



IN THE NORTH GAUTENG HIGH COURT, PRETORIA /ES

(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO.	
(2) OF INTEREST TO OTHER JUDGES: YES / NO.	
(3) REVISED. ✓	
DATE 29/5/12	SIGNATURE 

CASE NO: A456/2011
CC366/2001

DATE: 8/6/2012

IN THE MATTER BETWEEN

SOLOMON MASILO

APPELLANT

AND

THE STATE

RESPONDENT

JUDGMENT

PRINSLOO, J

[1] On 28 May 2001 the appellant, then about 29 years old, was convicted in the Rustenburg regional court on one count of rape.

[2] On the same date, the learned regional magistrate, in terms of section 52(1)(b) of Act 105 of 1977, stayed the proceedings and referred the case to the High Court for sentence.

[3] On 7 March 2002 the case came before the Local Circuit Division for the Western Circuit of the High Court for sentence purposes.

Although it does not appear from the record, I assume that the learned judge, before imposing sentence, found that the proceedings before the learned regional magistrate were in accordance with justice and that the conviction was in order.

[4] On the same day, 7 March 2002, the appellant was sentenced to imprisonment for life.

[5] On 17 March 2010, the appellant applied to this court for leave to appeal against the conviction and the sentence. This was more than eight years after the sentence had been imposed.

The application came before VAN DER MERWE, DJP because the learned judge who had imposed the sentence, SCHABORT, J, had in the interim retired.

[6] The application for leave to appeal against both the conviction and sentence was refused.

[7] On 31 August 2010, the Supreme Court of Appeal granted leave to appeal to this full court against both the conviction and the sentence.

[8] The appeal came before us on 9 May 2012.

[9] In the regional court, the appellant was legally represented and he pleaded not guilty.

In the circuit court, when he was sentenced, and also in this court, when he applied for leave to appeal, the appellant was legally represented.

[10] Before us, Mr Mojuto appeared for the appellant and Ms Van Vuuren appeared for the state.

[11] For illustrative purposes, it is convenient to quote the wording of the charge-sheet:

"Verkragting:

Dat die beskuldigde skuldig is aan die misdryf van verkragting.

Deurdadig op of omtrent 14 Oktober 1999 en te of naby Kroondal, Rustenburg in die streekafdeling van Noord Transvaal, die beskuldigde wederregtelik en opsetlik vleeslike gemeenskap met Dinah Monyebodi (13 jr) 'n vrouepersoon sonder haar toestemming en teen haar wil en sin gehou het."

- [12] There was also an alternative charge containing an allegation that the appellant had contravened the provisions of section 14 of the Sexual Offences Act, 23 of 1957, for having had sexual intercourse with the 13 year old complainant, being a female person under the age of 16 years.

The appeal against the conviction

- [13] When the appellant pleaded not guilty in the regional court, and given the opportunity to offer a plea explanation the following was said on behalf of the appellant (then the accused) by his legal representative:

"Beskuldigde plaas spesifiek identiteit in geskil en die beskuldigde maak verder van sy swygreg gebruik."

The case turned on the question of identity.

The fact that the complainant was attacked and raped, as described by her, was therefore not in dispute.

- [14] The first state witness was the complainant, Dinah Monyebodi.

In October 1999 she was a pupil in Grade 7 in the Durolong Intermediary School.

On 14 October 1999, at about 15:00, she was walking home from school. She was alone. A man wearing a garment like a dress, and also with a garment, like a dress, wrapped over his head and tied below the chin, approached her. He had a knife in his right hand. It was about 9 inches long. The complainant tried to run away but she stumbled. At that point the attacker was about four metres away. She also recognised the attacker as a man who had confronted her earlier that morning when she was on her way to school. He asked her for her name which she refused to give him. He then said that he would send the "dindella straatseuns" to her "en dié gaan my regmaak". When she saw the attacker in the morning he did not wear the dress but a blue overall. He also did not have the wrapping around his head. She managed to identify him during the morning confrontation and she confirmed his presence in the court.

[15] When she tried to flee, the attacker caught her and dragged her between some trees. He dragged her by the belt around her school uniform. He said he would kill her if she were to scream. He removed her panty, and his underpants. He flung her to the ground and inserted his penis into her vagina. While he was having intercourse with her, he held her arms above her head. Afterwards he told her not to use that particular road again and if he saw her there he would kill her.

[16] The complainant went home and reported the attack to an elderly lady, called Anna. They summoned the police. The police took the complainant and her mother to the police station. Some social workers took them to the doctor. The

doctor still had to remove pieces of dirt from her vagina as she had been raped on the ground. The social workers took them home. She testified that when she first got home she was crying when she reported the incident to Anna. She was asked to describe the attacker and did it as follows:

"Ek het vir haar gesê die persoon is so lig van kleur. Sy tande is nie heel nie. Hy het puisies in die gesig."

