
SOUTH AFRICA / JUDGMENT

Boshoff v S (CA&R 51/14) [2015] ZANCHC 56 (23 January 2015) [2015] ZANCHC 56

COURT

Northern Cape High Court, Kimberley

BEFORE

BM Pakati, MC Mamosebo

CASE / FILE NUMBER

CA&R 51/14

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IN THE HIGH COURT OF SOUTH AFRICA

(NORTHERN CAPE HIGH COURT, KIMBELEY)

Case No: CA&R 51/14

Heard On: 10/11/2014

Delivered: 23/01/2015

In the matter between:

GIDEON BOSHOFF

APPELLANT

AND

THE STATE

RESPONDENT

Coram: PAKATI J et MAMOSEBO AJ

JUDGMENT ON APPEAL

PAKATI J

- [1] The appellant, Gideon Boshoff, was arraigned in the Regional Court, Upington, on two charges. On Count 1 he faced a charge of sexual assault and on Count 2 rape. He pleaded not guilty to both counts but was nevertheless convicted on 29 November 2012 on both counts. On 27 June 2013 he was sentenced to eighteen months imprisonment on Count 1 and twenty years imprisonment on Count 2. The sentence on Count 1 was ordered to run concurrently with the one on Count
2. In terms of the Firearms Control Act, 60 of 2000, he was declared unfit to possess a firearm.
- [2] The appellant applied for leave to appeal against the convictions and the respective sentences but was granted leave only on a limited point. The appellant's main complaint was:

"Punt 1:

Die agbare verhoor landdros het fouteer deur te bevind dat slegs die beskuldigde in sy saak getuig het en geen getuies geroep het nie. Nadat die beskuldigde getuig het, het [RB] (the appellant's wife) vir die verdediging getuig sy het die getuienis van die beskuldigde in verskeie aspekte gestaaf insluitend die kwessie dat die klaagster haarself bevredig het seksueel. Die agbare Hof het fouteer deur nie behoorlik alle getuienis rakende die saak in ag te neem nie."

However, leave was granted by Olivier J and Lever AJ on petition to the Judge President of this Division on 08 October 2014 with regard to both convictions and sentences. At the trial the appellant was represented by Mr Jaardts on the instructions of Legal

Aid South Africa.

- [3] The principle applicable on appeal is that in the absence of a material misdirection by the trial court its findings of fact are presumed to be correct and will only be disregarded or disturbed if the evidence shows them to be clearly

wrong. See *R v DHLUMAYO AND ANOTHER* 1948 (2) SA 677 (A) at 706 where Davis AJA held that where there has been no misdirection on fact by the trial Judge, the presumption is that his conclusion is correct; the appellate court will only reverse it where it is convinced that it is wrong.

- [4] It is common cause that the appellant is the biological father of the complainant, Ms M. He was married to the complainant's mother, Ms B. They divorced during 2010. At that stage Ms M was about three years old and her younger brother, Mr G, two years. During the divorce the appellant was awarded custody of both children because Ms B was unemployed and could not take care of them. The children stayed in Upington with him. During Ms M's stay with the appellant their relationship appeared to be good until she complained that he sexually assaulted and raped her during 2010. She was twelve years old when the incidents are alleged to have taken place.

[5] Ms M was fifteen years old when she testified through closed circuit television in terms of s 158 (2) (a) of the Criminal Procedure Act, 51 of 1977. She testified that during 2010 her father started touching her thighs on several occasions. She knew it was wrong because according to her a father does not touch a girl's legs. She moved out of his way each time he did that. She ended up avoiding him.

[6] During 2010 the complainant was at home with the appellant and her younger brother. The appellant started fondling her breasts. She told him it was wrong but he assured her that he won't hurt her and took her to his bedroom. He ordered her to undress which she submitted to. The appellant again fondled with her breasts and touched her abdomen whilst lying on top of her. She said:

"He tried inserting his penis into my vagina. He asked if his penis was in and I said no. He asked again if it was in and I said yes for him to think so."

She added: When he tried to insert his penis in my vagina I think he was moving."

After a while the appellant told her to go to the bathroom. In the bathroom he held his penis over the washing basin and ordered her to move it up and down. She complied until 'some things', as she termed it, came out. At that stage her stepmother, Ms RB, who at that stage worked at Bi-Lo, knocked at the door. The appellant ordered the complainant to put on her clothes and go to her bedroom.

