

SOUTH AFRICA / JUDGMENT

Duda v S (A 179/2022) [2023] ZAFSHC 157 (26 April 2023)

[2023] ZAFSHC 157

COURT

Free State High Court, Bloemfontein

BEFORE

Mhlambi, Van Rhyn

CASE / FILE NUMBER

A 179/2022

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IN

THE HIGH COURT OF SOUTH AFRICA

FREE

STATE DIVISION, BLOEMFONTEIN

Appeal

no. A 179/2022

In

the appeal of:

PAPI
PETRUS DUDA Appellant
and
THE
STATE Respondent

CORAM:

MHLAMBI, J et VAN RHYN,
J
HEARD

ON:

19 APRIL 2023

DELIVERED:

26 APRIL 2023

JUDGMENT

BY:

VAN RHYN, J

- [1] The appellant was convicted in the Regional Court Bloemfontein on a count of contravening section 3 of Act 32 of 2007, read with the provisions of section 51(1) of Act 105 of 1997. The provisions of section 51 (1) of Act 105 of 1997 were duly explained to the appellant at the commencement of the trial. On 19 April 2022 the appellant was sentenced to life imprisonment.
- [2] Appellant has an automatic right of appeal and filed a Notice of Appeal against his conviction and sentence. Appellant was duly represented during the trial which commenced on 5 September 2018. He pleaded not guilty to the charge of rape levelled against him and did not tender a plea explanation.
- [3] The record reflects that before the complainant, who was 9 years old at the time of the incident, presented her testimony, the trial court made a ruling in terms of the provisions of Section 170A(1) of the Criminal Procedure Act[1] that her evidence be presented through the assistance of an intermediary. The complainant presented her testimony in camera.
- [4] The grounds upon which the appellant's appeal against the conviction rest are that the court a quo erred in:
- 4.1 finding that the guilt of the appellant was proved beyond reasonable doubt;
- 4.2 finding that the complainant's and other State witnesses' identification of the appellant is reliable beyond reasonable doubt;
- 4.3 drawing a negative inference from the appellant's version and failing to find the appellant to be a credible witness
- [5] The facts underlying the conviction are briefly as follows: The complainant and her minor brother, who was 7 years old at the time of the incident, were sent by their mother to visit relatives at Rocklands with the purpose to ask for money. While they were walking they came upon a man who, initially requested assistance to carry bags and showed them R10.00, but eventually grabbed the complainant by her arm and insisted that both children walk with him until they came to a park. At the park he left the minor boy and took the complainant by her hand. He walked with her to a tree where he raped her.
- [6] The complainant testified that she had seen the man who raped her on many occasions prior to the incident. According to her, the accused on several occasions passed her family's place of residence and she recognised him due to the fact that his face is familiar to her. Subsequent to the incident that occurred underneath a big tree, the man took her back to the park where she again met up with her little brother. Two ladies were standing at the gate

to the park with her brother. The man then ran away, back through a passage, the same way in which she, her brother and the accused arrived at the park.

- [7] One of the ladies succeeded in stopping a police vehicle and two members of the South African Police Services went after the man. Shortly thereafter, the police officials brought the same man back to them where after she was able to positively identify him as the man who raped her. He was wearing a yellow MTN hat, a brown jersey, a shirt with blue and white stripes and brown trousers. Although some confusion existed regarding the date of the incident due to the testimony of the first State witness, Vivian Veldschoen, it was found to have occurred on 2 January 2018.
- [8] The sole issue for determination in this appeal is the adequacy of the evidence of identification of the appellant. The appellant, although admitting that he was the person who was arrested by the police on 2 January 2018 in close vicinity to the park, denied that he was the person who had raped the complainant. At the trial, 4 witnesses testified on behalf of the State. They were Vivian Veldschoen, her sister, Tandiwe Veldschoen, the complainant and Constable Phukuntsi, the arresting officer. The appellant was the only witness to testify in his defence.
- [9] It is common cause that the evidence of the complainant in respect of the rape, is evidence of a single witness and needs to be treated with caution. In criminal proceedings a conviction will normally follow only if the evidence of a single witness is substantially satisfactory in every respect or if there is corroboration.[2]
- [10] The second question which needed to have been considered by the court a quo was whether, on the totality of the evidence, it can be said that the State had proved its case against the appellant beyond reasonable doubt.
- [11] The trial court was alert to the fact that the complainant was a child and a single witness and properly dealt with it. The complainant was taken to the National Hospital, Bloemfontein and examined by a forensic nurse on the day of the incident, as per the medico-legal examination report, "Exhibit C".
- [12] On behalf of the appellant it was submitted that the court a quo was not alert to the contradictions between the evidence presented by the State witnesses. However, contradictions, per se, do not lead to the rejection of a witness's evidence. Taking into account the nature of the contradictions, their number and importance, and the testimony of the other State witnesses, I agree with the finding of the court a quo that the contradictions referred to by the appellant, are immaterial.
- [13] The appellant furthermore argued that discrepancies exist in the description provided to the police officials regarding the clothing worn by the complainant's assailant. I am of the view that the description of the clothing worn by the complainant's assailant matches the description regarding the clothing worn by the appellant in respect of the shirt with blue and white stripes, the jersey and the fact that he was wearing a hat at the time of his arrest.

