

SOUTH AFRICA / JUDGMENT

Baas and Others v S (A323/2011) [2011] ZAGPPHC 80 (26 May 2011)

[2011] ZAGPPHC 80**COURT**

North Gauteng High Court, Pretoria

BEFORE

B L Molamu, M W Msimeki

CASE / FILE NUMBER

A323/2011

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****(NORTH****GAUTENG HIGH COURT PRETORIA)****CASE:**

A323/2011

DATE:26/05/2011

In

the matter between

MOHLATSI

ALEX

BAAS.....

1st APPELLANT

FILALA

JOSEPH

LEKITLANE.....

2nd APPELLANT

BELOVED

NKOSI.....3rd

APPELLANT

NKOSANA

MOSES

SOMFULA.....4th

APPELLANT

And

THE

STATE.....RESPONDENT

JUDGMENT

MOLAMU AJ:

1. The four appellants faced a charge of rape in the Regional Court at Klerksdorp. The appellants were convicted and sentenced to undergo an imprisonment term of 15 years. The trial court granted the appellants leave to appeal against sentence only.
2. The appellants have requested this court to exercise its inherent jurisdiction to review their conviction by the court a quo, to satisfy itself that the proceedings in the trial court were inaccordance with justice.
3. Before I deal with the substance of the appeal itself, I wish to comment on some observations I made on perusal of the record of proceedings of the court a quo. The cross-examination of the complainant elicited questions on the statement that she had made to the police. The questioning resulted in a trial within a trial. The matter was postponed for the evidence of the police officer who had taken down the complainant's statement.
4. When the matter resumed, appellant 3's legal representative applied for the recusal of the presiding officer. He was supported by the legal representative of appellant 2 in this regard. Appellants 1 and 4's legal representatives indicated that they had nothing to say on the matter. After this address from the bar, the court proceeded to hold the trial within a trial without pronouncing any ruling on the application for recusal. Similarly, after the police officer had testified in the trial within a trial, the court a quo did not make any ruling on the admissibility of the statement by the complainant to the police.
5. As indicated earlier, these observations I made when I was perusing the record. They were not raised in the appeal to this court. The question arises as to whether the failure by the trial court to make a ruling in these circumstances constituted a gross irregularity. Did the appellant suffer any prejudice as a result of this failure? In an attempt to answer these questions it is perhaps prudent to first examine the reasons that were advanced for the recusal of the Magistrate. Appellant 2's legal representative merely stated that his client felt that the Magistrate was too sympathetic towards the complainant. The complainant in this matter was a 15 year old girl, who was 12 at the time of the incident.
6. My perusal of the record did not reveal any untoward conduct on the part of the Magistrate. On the contrary it displayed the kind of approach expected of a presiding officer in matters of this nature where he or she has to ensure that witnesses are treated with great sensitivity lest they are subjected to secondary trauma in court. A perusal of the record further indicates that on the whole, the appellant did not suffer any prejudice as a result of the Magistrate's failure to make the rulings. The appellants were at all times legally represented. Their silence in not pursuing the outcome of their applications is inexplicable. One can only infer that they realized that the recusal application had no merit, and they aligned themselves with the trial process going forward. The same can be said of the ruling on the

trial within a trial. This court is of the opinion that, looking at the overall evidence and the trial proceedings, the appellants did not suffer any prejudice.

7. Going back to the subject of this appeal, as indicated above, the appellants have requested this court to review the conviction of the court a quo and set it aside if it is of the opinion that it is not in accordance with justice. The appellants have further submitted that the Magistrate misdirected himself in finding that the complainant was a fit and competent witness, and further, that the Magistrate in admonishing the complainant, did not fully investigate whether she had the capacity to distinguish between the truth and falsity.
8. I will first deal with the issue of competency of the complainant. The complainant was fifteen (15) at the time she testified and in Grade 9. The Magistrate after establishing her age and school grade went on to ask her whether she knew the difference between the truth and lies to which she responded in the affirmative. She went on further to explain what happens when a person tells lies. The appellants submitted that the Magistrate did not fully or properly investigate the competence of the complainant in terms of section 164(1) of the CPA.

Section 164(1) of the CPA provides the following: "(1) any person who is found not to understand the nature and import of the oath or affirmation, may be admitted to give evidence in criminal proceedings without taking the oath or making an affirmation: Provided that such person shall be admonished by the presiding judge or judicial officer to speak the truth".

