

SOUTH AFRICA / JUDGMENT

Barnard v S (A144/2019) [2019] ZAFSHC 185 (24 October 2019) [2019] ZAFSHC 185

COURT

Free State High Court, Bloemfontein

BEFORE

Molitsokane, Murray

CASE / FILE NUMBER

A144/2019

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IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Appeal no: A 144/2019

FRANS BARNARD Appellant

and

THE STATE Respondent

HEARD ON: 21 October 2019

CORAM: MOLITSOANE, J et MURRAY AJ

JUDGMENT BY: MURRAY AJ

DELIVERED ON: 24 OCTOBER 2019

[1] The Appellant was convicted of the rape and sexual assault of a 4-year old girl on 18 May 2017 in the Odendaalsrus Regional Court by Magistrate C Nekosie. On 26 July 2017 he was sentenced to Life Imprisonment for the rape, and to 3 years' imprisonment for the sexual assault, which sentence is to be served concurrently with the life sentence. He is now exercising his automatic right of appeal. The appeal lies against both the convictions and the sentences.

[2] Adv PL van der Merwe of the Bloemfontein Justice centre drafted the Heads of Argument for the Appellant, but Ms V Abrahams appeared in his place during the appeal, and Adv DW Bontes appeared for the State. The State supports both the convictions and the

sentences.

[3] The two charges on which the Appellant was arraigned were properly put to him at the beginning of the trial, and the relevant parts of the charge sheets are as set out below, namely:

3.1 Count 1: Contravention of Section 3 of Act 32 of 2007 ... read with the provisions of Sections 51(1) * 51(2)(b) of the Criminal Law Amendment Act 105 of 1997 as amended ... RAPE in that ... he unlawfully and intentionally committed an act of sexual penetration with the 4-year old Complainant by penetrating her mouth, and/or vagina, and/or anus with his penis and/or finger without her consent more than once over a period of time.

3.2 Count 2: Contravention of Section 5(1) of Act 32 of 2007 ... SEXUAL ASSAULT in that he did unlawfully and intentionally sexually violate the Complainant by kissing her, inserting his tongue into her mouth and/or touching her vagina, and/or other action.

[4] Before he was asked to plead, the court a quo and the prosecutor explained to the Appellant the relevant minimum sentences he was facing upon conviction if no substantial and compelling circumstances were to be found, namely Life Imprisonment on Count 1 and 10 years' imprisonment on Count 2.

[5] The Appellant pleaded not guilty on both Counts and gave no plea explanation. When he testified in his defence, his version

amounted to a bare denial. He alleged that he was being falsely implicated because an alleged request of the Complainant's

parents to borrow money from his mother had been refused. He averred that her parents then told the 4-year old Complainant to tell the court a quo that he had raped her and that the mother not only told her what to say, but also showed her what and how to demonstrate what happened during her testimony with anatomically correct male and female dolls.

[6] The Appellant's grounds of appeal against his convictions are that the court erred:

6.1 in finding that the Complainant and other State witnesses were credible witnesses;

6.2 in drawing a negative inference of the Appellant's version and not making a credibility finding in favour of his testimony; and

6.3 in finding that the State had proved its case beyond reasonable doubt.

[7] The Appellant's grounds of appeal against the sentences are:

7.1 that the sentence of life imprisonment is shockingly inappropriate and induces a sense of shock;

7.2 that the severity of the offence was over-emphasised at the cost of the personal circumstances of the Appellant; and

7.3 that the court erred in finding that there were no substantial and compelling circumstances to justify a deviation from the prescribed minimum sentence.

