

SOUTH AFRICA / JUDGMENT

F.J.N v S (27/2016) [2017] ZAECHGC 31 (7 March 2017) [2017] ZAECHGC 31

COURT

Eastern Cape High Court, Grahamstown

BEFORE

PT Mageza, GH Bloem

CASE / FILE NUMBER

27/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

Appeal

Case No: 27/2016

In the

matter between:

F.
J.
N.
Appellant
and
THE
STATE
Respondent
APPEAL

JUDGMENT

MAGEZA AJ

- [1] This matter came before us on appeal from the judgment of the Regional Magistrate, Port Elizabeth. Appellant was convicted on one count of rape committed on 11 April 2012 in contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2000. In respect of the second count he was convicted of an attempt to commit a sexual offence in contravention of Section 55(a) of the Sexual Offences and Related Matters Act, committed in April 2014.
- [2] At the time the offences were committed, the victim was a minor child below the age of 16 (sixteen). She is also the appellant's daughter with whom he resided in Motherwell township at the time of the alleged commission of the offences. He pleaded not guilty to the charges and elected not to disclose the basis of his defence, thereby exercising his right to remain silent. Following the conviction on both counts, appellant was sentenced to life imprisonment in respect of the rape count and handed a 10 (ten) year period of imprisonment in respect of the attempt to commit a sexual offence conviction. The appeal is against the convictions and sentences.
- [3] The victim was 12 years old when the first offence was committed in 2012 and 14 years old at the time of the second offence. The appellant and the victim lived alone in a one-room shack divided into appellant's bedroom and a rudimentary lounge in which his daughter slept. He has a number of sisters who also live in the Motherwell area. One of appellant's sisters was called as a state witness.
- [4] Complainant's evidence in respect of the rape charge revealed that during the evening of 11 April 2012, she was busy with household chores when appellant looked at her and asked her why she was wearing a pantyhose with a hole in it. She said appellant then accused her of having boyfriends. He then instructed her to go to his bedroom for 'an inspection'. Once there he removed her pantyhose, undressed her and got her to lie on his bed. He then inserted his finger into her vagina. Complainant said she started crying and he inserted his penis into her vagina. She remonstrated with him and tried to kick him, but he hit her with an open hand and continued the attack on her. After he was done, he instructed her to sleep next to him. She said she did so because she was scared.
- [5] The following morning she went to school as usual but did not return home that evening. Instead, she went to the home of one of her aunts (appellant's sister), K., to report what had happened. She did not find her aunt at her home and as a result, she ended up putting up at a neighbour's home for the night. She returned to her home on 13 April but again left to look for her aunt K. at her home. Once there she told her that the appellant wanted to sleep with her.

- [6] The appellant followed the complainant to his sister's home. On arrival, K. confronted him about what the complainant had reported. The appellant initially denied that he said he wanted to sleep with his daughter. A family meeting with appellant's other sisters was, in due course, held and at this meeting appellant, for the first time, admitted to inserting his finger in his daughter's private parts.
- [7] A decision was taken by the sisters to report the matter to the police. It is common cause that although this was done, the police never arrested the appellant. Subsequent to these events, the appellant also disappeared from the community and was not seen for a period of approximately two years. Complainant also left the home she lived in with appellant and went to live with another aunt, N.. At some point, complainant went to live with her aunt K. but she told the court that she was most unhappy there and felt neglected and ill-treated. She testified that K. did not give her money from the government grant monies that she collected on her behalf. Evidence was also led from K. during the trial that the complainant was not an easy child to live with and sadly, her relationships with her various aunts were, to put it mildly, very strained. She said the complainant slept out without permission. In her evidence Dr Phumla Mhlala, who examined the complainant on 14 April 2012, testified that there were signs that the complainant was already sexually active.
- [8] It appears from the evidence that the appellant returned to his home after about two years and reported that he had found employment in Kirkwood between leaving and his return. It is common cause that the complainant moved back in with her father sometime in 2014. She said she did so because her father had apologised to her for what had happened before. He had, according to her, told her that what he had previously done to her had not been intended. She said she told him she accepted his apology provided he was going to assist her with her schooling needs because she was suffering in that regard. According to her, her aunts had also persuaded her to forgive her father. She also said her father was the one person in her life who made an effort to look after her. He supported her financially and was a regular attendant at parents' meetings in her school. It appears that he also attended these school meetings even during the period he had disappeared from the community. Despite the relationships she had with her aunts, some of whom were prepared to assist from time to time, the complainant preferred to live with her father.
- [9] With regard to the second incident forming the basis of the second conviction, complainant testified that one Sunday evening in April 2014, she came home and observed that appellant was inebriated. She said at some point, she lied down on the couch to sleep and the appellant was sleeping on his bed. She said appellant looked at her and suddenly accused her of masturbating. She denied she had been masturbating. Appellant said she must sleep on his bed, which invitation she declined. Appellant told her that he did not want to struggle with her. Complainant said the appellant's facial expression changed and, fearful of what he might do, she took a pillow and went to sleep at appellant's feet on his bed. Appellant then told her there was a traditional practice in his family which required that she must sleep with him. She disagreed with the suggestion but he forcefully took off her tight jeans and she