9. In casu, the complainant was 15 at the time she testified. The questions put to her by the trial court were apt and most relevant

and elicited appropriate responses from her. The appellants referred this court to *S v Swartz* 2009 (1) SACR 452 and submitted that the trial court should have followed the principle laid down in this case in admonishing the complainant. The complainant in the Swartz matter, was 7 at the time she testified and 4 at the time of the commission of the offence. The two cases are incomparable and distinguishable. In the Swartz matter, the judicial officer had the added duty to go beyond establishing whether the child knew the difference between truth and falsity. The complainant in this case was much older.

This court is of the opinion that the appellants' submission is unfounded in this regard. The trial court complied with the provisions of section 164(1) of the Criminal Procedure Act, 1977.

10. Having heard counsel with regard to conviction, this court is of the opinion that the trial Magistrate considered and carefully evaluated the evidence of the State and accepted same as the truth. The evidence against the appellants was overwhelming; the identity of the appellants was not an issue; they gave contradicting statements in their defence. Having read the record as well, this court is satisfied beyond doubt that the conviction is in accordance with justice.

11. I will now deal with the issue of sentence. It is an established principle of our law that sentencing is primarily in the discretion

of the trial court. The appeal court will only interfere with this discretion if it finds that the trial court did not exercise this discretion properly, reasonably and judicially, or that the sentence imposed is shockingly inappropriate or substantially misdirected. See *S v Rabie* 1975 (4) SA 855 at 857 D-E and *S v Pieters* 1987 (3) SA 717.

12. While acknowledging the discretion enjoyed by the trial court, in this regard, this discretion, must of course, be exercised "within the structure provided by law, both statute and case law". See S.S Terblanche, *Guide to sentencing in South Africa*, 2nd Edition, p 117.

In casu, in considering sentence, the Magistrate found that the Criminal Law Amendment Act 105 of 1997 (Minimum Sentence) was applicable. This was indeed a serious misdirection on the part of the Magistrate. Appellants 1, 2 and 3 were under 16 at the time of the commission of the offence and Appellant 4 was 17 at the time.

Section 51(6) of the Criminal Law Amendment Act 105 of 1997 (the Act), provides that the Act shall not be applicable to a child who was under the age of 16 at the time of the commission of the offence.

13. The Constitutional Court in *Centre for Child Law v Minister of Justice* 2009 (2) SACR 477 at par 78, has declared as unconstitutional and invalid section 51 (1) of the Criminal Law Amendment Act 105 of 2007 as amended by the Criminal Law (Sentencing) Amendment Act 38 of 2008 to "the extent that they apply to persons who were under 18 years of age at the time of the commission of the offence". The Constitutional court also declared as invalid and unconstitutional

the provisions of section 51 (6) and proposed that it should provide as follows: "This section does not apply in respect of an accused person who was under the age of 18 years at the time of the commission of the offence as contemplated in ss (1) and (2)." The Constitutional Court at par: 31 further acknowledged that "while the Bill of Rights envisages that detention of child offenders may be appropriate, it mitigates the circumstances. Detention must be a last, not a first, or even intermediate resort; and when the child is detained, detention must be only for the shortest appropriate period of time".

14 It is in furtherance of this approach that this court is obliged to interfere with the sentence of the court a quo. This court, however, does not agree with the appellants' submission that the present case cannot be said to be the worst kind of rape by any stretch of imagination. The complainant was 12 at the time of the commission of the offence, and was also a virgin. There was unfortunately no evidence led as to the impact this experience has had on the complainant. Rape is an appalling crime. Not only is it humiliating

to the victim, it is also a brutal invasion of the victim's right to privacy.

15. It is also of great concern to me that the appellants have not shown any remorse and are not taking responsibility for their actions. Indeed they are young and should not be destroyed. All avenues should be explored in an attempt to rehabilitate them so that they can learn from their actions.

16. In conclusion, the court makes the following order:

1. The Appeal against conviction is dismissed;
2. The appeal against sentence is upheld;
3. The sentence by the trial court is set aside and substituted by the following sentence:

The appellants are sentenced to 8 (eight) years imprisonment each and the sentences are antedated to the date of sentencing in the court a quo being 23 June 2009.

B L MOLAMU

Acting Judge of the High Court

I agree and it is so ordered.

M.W. MSIMEKI

Judge of the High Court

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