non-specific and that various factors could cause same.

4.5

4.5.1 That concluded the state’s case and the appellant testified in his own defence. He denied the allegation of rape and denied that the

complainant was sent to his house or that he gave her R20, 00. He testified that he was at a drinking place up until 5pm and thereafter returned home, which was next door to the shebeen. Shortly thereafter M[...] came to his dwelling and confronted him with the allegation that he had raped the complainant. He asked M[...] as to the time and place where the incident took place. He further testified that he had never heard about the R20, 00 story until the trial had commenced. He had a good relationship with M [...], whom he referred to as the complainant's mother. There had been a problem between them about four months prior to the incident but according to him, this had been resolved. He did not know the uncle or the neighbour and had no knowledge as to why they would fabricate this allegation against him. He denied that he would ever have whispered to the complainant.

According to him, M[...] had never been to his house at any stage, either on the day of the alleged rape or prior thereto. The following day, M[...] also confronted him about the alleged rape, but from a distance.

4.5.2 He further testified that he had no knowledge how the uncle had come to hear about the incident. Furthermore that he was at a drinking place on the day of the incident and that the owner of the establishment will be able to confirm the same. This was, however, never put to the state witness.

4.6

4.6.1 One defence witness was called, M[...] P[...] M[...]. She testified that the complainant had been staying with her since she was ten

days old. She was not the biological mother of M[...]. On the Sunday she saw the appellant whispering to the complainant, she confronted the complainant and was eventually told that the appellant had offered her R20,00 to have sexual intercourse with her.

4.6.2 She confronted the appellant at a drinking place and he threatened her. She told the neighbours that the complainant was almost raped by the appellant and that he had offered the complainant R20,00. On the Monday the uncle came to her house and confronted her about the incident, she informed him that the complainant was not raped, whereafter he took the complainant away.

4.6.3 She denied having sent the complainant to the appellant and that R20,00 was handed over to her. Later in cross-examination, the witness testified that R20, 00 was handed to her by the complainant on a previous occasion. She denied having told the neighbour that M[...] was raped, or that she could not have walked properly. During cross-examination it was put to her that the appellant testified she confronted him of raping the complainant, which she denied. She stated that she had confronted the appellant with the version of the whispering incident and offer for sex. She was adamant that since the Sunday when she confronted the appellant at the drinking place, complainant was in her presence the whole time. It could therefore not have been possible for the appellant to rape the complainant. She further said that M[...]’s version was pure fabrication and that she had been

coached by the uncle to provide such version to the court. That concluded the defence case.

[5]

5.1 Me Kruger who appeared for the appellant argued that the complainant was a 9 year old single witness and that the cautionary rules applied to her evidence, as set out in **R v Mokoena 1932 OPD 79** as well as **R v Mokoena 1956(3) SA 81 (A)**.

5.2 Me Kruger argued that the medical report could be seen as neutral. She further argued that the court *a quo* erred by accepting the evidence of the complainant and that it had to be evaluated with caution. She submitted that although there were statements put to witnesses which were not testified to by the appellant, his version could still be seen as reasonably possibly true.

She referred to **Shusha v The State (609/10) [2011] ZASCA 171, par. 9** in which it is recorded:

“It is trite law that in criminal matters the state must prove its case beyond reasonable doubt. An accused’s version can only be rejected if the court is satisfied that it is false beyond reasonable doubt. An accused is entitled to an acquittal if there is a reasonable possibility that his or her version may be true. An accused’s version cannot be rejected merely because it is improbable.”

On this basis Me Kruger suggested that the conviction cannot stand. She did, however, concede that the evidence of Mampfi was unconvincing.

[6] As far as sentence was concerned she argued that this court could and should interfere with the sentence of lifelong imprisonment that was handed down. She emphasized the appellant's personal circumstances as well as the fact that he had spent 17 months in custody awaiting trial. He was a first offender and 55 years old, as well as gainfully employed at the time. Compelling and substantial circumstances existed which should minimise the maximum sentence.

[7]

7.1 Mr Botha, who appeared for the state, agreed that the cautionary rule needed to be applied, but argued that the magistrate had not erred in applying the same. He argued that the court had not erred in accepting the evidence of the complainant and the state witness as credible. He was of the opinion that the appellant himself had provided corroboration for the state's case in that M[...] had confronted him with the allegation of rape. Mr Botha was further of the opinion that the fact that no injuries were found did not suggest that the complainant had not been raped. According to Mr Botha therefore the court *a quo* had correctly adjudicated that the appellant and his witness's evidence was contradictory and that the versions of both had to be rejected as false beyond reasonable doubt.

7.2 On sentence he submitted that there were no grounds for interference.

[8]

- 8.1 As stated by the magistrate in his judgment at page 108 of the record at line 15:

“Whichever way this court looks at the facts before it, the R20,00 and the sexual intercourse, or rape, or sexual penetration, the facts thereof, keep on coming up. Is this coincidence? This court thinks not.”

The court *a quo* found on page 109 at line 20 as follows:

“The court a quo found the complainant to be a credible witness. The uncle and the neighbour corroborated her on all material aspects, they did not make it worse than what it was. The neighbour even went so far as to say she didn’t see the complainant. It would have been easy to make matters worse, for instance by saying the child was beaten, the child was bloody, etc., etc. This was not done, just the facts were given to the court.”

Conversely, the magistrate found that the accused and his witness were not sure which versions to stick to, as to whether he was drinking, whether he was whispering to the child or whether this allegation was made to him at all. The magistrate therefore rejected the accused’s version as false.