[7] The complainant stated that she did not get hurt when the appellant tried to insert his penis into her vagina. She said: "I felt it there but it wasn't painful". After this incident the appellant woke her up but she pretended to be asleep. She avoided being alone with him and always remained in her younger brother's company. She did not tell anyone about the incident because she was afraid. After a few months she reported the incident to her younger brother, Mr G, and said: "I think my father raped me". She told him to keep it a secret which he did until they had an argument about who should use a computer, a year later. They had visited their mother in Kakamas. Her stepsister, Ms CJ, overheard them. The complainant ultimately reported the incidents to her mother a year and some months later. The defence suggested that the complainant has a boyfriend (Mr R) with whom she had been in the reeds at Riegat Pub. The complainant has vehemently denied the insinuation. She and her younger brother currently live with their mother in Kakamas.

[8] Mr Heinrich Ferris, a Forensic Nurse, testified that on 27 February 2011 he examined the complainant and completed the J88 medical form (Exhibit "A") after the incidents were reported to the police. He stated that the complainant's clitoris, hymen

and posterior fouchette were normal. There were no tears found. He noted two healed scars which he referred to as flag wounds between

the hymen and the urethral opening, triangular in shape. He concluded that the injuries were caused by a hard object. During his

examination of the complainant she told him that the appellant attempted to penetrate her.

- [9] The complainant's younger brother, Mr G, who also testified through closed circuit television, said he initially did not believe the complainant. He noticed though that the complainant's behaviour had changed. She constantly remained in his presence. He disputed reporting to the appellant that the complainant did something in the reeds with Mr R at Rietgat Pub. He testified that he used to tease her about Mr R and refer to him as her boyfriend just to irritate her. In my view, it is not strange for siblings to tease each other like that. Mr G stated that he knew that the complainant 'did not like Ronald'. This, he would do in the presence of their grandparents and the appellant.
- [10] The appellant denied all the allegations against him. He testified that he was strict with the complainant with regards to cell phones and dancing, unlike mother, Ms B. Just before his arrest she insisted on seeing the children frequently. Her husband, Mr Horn, called him and requested that the children stay permanently with them but he refused. He stated further that an argument ensued between the complainant and his wife about neatness and hygiene. The complainant informed her that she would rather stay with her biological mother. This, according to him, was the reason why the complainant falsely implicated him. He stated that his children were "my als". He never had problems with the complainant. During cross-examination he disputed being in the presence of the complainant alone. The appellant disclosed for the first time when he was under cross-examination that the complainant's stepmother has observed the complainant on several occasions stroking her private parts. The appellant requested a police officer, Mr Marius Struwig, to investigate the incident that allegedly took place at Riegat Pub but nothing worthwhile was discovered.
- [11] Ms RB, the complainant's stepmother, testified that she never gained the impression that the complainant avoided the appellant. She denied having arguments with the complainant as testified to by the appellant nor did she intimate that she preferred to be with her biological mother. Significantly, Ms RB denied witnessing the complainant stroking her private parts and bringing it to the attention of the appellant. She conveniently remembered one incident during re-examination by Mr Jaardts after a leading question to the following effect:
- "Was daar enigsins 'n voorval tussen u en M van 'n kwessie wat gegaan het oor selfbevrediging of iets soos dit?"*
- [12] In convicting the appellant the court a quo found that the State proved its case beyond a reasonable doubt in respect of both counts. The Magistrate in evaluating the evidence dealt with the Cautionary Rule regarding the evidence of the complainant, a young child and a single witness.
- [13] The complainant is indeed a child and a single witness in respect of both charges. Her younger brother, Mr G, is also a minor child. It has been accepted that the evidence of young children should be treated with caution owing to the dangers inherent in such evidence. See *S v V* 2000 (1) SACR 453 (SCA) at 454G-H where Zulman JA stated:

“[2] In view of the nature of the charges and the ages of the complainants it is well to remind oneself 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 (R v MANDA 1951 (3) SA 158 (A) at 163 G; WOJI v SANTAM INSURANCE CO LIMITED 1981 (1) SA 1020 (A) at 1028 B-D); and that the evidence in a particular case involving sexual misconduct may call for a cautionary approach (S v J 1998 (2) SA 984 (SCA) at 1009F).”

The imaginativeness and suggestibility of children are only two of the elements against which a trier of fact should guard, and a trial court is required to indicate in the reasons furnished for its decision that it has fully appreciated these dangers and duly taken into account such safeguards as there may be in the circumstances of the case (See R v Manda supra).

[14] The court a quo also highlighted the shortcomings in the State case and stated:

“Looking at the entire evidence there were shortcomings and as Mr Jaardts pointed out. However, one cannot say those shortcomings are immaterial (sic) or can cause rejection of the evidence of those witnesses.”

