

**IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA**

CASE NO. AR 352/11

In the matter between:

NKOSIKHONA SIZWE MAZIBUKO

APPELLANT

and

THE STATE

RESPONDENT

APPEAL JUDGMENT Delivered on 31 May 2012

SWAIN J

[1] The appellant with the leave of K. Pillay J, appeals against his conviction by the Regional Court at Newcastle, of the rape of a fourteen year old girl, for which he was sentenced to life imprisonment by K. Pillay J, acting in terms of Section 51 of the Criminal Law Amendment Act 105 of 1997 (the Minimum Sentences Act).

[2] As correctly appreciated by the Magistrate the evidence of the complainant has to be approached with caution, because the

complainant was not only a single witness to the rape, but is also youthful. The complainant's merits as a witness must be weighed against factors which militate against her credibility.

Zeffertt et al – The South African Law of Evidence pg 800

What has to be decided by the trier of fact is whether the evidence of the complainant is trustworthy and “whether despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told”.

S v Sauls and others
1981 (3) SA 172 (A) at 180 E – G

[3] The evidence of the complainant was that she had attended a New Year's Eve celebration at Mayisela's place and left alone at about 01h30, intending to go to a friend's house. Along the way she met up with the appellant, whom she knew as he had previously taught her music. The appellant asked her to accompany him so that he could go and get his jersey, which she agreed to do because she knew him. When they reached his home there was nobody there, the appellant entered his home and called her to come in. She refused to do so because she was afraid, because she thought that it was possible the appellant would grab her and pull her into the house. The appellant then approached her, grabbed her and pulled her into the house. After he dragged her into the house he closed the door, dragged her to his bedroom, where he pushed her onto the bed and removed her pants and panties. He then hit her with an open hand, forced her legs apart and raped her, again striking her with an open hand in her face. After the appellant had

raped her she was able to dress and leave the room because he did not lock the door. After she had left the appellant's home, she met up with a police van and reported what had happened to the police. The police asked her to point out the appellant's home, which she did and the appellant was arrested. The complainant was examined by Dr. Magubane on the afternoon of 01 January 2003.

[4] When cross-examined the complainant conceded that she was drunk on the evening in question, but later denied being drunk, when it was put to her by the appellant's legal representative, that the appellant had seen her whilst he was braaing meat with friends and she was drunk. She also denied that the appellant had given her any meat. It was put to the complainant that the appellant would deny having raped her, because it could not have taken place in his house, because his girlfriend was sleeping with him in his house on the evening in question, which the complainant denied. It was also put to the complainant that she did not know who had raped her and she was falsely implicating the appellant because the appellant had dismissed the complainant, from a choir of which she had previously been a member.

[5] It is therefore clear that the basis for the appellant's denial that he had raped the complainant in his home, was that his girlfriend was with him in his home, on the night in question.

[6] The evidence of Sergeant Magaga, who arrested the appellant in his home on the night in question, is therefore of vital

importance. He said he was patrolling and on duty in the early hours of the morning on 01 January 2003. They were ordered by radio to proceed to No. 533 at Section 1 which is the address of the appellant's home. When they arrived there, they met up with the complainant who told him that she had been raped. She was crying and frightened and scared. She said she had been raped by a person that she knows and this person was a member of the same choir as her. She gave him the name of the person and took them to the house. She pointed out the appellant as the one who had raped her. There was nobody else in the house and the appellant was alone. The appellant was arrested. When cross-examined it was put to Sergeant Magaga that he and his colleague were drunk, which he denied. It was also put to him that he asked the appellant to produce a firearm, which he agreed he had done, because he said the complainant had alleged the appellant had produced a firearm during the rape. They did not however find any firearm. He added that the complainant told them that she was approached by the appellant, who asked her to accompany him to fetch a jersey from his house. He denied that the appellant's girl friend was with the appellant in the house.

[7] Dr. Magubane said that he had examined the complainant on 01 January 2003, and found that there was a tear on the posterior fouchette. There was also a tear on the hymenal ring at the 9 o'clock and 5 o'clock positions, from which there was minor bleeding. As a result he concluded that there had been forceful penetration of the complainant.

[8] The appellant's defence was that the only time he had seen

the complainant on the evening of 31 December 2002, was when he was braaing meat with his brother, when the complainant appeared in the company of boys and girls, who were drinking. The complainant asked for some meat, which he gave her and she then walked away with the group. He only saw her again when she arrived that evening at his home with the police, where he was sleeping with his girlfriend. When the police arrived they said they wanted a gun and searched for one but did not find one. When cross-examined he maintained that the complainant was drunk because of the way she staggered and shouted. He said that while the police searched his house his girlfriend was lying on the bed, but could see what was happening. He said he believed the police had seen his girlfriend and the complainant had seen her. He said that when the complainant was called into the house it was alleged that he had raped her. He said that his girlfriend was surprised to hear this and as a consequence she went to tell the friend of the appellant's mother, who lives in the same street, who telephoned the appellant's mother. When the appellant was asked how the complainant knew he was at home, because according to the appellant he was at a party at another house, he said he did not know. He said the police were lying that there was nobody else with him, because they were drunk. When it was put to the appellant that the complainant would not have known who was at his house, when she came with the police, he did not respond.