On behalf of the appellant it was contended that the identification of the appellant as the complainant's assailant remains doubtful on the basis that it was only later, subsequent to the appellant being brought back to the witnesses, discovered that the trousers worn by the appellant also had stripes or consisted of a "check- pattern". In my view the fact that Vivian Veldshoen testified

that she initially did not see that the trousers worn by the appellant also consisted of fabric with a check -pattern, is an indication that same was only visible when the appellant was close by Vivian Veldschoen, which is consistent with her testimony in court.

- [14] It is trite that a court of appeal will rarely interfere with findings of fact of the trial court, including credibility findings with regard to witnesses. In the absence of material misdirections by the trial court, its findings of fact are presumed to be accurate, and would be disregarded only if the recorded evidence shows them to be wrong.
- [15] Taking cognisance of the fact that the appellant was apprehended within 2 minutes after the members of the South African Police Services left the complainant and the Veldschoen-sisters to look for him, there can be no doubt regarding the identification of the appellant. I am satisfied that the court a quo correctly rejected the appellant's version that he was merely in the unfortunate position of being in the vicinity when he was apprehended by the police officials shortly after they received a description of the clothes worn by the complainant's assailant which matched the clothes worn by the appellant. I am convinced that the appeal on the conviction should fail.
- [16] The following personal circumstances and aggravating facts as well as mitigating factors appear from the record:
- 16.1 appellant was born on 2 June 1970, presently 53 years old. He is a widower and the father of major children.;
- 16.2 he never attended school and was working as a gardener and received an income of R800.00 per week.
- 16.3 he is a first offender.
- 16.4 he was on warning for the duration of the trial and has been in custody since November 2021.
- [17] Rape is a heinous crime and an invasion of privacy of the individual[3], in this case a young girl aged 9 years. Due to the escalating levels of serious crime the Legislature considered rape of a girl under the age of 16 years as one of many serious crimes and ordained life imprisonment as the sentence to be imposed.
- [18] The trial court, naturally, relied heavily on the contents of the medico-legal examination report and the testimony of the complainant that she felt sad about what the appellant did to her. The content of the medico-legal examination report was, by agreement between the State and the defence, admitted as part of evidence before the court a quo. From the medico-

legal examination report it is evident that the complainant suffered genital injuries in the form of red abrasions on the fossa navicularis. No victim impact statement emanating from the complainant or her parents were submitted during the trial.

- [19] Taking cognisance of the complainant's age, the injuries sustained by the complainant were not of a very serious nature. There is no evidence that the appellant assaulted the complainant in any other way. In this matter, I take cognisance of the fact that fairly little violence was used by the appellant.
- [20] The regional magistrate was correct that the court should not deviate from imposing the minimum sentence for flimsy or unconvincing reasons as stated in *S v Malgas*.^[4] In my view the appellant's age, being 53, and being a first offender, together with his prospects of rehabilitation were not sufficiently considered by the court a quo. In fact, the court a quo held that when regard is had to the personal circumstances of the appellant and the circumstances surrounding the commission of the offence, nothing special in his personal circumstances exists. The court a quo found that the mitigating factors outweigh the many aggravating factors and therefore found no substantial and compelling circumstances to exist for the trial court to deviate from the prescribed sentence of life imprisonment.
- [21] I am of the view the court a quo ought to have balanced the other objects of sentencing, with rehabilitation. This is particularly so when dealing with an accused who is a first offender, a person who had a stable past, a fixed income and who was 48 years old at the time when the crime was committed. It ought to have imposed a sentence which, whilst achieving retribution, deterrence and prevention, allowed the possibility of the appellant's rehabilitation. Due to the insufficient consideration of the prospects of the appellant's rehabilitation, the court a quo, in my view, misdirected itself in this regard. This calls for this Court to intervene and consider the issue of sentencing afresh.
- [22] I am of the view that, when the circumstances of this particular matter are considered, the prescribed sentence of life imprisonment would be rendered unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice will be done by imposing the prescribed sentence. I agree with the submission by Mr Van der Merwe, on behalf of the appellant, that in this matter the court is not dealing with the category of the 'worst rapes' and that this ought to be considered in arriving at an appropriate sentence.
- [23] Accordingly I propose the following order:-
1. The appeal against the conviction is dismissed.
 2. The appeal against the sentence is upheld and the sentence of life imprisonment is set aside.
 3. The appellant is sentenced to imprisonment for a period of 23 years, and
 4. The order in 3 is antedated to 19 April 2022.

VAN RHYN, J

I agree and it is so ordered.

MHLAMBI J

On behalf of the Appellant: Mr P L van der Merwe Instructed by: BLOEMFONTEIN JUSTICE
CENTRE On behalf of the Respondent: Adv. T E Komane Instructed by: DIRECTOR PUBLIC
PROSECUTIONS BLOEMFONTEIN

[1] Act 51 of 1977.

[2] Stevens v S

[2005] 1 All SA 1 (SCA) para 17.

[3] S v Chapman [1997] ZASCA 45; 1997 (2) SACR 3 (SCA).

[4] 2001 (2) SACR 469 (SCA).

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Prepared on 8 October 2026 · Esheria