

SOUTH AFRICA / JUDGMENT

Bezuidenhout v S (CA&R76/2016)

[2016] ZANCHC 71 (2 December 2016)

[2016] ZANCHC 71**COURT**

Northern Cape High Court, Kimberley

BEFORE

Olivier, Erasmus

CASE / FILE NUMBER

CA&R76/2016

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA****(Northern****Cape High Court, Kimberley)****Reportable:**

NO

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to Regional Magistrates: NO

REVIEW CASE NO:

CA&R 76/2016

DATE HEARD:

28/11/2016

DATE DELIVERED:

2/12/2016

In

the matter between: BEZUIDENHOUT,
 VUYANI
 Appellant
 and
 THE
 STATE
 Respondent

Coram: Olivier
 J et
 Erasmus
 AJ

JUDGMENT

Olivier J:

[1.] The appellant, Mr Vuyani Bezuidenhout, appeared in the Regional Court at De Aar on a charge of housebreaking with intent to commit rape, and rape[1]. The appellant pleaded not guilty. He denied having broken into the house of the complainant. He admitted intercourse, but claimed that the complainant had consented thereto.

[2.] The appellant was convicted of the rape only and sentenced to life imprisonment, on the basis that the complainant had been a victim who had at the time of the incident been a “physically disabled person who, due to ... her physical disability, (was) rendered particularly vulnerable”[2]. This appeal is against both the conviction and the sentence[3].

[3.] The notice of appeal was filed late and the appellant accordingly also applies for condonation. His affidavit in support of such application is very vague, but it was prepared without legal assistance.

[4.] What he did, however, pertinently allege is that there had been repeated attempts by him to pursue his appeal, inter alia by means of letters addressed to “the court”.

[5.] In his heads of argument counsel for the respondent, Adv J J Rosenberg, submitted that condonation should be refused because of the lack of detail in the appellant’s affidavit. No answering affidavit has however been filed and the appellant’s explanation, vague as it may be, has not been challenged on oath.

[6.] It is so that the delay has been very long, in fact more than three years, but it must be kept in mind that the appellant was incarcerated during that period and had no legal representation.

[7.] It is in any event trite that, insofar as the explanation for the delay may be regarded as not completely satisfactory, that fact will have to be weighed up against the prospects on appeal[4], which I will now turn to.

[8.] The complainant denied having consented to intercourse. She testified that she had in fact screamed for help and that the

appellant had then fled, leaving behind his shoes.

[9.] The complainant was a single witness in respect of these events, and her evidence would therefore have had to be approached with caution[5]. Mr Fourie, on behalf of the appellant, correctly conceded that there were no material contradictions in the evidence of the complainant.

[10.] The witness, J. in any event corroborated her evidence in material respects. His evidence was that he had passed the house of the complainant when he heard her calling for help. He saw the appellant jumping out of a window of the complainant's house, wearing socks but no shoes. He tried unsuccessfully to apprehend the appellant. Shortly thereafter he entered the house and found the complainant crying. He further testified that the complainant then reported to him that the appellant had raped her.

[11.] Both the complainant and J. were found to have been credible witnesses and that finding has not been criticised.

[12.] The medical report (J88) reflects injuries to the genitalia which were interpreted as a sign of forceful penetration. The contents of the report, which would include remarks about the injuries and the conclusion, were admitted.

[13.] The appellant chose not to testify or to present any evidence. In his notice of appeal he claimed to have been represented by an incompetent attorney and complained that the matter was decided without regard to his version. These allegations are not borne out by the record. In fact, when the appellant's legal representative at the time informed the Regional Magistrate that he had been instructed by the appellant to close his case without presenting evidence, the Regional Magistrate took this up with the appellant himself and he confirmed those instructions. This choice which the appellant had exercised, while he was properly legally represented, resulted in there being no version on oath by him on record. The evidence presented by the prosecution called for an answer and, in the absence an answer, was sufficient to prove that the complainant had not consented to intercourse[6].

[14.] It is trite that the credibility findings of a trial court should not readily be interfered with and in my view there is no cause to do so in the present matter.

[15.] The physical disability and condition of the complainant at the time of the incident resulted in the prescribed sentence of life imprisonment being applicable[7]. Evidence regarding the condition of the complainant was presented and the physical manifestations and effects of the disability were placed on record. The complainant had suffered a stroke, long before this incident, which left her one hand deformed, rendering that arm useless, and her one leg weakened.

[16.] The appellant, who had been a friend of the complainant's son, had been aware of this. His legal representative conceded, at the trial, that the complainant was indeed, as a result of the stroke and its consequences, a person as described in Part 1 of Schedule to the Criminal Law Amendment Act.

[17.] The Regional Magistrate found that there were no substantial and compelling circumstances to justify a lesser sentence than life

imprisonment. In an appeal against such a finding the approach differs from that applied in appeals against sentences in general. This court would be free to consider "whether the facts which were considered by the sentencing court are substantial and compelling, or not"[8].

[18.] The undisputed evidence was that the rape had left the complainant feeling helpless and betrayed by somebody she had known and had

trusted. She did not sustain serious physical injuries, but this must be seen in the context of her physical condition. She told the social worker that she had been unable to push the appellant off her, because of her weakened state. The appellant would therefore arguably not have had to apply any real physical violence to subdue the complainant.

