

SOUTH AFRICA / JUDGMENT

Bodumele v S (CA&R13/20) [2020] ZANCHC 53 (21 August 2020)

[2020] ZANCHC 53

COURT

Northern Cape High Court, Kimberley

BEFORE

APS Nxumalo, CC Williams

CASE / FILE NUMBER

CA&R 13/20

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IN THE HIGH
COURT OF SOUTH AFRICA
(NORTHERN
CAPE DIVISION, KIMBERLEY)
CASE
NUMBER: CA&R 13/20
In

the matter between: BODUMELE,
 DIKGANG ABEL
 Appellant
 And
 THE
 STATE
 Respondent

JUDGMENT**INTRODUCTION**

1 The appellant herein appeals against his conviction and sentence for life imprisonment on one count of rape for contravening section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.[1] This offence was committed sometime during November 2012,[2] when the appellant committed an act of sexual penetration with the complainant without her consent. The complainant who subsequently

fell pregnant from the rape, had to undergo an abortion at the age of fourteen. It was conceded at the trial that the appellant knew at the time of the intercourse that the complainant was a minor.
[3]

2 The appellant was convicted on 26 October 2016 and subsequently sentenced to life imprisonment in terms of section 51 (1) of the Criminal Law Amendment Act 105 of 1997,[4] in the Regional Court, Mothibistad. The relief sought by the appellant in these proceedings is twofold. First, he seeks his conviction on the count of rape to be set aside and substituted with a conviction of contravention of section 15 of the said Act (i.e. the offence of having sexual intercourse with a minor or statutory rape). Second that the sentence of life imprisonment be set aside and substituted with a suitable sentence of long term imprisonment.[5] The respondent is opposed to this appeal being upheld and enjoins this court to instead confirm the impugned conviction and sentence.

BRIEF STATEMENT OF THE LAW

3 Section 3 of the Sexual Offences Act, expressly stipulates that a person who intentionally commits an act of sexual penetration with a complainant, without the complainant's consent, is guilty of the offence of rape. Section 15 (1) of the same Act, expressly stipulates that a person who commits an act of penetration with a child is, despite the consent of the said child to the commission of such an act, guilty of the offence of having committed an act of consensual sexual penetration with a child. Section 51 (1) of Act 105 of 1997, on the other hand, expressly stipulates that, notwithstanding any other law, but subject to subsection (3) and (6), a court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2, to imprisonment for life. The appellant has been convicted of such an offence.

ISSUES

FOR DETERMINATION AND HOW ARE SAME TO BE DETERMINED

4 It was inter-alia contended on behalf of the appellant that regard being had to the evidence viewed as a whole, the appellant's version could reasonably be true. It was also contended for him that the court a quo ought to have considered the following factors in favour of the appellant; to wit:

- (a) that the amount of violence used in the commission of the offence was minimal; (b) that the appellant was a 46-year-old first time offender; and (c) that the appellant's personal circumstances viewed cumulatively, amount to substantial and compelling

circumstances. In the premise, it was finally contended for him that the sentence of life imprisonment is so disproportionate to the facts and circumstances of the offence, that same constitutes an injustice to him.[6]

5 For its own part, the respondent in sum inter-alia contended as follows; that: (a) the complainant generally made such a good impression on the trial court that no valid criticism can be levelled at her as a witness; (b) the probabilities support the complainant's version of events; and (c) the only factor in favour of the appellant (i.e. that he is a first time offender), is not enough to constitute substantial and compelling circumstances.[7]

6 Regard being had to the foregoing, it is common cause that the following issues fall for determination; to wit:

- (a) whether the version of the appellant could reasonably possibly be true; and (b) whether there are any substantial and compelling

circumstances present justifying the imposition of a lesser sentence than life imprisonment. It is trite that there is no obligation upon an accused person, where the state bears the onus, "to convince the court". The appellant's version need only be reasonably possibly true, even if improbable. Whilst it is permissible to look at the probabilities of the case to determine whether the accused's version is reasonably possibly true, whether one subjectively believes him is not the test. In other words, the court need not believe him. As pointed out in many judgments, the test is whether there is a reasonable possibility that the accused's evidence may be true.[8]

7 It is also trite that, all the evidence should be considered and evaluated as a whole to establish whether the guilt of an accused has been proven beyond reasonable doubt. By parity of reason, if his version is reasonably possibly true, he is entitled to his acquittal even though his explanation is improbable. It follows that a court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but beyond any reasonable doubt, it is false.

