

SOUTH AFRICA / JUDGMENT

Coerecius v S (A36/2012) [2012] ZAWCHC 73 (16 March 2012)

[2012] ZAWCHC 73

COURT

Western Cape High Court, Cape Town

BEFORE

Allie, Mantame

CASE / FILE NUMBER

A36/2012

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IN

THE HIGH COURT OF SOUTH AFRICA (WESTERN CAPE HIGH COURT, CAPE TOWN)

Case

No: A36/2012

In

the matter between:

CLIVE

COERECIUS

.....Appellant

Versus

THE

STATE

.....Respondent

JUDGMENT

DELIVERED ON 16 MARCH 2012 Allie, J [1] The appellant was charged on 11 May 2011 in Oudtshoorn Regional court with rape and two counts of assault with intent to inflict

grievous bodily harm. He pleaded not guilty and had legal representation. [2] He was convicted on counts 1 to 3 on 15 June 2011 and sentenced on 28 June 2011 to life imprisonment on all the counts taken together for the purpose of sentence. [3] The automatic right of appeal granted to persons sentenced to life imprisonment by section 309 of the Criminal Procedure Act 51 of 1977 as amended by Section 6 of Act 38 of 2007, was repealed in error by section 99 of the Child Justice Act 75 of 2008. The legislature intends reinstating the automatic right of appeal by the introduction of Section 63(2) of the Judicial Amendment Bill, 2011 that has not yet been tabled in Parliament. The appellant was 20 years old at the time and clearly not subject to the provisions of

Section 84 of the Child Justice Act. [4] Given the serious consequences of a sentence of life imprisonment, the appellant should be afforded the right of appeal he would

otherwise have had. [5] The complainant, Magda Malgas, testified that she was 19 years old and she can write but not read. On the evening of 23 December 2010 she and her boyfriend, Paulus, the complainant in count 2 were at the scrapyard selling scrap. She saw accused 2 and the appellant approaching them from behind. Accused 2 grabbed her on her chest, held her and held a knife in front of her chest and he told Paulus to stand still and not to come nearer. [6] Appellant held Paulus with a knife in front of his chest as well. Accused 2 then pulled down her pants, punched her in the face with his fist and raped her. At that point she cried and struggled. Thereafter accused 2 threw her down so she could lie down, so that appellant could rape her. [7] Appellant proceeded to rape her and he ejaculated in her vagina. They threatened to rape Paulus too and told the complainants to leave or they would hurt them. [8] When she and Paulus arrived at the tar road, both accused 2 and appellant dragged her face down across the tar road. They went straight to the mother of Paulus and Magda told his mother that she had been raped and assaulted. His mother then called the police. She went to the doctor the following day. Her eyes were bruised, her face and arms were injured and her lower body felt painful internally. [9] Photo 4 depicts healing open wounds on her forehead, nose, above her lip and on her arms. The defence did not challenge the content of the photo or that it correctly shows Magda's injuries. [10] During cross examination it was put to the complainant that both accused admitted having sexual intercourse with her but they allege they did so with her consent and at her request. She denied this allegation. It was put to her that both accused were under the influence of tik but she could not comment on the allegation. [11] During cross examination she mentioned for the first time that appellant hit Paulus with the sharp part of the knife against his forehead when Paulus tried to prevent them from holding her. [12] Paulus Filander testified that he and Magda were returning from the scrapyard when they noticed the two accused approaching them. Appellant immediately grabbed him with a long knife in his hand. He saw accused 2 run towards Magda and he asked what they were doing. When he wanted to help Magda, appellant hit him with the long knife on his head and it bled a lot. Then appellant kicked and tramped him. He heard Magda crying and saw accused 2 was busy raping her. He pleaded that they should take the money and leave Magda but they said they would kill them both, if he did not stand still. When accused 2 was finished with Magda, he held Paulus and the appellant went to Magda and raped her. He tried again to help Magda but accused 2 hurt him on his hand and said he would kill him. [13] After they finished raping Magda, they told the complainants to leave and threw stones at them. On the way home, they encountered

the accused again in the road. They grabbed Magda again. Then, Paulus shouted so they ran away. They went to the police the same

day and to the doctor the next day. The doctor examined him but his injuries were not too bad. He also had light injuries on the side of his body. [14] He said that the accused dragged Magda when they raped her and again later at the gate. He did not see them tramp and kick her but said it could have happened when he was being attacked. [15] Both complainants knew the accused.