cried. Appellant took out a small breadknife and threatened her with it. He proceeded to take off her clothes whilst she was crying. He then put his penis on her vagina and she vomited. The vomiting appeared to have made him backtrack as a result of which he did not penetrate her although he attempted to do so. He stopped and told her to put on her clothes.

- [10] The following morning, before she left for school, she asked him if he remembered what he had done to her the night before. He said he remembered and had told her he was not remorseful and would do so again. She reported the incident first to her karate instructor and thereafter to her class teacher, Ms M.. Ms M. was called during the trial and in her testimony, she confirmed what complainant had told her that morning. She also said complainant was distressed and had been in an emotional state. This incident was reported to the police as a result of which the appellant was arrested.
- [11] K. testified at the trial and confirmed what the complainant had reported to them. She also testified that the appellant had been summoned to a meeting where he admitted inserting his finger into complainant's vagina. Dr Mhlaba, completed a medical report, wherein she concluded inter alia, that complainant's hymen was not intact. Furthermore, she noted in her report that there were two bumps and clefts denoting old injuries in complainant's vagina.
- [12] In summing up the evidence led before him, the Regional Magistrate found the complainant to be an honest and reliable witness. The court also found corroboration on count 1 in the admission made by appellant at the family meeting acknowledging he had inserted his finger into complainant's vagina. He found that complainant's aunt K. had been a good witness who had confirmed that appellant had admitted at the meeting that he inserted his finger into complainant's vagina. She had also related in her evidence the behavioural problems plaguing the complainant. Ms M. and other witnesses corroborated and confirmed how complainant had reported to them whilst presenting as distressed, particularly after the second incident.
- [13] K. also testified that she and her sisters had a lot of problems with complainant because she slept out a lot and went where she pleased. Under cross- examination, complainant admitted that she attended karate classes and that she at times went home around midnight. This also made her aunt very unhappy whilst she lived with her. She admitted there had been instances of her sleeping out some nights. Her coming late was quite usual as she played and trained soccer and karate as the sporting codes she took a keen interest in.
- [14] With regard to the evidence of appellant, the Magistrate found that his version consisted in a plain denial of the allegations against him. He flatly denied committing rape or attempted rape. He confirmed complainant reported to his sister K. and a family gathering that was held to discuss the issue. He denied admitting to having inserted a finger into complainant's vagina or inserting his penis. He denied that he ran away after the family gathering but said he went to work at Kirkwood. His version was that complainant had accused him of these offences simply because he was a strict father and had prohibited her from not sleeping at

home and having boyfriends.

- [15] Without undertaking a comprehensive narration of the findings, suffice to state that the learned magistrate accepted the fact that complainant was both a child and a single witness. In addition, the magistrate accepted that Section 208 of the Criminal Procedure Act, Act 51 of 1977 allowed for a Court to convict an accused person on the evidence of a single competent witness. In this respect, he referred to the well-known authorities of *S v Saul's and others* 1981 (3) SA 172 (AD) and *Yoji v Santa Insurance Company Ltd* 1981 (1) SA 1020 (A) which deal with the relevant principles governing the testimony of a single witness. He also applied the cautionary rules concerning the evidence of children and found complainant a satisfactory witness. The court found her version credible and rejected that of appellant as so improbable that it could not reasonably possibly be true. The learned magistrate reiterated that the appellant's version need only be reasonably possibly true to entitle him to an acquittal. He found appellant's improbable and rejected it.
- [16] Now, as was reiterated in *S v Chabalala* 2003 (1) SACR 134 (SCA) para 15, the proper approach to assessing evidence is 'to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of

inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt'. The inherent probabilities therefore play a critical role in the enquiry.