[9] The appellant's girlfriend was called and stated that she, together with their child, were in the house of the appellant on the night of 31 December 2002. The appellant had gone to a braai at another house and returned after people had beaten drums,

indicating that it was midnight. They then went to bed whereafter the police arrived, kicked the door open and searched the house, saying they wanted a gun. When the police were searching the house she was lying on the bed and she thought they saw her. She also said that she knew the complainant and she saw her on the day the police came to her house. She said there were three persons who had come to the house and the third person was a lady. Later however, she said that she did not see the lady clearly and when the contradiction was put to her, she said she had said there was a lady who she thought was the complainant. She then conceded that she had said she knew the complainant. She said the police looked as though they had consumed alcohol. When cross-examined she said that when the appellant returned from the party, he had consumed alcohol and when it was put to her that the appellant said he did not drink alcohol at all, she said he had the smell of alcohol on him. She said they asked the appellant for a gun but they never spoke to her and did not ask her who she was. She said the police never said why the appellant had to leave with them, she did not know why they were taking him away and she did not ask them why. When asked how it was possible that the police did not notice her on the bed, she said she thought it was because the bed was high and she estimated it to be more than a metre in height. When it was put to her that the appellant said the police told him, that he was accused of raping the complainant in the house, she said she did not hear that.

[10] It is clear that the evidence of the appellant and his girlfriend, that they were together in the house with their child on the night in question cannot be true, for the following reasons:

[10.1] Sergeant Magaga said the appellant was alone in the house. Although the appellant said the police were drunk, which was denied by Sergeant Magaga, it would have been virtually impossible for Sergeant Magaga, not to have seen the appellant's girlfriend lying on the bed, if she was there. In addition, there would be no reason why Sergeant Magaga would lie about such an issue.

[10.2] The appellant said he did not know when asked, how the complainant knew he was at home in order to direct the police there, when on his version the complainant had seen him braaing meat at a different location that night.

[10.3] The appellant could not respond when it was put to him that the complainant, on the appellant's version, could not have known who was at home with him when she arrived with the police. If there were persons in the house with the appellant, this would have refuted her allegation of rape.

[10.4] The evidence of the appellant's girlfriend is implausible and riddled with contradictions. She suggested that the police did not see her because it was a high bed. In addition, the appellant said that she had heard the police accusing him of raping the complainant, because she was surprised. She also knew why he had been arrested because the appellant said she had told a friend of his mother's in that street about it, who had telephoned his mother. The girlfriend however said that she had never heard the police accusing the appellant of rape and did not know why they had arrested him. In addition, she contradicted herself as to whether she knew the complainant and had seen her there in the

company of the police.

[11] A finding that the appellant has lied about the presence of his girlfriend at his home, obviously has a profound effect upon an assessment of his credibility in denying that he had raped the complainant. This is because he sought to justify his denial of raping the complainant by this false evidence.

[12] When this evidence is taken together with the evidence of the doctor, that there had been forceful penetration of the complainant's vagina and the evidence of Sergeant Magaga that when he found the complainant, she was crying and frightened, shortly after she had been raped, I am satisfied that the allegations of the complainant that the appellant raped her, are proved beyond a reasonable doubt. Of particular significance is the evidence of Sergeant Magaga that the complainant told him at the outset that the appellant has asked her to accompany him to his home to fetch a jersey, which is what she said when giving evidence. Such detail has the ring of truth to it and excludes the possibility that the complainant's evidence in this regard was a recent fabrication.

[13] In coming to this conclusion I do not overlook the evidence of Sergeant Magaga that the complainant had said the appellant had produced a firearm during the rape, which is why they searched the appellant's premises, but did not find a firearm. The complainant never mentioned a firearm when giving evidence, but it was equally never put to her by the appellant's legal representative, that the

police had searched the appellant's house for a gun, because she had alleged that the appellant had threatened her with it. The complainant was accordingly never given an opportunity to deal with this evidence. Be that as it may, I agree with the view of the Magistrate that this is not such a material defect in her evidence, to justify the rejection of her version. I also do not overlook the evidence of the appellant that he had dismissed the complainant from the choir of which she was a member. The appellant however when asked why the complainant would falsely implicate him said he did not know and did not rely upon this incident. The fact that the complainant had something to drink and was walking alone in the middle of the night, obviously does not constitute any grounds for doubting the veracity of her evidence.

[14] I am accordingly of the view that the appeal against conviction must fail.

[15] As regards the appeal against the sentence imposed of life imprisonment, the relevant facts are as follows. The appellant was at the time of the trial twenty one years of age which means he was nineteen years of age when the offence was committed. He was a first offender, married with two children who rely upon him for support, and he had a grade eleven education. K. Pillay J referred to the fact that the appellant had taken advantage of the complainant as a young girl and subjected her to violence. More than ordinary force was used in raping the complainant, because there were injuries to her vagina.