[8] Because of her age, the Complainant testified through an Intermediary. Her version is that 'Fransie', the Appellant, hurt her. She testified how, in the toilet at Frogs Bar, and on the farm, he 'made love to her'[1] with his tongue in her mouth, how he touched her vagina and inserted his penis into her vagina and her anus, telling her over and over that he loved her whenever she told him she did not want him to do the 'things' to her. She testified that when he told her he loved her, she told him that she is still small. In testifying she used age appropriate terms like "parra"

and "tottie" for the relevant female and male body parts. She testified how the Appellant knelt in front of her as she was sitting on the toilet and inserted his finger into her vagina. She testified about various events at Frogs Bar and on the farm, which she demonstrated with the two anatomically correct dolls, the female one depicting her and the male one depicting the Appellant. She showed how the Appellant took off her panty and then took off his own pants, underwear and shirt, and how he inserted his penis into her vagina while kissing her with his tongue in her mouth.

[9] She also demonstrated how the Appellant took off her shirt and later all her clothes and removed his own when she was preparing to take a bath. She demonstrated, with the dolls, how, when they were both completely naked, they were lying on the floor with the Appellant on top of her, with his penis in her vagina while he was moving up and down. She testified that it hurt her vagina. She testified, furthermore, that at the farm on another occasion he inserted his finger and his penis into her buttocks and her vagina. She demonstrated this with the dolls, the female doll lying face-down with her legs spread wide and the male on top with his penis in her anus, also moving up and down.

[10] She testified that some of the incidents also happened at the toilets or in the Appellant's car outside Buddies Diner which the Complainant's parents had before they had Frogs Pub, and where they apparently lived in 2013. She demonstrated how, there too, they would both be completely naked when the Appellant inserted his penis into her mouth, and as she called it, 'spit' into her mouth, and described how it smelled and tasted bad and made her vomit, and how her mouth felt sick when he put his penis in it.

[11] The Complainant testified, furthermore, that the Appellant told her not to go to the police and that, if she told her mother, he would find her and her mother and father and would slit their throats. According to her, when she heard that, she felt sick and started vomiting. She testified that she told only her mother what had happened and only when her mother took a bath with her and noticed the redness and swelling of her private parts and started asking her questions. Her mother then took her to be examined by a doctor.

[12] According to Capt Buys, a forensic social worker in the South African Police Services who works with young children subjected to sexual and physical abuse, a child of the Complainant's age would not know about, remember and be able to add all the sensory details that the Complainant did if she had not experienced it herself but had merely been shown how to demonstrate the movements with the dolls as the Appellant alleged.

[13] The version that the Complainant gave to Sister Ceba also corroborates her testimony. The Complainant's and her

mother's evidence, furthermore, was corroborated by the findings in the J88 report which was handed up by agreement: it reported clear signs of redness and erosion on the Complainant's perineum and inner labia minora, which, according to Sister Ceba, the forensic nurse who examined her two days after the last incident, is basically the lower part of the vagina, and which injuries were painful upon examination and "fit well to the history of penetration".

[14] Dr Kotzé, who deals with forensic medicine and runs a clinic for sexually abused children under the age of 11 explained in court that because the Complainant was so young, estrogen remaining from her mother would make it possible for her vagina and hymen to still be so soft and pliable as to not show tears and bleeding such as one would expect to find in an older rape victim. The hymen would also be less sensitive than in an older child and any injuries could heal fast enough that two days after penetration, they would no longer be visible. The same would apply to anal injuries.

[15] Dr Kotzé was adamant, furthermore, that a child of the Complainant's age would not be cognitively advanced enough to describe specific body parts like the Complainant did if not from experience. She stated that a 4-year old child cannot tell elaborate lies. She indicated, furthermore, that the clarity, detail and consistency of the Complainant's evidence pointed to a history of probable sexual abuse. It is most improbable, in my view, too, that a 4-year old child could have imagined everything the Complainant described in such fine and graphic detail if someone had merely coached her, and to so

accurately and vividly demonstrate everything that happened by way of the two anatomically correct dolls. As Holmes JA warned in *S v Artman*[2] "the exercise of caution must not be allowed to displace the exercise of common sense."