THE RELEVANT EVIDENCE AND ARGUMENTS OF THE PARTIES IN SUM

Appellant

8 The appellant, who testified in his own defence, in sum admitted having had sexual intercourse with the complainant, but maintains that it was on a different occasion and venue (i.e. in an outside-toilet at her home) whilst her family was at home. In other words, he denied ever having had sex with the complainant on the particular evening or in the manner alluded by the complainant. The Learned Magistrate duly considered this version and concluded that it was highly improbable and clearly not reasonably, possibly true. The magistrate rejected it accordingly. The magistrate concluded that the more probable version is that of the complainant i.e. that the intercourse took place at Mokgokong's place. I agree.[9]

9 On his behalf, it was submitted that since the complainant was a single witness, who was also only 14 years old at the time of the incident, her evidence should have been approached with "a double measure of caution." [10] This court was referred to the case of *S v 2000 (1) SACR 453 (SCA)* at 454H-I, where it was cautioned that in view of the nature of the charges (sexual misconduct) and the ages of the complainants, it was well for the court to remind itself at the outset that, whilst there is no statutory requirement that a child's evidence must be corroborated, it has long been accepted that the evidence of young children should be treated with caution. It was also

there opined that the evidence in a particular case involving sexual misconduct may call for a cautionary approach.

10 The foregoing dicta has fortunately been superseded by the provisions of section 60 of Act 32 of 2007, which expressly stipulate that notwithstanding any other law, our courts are precluded from treating the evidence of a complainant in criminal proceedings involving the alleged commission of a sexual offence with caution, on account only of the nature of the offence. It is also well established that the so-called cautionary rule in sexual assault cases is based on an irrational and outdated perception.[11] In *S v Mahlangu* 2011 (2) SACR 164 (SCA) at 171B-C, it was inter-alia held as follows; that:

“The court can base its finding on the evidence of a single witness, as long as such evidence is substantially satisfactory in every material respect or if there is corroboration. The said corroboration need not link the accused to the crime.”[12]

11 Whilst the trial court seems to have been well aware of the fact that the complainant was a single child witness, the complainant nevertheless seems to have made a good impression on the trial court.[13] Nothing therefore turns around this point. Of significance is the fact that section 51(3)(aA) of Act 105 of 1997, contemporaneously

precludes our courts, when imposing a sentence in respect of an offence of rape from accepting inter-alia an apparent lack of physical injury to the complainant, as constituting substantial and compelling circumstances justifying the imposition of a lesser sentence. In *S v Radebe* 2019 (2) SACR 381 (GP), the fallacy of the lack of physical injuries in a sexual offence was exposed as such:

“Support for the proposition that lack of physical injuries will result in a ‘less serious’ rape ought to fail, firstly, because rape constitutes the invasion of a bundle of rights impacting on the bodily integrity and psyche of the victim, and, secondly, because the mere absence of physical injury cannot automatically equate with a lesser degree of graduation or emotional and psychological trauma. Moreover, it would mean that the yardstick by which society is to determine the appropriate punishment for rape requires the presence of some undefined degree of physical or psychological injury....”