The missing teeth were upper teeth, and to the right. In cross-examination she said that the appellant also had a scar which she noticed on his right cheek during the early morning encounter. He also had a moustache. During the afternoon attack, she could not see the scar on the cheek because of the garment wrapped around the attacker's head. In cross-examination it was put to the complainant that the appellant was not the person who attacked her. She insisted that he was. She was subjected to intensive and lengthy cross-examination. In my view she was not in any way discredited. She also said that, in addition to the moustache, the attacker had a small beard ("n bokbaardjie").

[17] Dr Stephanus Johannes Paulus Kruger was the doctor who examined the complainant. The J88 medical form which he completed on 14 October 1999, the day of the attack, when he examined the complainant, forms part of the record which was presented to us.

[18] The doctor said the following:

"By ondersoek van haar skaamdele, laterale vars skeure in die hymen. Slymvlies van die premenia area is daar 'n 1cm lang skeur. Sy het redelik swaar gebloei, rooi helder bloeding. Bloedvlekke ook versprei van die skaamdele na die binne waaie van die been, op beide bene. ... Die pasiënt was verwys na die hospitaal vir steke en vir behandeling."

The doctor said that his findings would support a conclusion that the complainant had been raped earlier that particular day. The doctor confirmed the contents of his medical report. He was not cross-examined.

[19] Fransinah Monyebodi was called to testify as the mother of the complainant. The complainant was born on 4 February 1986 so that she would have been 13 years old on 14 October 1999 when the attack took place.

[20] The complainant came from school at about 15:00 on that particular day. She was bleeding. She reported that she had been raped. She bled from her private parts. The elderly lady, Anna, was also residing with the complainant and the witness at the time. Anna was present when the rape was reported. The complainant also told her about the encounter earlier in the morning with the same attacker. She told them about the dress that the attacker wore at the time of the rape and the report given to this witness corresponded with the evidence given by the complainant during her testimony.

[21] The mother then telephoned the police, and at one stage the complainant also described the appearance of the attacker to her uncle, Mike Monyebodi, the brother of the witness who is the mother of the complainant. The uncle went in search of the attacker, located him and brought him home only for the complainant to identify him.

[22] The description which the complainant gave to the mother of the attacker was:

"Sy het gesê hy is 'copper colour' van kleur. Hy is kort. Hy is skraal. En hy het van sy tande verloor, sy botande. En die persoon het puisies in sy gesig gehad. Op sy gesig."

[23] The uncle, Mike Monyebodi, corroborated the evidence of the complainant and her mother as to the description the complainant gave to the witness about the appearance of the attacker.

The witness went in search of the attacker. He determined that his name was Soily. He took the attacker with him, and showed him to the complainant who identified him.

Before he went in search of the attacker, the complainant described the attacker to her as "Sy het gesê hy is skraal. Gemiddeld lank. Hy is so bietjie lig van kleur. Hy het 'n bokbaard en 'n snor."

When he confronted the attacker he indeed did have a "bokbaard" and a moustache. His appearance fitted that which was given to him by the complainant.

[24] Not one of the state witnesses was, in my view, discredited in cross-examination.

[25] The appellant testified that he knows nothing about the attack. He confirmed that Mike came and apprehended him. Shortly after he was told to enter Mike's vehicle, members of the community tried to assault him. He said on the day in question he was at home weaving baskets. He was in the presence of another young man. This person was not called to testify.

[26] During his testimony, the magistrate also inspected the face of the appellant and recorded the following features: two of his upper teeth were missing on the left hand side. On the right cheek, there was a scar of half a centimetre. There were other scars on the face as well. There were marks all over the face which may have been caused by acne.

[27] In his judgment, the learned regional magistrate carefully analysed all the evidence. He also described the appearance of the appellant in court:

"Hy is korterig. Hy is skraal en nie lank nie. Hy is lig van kleur. Daar is voortande uit. Hy het merke van een of ander aard aan sy gesig, hetsy dit puisies is, al dan nie."

The learned regional magistrate also took note of the fact that the complainant immediately identified the appellant when he was brought to her by Mike. On considering the evidence as a whole, the learned magistrate convicted the appellant. I can see no material misdirection on the part of the learned magistrate which will allow this court of appeal, with its limited powers, to interfere with the factual findings of the magistrate under these circumstances. See *R v Dhlumayo* 1948 2 SA 677 (AD).

[28] In the result, I am of the opinion that the appeal against the conviction falls to be dismissed.

The appeal against the sentence

[29] The sentencing procedure was handled in terms of the provisions of the Criminal Law Amendment Act, Act 105 of 1997, which came into operation on 13 November 1998, almost a year before this particular offence was committed in October 1999. The proceedings were stopped by the learned magistrate in terms of the provisions of section 52 of Act 105 of 1997 ("the Act") and the learned judge imposed a sentence on the strength of the provisions of the Act. He found that there were no substantial and compelling circumstances and under the circumstances imposed the prescribed minimum sentence of life imprisonment.