According to the Magistrate there is nothing strange for a father to be home alone with his daughter. I agree. She further stated as follows with regards to the complainant’s motive:

“What is clear is that [the] complainant other than B (Mr G) she told no one. She wanted to keep this a secret. A week passed after [Ms CJ] became aware but still [the] complainant never told her secret out either to her mother or her stepfather. Such a motive then cannot stand in the light of the entire evidence.

What is clear is that she [the complainant] had no reason to falsely implicate her father, a father that she fought so hard to protect by not telling anyone. [The] accused raised the complainant from childhood he said so after divorcing her mother. Now all of a sudden at the age of twelve she would falsely accuse the father that he helped raise. In light of all this evidence this does not make sense.”

[15] The evidence clearly shows that the complainant was afraid of the appellant and was prepared to protect him. She said that she did not know what her father would do if she reported the incidents and she thought that no one would believe her.

According to her she was taught to listen to her parents. It was clearly by accident that the secret was discovered. The complainant

did not propose whether or not the appellant should be sent to prison for his behaviour.

[16] The appellant’s version was clearly a fabrication. His wife, Ms RB, did not corroborate his version that the complainant wanted to go and stay with her mother after they had an argument. She also did not support the appellant’s version that the complainant had the habit of stroking her private parts. This evidence was elicited at a very late stage and neither the complainant nor Mr Ferris, the forensic nurse, had an opportunity to comment on it. According to the trial Magistrate, this was an afterthought by the appellant. I agree. It was a

desperate effort on the appellant's part to explain the two healed flag wounds found between the complainant's

urethral opening and the hymen.

[17] In considering whether there was penetration or not the trial Magistrate said:

"What we have is the evidence of minimal penetration and the evidence of sister Ferris saying that the hymen was still intact indicates that penetration was not up to the hymen but there were injuries between the hymen and the urethral organ such as those of old or healed skin tears on both sides of the urethral opening.

So in accordance to our case law the slightest penetration is sufficient for rape in fact entry into the labia and the labia is the exterior of the female genital organ that entry is sufficient. That the hymen is intact or that the person did not ejaculate inside the vagina is irrelevant for a charge of rape."

[18] Adv CG Jansen, for the State, submitted that although the complainant persisted in her claim that the appellant only attempted to penetrate her it cannot be expected from her to understand what the legal definition of rape is. In my view, the trial Magistrate was alert to the definition of rape as contemplated in s 1 read with s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007. In *S v CARTER* 2014 (1) SACR 517 (NC) at para 17 Kgomo JP and Mamosebo AJ held:

"What seems to have blindsided the constitutive court is their unawareness that the slightest penetration of an orifice (per vagina or anally) constitutes rape. JLR Milton South African Criminal Law and Procedure vol 2, 3 ed at 448, pertaining to sexual intercourse, records:

"The slightest penetration is sufficient. Once penetration has occurred the necessary element for liability of the male is established".

Milton refers to *S v F* 1990 (1) SACR 239 (A) at 248g-I where Kumleben JA raised the following:

"Die afwesigheid van semen is wel 'n aanduiding dat gemeenskap nie plaasgevind het nie. Maar hierdie feit, of veronder-stelling, doen nie noodwendig afbreuk aan die afleiding dat daar tog penetrasie was nie. Dr Lamprecht se getuienis in dié verband is tot dien effek:

'... (B)eteken die feit dat person nie volledige of volle, manspersoon nie volle of volledige ereksie kan bewerkstelling nie, beteken dit noodwendig dat daar geen penetrasie was nie? – Sekerlik nie. Man hoef nie volledige ereksie te kry om te kan penetreer nie. Inteendeel geringe mate van ereksie sal seker tot kleiner mate van penetrasie kan aanleiding gee. Hoe suksesvol gemeenskap dan kan plaasvind is natuurlik ander vraag, maar mate van penetrasie kan sekerlik nog plaasvind.'"

[19] The learned Judges added at para 20:

“[20] What should be added to the raft of oversights already enumerated is the fact that a focused mind would have alerted the prosecutor and the magistrate that it is immaterial whether the rapist’s erect penis or a finger or a sexual aid hurt the complainant. Such act still conforms to the definition of rape as contemplated in s 1 read with s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007, which defines rape as:

‘3 Rape

Any person (“A”) who unlawfully and intentionally commits an act of sexual penetration with a complainant (“B”), without the consent of B, is guilty of the offence of rape’.

‘In this Act, unless the context indicates otherwise-

...

