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IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE HIGH COURT, KIMBELEY)

Case No: K/S 13/15

Delivered: 15 May 2015

In the matter between:

THE STATE

AND

IVAN MATHIBE

ACCUSED

JUDGMENT

PAKATI J

[1] The accused, Mr Ivan Mathibe, is arraigned on five charges. The first charge, theft, was withdrawn at the inceptive of the trial. In Count 2 he is charged with kidnapping. In Counts 3 and 4 he is alleged to have committed rape in contravention of s 3 read with secs 1, 55, 56, 56A and 57 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007, and further read with secs 256 and 261 of the Criminal Procedure Act, 51 of 1977 (the CPA), as well as s 51 of the Minimum Sentences Act, 105 of 1997. In Count 5 he faces a charge of murder. The incidents are alleged to have occurred on 29 November 2014 at or near Galeshewe, Kimberley.

[2] The accused, a 30 year old male, is accused of having kidnapped the deceased, F..... D..... B....., a five year old (born on 30 September 2009), raped and murdered her. He is represented by Mr P Fourie on the instructions of Legal Aid South Africa, Kimberley. He pleaded guilty to Counts 2, 3 and 5 and not guilty to Count 4 and denied raping the deceased vaginally. A statement (Exhibit “A”) in terms of s 112 (2) of the CPA reads as follows:

“I the undersigned, Ivan Mathibe, do hereby declare as follows:

- 1. I am the accused in this matter.*
- 2. I know and understand the charges against me and plead guilty to charges 2, 3 and 5 without being unduly influenced to do so.*
- 3. My legal representative has explained the consequences of section 51 of Act, 105 of 1997, to me namely that charges 3 and 5 carry a prescribed minimum sentence of life imprisonment unless the court finds the existence of compelling and substantial circumstances which may persuade the court to deviate from the prescribed minimum sentence. I have considered all this information but still decide to plead guilty.*

4. *I make the following admissions:*

4.1 *I admit the identity of the deceased as that of F..... D..... B.....*

4.2 *I admit that the body of the deceased did not sustain any further injuries from the time that the body was found on the scene of crime until the time that a medico-legal autopsy was performed on the body of the deceased.*

4.3 *I admit that Dr Lemainé Fouché conducted [the] medico-legal autopsy on the body of the deceased and compiled [the] post-mortem report and I admit the contents of the report as true and correct.*

4.4 *I admit that the cause of death is a head injury.*

4.5 *I admit that the deceased was 5 years old at the time of her death.*

5. *The facts [to] which I plead guilty are the following:*

5.1 *I admit that on 29 November 2014 I was at Galeshewe in the district of Kimberley.*

5.2 *I was at the home of Mr Solomon M..... who is the father of the deceased.*

5.3 *I sat and drank beer with Mr M..... I also smoked tik that day.*

5.4 *The deceased was also present but she played outside the house.*

5.5 *I decided to go home and got up from where I was seated and left the house. When I got outside I noticed the deceased playing.*

5.6 *I took her by the hand and walked down the street.*

5.7 *Whilst walking down the street I decided to rape the deceased. I walked with the deceased to the veld at Witdam and took her behind a bush.*

5.8 *I instructed her to undress which she did and I then ordered her to lie down on her stomach on the ground.*

5.9 *I then pulled my pants down and got on top of the deceased and forced my penis into her anus and raped her. When I raped her in her*

anus my penis slipped out of the anus and touched the vagina of the deceased and in the process might have penetrated her vagina.

