

SOUTH AFRICA / JUDGMENT

Bran v S (A248/2015) [2017] ZAGPPHC 316 (7 July 2017)

[2017] ZAGPPHC 316

COURT

North Gauteng High Court, Pretoria

BEFORE

N V Khumalo, T S Madima

CASE / FILE NUMBER

A248/2015

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IN THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: A248/2015

Not reportable

Not of interest to other judges

Revised.

7/7/17

DAVID COLIN BRAN APPELLANT

and

STATE RESPONDENT

JUDGMENT

KHUMALO J INTRODUCTION

[1] On 11 October 2011, a 58 year old Appellant was arraigned and convicted in the Regional Court, Pretoria for contravening s 3

(“Count 1”) and s 22 (“Count 2”) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (“the Act”).

[2] The charges were according to the charge sheet that, he committed an act of sexual penetration with NM, a 5 year old girl, (“the

complainant”) by inserting his finger into her vagina without her consent and also exposed his private parts or penis to her.

[3] He was duly represented during the trial and pleaded not guilty to both charges. At the end of the trial, the learned magistrate

returned a guilty verdict having accepted the evidence of the complainant and her mother P M (“P”). He sentenced the

Appellant to a period of 12 and 5 years imprisonment on Count 1 and Count 2 respectively. The sentences were to run concurrently.

Appellant is with leave of the court a quo appealing against both conviction and sentence.

[4] The hearing of the appeal was delayed due to the record that had to be reconstructed. The Appellant has however been on bail pending the appeal.

[5] The salient facts are that on 12 July 2009 P found Appellant sitting with the complainant in his car. She alleged that Appellant had his right hand finger inserted in the complainant's vagina and his left hand placed on her mouth. His private parts were exposed to the complainant. The matter was reported to the police and Appellant was arrested.

[6] P was the first to lead evidence for the state. She testified that when the incident happened she and the complainant were at her friend, M N's (“M”) house. She knows the Appellant to be M's boyfriend. At about nine o clock in the evening Appellant came into the house and announced that he was leaving. He went out to his car that was parked outside the gate. The complainant was having her hair braided at the time. M called the complainant and told her to go and bid the Appellant goodbye. The complainant went outside to the Appellant. P said she realised that the complainant was not coming back and sent one Q to go out and look for her. Q came back and gave her a report. She (P) then went outside to also check on the complainant. She saw Appellant inside his car with his head bowed. She then saw the complainant in the car with the Appellant .She opened the door of the car, Appellant had his right hand finger in the complainant's vagina and his left hand was on the complainant's mouth. His private parts were exposed to the complainant. The complainant's pants were lowered down. She dragged the complainant out of the car whilst screaming at the Appellant and also shouting M's name. Hearing the screams, the other ladies came out and started gathering around. Appellant sped off. M was the last to come out. She asked Q to call the police.

[7] The complainant's testimony was that, on that evening they were sitting around the fire with M, Q and other ladies. The adults were playing cards. M came from outside and told her to go and bid Appellant good bye. She went outside and found Appellant urinating

outside his car. Appellant told her to get inside the car and he also got in. He picked her up from the passenger seat and put her on top of him. He took off her pants, lowered his pants and underwear exposing his thing that looks like a russian. He switched off the light in the car. Appellant inserted his right hand finger in her vagina which was painful. He also closed her mouth with his left hand. At that time P opened the door and took her out of the car. P screamed at the Appellant and as a result the other ladies from the house came out. Appellant sped off. P asked her what happened and she did not say anything. Later she told one T what happened.

[8] The Appellant's testimony was that he has been at M's place the whole weekend looking after the children whilst the ladies were playing cards. In the evening on the day of the alleged incident when he was leaving he asked M to inform the complainant. The complainant came out to him, he was outside sitting in his car. She was inside the car with him for a maximum of 2 minutes. After he told her he was leaving she jumped out of the car and he drove away. He said the children were accustomed to coming outside to bid him goodbye if he had left the house without telling them. He explained that the complainant was inside his car because when she opened the door to his car, his dog ran out. So the complainant caught it and brought it back to him. She climbed in the car with the dog. When asked by the court to repeat what he said, he said the complainant passed the dog to him through the door. He thinks she climbed inside the car when he shouted at her to close the door. She then stood in the front seat with her hands on

the dashboard. He told her he was leaving, leaned over to her side and opened the door to let her out. He then drove off.

[9] Under cross examination he testified that he did not know P that well and only knew her as one of the ladies who play cards at M's house, an activity he did not approve of. P was aware of his disapproval. He nevertheless looked after the children whilst the ladies were playing cards. They were mostly of M's relatives, friends and family. He said he could not say how many children were there that day because he did not go inside M's place. He instead was looking after ten children at his friend's place that is two houses away from M's place. He suspected that P instigated the charges because she was aware that he disapproved of them playing cards at M's place. She did not think the matter would be serious. He said when all this happened he was not living with M, they were separating.