12 Nothing therefore turns around the amount of violence used in the commission of this offence which is the subject matter of this appeal. Whilst it was conceded on behalf of the appellant during argument before us that the reason why she did not disclose the incident preceding the discovery of her pregnancy, is probably because she was afraid of the appellant. It was nevertheless submitted on behalf of the appellant before this court that the most glaring improbability in the evidence of the complainant is her silence about the incident for a period of three months, up until her pregnancy was discovered. It was also submitted on his behalf before this court that whilst it seems improbable that he accompanied the complainant home after the incident, if one takes into account his version that there was “some sort of a relationship” between them, this provides a reasonable explanation for her conduct. It was contended for him that if he had committed rape, it could be improbable that he could walk the complainant home, but if they had been involved in a relationship this conduct is reasonable. In the premise, it was submitted on behalf of the appellant that his version may be reasonably possibly be true. The

Learned Magistrate considered and opined on this version at pages 201-201 of Volume 2 of the Record. The magistrate found the appellant's version highly improbable. I agree.

13 The appellant's contentions are clearly careless of the following. First, in criminal proceedings involving the alleged commission of a sexual offence, the court is precluded from drawing a negative inference only from the length of any delay between the alleged

commission of such offence and the reporting thereof.[14] In *Monageng v S* 2009 (1) SA 237 (SCA) at 245A-E, it was correctly pointed out that it has been established that there are many factors which may inhibit a rape victim from disclosing the assault immediately and to present a façade of normality. It was also correctly pointed out that raising a hue and cry and collapsing in a trembling and sobbing heap is not the benchmark for determining whether or not a woman has been raped.[15] Second, whenever an accused person is charged with an offence under section 3-7, it is not a valid defence for that accused person to contend that a marital or other relationship exists or existed between him or her and the accused, regard being had to section 56

(1) of Act 32 of 2007.

14 In *S v Konick* 2007 (2) SACR 155 (SCA), the complainant who was also 14 years old when she was raped by three men at the time, did not report the matter to her parents or the police until nineteen years later. It was only when she met one of her rapists which revived memories of her ordeal and prompted her to lay charges, which ultimately led to the conviction of the accused. The Supreme Court of Appeal in confirming the conviction and sentences, accepted as plausible the complainant's explanation for the delay in reporting or laying the charges.

Respondent

15 According to the respondent, the plausible evidence of the complainant in sum is as follows. On the evening in question, she accompanied the appellant to go and buy beers, at his behest. While they were on their way, the appellant informed her that his aunt had called him and that they should go there instead. They did so. Upon arrival at his aunt's house, the appellant gave money to another man and asked him to go and buy beer.[16] He thereafter gave some keys to the complainant under the pretext that he needed her to fetch some chairs from a certain backroom. She proceeded to the said room and whilst she was therein, the appellant entered the room and locked the door. He proceeded to push the complainant onto a bed in the room; tied a cloth around her mouth and her hands behind her back, with another. He then proceeded to remove her pants and panty and proceeded to have sexual intercourse with her without her consent.[17] The court a quo's view is that the sending away of Mokgosi with his girlfriend was to afford the appellant the opportunity to molest the complainant.[18] I agree.

16 After the intercourse, both the complainant and the appellant went to her home. Whilst on the way there, he threatened the complainant with witchcraft if she told anyone of the incident. The complainant believed him and accordingly did not tell.[19] It has been submitted on behalf the applicant, with reference to the record, that the conduct of the appellant of going home with the complainant after the incident, is not improbable, but expected, in the context of the version of

the appellant, that they had “some kind of a relationship.” Contra wise, it was submitted on behalf of the respondent that what can be deduced from this fact is simply that he wanted to make sure that she did not report the incident to her mother and that it formed part of a pattern of threats which commenced just before the appellant raped the complainant.[20] I agree.

17 Approximately three months later, the complainant felt sick and was taken to hospital where it was discovered that she was pregnant. She then told her mother everything that transpired three months ago i.e. that the complainant had raped her.

CONCLUSION

18 In terms of section 51(1) of the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997), it was peremptory for the magistrate, after the conviction of the appellant for an offence referred to in Part I of Schedule 2, to sentence the appellant to life imprisonment. The question is whether substantial and compelling circumstances exist which justified the imposition of a lesser sentence than the sentence prescribed.