5.10 *After I [had] raped the deceased I decided to let her go home but immediately realised that I was going to get into trouble if the deceased told her parents what I have done to her.*

5.11 *I then decided to kill the deceased and picked up a stone and threw it to the head of the deceased. The stone hit the head of the deceased and she immediately lay still on the ground.*

6. *I admit that I had no permission to remove the deceased from the care of her parents and that I am guilty of kidnapping.*

7. *I also admit that I had no permission to perform an act of sexual penetration on the deceased and that she by law could not consent to an act of sexual penetration and that I am guilty of rape.*

8. *I admit that I had no right or reason to kill the deceased and that I am guilty of murder.*

9. *I admit that I knew that my acts were wrong and that I can be punished for it by a court of law.*

10. *I admit that although I consumed alcohol and smoked tik I was not affected by it in such a way that I did not know what I was doing.*

11. *I have given my co-operation to the Police since my arrest on 29 November 2014 and also made a full confession of the events to a magistrate.*

12. *I am sorry for what I have done and thus plead guilty.”*

[3] Dr Lemainé Fouché, who performed the autopsy on the deceased, recorded the chief post-mortem (Exh “B”) findings as follows:

“The body of a black female child with abrasions and lacerations on the head, with a depressed fracture of the right temporo-parietal bones, as well as a shattered hinge fracture through the middle cranial fossae. The

brain is swollen with flattening of the gyri. There are lesions around the urethral opening and labial minora. There is a fissure in the ano-rectal junction stretching into the rectum as a linear erythematous lesion. No sphincter present”

- [4] She further recorded the injuries in the genital organs as follows:

“There are erythematous changes around the urethral opening. There are small fissures present on both sides of the urethral opening. There is a small fissure, 4mm long in the 15:00 position on the left labia minora. There are small tears in the hymen, 2mm long in the 18:00 and 19:00 positions. There is a small haemorrhage, 2mm in diameter in the right labia minora. A perineal dissection revealed the following injuries to the ano-rectal area: a deep fissure, 2cm x 4mm in the 18:00 position in the anus, stretching into the rectum for 2 cm continuing further inwards as a linear erythematous lesion. There is a ring erythematous change approximately 5mm wide on the inside of the anal opening. No sphincter present. These lesions are consistent with anal penetration.”

- [5] According to Dr Fouché erythematous change means when an organ looks red and swollen. The injuries were in the perineal area and not inside the vagina. She explained the perineal dissection as the removal of skin tissue around the urethral opening, the vagina as well as the anus. This enabled her to have a clear picture of the internal injuries. She explained that “*no sphincter present*” means that the anal opening was wide and was dysfunctional whereas normally there would be a slack. She testified that the injuries in the anus were serious and had a fissure (a long narrow crack) which should not be there in a toddler.

[6] Dr Fouché could not tell whether the deceased was first penetrated vaginally or anally. She did not rule out a possibility that the accused's penis could have slipped out of the anus and injured the vagina. She also did not exclude another possibility that there could have been an attempt to penetrate the vagina. She testified that there were small tears in the hymen and had there been full penetration there would have been serious and deeper injuries to the hymen.

[7] Elaborating on her post-mortem findings Dr Fouché recorded the following injuries to the head and neck:

“HEAD AND NECK

5. Skull:

An extensive under-skin haemorrhage overlying the left parietal bone. There is a depressed skull fracture, 5cm x 4cm of the right temporo-parietal bones. There is a shattered hinge fracture through the middle cranial fossae. The dura mater is intact.

6. Intracranial contents: Mass: 1134g. The brain is macroscopically swollen with flattening of the gyri. No herniation noted.”

The doctor concluded that the cause of death was head injuries and that the injuries are consistent with blunt trauma to the skull. She opined that a stone fitted in well as the assault weapon used.

That concluded the State case.

[8] The accused elected to exercise his constitutional right to remain silent and closed his case.

[9] What remains for determination relating to the sexual charges is whether the State proved two separate acts of rape. Mr Fourie requested the Court

to acquit the accused with regards to Count 4 and only convict him on Counts 2, 3 and 5 as pleaded.