[16] The Complainant's version was also corroborated by her mother who testified how the Appellant would visit them, sometimes for two weeks at a time, and how his visits continuously caused friction between them because of his conduct with the Complainant. She testified how she had to tell him to stop picking up the Complainant because of the way he carried her around on his hip, as if he was deliberately making her private parts rub against his side, and how he insisted on time-and-again removing the clips and rubber bands from the Complainant's hair, despite the mother's objections. She described how he bought the Complainant sweets, and even took her into town to buy her a dress and a panty (which he admitted during his testimony). She testified, furthermore, how she once found them alone in the Appellant's car and described how the Complainant immediately ran to

her in apparent relief. She also described how upset she was one night to find the Appellant drying the Complainant's hair after apparently having given her a bath (which he denied) whereas her own father does not even go into the bathroom while she is having a bath.

- [17] The mother stated that although the Complainant had from time to time told her she was hurting, she thought it was just from playing out in the sand. It was only when she took a bath with the Complainant one evening and noticed that the area around her vagina was red and swollen, while around her anus there were swellings resembling piles, that she realised that something was really wrong. It was on that occasion, when she started questioning the Complainant, that the Complainant for the first time told her what the Appellant had been doing to her.
- [18] Since it was late at night, she only took the Complainant to the doctor the next day and to the Police the day after that. That is when the Complainant was then examined by Sister Ceba whose conclusion was set out in the J88 report, and which is material

corroboration of the Complainant's version. As the court remarked in *Mocumi v S*[3] :

"Clinical findings and conclusions drawn by doctors who examine complainants in sexual assault cases are generally accorded significant weight by our courts as an indication that sexual intercourse probably did or did not occur, particularly in relation to young children. The identity of the perpetrator then becomes determinable on its own merits."

- [19] The court a quo correctly took into consideration that the Complainant was a single witness regarding the rapes and the sexual assault and approached her testimony with caution, finding corroboration for her version in the evidence of the various State witnesses. Although her testimony was not chronological, it was clear that the events she described took place at various locations over an extended period of time, according to the State from 2013 until April 2014. Vigorous and relentless cross-examination by the attorney for the Appellant failed to make her materially contradict herself or shake her version.
- [20] I can therefore find no reason to doubt the court a quo's credibility finding regarding the Complainant's evidence. Her ability to recall and demonstrate in graphic detail the different events, the Appellant's words and actions, her own reactions, feelings and attempts to make him stop, the different positions they were in to make the various forms of sexual assault and rape possible, and even such sensory reactions as pain, smell, taste and hate is remarkable, seeing that she was only four years old when the sexual assault and rapes took place and the trial only commenced two years after that. Those characteristics of her evidence in my view gives her implication of the Appellant as a rapist and child molester enough of 'a hallmark of trustworthiness to reduce substantially the risk of a wrong reliance on her evidence' as a single child witness. (See: *S v MG*[4]).

[21] I agree with the trial court's finding that the slight contradictions between her evidence and her mother's are not material and that her evidence, even though not chronological, was indeed satisfactory, credible and reliable. It is common cause that the Appellant was well-known to the Complainant since their parents were related and according to the Complainant's mother, frequently visited them. His mother is a cousin of the Complainant's father and it is undisputed that he visited the

Complainant's family from time to time in 2013 and 2014 and assisted her father in the pub. His identity was therefore

never in question.

[22] The Appellant's version in court boiled down to a bare denial of facts. He averred that he had had a good relationship with the Complainant and would buy her sweets, dresses and underwear. He denied that he ever bathed the Complainant and averred that he only drew her a bath on her mother's request. He denied, furthermore, ever having touched her inappropriately or ever having performed any of the acts which the Complainant described. He averred that he only played with her by from time to time by catching her as she jumped from the stairs.