[16] In the case of

S v Vilakazi
2009 (1) SACR 552 (SCA) 562 A - D

the Supreme Court of Appeal stressed that in a case such as the present, the Court was required to apply its mind to the question of whether the sentence was proportional to the offence. Proportionality was to be determined on the circumstances of the particular case. When regard is had to the relative ages of the complainant (fourteen years) and the appellant (nineteen years) at the time of the offence, together with the fact that the appellant is a first offender, I am satisfied that a sentence of life imprisonment is disproportionate on the facts of this case. As pointed out in Vilakazi (at pg 557 b – c) the factor that distinguishes a minimum sentence of ten years' imprisonment, from one of life imprisonment for rape (in the absence of the other aggravating feature set out in part 1 of Schedule 2 to the Minimum Sentences Act) is whether the complainant is under the age of sixteen years. The following remarks of Nugent J A at paragraph 59 are apposite to the facts of this case.

“When viewed as a whole the only material feature that the evidence discloses as having aggravated what is inherently a serious crime was the complainant's age. Bearing in mind where the complainant's age fits in the range between infancy and 16 I do not think that her age by itself justifies what would otherwise have been a sentence of ten years' imprisonment being raised to the maximum sentence permitted by law. A substantial sentence of 15 years' imprisonment seems to me to be sufficient to bring home to the appellant the gravity of his offence and to exact sufficient retribution for his crime. To make him pay for it with the remainder of his life would seem to me to be grossly

disproportionate”.

[17] In the case of

S v Matyityi
2011 (1) SACR 40 (SCA) at pg 53 e – g

the Supreme Court of Appeal stressed that courts are obliged to impose the prescribed minimum sentences “unless there are truly convincing reasons for departing from them. Courts are not free to subvert the will of the Legislature by resort to vague, ill-defined concepts such as ‘relative youthfulness’ or other equally vague and ill-founded hypotheses that appear to fit the particular sentencing officer’s personal notion of fairness”.

[18] In Matyityi the Supreme Court of Appeal at 53 i – 54 a however re-affirmed the need for proportionality by finding that the Court *a quo* had failed to pay sufficient attention to the traditional triad of the crime, the criminal and the interests of society and instead had emphasised the personal interests of the accused.

“In doing so it failed to strike the appropriate balance. It thus imposed a sentence that was disproportionate to the crime and the interests of society”.

In the case of

DPP, North Gauteng, Pretoria v Thusi
2012 (1) SACR 423 (SCA) at pg 429 i

the SCA held on the facts of that case that

“In my view, when weighed against the objective gravity of these offences, their prevalence in South Africa and the legitimate expectations of society that such crimes must be severely punished, neither the youthfulness of the respondents nor their prospects of rehabilitation tip the balance in their favour”.

The objective gravity of the offences in Thusi were more serious than in the present case, and consequently in seeking to achieve proportionality, I am satisfied that the youthfulness of the appellant, as well as the prospects of his rehabilitation tip the balance in the appellant’s favour, in finding the presence of substantial and compelling circumstances, justifying the imposition of a lesser sentence than life imprisonment. When all is said and done I, with respect, adopt the words of Navsa J A in the case of

Director of Public Prosecutions KZN v Ngcobo and others
2009 (2) SACR 361 (SCA) at para 22

where he said the following:

“Traditional objectives of sentencing include retribution, deterrence and rehabilitation. It does not necessarily follow that a shorter sentence will always have a greater rehabilitative effect. Furthermore, the rehabilitation of the offender is but one of the considerations when sentence is being imposed. Surely, the nature of the offence related to the personality of the offender, the justifiable expectations of the community and the effect of a sentence on both the offender and society are all part of the equation? Pre- and post-Malgas the essential question is whether the sentence imposed is in all the circumstances, just”.

[19] In my view, the imposition of the minimum sentence of life

imprisonment upon the appellant in the present case, was disproportionate to the crime and the interests of society. The sentence served to emphasise the nature of the crime without due regard being had to the fact that the appellant was a first offender as well as the relative ages of the complainant and the appellant at the time of the commission of offence. In these circumstances the sentence imposed was not just and cannot stand. The appellant must however be severely punished, which will find expression in the sentence I intend imposing. The appeal against sentence accordingly succeeds.

The order I make is the following:

a) The appeal against conviction is dismissed.

b) The appeal against sentence is upheld. The sentence imposed upon the appellant is set aside and the following sentence is substituted:

“The accused is sentenced to 18 (eighteen) years’ imprisonment, the commencement of such sentence being back dated to the date when sentence was originally imposed, being 20 April

2005”.

SWAIN J.

I agree

MBATHA J

I agree

HENRIQUES J

Appearances/:

Appearances:

For the Appellant : Adv. J. Butler

Instructed by : Justice Centre
LASA. Pietermaritzburg

For the Respondent : Adv. E. Smith

Instructed by : Director of Public Prosecutions: KZN
Pietermaritzburg

Date of Hearing : 25 May 2012

**Date of
Filing of Judgment** : 31 May 2012