- [10] The only evidence before Court is that of Dr Fouché and the accused's statement in terms of s 112 (2) of CPA. Sadulker AJA in **S v TLADI 2013 (2) SACR 287 (SCA)** quoted with approval the case of **S v BLAAUW 1999 (2) SACR 295 (W)** at 300 a-d where Borchers J held:

“Mere and repeated acts of penetration cannot without more, in my mind, be equated with repeated and separate acts of rape. A rapist who in the course of raping his victim withdraws his penis, positions the victim's body differently and then again penetrates her, will not, in my view, have committed rape twice. This is what I believe occurred when the accused became dissatisfied with the position he had adopted when he stood the complainant against a tree. By causing her to lie on the ground and penetrating her again after she had done so, the accused was completing the act of rape he had commenced when they both stood against the tree. He was not committing another separate act of rape. Each case must be determined on its own facts. As a general rule the more closely connected the separate acts of penetration are in terms of time (ie the intervals between them) and place, the less likely a court will be to find that a series of separate rapes has occurred. But where the accused has ejaculated and withdrawn his penis from the victim, if he again penetrates her thereafter, it should, in my view, be inferred that he has formed the intent to rape her again, even if the second rape takes place soon after the first and at the same place.”

- [11] In this Division of the High Court in **XOLANI PLAATJIES v THE STATE** (Unreported judgment delivered on 27 March 2015) Lacock J (Kgomo JP concurring) had this to say on multiple rapes (Translated):

“(6) Secondly, the issue that falls for determination is whether the Magistrate was correct to convict the appellant on three separate acts of rape in that he poked his finger on three occasions into the vagina of the complainant; and whether the three acts did not in reality constitute a single intent.”

“6.2 In casu it is evident that the appellant’s insertion of his finger in the complainant’s vagina was interrupted on two occasions when the complainant kicked him away from her. After each brief interruption the appellant would poke his finger once more into the vagina of the complainant. This situation repeated itself whilst the complainant was lying on her bed. Having regard to the short duration and the place where these finger-penetrations occurred, it would, in my view, be convoluted or artificial to conclude that each of the three separate finger-penetrations amount to an independent intention to rape. I am of the view that the brief interruptions are demonstrative of a single intent to penetrate the complainant with his finger.

6.3 In the result the conviction of the appellant on three separate counts of rape was unjustified and a misdirection.”

Lacock J’s reasoning was based on **S v Blaauw** (*supra*) which he quoted with approval. He also cited **S v Tladi** (*supra*) which the SCA endorsed.

- [12] Counsel for the State, Ms J Mabaso, conceded that no evidence was presented in the trial to sustain a conviction on Count 4 (rape). The evidence by Dr Fouché that she would have expected to find more serious and deeper injuries in the hymen if there was vaginal penetration is consistent with the accused’s version. There is therefore no basis for a conviction on Count 4. I am satisfied that the State failed to prove its case beyond a reasonable doubt in this regard. The version of the accused is reasonably possibly true and entitled him to his acquittal.

[13] The accused in para 5.11 of his s 112 (2) statement stated:

“I then decided to kill the deceased and picked up a stone and threw it to the head of the deceased. The stone hit the head of the deceased and she immediately lay still on the ground.”

This clearly shows his intention to silence the deceased because he says so in so many words in para 5.11 of his guilty plea. Taking into account the conduct of the accused towards the deceased, a five year old defenceless toddler, the weapon used to inflict the injury, the part of the body aimed at, being the most vulnerable part of a human being, and his expressed intention I am satisfied that the accused had the direct intention to kill the deceased and did so.

The following verdicts are returned:

- 1. On Count 1: Theft, was withdrawn.**
- 2. On Count 2: Kidnapping, The accused is found guilty of kidnapping the deceased, F..... D..... B.....**
- 3. On Count 3: Rape, The accused is found guilty of having raped the deceased, F..... D..... B....., a minor of five years.**
- 4. On Count 4: Rape, The accused is found not guilty and discharged.**
- 5. On Count 5: Murder, The accused is found guilty of the murder of F..... D..... B..... with *dolus directus* as the form of intent.**

**BM PAKATI
JUDGE**

<i>On behalf of the State:</i>	<i>ADV J MABASO</i>
<i>Instructed by:</i>	<i>Director of Public Prosecutions</i>
<i>On behalf of the Accused:</i>	<i>MR P FOURIE</i>
<i>Instructed by:</i>	<i>Legal Aid South Africa, Kimberley</i>