

SOUTH AFRICA / JUDGMENT

Cele v S (AR383/18) [2020]

ZAKZPHC 14 (14 May 2020)

[2020] ZAKZPHC 14**COURT**

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Bezuidenhout, Hiralall

CASE / FILE NUMBER

AR383/18

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**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG
CASE
NO: AR 383/18**

In the matter between:

ARTHUR "NGQO"
MKHONZENI CELE
APPELLANT
and
THE
STATE
RESPONDENT

Coram:

Bezuidenhout AJ with Hiralall AJ concurring

Heard:

14 February 2020

Delivered:

14 May 2020
ORDER
On appeal from the

**Verulam Regional Court
(sitting as court of first
instance):**

The
appellant's appeal against both count 1 and count 2, on
conviction and sentence in both counts, is dismissed.

JUDGMENT

Bezuidenhout AJ (with Hiralall AJ concurring)

- [1] The appellant was convicted on 19 July 2017 of one count of housebreaking with the intent to rape (count 1) and one count of rape (count 2).
- [2] In respect of count 1 the appellant was sentenced to five years imprisonment. In respect of count 2, the so-called minimum sentence legislation was applicable, but the appellant was only sentenced to 20 years imprisonment instead of life imprisonment. The sentence in respect of count 1 was ordered to run concurrently with the sentence imposed on count 2.
- [3] The appellant appeals against his convictions and sentences after being given leave to do so by the magistrate.
- [4] The facts were briefly that the complainant, Mrs. Tholakele Phumelele Ndlovu, a 66-year-old pensioner, was at her home on the evening of the incident. She lived in a so-called RDP house, which had one door as well as a security gate. Although the door couldn't lock she had a padlock to secure the gate. The complainant's great grandson, Siyabonga, was also living with her.
- [5] At some stage that evening, the complainant went outside to open a tap. She returned and closed the door and locked the padlock. Siyabonga was busy watching television and the complainant was listening to the radio.
- [6] The complainant heard a noise outside and opened the door to investigate. She noticed that the padlock on the gate was unlocked and locked it again. She did not go outside.
- [7] The complainant put Siyabonga to bed and he fell asleep. The complainant continued to listen to the radio.
- [8] Whilst still listening to the radio, the complainant turned and saw a person, wearing a black plastic bag over his head, at the back of the room near the door. She screamed and the person grabbed a knife out of the kitchen cupboard and approached her. A struggle ensued during which the complainant managed to tear the plastic bag. She immediately recognized her assailant as "Ngqo", pointed out in court as the accused - now the appellant. She had known him for a long time as he was friends with her late granddaughter, Siyabonga's mother.
- [9] The appellant assaulted the complainant, inter alia, by kicking her in the ribs and at one stage he had his hands around her neck. The complainant fought with the appellant and amongst other things bit his hand when he was trying to block her mouth, apparently in an attempt to silence her. The appellant eventually overpowered the complainant and managed to rape her where after he made his escape.

- [10] The complainant immediately raised the alarm - she went to her neighbour, Monica Ngubane, and reported that she had been raped by "Ngqo". She also made a similar report to two young boys who were sitting outside another neighbouring house, listening to music.
- [11] The police arrived a while later and was given the appellant's name . Importantly, the complainant also told the police to look out for an injury on the appellant's finger.
- [12] The appellant was subsequently arrested at his parental home by Warrant Officer HT Naidoo, who testified that he had observed that the appellant had 'Several bite marks on his fingers that were fresh and there were still blood on the fingers'.
- [13] According to the doctor who examined the complainant a few hours after the incident, she had sustained injuries below her breasts on her ribcage as well as on her neck.
- [14] The appellant's defence was that of an alibi. He admitted having a cut on his one finger and claimed it was sustained when he apparently tried to stop a bottle from falling over - which broke and then cut his finger.
- [15] In short, the appellant claimed that he had been away from the area during the day and had returned home around 21h15 in the evening. His mother was at home and was also called to testify. She stated that the appellant returned home at around 20h00 that evening but that he left again and returned at around 21h00.
- [16] Although it is unclear exactly when the complainant was attacked and raped by the appellant, it appears to have been between 22h00 and 24h00 that evening.
- [17] A buccal swab was taken of the appellant, but no evidence was presented or placed before the court regarding the DNA results.
- [18] In convicting the appellant on both counts, the magistrate relied on the evidence of the complainant - clearly a single witness in respect of how the offences were committed. The magistrate also had to decide whether the complainant's identification of the appellant as her attacker was satisfactory.
- [19] In argument before us, counsel for the appellant, Mr L Barnard, concentrated most of his efforts on the conviction in respect of count 1, the housebreaking. He submitted that there was no evidence that the appellant had displaced an obstacle and that it is possible that the 'intruder' snuck into the house through the open door whilst the complainant was outside.
- [20] Snyman, in *Criminal Law* (6th ed, 2014), said the following at page 547 when dealing with the element of 'breaking' (footnotes omitted):