[23] The Appellant's averment that the Complainant's mother must have told her to make the false accusations against him and must have shown her how to demonstrate her averments with the dolls, is not borne out by the evidence. He materially contradicted himself, furthermore, by averring at first that he visited the Complainant's family only once, in 2014, then later admitting that he was also there in January of that year, as well as in April. His averment that the Complainant's parents must have told her what to say because they had wanted to borrow money from his mother and their request had been refused, was refuted by the accepted evidence of the Complainant's father who testified that he had no knowledge of such a loan.

[24] It is trite that, if the Appellant's version were to be found to be reasonably possibly true, he would be entitled to have his conviction set aside. To determine if his version was reasonable, as held in *S v Sithole*,^[5] the court correctly weighed the probabilities of the Appellant's version against the totality of the evidence against him. In *S v Phallo and Others*^[6] the court cautioned that the fact that the State has to prove the Appellant's guilt beyond a reasonable doubt, does not mean that it must close every loophole. But, having had regard to the evidence of all the State witnesses and the medical evidence, in my view the finding by the trial court that the evidence proved beyond reasonable doubt that the Complainant was raped and sexually assaulted must be accepted as correct. And so must the Complainant's identification of the Appellant as her assailant.

- [25] On the totality of the evidence, accordingly, I cannot fault the court a quo's finding that the Appellant's version is not reasonable. It is simply not probable that the Complainant would, at her age, have been able to conspire with her parents to take revenge and falsely implicate the Appellant and would then be able to describe and demonstrate a series of events in such vivid and graphic detail. I therefore have no doubt that the magistrate correctly found the State to have proved its case beyond a reasonable doubt.
- [26] The Appellant's conviction therefore has to stand.
- [27] Prior to sentencing, it was submitted that the court a quo had failed to take into proper account the Appellant's personal circumstances, namely that he is 36 years old, is divorced with two minor children, was self-employed earning R8 000 per month, is a first offender for this type of offence, was a productive member of society who maintained his children and that he had attended a special school since he was a slow learner.
- [28] As stated in *S v Vilakazi*[7] regarding an accused person's personal circumstances, however:
- "Once it becomes clear that the crime is deserving of a substantial period of imprisonment the question whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be, and those seems the kind of "flimsy" grounds that Malgas said should be avoided."*
- [29] One has to look at the cumulative weight of the personal circumstances to see whether they outweigh the aggravating circumstances in order to constitute substantial and compelling circumstances which would justify a deviation from the prescribed minimum. First of all, the Appellant was, at 35 years old, not young enough for his moral blameworthiness to have been affected by immaturity (See: *S v Matyityi*[8]) and indeed there was no such evidence. His age is therefore at best for the Appellant a mere neutral factor when mitigation is considered.
- [30] There is no evidence, either, that the R8 000 that he earned was indeed applied towards the maintenance of his mother and children, except for his legal representative's reference in argument to his doing so.
- [31] In my view the Appellant's age, as well as the fact that he has two children of his own, should in the circumstances of this case, rather be viewed as aggravating factors since as a mature father of two children and a relative of the Complainant's he should have known better than to abuse the trust of his relatives and to rape and sexually abuse their 4-year old daughter in her own home.
- [32] Seriously aggravating, furthermore, is that his actions were planned and committed over an extensive period of time. It is obvious from the Complainant's testimony how he systematically groomed her with kisses and gifts and assurances that he loved her, to the point where she could be raped and abused, at first because he told her he loved her, and later under threat of his slitting the throats of her parents if she told anyone.

[33] The Appellant showed no remorse for violating the trust and the emotional and psychological well-being of his 4-year old victim.

Instead he simply denied any liability and even concocted an obviously improbable motive for the charges brought against him. His

lack of remorse virtually obviates the need to consider possible rehabilitation in deciding on a sentence.

[34] These types of offences are prevalent, not only in that area, but also in the entire country and have been referred to as a scourge and a pandemic. Rape is an abhorrent offence which invades and violates the innermost privacy and security of the victim in a brutal, degrading and humiliating way, and which mostly leaves permanent emotional and psychological scars. As one rape victim put it so eloquently: childhood sexual abuse is a life sentence.