“Sexual penetration” includes any act which causes penetration to any extent whatsoever by-

- (a) The genital organs of one person into or beyond the genital organs, anus, or mouth of another person;
- (b) Any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or
- (c) The genital organs of an animal, into or beyond the mouth of another person.’ (Emphasis added)

[20] The findings by Mr Ferris are consistent with the complainant’s evidence that she felt the appellant’s penis ‘in there.’ Adv Nel in para 28 of the appellant’s Heads of Argument confirmed that penetration was minimal. This is tantamount to a concession that there was penetration though minimal. Adv Nel also confirmed that the complainant was not biased in her evidence against her father. I consider that the complainant was only twelve years old. She is clearly not in a position to comprehend the legal definition of sexual penetration as contemplated by the Act. No wonder she kept referring to ‘attempted

rape’. The trial Magistrate committed no misdirection when she found that there was penetration. The appellant was therefore

correctly convicted on both counts.

ON THE SENTENCE

[21] The appellant’s personal circumstances are as follows: He is 44 years old. He stays in Karos with his wife, Ms RB, and their two sons, aged 7 and 5 respectively. He and Ms RB have been married for more than 10 years. The appellant also has two other children, the complainant and her younger brother, Mr G, who currently live with their biological mother, Ms B. The appellant’s youngest son suffers from a lung problem. He frequently requires hospitalisation. Ms RB was diagnosed with lung cancer and is receiving treatment. Sometimes the appellant had to take care of the minor children in her absence. She also

suffers from high blood pressure. She is unemployed. The appellant is therefore the sole breadwinner. He was employed by Brits, a tow truck service in Uptington. He earned plus R6000.00 per month. He also worked for the Department of Health, the fire brigade and Motolek. He passed N1 certificate, an equivalent of Grade 10.

[22] The appellant, his wife and their two sons stay about 40 km out of Karos. He is the only licenced driver. The family depended on his availability for emergencies. He is a first offender.

[23] S 51 (1) of the Criminal Law Amendment Act, 105 of 1997, provides:

“Notwithstanding any other law but subject to subsections (3) and (6), a Regional court or a High Court shall sentence a person who has been convicted of an offence referred to in Part 1 of Schedule 2 to imprisonment for life.”

An offence of rape as contemplated in s 3 and 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act falls under Part 1 of Schedule 2 offences. The court a quo imposed a sentence of twenty years imprisonment. It correctly found, in my view, that there were substantial and compelling circumstances in the personal circumstances of the appellant. In *S v MALGAS* 2001 (1) SACR 469 (SCA) at 481 para 25B Marais JA held:

“Section 51 has limited but not eliminated the court’s discretion in imposing sentence in respect of offences referred to in Part 1 of Schedule 2 (or imprisonment for other specified periods for offences listed in other parts of Schedule 2)

Courts are required to approach the imposition of sentence conscious that the Legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.

Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts.”

[24] Bosielo JA IN AN UNREPORTED JUDGMENT OF PATRICK CLIVE BAILEY v THE STATE, DELIVERED ON 01 OCTOBER 2012, CASE NO 454/2011 had this to say at para 24:

“On the other hand, the complainant was twelve years old when she was raped; the appellant is her biological father. This rape therefore is incestuous, which is found to be morally repugnant by many if not all right-thinking people. In addition before the rape the appellant had performed improper sexual practises on her twice. The full extent of the emotional and psychological suffering, as they appear from the Victim Impact Report had already been discussed earlier. Undoubtedly, these are seriously aggravating circumstances which deserve to be given appropriate weight in the consideration of an appropriate sentence. Like the majority of the court below I am not persuaded that the appellant’s circumstances meet the threshold of substantial and compelling circumstances.”

[25] Adv Nel, on behalf of the appellant, argued that the sentences are shockingly inappropriate even though the court a quo correctly found that there were substantial and compelling circumstances with regards to Count 2. Ms Jansen, for the State, urged us to confirm the convictions and the sentences. In my view, the court a quo committed a misdirection when it imposed a sentence of 20 years (twenty) on Count 2 taking into account that substantial and compelling circumstances were found to exist. In the circumstances an appropriate sentence would be 15 (fifteen) years imprisonment. The appeal on both convictions and the sentence on Count 1 must fail.

ORDER

1. The appeal against convictions is dismissed.
2. The appeal against sentence of 18 (eighteen months) on Count 1 (sexual assault) is dismissed.
3. The appeal against sentence on Count 2 (Rape) is upheld.
4. The sentence of 20 (twenty) years imprisonment imposed by the magistrate is set aside and replaced with the following:

“The accused is sentenced to undergo 15 (fifteen) years imprisonment.”

5. Both sentences are ordered to run concurrently.

BM PAKATI

JUDGE

I concur

MC MAMOSEBO

ACTING JUDGE

On Behalf of the Appellant: Adv Nel Instructed by:

Office of the Kimberley Justice Centre On Behalf of the Respondent: Adv Jansen Instructed by:

Office of the Director of Prosecutions

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Prepared on 12 October 2026 · Esheria