[10] According to M, she has been living with the Appellant for nearly ten years. On the day of the incident the complainant and her mother were visiting at her place and had spent most of the weekend there. In the evening when Appellant was leaving she went outside with him and they sat inside his car for a while. When she was going back in the house Appellant asked her to call the complainant so that he can bid her goodbye. She passed the message to the complainant who then went outside to the Appellant. M had left the Appellant sitting inside his car and joined the ladies playing cards. All of a sudden she heard P screaming her name. She rushed outside with the other ladies and found P holding the complainant's hand. The Appellant was no longer there. She asked them what was happening. The complainant did not say anything but Paulina told her that she found the complainant on top of the

Appellant and he had his hand in the complainant's vagina whilst sucking his penis. She called the police. The complainant, P and Q went with the police to the police station. They came back very quick and confirmed that the complainant was not taken to hospital.

- [11] H ("H") is one of the ladies who were also at M's place that night. Her evidence was that all the parties in this matter were known to her and were at M's place busy gambling. She saw the complainant going out to say goodbye to the Appellant who was sitting in his car. At some stage she saw Q peeping through the window of the room where they were sitting, beckoning Paulina to come outside. Paulina went out. She then heard Paulina screaming. They all rushed out and saw Paulina holding the complainant's hand. At that stage the Appellant was reversing his car and he sped off. Paulina told them that she found Appellant raping the child. M suggested that they call the police.

GROUND OF APPEAL

AD CONVICTION

- [12] As grounds of appeal of his conviction, the Appellant alleges that the learned magistrate misdirected himself for the reason that:

[12.1] after he conceded that P was not a good witness, he still found her evidence admissible and to be corroborating complainant's evidence.

[12.2] The complainant had alleged that once the light inside the car was switched off the lighting was not good, she therefore could not see properly. It therefore could not have been possible for P to see that the Appellant and the complainant were naked inside the car, and the Appellant's hand was inside the complainant's vagina. It must have been difficult for complainant as well, to see what she said was Appellant's russian since according to her, Appellant lowered his pants after he had switched off the light.

[12.3] P was evasive and did not want to accept or acknowledge that they were gambling as a result her evidence together with that of the complainant should have been treated with caution, the complainant more so as she was a single witness

[12.4] Most children are exposed to obscene materials on Television, Internet and print media at a tender age, as a result a 5 year old complainant, would know how male private parts look like.

[12.5] No J88 was presented to confirm whether there was truly a penetration of the complainant's vagina by a finger to corroborate complainant's version. In addition, P 'had a possible motive to implicate the Appellant, as she was aware that he did not like it when they gamble at M's place. The trial court should therefore have at least used its resources to call Q as a witness to assist the court to be able to make a fair judgment.

- [13] Appellant argued that the learned magistrate should have found his version to be reasonably possibly true and acquitted him.

- [14] When the learned magistrate assessed the evidence to determine whether Appellant's guilt was proven beyond reasonable doubt, he was satisfied with the overall evidence of the complainant even though he found two aspects in her evidence not to be clear. This related to the hands of the Appellant, whether they were bandaged or not and whether she sat on Appellant's lap or next to him inside the car. The learned magistrate found that her version was corroborated by P in all material respects, specifically that she was found on the driver's side, her and the Appellant were half dressed with their pants and underwear lowered to their knees and Appellant's private parts exposed. Appellant's hand was touching her vagina.
- [15] The complainant's evidence was also corroborated by all the other witnesses who testified to Paulina's screams whilst holding

complainant's hand after she took her out of Appellant's car. Also to Appellant speeding away with his door barely shut. The court a quo found Appellant's conduct to be consistent with allegation that he was half dressed and had done what P and complainant allege he did to the complainant.

- [16] The learned magistrate was very impressed that the complainant was not shaken by cross examination and stood her ground on material issues. I agree with the learned magistrate, being mindful of complainant's very young age at the time of trial. On the two aspects she was found to be unclear, it was under cross examination and the questions she was asked were unfairly leading and not open-ended. In child complainant cases the court carries a duty to protect the child from such manner of examination or cross-examination as it may easily persuade a child to respond in a certain way, affecting the clarity of her or his responses. As a result more restraint is to be exercised; see Hiemstra's Criminal Procedure 5th edition on p567.
- [17] In casu the complainant testified that Appellant took her from her seat and put her on top of him. The interpreter translated that to say "he put her on top of his seat." Appellant's counsel summed that up and put it to her that she had said "not on top of him." The complainant had however clearly explained that there were two seats, Appellant moved the staff that was next to him to the passenger seat, and put her on the driver's seat. P corroborated her when she said she opened the door of the car and found the complainant on the driver's seat. The misperception on the clarity of her answers was due to the manner in which she was examined which should not be meant to confuse the child but to ensure that the child understands what it means to speak the truth (See *S v Raghubar* 2013 (1) SACR 398 (SCA)).
- [18] The Appellant's contention that P could not have been able to see what was happening in the car because visibility was, according to the complainant, not so clear after Appellant switched off the light in the car, has no merit. P opened the driver's door and was therefore able to see that the pair's pants and underpants were lowered with Appellant's private parts exposed.