19 The approach on appeal where a prescribed sentence was imposed, was set out by the Supreme Court of Appeal in *S v PB* 2013 (2) SACR 533 (SCA) at 539 F-G:

"The approach to an appeal on sentence imposed in terms of the Act should, in my view, be different to an approach to other sentences imposed under the ordinary sentencing regime. This, in my view, is so because the minimum sentence to be imposed are ordained by the Act. They cannot be departed from lightly or for flimsy reasons. It follows therefore that a proper enquiry on appeal is whether the facts which were considered by the sentencing court are substantial and compelling, or not."

20 The court a quo took into full consideration, not only the merits and the demerits of the state and defence witnesses, but also the probabilities of the case. Significantly, the court a quo correctly took the following into consideration, which is common cause; that:

- (a) sexual intercourse did take place between the parties; (b) the appellant impregnated the complainant, as confirmed by the DNA results which were admitted in evidence during the trial, by consent between the parties; (c) the appellant was such a trusted and close family friend to the complainant that he used to at times sleep at her home; and (e) during October or November, the appellant and the complainant did go to Mokgosi's house.[21]

21 The appellant was 46 years at the time he raped the complainant. She was only 14 years at the time and she regarded him as an uncle. The appellant placed himself in a position of trust to the complainant and her mother. The complainant looked up to him as a father figure. Appellant abused a position of trust. Instead of protecting her, he put her through trauma not only of rape but abortion and trial. The removal of the complainant from her home to the house where the offence was committed, is also an indication that the offence was indeed planned by the appellant.

22 The personal circumstances of the appellant, which were placed before the trial court under these circumstances, cannot outweigh the seriousness of the offence and the interests of the community. Having regard to all the aggravating factors, this court cannot conclude that there are substantial and compelling circumstances present that would justify a departure from the prescribed minimum sentence. In my view there is no basis for this court to interfere with the sentence.

ORDER

23 In the result, this appeal is dismissed and the conviction and sentence of the appellant are hereby confirmed.

APS NXUMALO

Acting Judge of the High Court of South Africa

Northern Cape Division, Kimberley

I concur

CC WILLIAMS

Judge of the High Court of South Africa

Representation:

For Appellant: Mr A Van Tonder

Instructed by: Legal Aid South Africa, Kimberley

For Respondent: Adv JJ Cloete

Instructed by: Director of Public Prosecutions, Kimberley

Heard: 22 June 2020.

Delivered: 21 August 2020.

[1] Hereinafter referred to as “the Sexual Offences Act”

[2] 16 or 17 November, see p188, Vol II, Record.

[3] P211, Vol 2, Record.

[4] Hereinafter referred to as “Act 105 of 1997.”

[5] See p 211, Vol 2, Record.

[6] Paragraphs 15-19, Appellant’s Heads of Argument, 03/06/20

[7] Paragraph F, Respondent’s Practice Note, 05/06/20

[8] S v 2000 (1) SACR 453 (SCA) at 455A-C.

- [9] Page 202, Vol 2, Record.
- [10] Paragraph 2, Appellants Heads of Argument, 03 June 2020.
- [11] S v M 2006 (1) SACR 135 (SCA) at 199J-200C
- [12] Footnotes omitted.
- [13] Pages 198-199, Vol 2, Record.
- [14] Section 59 of Act 32 of 2007.
- [15] Monagang, *supra*, p245E,
- [16] This version of the complainant withstood cross examination, see p79, Vol I, Record.
- [17] Pp46-51, Vol I, Record.
- [18] See p203, Vol 2, Record.
- [19] Pp49-50, *ibid*.
- [20] See paragraph 22, p5, Respondent's Heads of Argument, 05 June 2020; see also pp50 and 57, ll1-10, respectively. Vol I, Record
- [20] See paragraph 22, p5, Respondent's Heads of Argument, 05 June 2020; see also pp50 and 57, ll1-10, respectively.
- Vol I, Record
- [21] See p196, Vol 2, Record.

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