

SOUTH AFRICA / JUDGMENT

Classen v S (A82/2020) [2024]

ZAFSHC 182 (7 June 2024)

[2024] ZAFSHC 182**COURT**

Free State High Court, Bloemfontein

BEFORE

Opperman J, Nemavhidi AJ

CASE / FILE NUMBER

A82/2020

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Source record**THE HIGH COURT OF SOUTH
AFRICA****FREE STATE PROVINCIAL
DIVISION****Reportable: YES/NO****Case No: A82/2020****In the matter between:**FERREL
CLASSEN
Appellant
And
THE
STATE
Respondent**Coram:**Opperman
J et
Nemavhidi
AJ**Heard:**

15 April 2024

Delivered:	7 June 2024. This judgment was handed down in court and electronically by circulation to the parties' legal representatives via email and release to SAFLII on 7 June 2024. The date and time of hand-down is deemed to be 15h00 on 7 June 2024
Judgment:	Opperman J
Summary:	Appeal - conviction & sentence- rape 15-year-old child - life imprisonment

JUDGMENT

Opperman J

[1] The appeal lies against both the conviction and sentence by the Regional Court on the 28th and 30th of August 2018, respectively. The conviction is on a charge of rape of a 15-year- old girl. The sentence is one of life imprisonment

in terms of section 51(1) of the Criminal Law Amendment Act 105 of 1997. The appellant was represented by counsel a quo. The delay in bringing the appeal was caused by the fact that the record had to be re-constructed by the presiding officer due to issues with the recording of the proceedings.

[2] The conviction circles around one central issue that fell for decision by the court a quo; it was whether the appellant raped the complainant.

[3] The grounds for appeal on conviction, which are opposed by the State, are that: The court a quo erred in:

1. Finding that the State proved their case beyond reasonable doubt;
2. finding that the complainant was a credible witness in the light of the contradictions in her testimony;
3. in not applying the requisite caution when dealing with the complainant's uncorroborated evidence;

4. in accepting the version of the State and rejecting the version of the appellant.

[4] Nugent JA in *S v Mbuli* 2003 (1) SACR 97 (SCA), stated that:

[57] It is trite that the State bears the onus of establishing the guilt of the appellant beyond reasonable doubt, and the converse is that he is entitled to be acquitted if there is a reasonable possibility that he might be innocent (*R v Difford* 1937 AD 370 at 373, 383). In *S v Van der Meyden* 1999 (2) SA 79 (W), which was adopted and affirmed by this Court in *S v Van Aswegen* 200 I (2) SACR 97 (SCA), I had occasion to reiterate that in whichever form the test is applied it must be satisfied upon a consideration of all the evidence. Just as a court does not look at the evidence implicating the accused in isolation to determine whether there is proof beyond reasonable doubt, so too does it not look at the exculpatory evidence in isolation to determine whether it is reasonably possible that it might be true. In similar vein the following was said in *Moshephi and Others v R* LAC (1980 - 1984) 57 at 59F - H, which was cited with approval in *S v Hadebe and Others* 1998 (I) SACR 422 (SCA) at 426f - h:

'The question for determination is whether, in the light of all the evidence adduced at the trial, the guilt of the appellants was established beyond reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees.' (Accentuation added)

[5] Although an accused has a right to appeal, a court of appeal is not at liberty to depart from the trial court's findings of fact and credibility, unless they are vitiated by irregularity, or unless an examination of the record of evidence reveals that those findings are patently wrong. The trial court's findings of fact and credibility are presumed to be correct, because the trial court, and not the court of appeal, has had the advantage of seeing and hearing the witnesses, and is in the best position to determine where the truth lies.

[6] A balanced approach on appeal lies in the words of Zulman JA in the Supreme Court of Appeal in *Sanlam Bpk. v Biddulph* (105/2003) [2004] ZASCA 11; [2004] 2 All SA 23 (SCA); 2004 (5) SA 586 (SCA) (23 March 2004):

[5] Whilst a court of appeal is generally reluctant to disturb findings which depend on credibility it is trite that it will do so where such findings are plainly wrong (*R v Dhlumayo and Another* 1948 (2) SA 677 (A) 706). This is especially so where the reasons given for the finding are seriously flawed. Over-emphasis of the advantages which a trial court enjoys is to be avoided lest an appellant's right of appeal 'becomes illusory' (*Protea Assurance Co. Ltd. v*

Casey 1970 (2) SA 643 (7) 648 D-E and Munster Estates (Pty) Ltd v Killarney Hills (Pty) Ltd 1979 (1) SA 621 (A) 623H - 624A). It is equally true that findings of credibility cannot be judged in isolation but require to be considered in the light of proven facts and the probabilities of the matter under consideration. (Accentuation added)

[7] The crux of the case is the following:

1. The complainant had resided with her aunt and the appellant for about six years at the time the incident occurred that caused the case. The appellant is the aunt's boyfriend. The appellant and the aunt had three minor children that also resided with them.
2. It is undisputed that on the 3rd of September 2015 the appellant took the 15-year- old complainant into a bedroom in their house and closed the door. He reprimanded her after her aunt complained about the complainant's conduct to him.
3. The consternation in the bedroom caused the other three minor children in the house to run to the neighbours and one of them reported that the complainant is being raped. The children were not called to testify.