- 8.2 In evaluating the totality of the evidence I agree with the findings of the court *a quo*. One of the major factors which tends to prove the appellant’s guilt beyond reasonable doubt is his own evidence that M[...] confronted him on the same afternoon, accusing him of raping the complainant. She would not have acted in such a manner but for the report. There is no evidence of malice between them. This testimony, coupled with the evidence of M[...] that M[...]

told her of the alleged rape on the following day demonstrates that the complainant must have told M[...] of the incident. Furthermore, M[...]’s evidence that R20,00 had been given to M[...] by the complainant must be accepted as true. The reasons for M[...]’s false version are irrelevant. For purposes of this judgment her testimony can be ignored.

I would therefore dismiss the appeal in respect of the conviction.

[9]

- 9.1 As far as the sentence imposed is concerned, it is trite law that each matter must be adjudicated on its own merits and that all relevant factors must be carefully judged. Majiedt, JA, emphasized this principle again in **S v SMM, 2013(2) SACR 292 (SCA)** as follows in paragraphs [13] and [14]:

“[13] ... I hasten to add that it is trite that each case must be decided on its own merits. It is also self-evident that sentence must always be individualised for punishment must always fit the crime, the criminal and the circumstances of the case. It is equally important to remind ourselves that sentencing should always be considered and passed dispassionately, objectively and upon a careful consideration of all relevant factors. Public sentiment cannot be ignored, but it can never be permitted to displace the careful judgment and fine balancing that are involved in arriving at an appropriate sentence. Courts must therefore always strive to arrive at a sentence which is just and fair to both the victim and the perpetrator, has regard to the nature of the crime and takes account of the interests of society ...

[14] ... There is consequently increasing pressure on our courts to impose harsher sentences primarily, as far as the public is concerned, to exact retribution and to deter further criminal conduct. It is trite that retribution is but one of the objectives of sentencing. It is also trite that in certain cases, retribution will play

a more prominent role than the other sentencing objectives. But one cannot only sentence to satisfy public demand for revenge – the other sentencing objectives, including rehabilitation, can never be discarded all together, in order to attain a balanced, effective sentence.”

The magistrate referred to case-law dealing with a variety of factors relating to sentence and determined that the fact that the appellant was a first offender, should not be seen as a compelling and substantial factor. He referred to **S v Zinta 1990(2) SACR 44 W** in this regard. I, however, feel that the court *a quo* did not give sufficient credit to the personal circumstances of the appellant. At the time of sentencing the following, amongst others, was placed on record:

- Appellant was 55 years old at time of sentencing;
- Appellant’s highest qualification is Standard 1;
- Appellant had four children, two of whom were still minors at the time of sentencing;
- Appellant was maintaining the children and working as a contractor, earning an income of R2 400,00 per month;
- Appellant had no previous convictions and was a first defender;
- Appellant had spent 17 months in custody awaiting trial.

The aggravating circumstances have been taken into consideration.

9.2 The defence attorney did refer the magistrate to the matter of **S v Mongoma 2007(2) SACR, at 198**, where it was indicated that

the age and absence of a previous conviction could be taken into account. The magistrate declined to follow this option.

- 9.3 According to the present foster mother of the complainant, her relationship with men has improved and she is no longer scared of them. According to the provisions of section 51(3)(aA), the apparent lack of injury to a complainant does not constitute a substantial and compelling circumstance justifying in position of a lesser sentence than the minimum prescribed. However, according to Hiemstra's commentary on this section found in Hiemstra's Criminal Procedure at 28-24(1)"

"If the provision regarding the apparent lack of physical injuries is interpreted literally, it is unconstitutional because it would mean that Parliament is attempting to instruct judges to ignore factors which are relevant when imposing sentence, and to impose sentences which would consequently be unfair (S v Nkawu 2009 (2) SACR 402 (ECG) par [15] per Plasket J). The provisions should however be read so as to preserve constitutional values. Section 51 (3)(aA)(ii) should be read to mean that any one of the factors mentioned on their own may not be regarded as a substantial and compelling circumstance justifying departure from the prescribed sentence, but each of the factors may be considered together with the other factors cumulatively to amount to substantial and compelling circumstances. On this interpretation the court is not precluded from considering the fact that the complainant suffered no serious or permanent injuries, along with the basket of other factors, in order to arrive at a just and proportionate sentence (par [17]). The same argument applies in respect of the other factors mentioned in section 51 (3)(aA). The factors must be considered cumulatively, not individually (S v SMM 2013 (2) SACR 292 (SCA))."

Although the appellant was convicted of a serious offence which has reached epidemic proportions in our country, I am convinced that the cumulative effect of the mitigating factors are of such a

nature that they provide substantial and compelling circumstances which justify the imposition of a lesser sentence. The imposition of the life sentence of imprisonment disturbs one's sense of justice, is unjust and inappropriate. In **S v Malgas 2001(1) SACR (SCA)** it was determined that in such circumstances a less severe punishment be imposed. It is recorded at paragraph 25 thereof:

“If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.”

[10] I am therefore inclined to interfere with the sentence.

[11] The following orders are made:

1. The appeal against the conviction is dismissed.
2. The sentence of life imprisonment is set aside and replaced with one of 13 years imprisonment.
3. The sentence is assumed to have been handed down on 15 November 2011.

A. WILLIAMS, AJ

I concur:

C. VAN ZYL, J

On behalf of appellant:

S. Kruger

Bloemfontein Justice Centre

On behalf of the state:

J.P du P Botha

Director: Public Prosecution