- [19] In respect of Appellant's allegation that it might be possible that the complainant has been exposed to obscene materials on television, internet and print media at a tender age, such is not based on fact but is a hypothesis therefore inadmissible. The court cannot determine the guilt or innocence of the accused from speculative suppositions.
- [20] In *S v Snyman* 1968 (2) SA 582 (A) at 586-7) it was held that 'a witness will not be regarded as a single witness where another witness gives evidence which, although not directly corroborative or incriminating, inferentially establishes one of the facts at issue.' Unless two or more witnesses are called by the state, but only one witness gives evidence that tends to incriminate the accused, so that the conviction rests solely on his testimony, then such witness should be regarded as a single witness and the cautionary rule be applied (*5 v Mokoena* 1956 (3) SA 81 (A) at 85F - G)). I am satisfied that the complainant was not a single witness.
- [21] The Appellant had also alleged that P was evasive. On the contrary her evidence significantly corroborated the complainant's version not only in material respects, but on the facts that directly prove the commission of the crime. The court a quo made a correct conclusion in holding that the Appellant had penetrated the complainant with his fingers and exposed his private parts to the child. The absence of a J88 report not being fatal to the finding.
- [22] The Appellant's version on the other hand was, having regard to all the evidence, inconsistent and not reasonably possibly true. His version initially was that he did not know the complainant very well, she was just one of the children he looked after. He however asked M to call specifically the complainant, to come and say goodbye. This is inconsistent with the conduct of someone who did not know the complainant very well. Under cross-examination he changed his version and said he asked M to tell "the children" that he was going but only the complainant came out. H's testimony was that the complainant was the only child there that day. He therefore struggled to answer when he was asked the number of children he looked after at M's place that day. He said he did not go into M's yard. When quizzed on H's testimony he turned around and said he looked after ten children that night but at his friend's place.
- [23] He also in his evidence in chief stated that the complainant was in his car for only 2 minutes. When he was quizzed on why complainant had to be physically inside his car to say goodbye to him, he for the first time told the court the story of the dog running out of the car, that evidence was not put to any of the state witnesses. Nevertheless none of Appellant's versions made sense. I am satisfied that the trial court correctly found that the established facts together with the proven circumstantial evidence proved Appellant's guilt on the two counts beyond reasonable doubt.

AD SENTENCE

- [24] The Appellant's ground of appeal against his effective sentence of 12 years direct imprisonment is that the court a quo erred when it disregarded altogether the recommendations of the probation officer that a suspended sentence in terms of s 297 of the Criminal Procedure Act 51 of 1977 (CPA) be imposed. The officer made the recommendations despite being aware that the provisions of s 51 read with Part II of Schedule 2 of the Act prescribes the minimum sentence to be imposed. The officer submitted that his recommendations were motivated by the fact that the Appellant was a first offender, 60 years old on the date of sentencing, with 3 adult children and disabled. He reckoned he will not be able to function properly at correctional facilities that are not disability friendly.
- [25] The officer had not investigated how a person with his disability might be treated in prison. He had not had an interview with prison officials to see or find out how prisoners with disabilities are accommodated. He just was of the view that Appellant will not cope.
- [26] The officer was also of the opinion that Appellant's upbringing could have played a role in influencing the crime that he has committed. He had an abusive alcoholic father and had to be moved from one foster care to another. He was divorced and currently staying with a partner and her children, two of whom are still minors. He suffers from high blood pressure and would be a pensioner soon. He has limited resources on his disposal and had spent a year in custody.
- [27] The court was therefore implored to take into account Appellant's clean record, and that the complainant had sustained neither serious injuries nor permanent damage since no violence or threat was used. Even though the kind of crime committed was shown to be prevalent, he had not shown any propensity to commit any crime. He was therefore not considered to be a danger to society.
- [28] It remains an established principle of our criminal law that sentencing lies pre-eminently within the trial court's discretion which discretion is to be exercised judiciously, in line with valid and established principles governing sentencing (see *S v PB 2013* (20 SACR 533 (SCA) at [19] A. The trial court is therefore in its assessment of punishment, afforded a wide discretion except in a case where a minimum sentence is set by statute as in *casu*, the provisions of s 51 read with Schedule 2 of the Act are applicable.
- [29] On the other hand, even though a court has to be conscious that the legislature has prescribed a sentence that should ordinarily be imposed for the crime specified, it is for the sentencing court to determine whether there are traditionally mitigating factors such as age or a clean record which lessens an accused's moral blameworthiness justifying a finding that substantial and compelling

circumstances are present; *S v Malgas 2001*

- (1) SACR 469 (SCA).