[16] Margaret Blom, the mother of Paulus testified. When Magda knocked on her door on the evening of 23 December 2010, she saw Magda was full of blood and she asked what happened and Magda said she was raped. She asked Magda who did it and she answered it was Clivie and another man. The injuries looked like drag marks and Magda said they dragged her. Magda and Paulus were both crying.

JUDGMENT

DELIVERED ON 16 MARCH 2012

Allie, J

- [1] The appellant was charged on 11 May 2011 in Oudtshoorn Regional court with rape and two counts of assault with intent to inflict grievous bodily harm. He pleaded not guilty and had legal representation.
- [2] He was convicted on counts 1 to 3 on 15 June 2011 and sentenced on 28 June 2011 to life imprisonment on all the counts taken together for the purpose of sentence.
- [3] The automatic right of appeal granted to persons sentenced to life imprisonment by section 309 of the Criminal Procedure Act 51 of 1977 as amended by Section 6 of Act 38 of 2007, was repealed in error by section 99 of the Child Justice Act 75 of 2008. The legislature intends reinstating the automatic right of appeal by the introduction of Section 63(2) of the Judicial Amendment Bill, 2011 that has not yet been tabled in Parliament. The appellant was 20 years old at the time and clearly not subject to the provisions of Section 84 of the Child Justice Act.
- [5] The complainant, Magda Malgas, testified that she was 19 years old and she can write but not read. On the evening of 23 December 2010 she and her boyfriend, Paulus, the complainant in count 2 were at the scrapyard selling scrap. She saw accused 2 and the appellant approaching them from behind. Accused 2 grabbed her on her chest, held her and held a knife in front of her chest and he told Paulus to stand still and not to come nearer.
- [6] Appellant held Paulus with a knife in front of his chest as well. Accused 2 then pulled down her pants, punched her in the face with his fist and raped her. At that point she cried and struggled. Thereafter accused 2 threw her down so she could lie down, so that appellant could rape her.
- [7] Appellant proceeded to rape her and he ejaculated in her vagina. They threatened to rape Paulus too and told the complainants to leave or they would hurt them.
- [8] When she and Paulus arrived at the tar road, both accused 2 and appellant dragged her face down across the tar road. They went straight to the mother of Paulus and Magda told his mother that she had been raped and assaulted. His mother then called the police. She went to the doctor the following day. Her eyes were bruised, her face and arms were injured and her lower body felt painful internally.

- [9] Photo 4 depicts healing open wounds on her forehead, nose, above her lip and on her arms. The defence did not challenge the content of the photo or that it correctly shows Magda's injuries.
- [10] During cross examination it was put to the complainant that both accused admitted having sexual intercourse with her but they allege they did so with her consent and at her request. She denied this allegation. It was put to her that both accused were under the influence of tik but she could not comment on the allegation.
- [11] During cross examination she mentioned for the first time that appellant hit Paulus with the sharp part of the knife against his forehead when Paulus tried to prevent them from holding her.
- [12] Paulus Filander testified that he and Magda were returning from the scrapyard when they noticed the two accused approaching them. Appellant immediately grabbed him with a long knife in his hand. He saw accused 2 run towards Magda and he asked what they were doing. When he wanted to help Magda, appellant hit him with the long knife on his head and it bled a lot. Then appellant kicked and tramped him. He heard Magda crying and saw accused 2 was busy raping her. He pleaded that they should take the money and leave Magda but they said they would kill them both, if he did not stand still. When accused 2 was finished with Magda, he held Paulus and the appellant went to Magda and raped her. He tried again to help Magda but accused 2 hurt him on his hand and said he would kill him.
- [13] After they finished raping Magda, they told the complainants to leave and threw stones at them. On the way home, they encountered the accused again in the road. They grabbed Magda again. Then, Paulus shouted so they ran away. They went to the police the same day and to the doctor the next day. The doctor examined him but his injuries were not too bad. He also had light injuries on the side of his body.
- [14] He said that the accused dragged Magda when they raped her and again later at the gate. He did not see them tramp and kick her but said it could have happened when he was being attacked.
- [15] Both complainants knew the accused.
- [16] Margaret Blom, the mother of Paulus testified. When Magda knocked on her door on the evening of 23 December 2010, she saw Magda was full of blood and she asked what happened and Magda said she was raped. She asked Magda who did it and she answered it was Clivie and another man. The injuries looked like drag marks and Magda said they dragged her. Magda and Paulus were both crying.