The court ruled the evidence of hearsay admissible because the defence cross examined on it and elicited the evidence on it.

4. The police arrived but neither the complainant nor the neighbour that allegedly saw the appellant lying on top of the complainant on the bed in the room when he looked through an opening above the door, reported the rape to the police. The wife of the neighbour that also went to the scene of the alleged crime similarly did not report the incident to the police that evening.
5. The complainant only reported the incident to a teacher the next day at school. The teacher was not called to give evidence. The police were involved and the matter came to court two years later in 2017.
6. The vaginal samples that were taken during the examination of the complainant and the compilation of the medico-legal examination report (Exhibit A) yielded no DNA after analysis (Exhibit B).
7. It was alleged by the appellant and the aunt that the complainant had regular intercourse with older men. The court refused evidence on this aspect.
8. The complainant died in 2018 of natural causes and the State was allowed to open their case on the merits to hand in the death certificate.
9. The court emphasised section 59 of the Criminal Law (Sexual Offences) Amendment Act 32 of 2007 in that a court may not draw a negative inference based only on the delayed report of a rape

[8] It is the word of the complainant against that of the appellant. The court a quo warned itself of the issues that involve the evidence of a single witness and a minor. She testified that the appellant raped her. The court noted that she made a good impression and that her evidence was corroborated by the neighbours

and the conduct of the children that reported the incident to them. He described her as a "fairly good witness"[1] and remarked that: "She has related a certain story to the court about what has happened inside the house and directly and indirectly almost every aspect were confirmed by evidence before this court." [2] The court a quo did not place too much reliance on the evidence of the complainant in itself; the court ruled that there was corroboration in the objective evidence of other witnesses and the real undisputed and proven events of the case.

[9] Important at this stage is that the complainant and the other children involved were beyond any doubt very scared of the appellant. The aunt that testified for the appellant, was not in the house during the incident. She admitted that she does not want to suffer the loss of the appellant as the sole breadwinner and for their children to grow up without a father. The complainant testified that she was threatened with a sheep shear by the appellant during the rape and that he would kill her if she reported the incident. One of the children that went to the neighbours to report the incident refused to return borne and spent the night with the neighbours because she was scared of the appellant. It stands undisputed that the children were crying and distraught when they arrived at the neighbours.

[10] The explanation of the neighbours for not reporting the incident is plausible. They wanted for the matter to be investigated properly and as one of them said; they would report the matter to another police person the next morning. The complainant was clearly too afraid to report immediately.

[11] The contradictions between the witnesses in the case for the State were carefully analysed by the court. The manner in which the court adjudicated the evidence cannot be faulted. The perfect case does not exist. The extensive expertise of the presiding officer and the careful manner in which he applied the law on the adjudication of the evidence cannot be questioned. It is unfortunate that he made the emotional comment on the passing of the complainant but magistrates are just human. Although it might cause a perception of bias due to maudlin sympathy to the complainant and the fact that her life was cut short at such a young age, none of this can be picked up in the evaluation of the evidence. This is what he had to say:

The evidence from the two neighbours Graham Collin Booysen and Candice Charlie is not without mistakes, but they were purely reactive. They have acted after they were alerted and the words that they were alerted with was the words of Valerie and for some or other reason Mr Sheminu thought it important to enter the arena to make inadmissible evidence admissible, but the answer was quite clear, they started to react after Valerie reported to them that her father is raping the complainant and what was testified by both the adults is in total support of the complainant. Interesting enough, on the version of the defence witnesses after the time,

immediately afterwards, there was already mention of rape. Why was that? To a certain extent this is in full support of what has happened to the complainant.

The moment when I am making my second evaluation of the complainant, I am satisfied that her version was the truth. On purpose I have asked Mr Carpede also about the version from the children and I think the movement, the hysteria, the reluctance to return to the house, everything is painting a certain picture of what has happened in the house that specific evening although they did not testify. Their actions are not in dispute and before court. It is possible to take care of that as well.

Collin Booysen made a few blunders and that is quite common. I think if you ask most people to relay exactly what has happened last week on a specific day, people will struggle. The moment when you are asked to testify about a thing that has happened almost two years ago, is difficult. It is also important to take note of a certain personality type. I think to a certain extent Mr Booysen is not a type of person who would like to confront. He is more a person that will try to avoid direct confrontation. Luckily it is not, there is not a need to rely purely on his evidence.