'The "breaking" consists of the removal or displacement of any obstacle which bars entry to the structure and which forms part of the structure itself. Thus, to push open a closed (though not locked) door or window or even to push open a partially closed door or window will amount to breaking, but there is no breaking if one merely walks through an open door... '

[21] As far as count 1 is concerned, the magistrate only dealt very briefly with it by stating that:

'common sense would dictate that a 65 year old woman, living alone in the township of Waterloo, is more likely to have closed her door, if not actually locked it, before retiring for the night'.

[22] The magistrate, when analysing the complainant's evidence in this regard made mention only of her evidence that after she had heard footsteps outside, she checked her door again and locked it. Unfortunately, the complainant's evidence was only led in a very limited way regarding the elements of the crime of housebreaking, and in particular the element of 'breaking'. She testified about locking the padlock of the security gate as the actual front door could not lock. At some stage she heard a noise outside and opened the door - she did not go outside. When asked whether any of her doors or windows were damaged her reply was 'no'.

[23] The appellant would only have had one chance to sneak into the complainant's house and that was when she initially went outside to turn the tap on and off again. At that time Siyabonga was still awake and watching television inside the house. From the photos in the album handed in during the trial, it is clear that the complainant stayed in a very small house consisting of only one room. There would clearly be no place to hide for an adult male without being detected.

[24] When the complainant later investigated the noise she heard outside, she opened her door but did not go outside. Even at that stage Siyabonga was still awake, watching television. She noticed that the security gate was unlocked for some reason and locked it again.

[25] Siyabonga was eventually put to bed and the complainant continued to listen to the radio, where after she noticed the person, her attacker, which later turned out to be the appellant.

[26] Mr D Naidoo, appearing on behalf of the State, submitted that although there was no forceful displacement, there was indeed displacement of some sort. He submitted that it is possible that the appellant gained entry by unlocking the gate whilst the complainant was listening to the radio, and accordingly was distracted from what was happening at her front door. The complainant also testified that there was a lot of noise outside, as some of her neighbours had been listening to loud music.

[27] Mr Naidoo, in his heads of argument, also referred to the complainant's evidence that after the appellant had finished raping her, he left and she heard him opening and closing the door and then closing the gate. It was submitted that this was a clear indication that the gate had been open during the attack.

[28] It was also submitted that the inference was inescapable that it was the appellant who had earlier unlocked the gate's padlock and the fact that he did not have to unlock the padlock in order to get out, indicates that he must have unlocked it to gain entry initially.

- [29] It is common cause that the appellant knew the complainant well. This fact was set out in the appellant's warning statement as well as during his plea explanation in court. They lived in the same area, quite close to each other and appellant had been friends with the complainant's granddaughter. Appellant also claimed to have visited complainant's house in order to buy 'dagga'.
- [30] I am not persuaded by Mr Barnard's argument that the appellant could have snuck into the complainant's home. It is highly improbable that he would have remained undetected in a small room until he showed himself after Siyabonga had gone to bed.
- [31] I am of the view that there is sufficient evidence to justify the conviction on the count of housebreaking.
- [32] As for the conviction on count 2, the evidence of the complainant was pretty clear. Her identification of the appellant as her attacker was found to be reliable by the magistrate. As mentioned hereinabove, it is common cause that the complainant and the appellant knew each other well.
- [33] It is so that evidence of an identification must be approached with caution. In *S v Mthetwa* 1972 (3) SA 766 (A) the following was said at page 768A-C:

'Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities ... '

- [34] Mr Naidoo referred us to the case of *R v Dladla* 1962 (1) SA 307 (A) in his heads of argument. The following was said at page 310C-E of the decision, where the appellate court quoted the trial court with approval:

'One of the factors which in our view is of the greatest importance in a case of identification, is the witness' previous knowledge of the person sought to be identified. If the witness knows the person well or has seen him frequently before, the probability that his identification will be accurate is substantially increased ... What is important is to test the degree of previous knowledge and the opportunity for a correct identification, having regard to the circumstances in which it was made.'