[30] The case is, however, complicated by the fact that, in the charge-sheet, there was no mention whatsoever of the provisions of the Act. The main charge was crafted

along the lines of an "ordinary" common law rape. The alternative charge, as I have said, only referred to the Sexual Offences Act of 1957. During the pleading proceedings, there was no mention made of the Act. There is no clear indication that the appellant's legal representative would have been alive to the provisions of the Act at the time and, for that matter, that he explained the consequences that may arise for the appellant, if, for instance, the prescribed minimum sentence had to be imposed.

- [31] In *S v Makatu* 2006(2) SACR 582 (SCA) the appellant was also sentenced to imprisonment for life in terms of section 51(1) of the Act but the indictment only referred to section 51(2), which makes no provision for a sentence of life imprisonment.

In paragraphs 3 and 7 of the judgment, the learned Judge of Appeal says the following:

"The appellant argues that the imposition of a sentence in terms of section 51(1), when the indictment refers to section 51(2), is a blatant misdirection. Even if the murder had indeed been premeditated – a question to which I shall return – an accused has the right to know at the outset what charge he has to meet. The State properly conceded this point. Since the enactment of the Act this Court has held that it is incumbent on the State to specify the case to be met in such a way that an accused

appreciates properly not only what the charges are but also the consequences."

Later on the learned judge states:

"However, an accused faced with life imprisonment – the most serious sentence that can be imposed – must from the outset know what the implications and consequences of the charge are. Such knowledge inevitably dictates decisions made by an accused, such as whether to conduct his or her own defence; whether to apply for legal aid; whether to testify; what witnesses to call; and any other factor that may affect his or her right to a fair trial ..."

- [32] In *Mashinini v State* (502/11) [2012] ZASCA 1 (21/2/2012) similar circumstances to those described in the previous paragraph prevailed. The majority of the court came to the same conclusion. The majority expressed the view that it was an appropriate case for the imposition of life imprisonment, involving, as it did, a gang rape but reduced the sentence to one of ten years imprisonment, being the minimum sentence prescribed in terms of section 51(2) of the Act. In a dissenting judgment, PONNAN, JA, concluded that he would dismiss the appeal, but we are bound by the decision of the majority.

[33] In the present case, where no reference was made at the outset to the Act at all, it seems to me that we are at large to impose a sentence on the basis that the Act does not apply at all.

[34] As to the personal circumstances of the appellant, he was 29 years of age when the crime was committed. He was unmarried with no children. He passed standard 5 and left school in 1986. His parents separated when he was young and he lived with his mother who was then employed. She passed away in 1997. Thereafter the appellant lived with relatives. He was employed at a platinum mine as a labourer in 1994 and 1995 whereafter he became unemployed doing only temporary jobs. In 1999, obviously before this offence was committed, he started taking lessons to do art and craft and in due course opened his own workshop where he manufactured artifacts and sold them. This included baskets and other objects.

[35] He exhibited no remorse because he tried to offer a false version to the court. During the sentence proceedings in the circuit court, however, it was recorded on behalf of the appellant that he was expressing remorse. By way of demonstrating aggravating factors, the state argued that the appellant used a knife to threaten his victim and that there also appeared to be an element of premeditation and planning associated with what he did. The particular crime is prevalent all over the country.

[36] To this should be added, in my view, the fact that the victim was only 13 years old.

[37] After due reflection, I have come to the conclusion that a sentence of fifteen years imprisonment would be appropriate in this case. As it happens, the sentencing jurisdiction of the regional court, at the time when the appellant was convicted, was also fifteen years, after it was increased to that limit on 7 October 1998, according to what was conveyed to us during the hearing by counsel for the state.

[38] In the result, I would make the following order:

1. The appeal against the conviction is dismissed and the conviction is confirmed.
2. The appeal against the sentence is upheld.
3. The sentence imposed by the court below is set aside and replaced with the following: "The accused is sentenced to fifteen years imprisonment."
4. In terms of section 282 of the Criminal Procedure Act, 51 of 1977, the sentence is antedated to 7 March 2002.

A456-2011

I agree


W R C PRINSLOO
JUDGE OF THE NORTH GAUTENG HIGH COURT

I agree


M W MSIMEKI
JUDGE OF THE NORTH GAUTENG HIGH COURT


A M L PHATUDI
JUDGE OF THE NORTH GAUTENG HIGH COURT

HEARD ON: 9 MAY 2012
FOR THE APPELLANT: J M MOJUTO
INSTRUCTED BY: PRETORIA JUSTICE CENTRE
FOR THE RESPONDENT: M J VAN VUUREN