There is some small contradictions with regard to the evidence tendered by his wife Candice Charlie and I was thoroughly impressed with her evidence. She never tried to implicate the accused. She did not shy away from differing from her husband Collin Booysen. She testified to this court to a certain extent as to what she can remember of the entire process. I was impressed with her. I termed her an iron woman at the end and also made a note for myself that if there is difference between her version and the version of Collin, I would rather accept her version and also that I must remember that it has taken place quite a long time ago.[3]

[12] The court a quo correctly refused to accept the evidence of the appellant and the aunt. The accused's version was one of bare denial. He made himself out to be the good substitute father; he did not admit that he assaulted the complainant until his cross examination. He did his utmost to befoul the character of the complainant and make her the villain in the case. But as was said in the judgment a quo; even if the complainant was sexually active it did not take away from what happened between her and the appellant. "Even a sex worker can be raped." The situation that prevailed in the house on the day of the incident indicates the opposite of what he wants the court to believe.

[13] The aunt was not present when the incident happened and she had much to lose if the appellant was incarcerated. She did not have a good relationship with the complainant. The appellant was not a good witness. His evidence stands in stark contrast to the spontaneous and unique evidence of the neighbour that he saw the appellant lying on top of the complainant on the bed. Further, the evidence of the wife of the neighbour that she heard the appellant say: "I have heard Ferrel telling the complainant to open up. I then turned and left. Mamie said no Ferrel." [4]

[14] The appeal of the appellant against his conviction cannot stand.

- [15] Turning to sentence; section 51(1) of the General Law Amendment Act 105 of 1997 is applicable.
- [16] The factors to be regarded and as submitted by the appellant during the adjudication of the sentence did not impress as substantial and compelling. It was mundane in comparison to the circumstances of the case. He raped a minor that was in his care. The home where she was raped was supposed to be her safe haven.
- [17] From the evidence adduced in the court below and the factors pointed out in the appeal, there is nothing that indicates that the trial court did not apply his mind judiciously and with due care. He did not misdirect himself. The sentence is in accordance with the prevailing legislation and law. There is not any issue that dictates for the interference of this court. The sentence is apt and appropriate in the circumstances. In *S v Ncheche* [2005] ZAGPHC 21; 2005
- (2) SACR 386 (W) Goldstein, J (Coram: Goldstein J, Snyders J and Willis J), concluded that:
- [1] In *S v Bopape* (unreported WLD case No A548/0I), I delivered a minority judgment in which I expressed the view that this Court is bound, when imposing sentence to following the precedents established by the Supreme Court of Appeal when that Court sets aside a sentence on appeal and itself determines an appropriate sentence. I have reconsidered that view and now believe it to have been erroneous for the reasons which follow.
- [2] In *S v Pieters* 1987 (3) SA 717 (A), Botha JA stated at 734D - F that the decisive question facing a Court of appeal on sentence was whether it was convinced that the court which had imposed the sentence being adjudicated upon had exercised its discretion to do so unreasonably. If so, the Court of appeal was entitled to interfere and, if not, not. After pointing out, at 734G - H, that the determination of a specific period of imprisonment in a particular case cannot occur in accordance with any exact, objectively valid standard or measure, the learned Judge of Appeal goes on at 734H I to say (citing *R v Alwyn* 1955 (3) SA 207 (A) at 213B- D, *S v Sibiya* 1973
- (2) SA 51(A) at 58B - 59A, and *S v Skenjana* 1985 (3) SA 51(A) at 54I-55F) that, even if the Court of appeal is of the view that it would have imposed a much lighter sentence, it would not be free to interfere if it were not convinced that the court below could not reasonably have imposed the sentence which it determined. In *Alwyn*, five Judges of Appeal subscribed to the view that they would have imposed a suspended sentence if they had been the court of first instance; nevertheless, they dismissed an appeal against an effective sentence of 18 months' imprisonment; this aspect of the case was referred to with approval in *Sibiya* at 58E-F.

[3] In Hiemstra Suid-Afrikaanse Strafproses 6 ed at 836 - 7, the learned authors, Kriegler and Kruger, say that Botha JA's dicta on sentence in Pieters have been repeatedly approved by the Appellate Division and ought to be the last word on the subject. Respectfully accepting that this is so, it seems to me to follow that, provided that a court imposing sentence exercises its discretion reasonably, it is not bound by sentences imposed by other courts, including higher Courts. (Accentuation added)

[18] ORDER

The appeal against the conviction and sentence is dismissed.

M OPPERMAN J

I concur,

M.B. NEMAVHIDI AJ

APPEARANCES

On behalf of the appellant

V.C. ABRAHAMS

Legal Aid: South Africa

Bloemfontein

On behalf of the respondent

N.M.TSHEFUTA

Office of the Director:

Public Prosecutions,

Free State

[1] Page 200 of the record at line 6.

[2] Page 195 of the record at lines 2 to 16.

[3] Pages 195 to 197 of the record.

[4] Page 12 of the reconstructed record and at page 250 at paragraph 3.3 of the record (the heads of argument by the State).

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