[17] The J88 form was handed in by agreement with the defence. No further medical evidence was led. Apart from bruises on her arm, no other injuries are noted on the report. [18] The appellant testified that earlier in the day, at about 3 pm, he and accused 2 met Magda near the clinic. She asked him to take her home but she first wanted to fetch something at the waste tip. Both accused were under the influence of tik. [19] They asked her what she will give them if they take her to the tip and she said she would give them consensual intercourse. [20] During cross examination, the appellant conceded that when he was so badly under the influence of tik, he saw things that were not there and he was more drunk than a person that drinks alcohol. He said he half and half knew what he was doing. He admitted that there are stages when he did not know what he was doing. He could remember she gave consent for intercourse with them. He could recall that they had intercourse with her and that is all he could remember. They did not use condoms. He could not explain why she could not walk alone at 3pm in broad daylight. He said that although she wanted them to take her home they did not do so, yet she allowed them to have intercourse with her because she said the tip was far enough. [21] He admitted that they had intercourse with Magda where she and Paulus said it happened. He said she had no injuries and he could not explain where she sustained the injuries. He speculated that it could have happened when she went home after they left her. He could not explain how Paulus was injured. [22] Mrs Blom, Paulus' mother serves as a first report for the complainant, Magda's allegation that both accused raped and assaulted her. The report was made to Mrs Blom, immediately after Magda and Paulus arrived home. Mrs Blom's evidence provides support for the consistent nature of Magda's allegations. Paulus was also an eye witness and confirmed that Magda was raped and assaulted by both accused. Magda's evidence supports Paulus' evidence that both accused assaulted him. Their evidence supports each other in material respects. The photo showing Magda's injuries which were not challenged by the defence and the J88, medico- legal report, reflecting bruises on Magda's arm provides further support for her evidence. [23] The appellant readily conceded that he knew only half and half what happened on the evening in question because he was under the influence of tik, yet he inexplicably remembers that Magda offered to have sexual intercourse with them. The magistrate found that the accused's version contained inherent improbabilities and their version stood to be rejected. The magistrate referred to the doctrine of common purpose but made no specific finding on its application in this case. The complainants' evidence implicates both accused in the rape and assault on Magda and in the assault on Paulus. There is accordingly no need to rely on the doctrine of common purpose here. I can find no misdirection in the court a quo's evaluation of the evidence and the conclusions the magistrate reached in convicting the appellant that would lead to a different result. [24] I would accordingly uphold the conviction. [25] With regard to sentence. The appellant was fairly young at the time, namely 20 years old. He had no children and was unemployed. His highest school grade attained is standard 5. The appellant and his co-accused laughed while Paulus testified about how they assaulted and raped Magda. The magistrate correctly found that it was an indication of their lack of remorse. [26] The court a quo took account of all the relevant factors in determining an appropriate sentence. The circumstances surrounding