- [17] I have little hesitation agreeing with the magistrate in his reasoning and findings and in my view, his finding that the appellant was guilty on both counts is unassailable. The evidence is sufficient, reliable and the complainant is corroborated by her aunt K. as well as her teacher. In respect of the rape charge, he instructed her to go to his bedroom for 'an inspection' and once she was there, he removed her pantyhose, undressed her and made her to lie on his bed. He inserted his finger into her private parts and thereafter inserted his penis into her vagina. This was corroborated by his own admission at the family gathering, albeit only to the extent of the insertion of his finger. In so far as the second incident is concerned, appellant told her that there was a traditional practice in his family which required her to 'sleep' with him. Appellant threatened her with a small breadknife and proceeded to attempt to insert his penis into her private parts but she vomited and he desisted.

The only response to these accusations is that she detested his being strict with her. This explanation flies in the face of all the evidence placed before the Court by all the witnesses who testified including the complainant.

[18] I am of the view that the State proved its case against the appellant beyond a reasonable doubt. For these reasons, I agree with the court of first instance and the appellant was correctly convicted on the available evidence. His version is not reasonably possibly true.

SENTENCE

[19] This court's power to interfere in sentences is limited as this primary role lies in the discretion of the sentencing court. 'A court of appeal may not simply substitute a sentence because it prefers it and will be entitled to interfere only if the sentencing court materially misdirected itself or the disparity between its sentence and the one which this court would have imposed had it been the trial court is 'shocking', 'startling' or 'disturbingly inappropriate'. See *S v Malgas* 2001

(1) SACR 469 (SCA) at para 12

[20] The Court below found no substantial and compelling circumstances to deviate from the prescribed sentence of life imprisonment for the rape of the child. As a result the court had an obligation to impose the sentence ordained.

[21] In *Mudau v S*

[2012] ZASCA 56 at para 14, the Court commented that, "Our country is plainly facing a crisis of endemic proportions in respect of rape, particularly of young children ... Government has introduced various programmes to stem the tide, but the sexual abuse of particularly women and children continues unabated... If anything, the picture looks even gloomier now... The public is rightly outraged by this scourge."

[22] In *S v Abrahams* 2002 (1) SACR 116 (SCA) at para 29 that Court observed that: "Some rapes are worse than others, and the life sentence ordained by the Legislature, should be reserved for cases devoid of substantial factors compelling the conclusion that such a sentence is inappropriate and unjust".

[23] The appellant was convicted of serious offences. There are aggravating circumstances present. The crime committed by the appellant was exacerbated by the fact he was an assailant against the very child he was required and expected by society to protect. He lived with this child alone and she has no other parent to provide her with nurture and protection. He is someone who stood in a position of authority over the child and it was his intrinsic duty to protect her even with his own life, if necessary. The repeated attacks all happened in the sanctity of what she knows as her only home and in which she lived with her protector.

[24] The appellant had a chance to mend his ways and become the father and parent that the child needed to have. Instead, he decided to repeat the personal invasion of the child and carried out a second attack. The only reason he did not actually penetrate her was not because of his own restraint but was due to the child vomiting, in all probability from the traumatic experience. He was beginning to see her as a personal sex object. I have no doubt

that if he had not been arrested, he would very well have continued to abuse her. The appellant is also devoid of any remorse and consistently denied raping his daughter. He told her the following morning he would repeat what he had done.

- [25] It must have been the worst thing for the child to be violated by her own father within her own home. The fact that a girl grows up without her mother and only with her father must be very confusing particularly when other girls her age lived with their mothers who were there to guide, love and protect them particularly in the sensitive age of becoming teenagers with new experiences brought about by evolving into the stage of being teenage girls. Appellant has, through his selfish and sadistic desires, left her with life-long trauma from whose psychological scars she might never recover.
- [26] Through all the revelations of the offending conduct in family meetings and interventions by his sisters, appellant maintained a disposition of stoic denialism. In the end, he in all probability, saw what he was doing to the child as his god given right.
- [27] Appellant also has a previous conviction for murder, for which he was found guilty and sentenced to a fifteen-year term of imprisonment in
2003. This conviction was less than ten years as at the time of the commission of the first offence.
- [28] There is no material misdirection on the part of the court in respect to both the conviction and sentence. It follows that the only result is that this appeal must fail. In the result, the appeal against both conviction and sentence is dismissed.

PT MAGEZA

ACTING JUDGE OF HIGH COURT

G H BLOEM

JUDGE OF THE HIGH COURT

For the appellant:

Adv D P Geldenhuys of the Grahamstown Justice Centre, Grahamstown.

For the state:

Adv D Els of the office of the Deputy Director of Public Prosecutions, Grahamstown.

Date of hearing:

1 February 2017

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