[19.] According to the judgment on sentence the appellant had been only 20 years old at the time of the crime, and he was 21 years old at the time of the trial. He had left school in grade 9. He was single and had no dependents. At the time of his arrest he was employed and earned an income of R40.00 per day.

[20.] The appellant had previous convictions, but none of them involved physical violence or sexual misconduct. He had two previous

convictions of housebreaking with intent to steal and theft, in 2007, and one of theft in 2010. He had served imprisonment before, albeit for short periods. Most importantly, however, he had been out on parole after his last sentence of imprisonment when he committed the present crime. This is an aggravating factor, as is the fact that the complainant was raped in her own bed and in her own house, where she was supposed to feel safe.

[21.] The appellant spent almost 15 months in custody before being sentenced.

[22.] The Regional Magistrate seems to have considered the appellant's plea of not guilty, and his persistence in his innocence, as aggravating, which would of course have been a misdirection, because it would have been appellant's constitutional right to put the prosecution to the proof of its case[9].

[23.] The Regional Magistrate regarded the appellant's previous convictions as indicative of his character, but made no mention of the fact that none of them were related to the crime the appellant had been convicted of.

[24.] In the judgment on sentence the Regional Magistrate mentioned that reference had during the trial been made to the influence of alcohol on the appellant at the time of the incident. It is not clear from the record exactly when that information was placed before the court. It may have been during the cross-examination of J., because some parts of what was put to him on behalf of the appellant could not be transcribed.

[25.] There was no indication that the appellant had planned the rape. How exactly he had ended up inside the house of the complainant is not clear. The complainant's evidence was that the doors of the house were closed when she went to bed, but she did not testify that they were locked. When J. went to the house after the appellant had escaped, he found a door of the house open, presumably in the sense of being unlocked. The appellant's version, as put to the witnesses on his behalf, was that he had gone there to visit the complainant's son.

[26.] In my view the ultimate and most severe sentence of life imprisonment[10] would in these circumstances constitute an injustice, taking into account the cumulative effect of the age of the appellant, the influence of alcohol, the absence of serious violence and of serious injuries and the absence of related previous convictions. These are in my view strong indications that the appellant is capable of rehabilitation. Mr Rosenberg wisely conceded that a sentence of life imprisonment is indeed disproportionate to the circumstances of the crime and of the appellant as an individual.

[27.] Undoubtedly, however, the crime would still call for a long term of imprisonment and Mr Fourie did not attempt to argue otherwise. In my view a sentence of 18 years imprisonment would have been an appropriate sentence, taking into account the "benchmark" set by the prescribed sentence of life imprisonment[11], but also the period already spent in custody awaiting trial.

[28.] In view of the above there would, for the purposes of the application for condonation, have been sufficient prospects of success for condonation to be granted.

[29.] In the premises the following orders are made:

1. THE LATE FILING OF THE NOTICE OF APPEAL IS CONDONED.
2. THE APPEAL AGAINST THE CONVICTION IS DISMISSED AND THE CONVICTION IS CONFIRMED.
3. THE APPEAL AGAINST THE SENTENCE IS UPHELD, THE SENTENCE OF LIFE IMPRISONMENT IS SET ASIDE AND IT IS SUBSTITUTED WITH A SENTENCE OF 18 YEARS IMPRISONMENT, ANTEDATED TO 5 MARCH 2013.

C J OLIVIER

JUDGE

NORTHERN CAPE DIVISION

I concur.

S L ERASMUS

ACTING JUDGE

For the Appellant: ADV P J FOURIE

(Kimberley Justice Centre)

For the Respondent: ADV. J ROSENBURG

(Office of the Director of Public Prosecutions, NC)

- [1] In contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007
- [2] As envisaged in Part I of Schedule 2 to the Criminal Law Amendment Act, 105 of 1997.
- [3] The appellant has an automatic right of appeal in terms of section 309 (1) (a) of the Criminal Procedure Act, 51 of 1977.
- [4] Compare *S v Senkhane* 2011 (2) SACR 493 (SCA) para [27]
- [5] Compare *Stevens v S* [2005] 1 All SA 1 (SCA) para [17]
- [6] Compare *S v Boesak*
[2000] ZACC 25; 2001 (1) SACR 1 (CC) para [24]
- [7] See section 51 (1), read with the classification of rape victims in Part I of Schedule 2, of the Criminal Law Amendment Act, 105 of 1997.
- [8] See *S v PB* 2013 (2) SACR 533 (SCA) para [20]; See also *S v GK* 2013 (2) SACR 505 (WCC)
- [9] Compare *S v Njikelana* 2003 (2) SACR 166 (C) at 175d; *S v Ngada* 2009 JDR 0216 (ECG) at p7 – 8; *S v Mncube* 2005 JDR 0251 (W) para [29]
- [10] Compare *Makwakwa & another v S* [2009] JOL 23789 (GSJ) para [12]; *S v Mashava* 2014 (1) SACR 541 (SCA) para [7]
- [11] Compare *Director of Public Prosecutions, North Gauteng v Thabethe* 2011
(2) SACR 567 (SCA) para [30]

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