the commission of the offences in this case include violence, coercion and humiliation. The appellant and his co-accused had every intention of raping and assaulting Magda and they were not prepared to spare Paulus in the process. To achieve their objective, they assaulted Paulus and made him endure the trauma of watching them rape his girlfriend. There can be no doubt that both complainants endured extreme physical and emotional pain and humiliation. Magda was a young 19 year old girl at the time and according to Mrs Blom, she was seriously injured and very distraught. The complainants offered the accused money if they would leave them alone but this was not acceptable to the accused who had every intention of harming the complainants. [27] Against the nature of the offences and the impact it had on the complainants, the court weighed the youthfulness of the appellant

and the fact that he had a previous conviction for assault. [28] Count 1, the charge of rape is subject to the imposition of a prescribed minimum sentence of life imprisonment in terms of Section 51(1) read with paragraph (a)(i) of Part 1 of Schedule 2 of Act 105 of 1997 and the charge sheet refers to the provisions of the applicable legislation. The appellant had legal representation and the provisions of Act 105 of 1997 would have been explained to him. [29] I can find no basis for interfering with the magistrate's finding that no substantial and compelling circumstances exist to justify a deviation from the prescribed minimum sentence. On count 1, the sentence of life imprisonment was correctly imposed. [30] On counts 2 and 3, there is no prescribed minimum sentence. The court a quo erred in taking together for the purpose of sentence counts 1, 2 and 3 as counts 2 and 3 were not subject to the prescribed minimum sentence of life imprisonment. The assault on Magda which forms the basis of count 3 occurred after she was raped and had left the scene and is accordingly a separate offence which ought not to be taken together for the purpose of sentence with count 1. Sentences imposed on other offences ordinarily run concurrently with a sentence of life imprisonment. The magistrate did not find that mitigating factors exist for counts 2 and 3 and there is no basis to interfere with that finding when we consider the violent, deliberate and unprovoked assault on both complainants which caused serious injury, particularly to the complainant, Magda.

[17] The J88 form was handed in by agreement with the defence. No further medical evidence was led. Apart from bruises on her arm, no other injuries are noted on the report.

[18] The appellant testified that earlier in the day, at about 3 pm, he and accused 2 met Magda near the clinic. She asked him to take her home but she first wanted to fetch something at the waste tip. Both accused were under the influence of tik.

[19] They asked her what she will give them if they take her to the tip and she said she would give them consensual intercourse.

[20] During cross examination, the appellant conceded that when he was so badly under the influence of tik, he saw things that were not there and he was more drunk than a person that drinks alcohol. He said he half and half knew what he was doing. He admitted that there are stages when he did not know what he was doing. He could remember she gave consent for intercourse with them. He could recall that they had intercourse with her and that is all he

could remember. They did not use condoms. He could not explain why she could not walk alone at 3pm in broad daylight. He said that although she wanted them to take her home they did not do so, yet she allowed them to have intercourse with her because she said the tip was far enough.

- [21] He admitted that they had intercourse with Magda where she and Paulus said it happened. He said she had no injuries and he could not explain where she sustained the injuries. He speculated that it could have happened when she went home after they left her. He could not explain how Paulus was injured.
- [22] Mrs Blom, Paulus' mother serves as a first report for the complainant, Magda's allegation that both accused raped and assaulted her. The report was made to Mrs Blom, immediately after Magda and Paulus arrived home. Mrs Blom's evidence provides support for the consistent nature of Magda's allegations. Paulus was also an eye witness and confirmed that Magda was raped and assaulted by both accused. Magda's evidence supports Paulus' evidence that both accused assaulted him. Their evidence supports each other in material respects. The photo showing Magda's injuries which were not challenged by the defence and the J88, medico- legal report, reflecting bruises on Magda's arm provides further support for her evidence.
- [23] The appellant readily conceded that he knew only half and half what happened on the evening in question because he was under the influence of tik, yet he inexplicably remembers that Magda offered to have sexual intercourse with them. The magistrate found that the accused's version contained inherent improbabilities and their version stood to be rejected. The magistrate referred to the doctrine of common purpose but made no specific finding on its application in this case. The complainants' evidence implicates both accused in the rape and assault on Magda and in the assault on Paulus. There is accordingly no need to rely on the doctrine of common purpose here. I can find no misdirection in the court a quo's evaluation of the evidence and the conclusions the magistrate reached in convicting the appellant that would lead to a different result.
- [24] I would accordingly uphold the conviction.
- [25] With regard to sentence. The appellant was fairly young at the time, namely 20 years old. He had no children and was unemployed. His highest school grade attained is standard 5. The appellant and his co-accused laughed while Paulus testified about how they assaulted and raped Magda. The magistrate correctly found that it was an indication of their lack of remorse.
- [26] The court a quo took account of all the relevant factors in determining an appropriate sentence. The circumstances surrounding the commission of the offences in this case include violence, coercion and humiliation. The appellant and his co-accused had every intention of raping and assaulting Magda and they were not prepared to spare Paulus in the process. To achieve their objective, they assaulted Paulus and made him endure the trauma of watching them rape his girlfriend. There can be no doubt that both complainants

