

REPORTABLE

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IN THE HIGH COURT OF SOUTH AFRICA (NORTH GAUTENG HIGH COURT)

Case number: A283/2012

Date: 3 May 2013

In the matter between:

ZAKHELE XABA

Appellant

and

THE STATE

Respondent

JUDGMENT

COLLIS AJ,

[1] During June 2011 the appellant was arraigned on a charge of rape before the Ermelo regional court. He was duly convicted as charged and sentenced to 10 years imprisonment. His application to appeal both conviction and sentence was granted by the court a quo.

[2] The brief background is that on the evening of 28 November 2010, the complainant, Ms ZM a had sexual intercourse with the appellant at his homestead. The complainant was 14

years old at the time and the appellant 19 years. They knew each other well prior to the incident. She gave evidence the intercourse took place without her consent, whereas the appellant's testimony was that it was consensual. Following the incident she left his homestead around 23h00 the evening in question and reported the rape to his neighbour. She also reported it to her mother and a charge was laid at the police culminating in the ultimate arrest of the appellant. The complainant following the incident was also examined by a medical practitioner.

[3] In essence the appellant had raised two defences to the charge, i.e he was told by the complainant when he first proposed love to her, that she indeed was 18 years old at the time and he denied he had sexual intercourse with the complainant on the night in question without her consent.

[4] The defence relating to the age to the complainant of significance was first mentioned by the appellant during his plea explanation. When the appellant eventually gave evidence in chief he confirmed this love relationship. During cross-examination he further qualified this testimony, in that he first proposed the complainant when she was in Standard 7 and that she had informed him during that time, that she was 18 years old. He also testified during such period they hardly ever saw each other as they were attending different schools and stayed in different areas and as at the date of the incident they had been engaged in a relationship for just over a year. It is of relevance to note, the first portion of his cross-examination took place on 21 June 2011, whereafter the cross-examination was resumed on 28 July 2011. On this last-mentioned date and upon the appellant being probed once again about the duration of his relationship with the complainant, he on the second mentioned date, had testified, their relationship had been ongoing for two to three years albeit their first sexual encounter had been the night of the incident giving rise to the

charge.

[5] This discrepancy in his testimony is of significance for more than one reason. If it is to be accepted they were engaged in a romantic relationship, why would they meet up by mere chance on the night in question. No evidence was presented before the trial court that indeed the 'couple' had planned to consummate their relationship on that faithful night. His testimony was when he first met up with the complainant she was waiting for Jabu. This too was the evidence of the complainant. Moreover, if one is to accept the evidence of the appellant with reference to the duration of their relationship, it is found to be improbable they would wait almost two years to engage in a sexual encounter. Another improbability to be found in his testimony, is that the complainant's parents were not expecting her to sleep at home on the night in question. This too the appellant had confirmed i.e that the complainant had intimated to him she was to sleep over at Jabu's place that night. Her immediate reporting then following the rape to his neighbour, is yet another probability found in favour of the complainant. In addition thereto, if the court a quo was to have accepted the testimony of the appellant that they had engaged in consensual intercourse, why would she report a rape to his neighbour, without even having being prompted on by anyone about her whereabouts earlier that night.

[6] The finding made by the court a quo on the probabilities having favoured the complainant, this court of appeal is in agreement with. In addition thereto, we agree the guilt of the appellant had been established beyond reasonable doubt.

[7] It remains irrelevant whether the complainant was seen to be dragged into the homestead of the appellant, or whether she walked into such homestead voluntarily. What remains of significance and relevance, is that she gave evidence she never agreed to

have sexual intercourse with the appellant and given her age, could not have agreed to such sexual intercourse even if she wanted too. _

[8] It as a result follows, the appeal on the merits should fail.

[9] It is trite that sentencing is pre-eminently the task of the trial court and the court of appeal will only interfere with the sentence if the trial court has misdirected itself or the sentence is shockingly inappropriate. However a court of appeal may interfere with the sentence on appeal provided where the trial court materially misdirected itself or where the sentence imposed is shockingly inappropriate.¹

[10] When dealing with sentence it is for purposes of this appeal necessary to consider the material and relevant aspects associated with sentencing which were placed before the trial court.

[11] In mitigation of sentence the appellant did not testify before the trial court and through his legal representative the following personal circumstances were placed before the court. He was twenty years old, a first offender, single and still at school at the time when the offence was committed. The court in mitigation took into account, the complainant as per the medical evidence had not sustained significant physical injuries.

[12] The trial court, prior to imposing an appropriate sentence took into account the personal circumstances of the appellant, the seriousness of the offence and the interest of society.

[13] In *S v Ro and Another* 2010 (2) SACR 248 (SCA) Majiedt AJA stated as follows: The

1 *S v Pillay* 1977 (4) SA 531 (A) at 534H-535A

moral reprehensibility of rape and society's adherence of this rampant scourge are unquestioned. The most cursory scrutiny of our law reports bears testimony of the fact that our courts have, rightly so, visited this offence with severe penalties. ”

[14] The court a quo took into account the youthful age of the appellant, the age difference between the appellant and the complainant, the absence of physical injuries to the complainant as well as the absence of any evidence presented on any impact of the rape on her.

[15] The sentence so imposed by the trial court certainly did not induce a sense of shock, nor could it have been considered startlingly inappropriate, where the peculiar circumstances of this case are anything to go by.

[16] It therefore follows and it is my view and finding the appeal on sentence similarly, is without merit.

[17] In the result I propose the following order:

17.1 The appeal against both conviction and sentence is dismissed.

C Collis

Acting Judge of the High Court

I agree and it is so ordered,

H. Fabricius

Judge of the High Court

Case number: A283/12

Heard on: : 3 May 2013

For the Appellant: Adv. K. P. Tlouane

Instructed by: Pretoria Justice Centre

For the Respondent: Adv. F.C. Roberts

Instructed by: Director of Public Prosecutions

Date of Judgment: 3 May 2013