[30] Life imprisonment is the prescribed minimum sentence that is already ordained for the offence committed by the Appellant on Count 1. The suspension of the operation of any sentence imposed in terms of s 51 of the Act is prohibited. Under s 51 (5) (a) of the Act, it is specifically determined that the operation of a sentence imposed shall not be suspended as contemplated in s 297 (4) of the CPA. It is consequently, a material misdirection “to suspend” any part of a sentence pursuant to the minimum sentencing regime (*S v Mabena* 2012 (2) SACR 287 (GNP) at [21]. The recommendations of the probation officer of a suspended sentence in terms of s 297 (4) of the CPA or correctional

supervision because of his physical disability although made with good intentions are not justifiable.

[31] Only a sentence imposed in terms of s 276 of the CPA may be postponed or suspended. There is however a contention that a sentence imposed after a finding that substantial and compelling circumstances exist is considered not a sentence “imposed in terms of s 51 of the Act,” rather to be a sentence imposed in terms of the court's ordinary sentencing jurisdiction: See Terblanche's *Guide to Sentencing* 2nd ed, (2007) at 72.

[32] Notwithstanding, the court a quo took into account all the personal circumstances aforementioned, the circumstances of the victim, the seriousness of the crime and its prevalence in our communities. The court considered it aggravating that the crime was committed against a 5 year old complainant, who was vulnerable, in the sanctity of a home and the company of adults. Appellant took advantage of her innocence and the respect that the child had for him. He betrayed the trust of the women in the house and treated the child and the women with such disdain by using them to gain access to the child. The crime he committed and the circumstances under which the crime was committed deserve a harsher punishment as it was recognised that in such circumstances, deterrence and retribution will come to the fore (See *S v Vilakazi* 2009

(1) SACR 552 (SCA).

[33] The court a quo recognised the existence of the aggravating circumstances, including the vulnerability of the child due to her age, the respect she had for the Appellant and the surrounding circumstances. Despite these findings the court still found it to be of a sufficient substantial and compelling circumstance that the Appellant was of an advanced age of 60 with a clean record, therefore justifying a lesser sentence to be imposed.

[34] In *S v M* 2007 (2) SACR the complainant was of a very young age and raped by a 64 year old Appellant, a person she looked up to, loved and respected. She was vulnerable due to the relationship Appellant had with her mother. Appellant had raped the 14 year old complainant twice and was sentenced to life imprisonment. It was conceded that the court could have imposed an appropriate but harsh sentence however not so shockingly inappropriate as a life imprisonment. It was argued that in considering whether in the circumstances the rape should attract the heaviest sentence permitted by our law, life imprisonment, though given the circumstances, the accused's clean record and advanced

age of 61 at the time of the rape surely should lessen his moral blameworthiness mitigating enough to compel a lesser sentence. Although the facts are not similar with the instant case I am persuaded by the rationale of the trial court on the sentence that was imposed.

[35] The circumstances do not justify a consideration of a suspension of any part of the sentence on the basis of his disability. The submission by the probation officer was not sufficient for consideration of such a sentence. He had neither researched the law properly nor conducted an investigation on the situation. He therefore could not present any demonstrable evidence, medical or otherwise for the alleged unsuitability of an imprisonment sentence upon the Appellant. His opinion on that aspect was therefore

inadmissible.

[36] I am also not persuaded that correctional supervision as a sentence would be a proper sanction. In *S v Lewis* 1997

(1) SACR 235 (T) it was held that 'where the legislator has prescribed a sentence of imprisonment without an option of a fine for a particular offence, correctional supervision was not a competent sentence in the full sense of the word as intended by the legislator. It would have been disproportionate to the gravity of the offence any way. The Appellant has indicated his intimate proximity to children

as well, as a result deserves to be removed from society, albeit not for life. I therefore find the lesser sentence of 12 years

imprisonment imposed appropriate.

[36] In the circumstances I therefore make the following order:

1. The appeal against conviction and sentence is dismissed.

N V KHUMALO

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

I concur

T S MADIMA AJ

ACTING JUDGE OF THE HIGH

COURT GAUTENG DIVISION,

PRETORIA

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