

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

Appeal No.: A55/2014

In the matter between:

ADRIAAN ZAGARIA MYNHARDT

Appellant

and

THE STATE

Respondent

CORAM: LEKALE, J et JAJI, AJ

HEARD ON: 23 JUNE 2014

JUDGMENT BY: JAJI, AJ

DELIVERED ON: 7 AUGUST 2014

- [1] The appellant, who was legally represented, was on the 19th April 2010 convicted of and sentenced to a period of 12 (twelve)

years imprisonment for rape pursuant to his guilty plea. He now comes before us on appeal against conviction with leave granted by members of this court on the 5th February 2014 when he petitioned the Judge President successfully.

- [2] On returning the guilty verdict the trial court simply accepted and relied on the appellant's statement submitted in terms of section 112(2) of the Criminal Procedure Act 51 of 1977 (the CPA) as well as the prosecutor's *ipse dixit* without putting any clarification questions to him. The relevant statement read as follows:

- “(1) Beskuldigde erken dat hy op die 28ste Julie 2009 te Parys in die Streekafdeling Vrystaat, vleeslike gemeenskap met M[...] A[...], ‘n 16-jarige meisie gehad het.**
- (2) Dat gemelde M[...] A[...] verstandelik vertraag is, soos uiteengesit in die sielkundige verslag van Frederick Jacobus Wilhelmus Calitz wat ek aanheg by die erkennings.**
- (3) Dat die waarheid en korrektheid van gemelde verslag van Frederick Wilhelmus Calitz erken word.**
- (4) Dat sy optrede deur vleeslike gemeenskap te hê met M[...] A[...] op verkragting neerkom.**
- (5) Dat gemelde M[...] A[...] verstandelik gestremd is soos bedoel in artikel 1 van Wet 32 van 2007 en dat hy geweet het sy optrede is dan verkeerd en wederregtelik.”**

- [3] In mitigation of sentence a letter directed to the appellant by the complainant in which she indicated that she wanted to make

love with him was handed in as exhibit. A presentence report in which it is pointed out that the appellant denied raping the complainant was also handed in by consent.

[4] The appellant's grounds of appeal amongst others are the following:

- “(i) He was improperly influenced by his former attorney to make the guilty statement;**
- (ii) The report of Professor Calitz was not conclusive;**
- (iii) Appellant did not understand proceedings as required by section 77 – 79 of the Criminal Procedure Act 51 of 1977;**
- (iv) The court *a quo* did not attach enough weight on the letter written by the complainant to the appellant (exhibit ‘D’) that she wanted to have sex with him;**
- (v) The court *a quo* did not attach weight to the letter by the appellant to his former attorney (exhibit ‘E’);**
- (vi) The court *a quo* did not attach enough weight to exhibits D, E & F where the appellant clearly on the exhibits deny intention:**
- (vii) The court *a quo* did not call for expert evidence regarding the mental state of the appellant. It had commented that the appellant's mental understanding was limited.”**

[5] The state does not support the appellant's conviction. The state submitted that the court *a quo* did not follow provisions of section 112(1)(b) of Act 51 of 1977(the CPA) with Ms Giorgi correctly pointing out that the appellant's statement was a

simple regurgitation of what is set out in the charge sheet. Such a statement is silent on how the crime was committed and, as Mr Makhene for the appellant correctly submits, the appellant does not admit *mens rea* or unlawfulness specifically. It is, further, correctly pointed out for the appellant that the appellant did not admit that the sexual consent by the complainant had no legal effect because he knew that she could not, in law, give such consent as a result of her mental incapacities.

[6] The state submitted that the court *a quo* should have questioned the appellant with reference to the alleged facts of the case in order to ascertain whether he admits the allegations in the charge sheet in the circumstances of the instant matter. Had the court *a quo* questioned the appellant in the light of the facts of the matter, it would have been clear, in my view, that a plea of guilty had to be entered.

[7] The state further submitted that the court *a quo* should have noted a plea of not guilty on account of exhibit 'D', a letter by the complainant to the appellant requesting to have sex with the appellant.

[8] Section 312(1) reads:

"Where a conviction and sentence under section 112 are set aside on review or appeal on the ground that any provision of subsection (1)(b) or subsection (2) of that section was not complied with, or on the ground that the provisions of section

113 should have been applied, the court in question shall remit the case to the court by which the sentence was imposed and direct that court to comply with the provisions in question or to act in terms of section 113, as the case maybe.”

[9] The conviction and sentence fall to be set aside.

ORDER

[10] The conviction and sentence are set aside.

[11] The matter is remitted to the Regional Court at Kroonstad for compliance with provisions of section 113 of Act 51 of 1977.

[12] In the event of the trial court returning a guilty verdict after the trial, it is directed to deduct the period which the appellant shall have already spent in jail since 5 August 2010 until the date of his release from any sentence which the court *a quo* may consider appropriate in the circumstances of the matter.

[13] The appellant shall immediately be taken to the court below where the said court shall determine whether he shall remain in custody as awaiting trial inmate, or whether he shall be released on bail or warning pending finalisation of the matter by the trial court.

N.P. JAJI, AJ

I concur.

L.J. LEKALE, J

On behalf of appellant:

Adv S. Giorgi
Instructed by:
The Director: Public Prosecutions
BLOEMFONTEIN

On behalf of respondent:

Mr J.S. Makhene
Instructed by:
Justice Centre
BLOEMFONTEIN

/spieterse