endured extreme physical and emotional pain and humiliation. Magda was a young 19 year old girl at the time and according to Mrs Blom, she was seriously injured and very distraught. The complainants offered the accused money if they would leave them alone but this was not acceptable to the accused who had every intention of harming the complainants.

[27] Against the nature of the offences and the impact it had on the complainants, the court weighed the youthfulness of the appellant

and the fact that he had a previous conviction for assault.

[28] Count 1, the charge of rape is subject to the imposition of a prescribed minimum sentence of life imprisonment in terms of Section 51(1) read with paragraph (a)(i) of Part 1 of Schedule 2 of Act 105 of 1997 and the charge sheet refers to the provisions of the applicable legislation. The appellant had legal representation and the provisions of Act 105 of 1997 would have been explained to him.

[29] I can find no basis for interfering with the magistrate's finding that no substantial and compelling circumstances exist to justify a deviation from the prescribed minimum sentence. On count 1, the sentence of life imprisonment was correctly imposed.

[30] On counts 2 and 3, there is no prescribed minimum sentence. The court a quo erred in taking together for the purpose of sentence counts 1, 2 and 3 as counts 2 and 3 were not subject to the prescribed minimum sentence of life imprisonment. The assault on Magda which forms the basis of count 3 occurred after she was raped and had left the scene and is accordingly a separate offence which ought not to be taken together for the purpose of sentence with count 1. Sentences imposed on other offences ordinarily run concurrently with a sentence of life imprisonment. The magistrate did not find that mitigating factors exist for counts 2 and 3 and there is no basis to interfere with that finding when we consider the violent, deliberate and unprovoked assault on both complainants which caused serious injury, particularly to the complainant, Magda.

[31] I am of the view that a sentence of 10 years imprisonment for count 3, should be imposed. Paulus was not as seriously injured in the assault as Magda and I would impose a sentence of 7 years direct imprisonment on count 2. Those sentences will automatically run concurrently with the sentence imposed on count 1. IT IS ORDERED THAT: 1. The appeal against conviction is dismissed. 2. The sentence imposed on count 1 is confirmed. 3. The sentence imposed on counts 2 and 3 are set aside and a sentence of 7 years direct imprisonment is imposed on count 2 and 10 years direct imprisonment is imposed on count 3 which will run concurrently with the sentence imposed on count 1. ALLIE, J I agree
MANTAME, AJ

[31] I am of the view that a sentence of 10 years imprisonment for count 3, should be imposed. Paulus was not as seriously injured in the assault as Magda and I would impose a sentence of 7 years direct imprisonment on count 2. Those sentences will automatically run concurrently with the sentence imposed on count 1.

IT IS ORDERED THAT:

1. The appeal against conviction is dismissed.
2. The sentence imposed on count 1 is confirmed.
3. The sentence imposed on counts 2 and 3 are set aside and a sentence of 7 years direct imprisonment is imposed on count 2 and 10 years direct imprisonment is imposed on count 3 which will run concurrently with the sentence imposed on count 1.

ALLIE, J

I agree

MANTAME, AJ

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