[35] The complainant had ample opportunity to observe the appellant during her ordeal of almost 30 minutes. After she tore the plastic bag covering his face, she immediately recognised him. She had even seen him earlier during the day when he passed her house and according to her he was still wearing the same clothes. There was sufficient light as an electric

light was still on during the whole incident.

[36] There is of course the further evidence of the complainant that she had bitten the appellant's finger and upon his arrest he was found to have an injury to one of his fingers. It is very unsatisfactory that the appellant was not taken to a doctor to confirm and describe properly this injury observed by the arresting officer, Warrant Officer Naidoo. Although the appellant was seen by a doctor the day after his arrest, in order to obtain a buccal swab, he was not examined for any injuries.

[37] During the trial a lot was made of the fact that the complainant's description of how and where she bit the appellant, was not contained in either of her two written police statements. She was cross-examined at length, and at times very unfairly, about her police statements. These police statements were never properly proved before court as it was her evidence that the statements were not read back to her. The persons who took down her statements were not called to testify.

[38] Taking everything into account I am of the view that the evidence of the complainant regarding the identification of the appellant is indeed reliable and was correctly accepted by the magistrate.

[39] The complainant is of course a single witness and this also requires caution to be applied. In *S v Sauls & others* 1981

(3) SA 172 (A) it was inter alia stated that a trial court should weigh the evidence of the single witness and should consider its merits and demerits and, having done so, should decide whether it is satisfied that the truth has been told, despite shortcomings, defects or contradictions in the evidence.

[40] The magistrate found the complainant to be an honest and reliable witness. The magistrate had ample opportunity to observe the complainant's demeanour in court and I cannot find any misdirection's in the magistrate's findings in this regard.

[41] On the other hand, the magistrate found the appellant to be an untruthful witness. There were a number of inherent improbabilities in his evidence. For example, his explanation as to how he sustained the injury to his finger made little sense. There is furthermore a major contradiction between his evidence and that of his mother regarding his comings and goings on the evening in question.

- [42] It is so that the State failed to present any DNA evidence and I would have expected the prosecutor to at least provide an explanation to the court as to why such evidence was not presented. I agree with Mr Naidoo that it can be inferred that a forensic link was not established. The prosecutor however should have placed this on record.
- [43] Unfortunately for the appellant the evidence against him (despite the absence of forensic evidence) is overwhelming and I am of the view that he was correctly convicted of the charge of rape.
- [44] As far as sentence is concerned, the appellant was sentenced to an effective period of imprisonment of 20 years. In terms of the minimum sentence legislation, appellant was facing a sentence of life imprisonment in respect of count 2. The magistrate imposed a lesser sentence of 20 years after finding that there was still room for rehabilitation and reformation in the appellant's case. In my view this particular case would have fully justified an imposition of life imprisonment
- it was a particularly brutal and violent rape of an elderly lady by someone young enough to be her grandson. The complainant sustained injuries around her neck and on her chest- a clear indication that the appellant intended to inflict grievous bodily harm.
- [45] Mr Barnard referred us to the decision of *S v Nkomo* 2007 (2) SACR 198 (SCA) wherein, under vaguely similar circumstances, the appellant in that matter received an effective sentence of 16 years' imprisonment.
- [46] In my view it cannot be said that the sentence imposed by the magistrate in respect of the count of rape constitutes a misdirection which would warrant interference. It certainly does not induce a sense of shock. The prevalence of rape and violence towards women in our country is well known and documented. In *S v Swartz & another* 1999 (2) SACR 380 (C) at 385d-e it was remarked that rape is a cancer in our society. I could not agree more. I do not deem it necessary to deal with the sentence imposed in respect of count 1 as it was ordered to run concurrently with the sentence imposed in respect of count 2 and in any event does not warrant any intervention.
- [47] Accordingly the appeal against both convictions and sentences should fail.
- [48] In the result the following order is made:

The appellant's appeal against both count 1 and count 2, on conviction and sentence in both counts, is dismissed.

BEZUIDENHOUT AJ

APPEARANCES:

APPELLANT'S COUNSEL: MR L BARNARD

RESPONDENT'S COUNSEL: MR D NAIDOO

INSTRUCTED BY:

THE DIRECTOR OF PUBLIC PROSECUTIONS

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