[35] Ms Abrahams submitted that the trial court should have found there to be substantial and compelling circumstances since the Complainant did not sustain any serious injuries and that, with the Appellant's personal circumstances, that should have been sufficient to establish such substantial and compelling circumstances. With reference to *S v MM*[9] it was also submitted that the trial court should have differentiated between degrees of seriousness and that, accordingly, the sentence should be reduced to 15 – 20 years' imprisonment.

[36] However, as determined in s 51(3)(aA)(ii) of Act 105 of 1997 the fact that the Complainant did not suffer serious physical injuries is not by itself a substantial and compelling circumstance. It is nevertheless a relevant factor which the Court, in order to prevent an unjust sentence, needs to take into account as indicative of the lesser objective gravity of the rape (See: *S v MM*[10]).

[37] A lack of serious injuries is therefore not in itself a substantial and compelling circumstance, but is merely one of the many factors the court may take into consideration in mitigation. As Ms Abrahams correctly conceded, physical injuries are not the only, or even the most serious, injuries a rape victim suffers. The victim impact study made by the Complainant when she was 8 years old clearly shows the emotional and psychological scars that she was left with. It stated that she was afraid that 'Fransie' would kill her and her parents by slitting their throats and that he would know where they lived and would then come to their house to do so. It stated, furthermore, that she has no friends and that nobody wants to play with her.

[38] It is clear that the entire family has been left severely traumatised. The effect on her parents is apparent from her

mother's victim impact report in which she stated that they have no contact with friends or relatives or the Appellant's

family; that they do not want them to know where they live because the Appellant is obsessed with the Complainant; that they had to give up their Bar; that the Complainant had been severely sexualised, masturbates continuously and plays sex games with her dolls; and that they keep her away from friends because they are afraid that it will happen to her again.

[39] Therefore, although the Complainant did not suffer serious physical injuries, this is one of the worst instances of continued sexual abuse and rape of a very young child that this Court has come across. I cannot find that there are substantial and compelling circumstances which would justify the imposition of a lesser sentence. It would, in fact, in my view be a significant

injustice and a shockingly inappropriate and disproportionate sanction of such a heinous crime, and would undoubtedly cause outrage

in the community, if the Appellant were to be sentenced to anything less than the minimum prescribed sentence of Life Imprisonment.

[40] The appeal against the sentences therefore cannot succeed either.

WHEREFORE I make the following order:

1. The appeal against conviction is dismissed.
2. The appeal against the sentences is dismissed and the sentences are confirmed, namely:

Count 1: Life Imprisonment

Count 2: 3 (THREE) years' imprisonment

The sentences are to be served concurrently.

MURRAY AJ

I concur and it is so ordered.

MOLITSOANE J

For the Appellant: Ms V Abrahams

Attorney for the Appellant

Bloemfontein Justice Centre

BLOEMFONTEIN

For the Respondent: Adv DW Bontes

Office of the Director of Public Prosecution

- [1] “Hy het my ‘gevry”.
- [2] 1968 (3) SA 339 (A) at 341C
- [3] (323/2015) [2015] ZASCA 201 (2 December 2015) at para [14]
- [4] 2010 (2) SACR 69 (SCA) at 72A and 72B.
- [5] S v Sithole and Others 1999 (1) SACR 585 (W) at 590 f – h.
- [6] 1999 (2) SACR 558 (A) at 562j – 563a
- [7] 2009 (111) SACR 552 at 574 at para [58]
- [8] 2011 (1) SACR 40 (SCA) at para [13]
- [9] 2013 (2) SACR 292 (SCA)
- [10] 2013 (2) SACR 292 (SCA) at 302b – g at par [26]
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Prepared on 11 October 2026 · Esheria