

SOUTH AFRICA / JUDGMENT

Gedu v S (A35/2016) [2016] ZAFSHC 174 (29 September 2016) [2016] ZAFSHC 174

COURT

Free State High Court, Bloemfontein

BEFORE

J.J. Mhlambi, M.H. Rampai

CASE / FILE NUMBER

A35/2016

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IN

THE HIGH COURT OF SOUTH AFRICA,

FREE

STATE DIVISION, BLOEMFONTEIN

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Case

No: A35/2016

In

the matter between:

TERENCE

GEDU

Appellant

and

THE

STATE

Respondent

CORAM:

RAMPAI J et MHLAMBI, AJ

JUDGMENT

BY: MHLAMBI, AJ

HEARD ON: 1 AUGUST 2016

DELIVERED ON: 29 SEPTEMBER 2016

- [1] The appellant appeals against both his conviction and sentence on a count of rape to which he was sentenced to life imprisonment on 1 September 2015 in the Regional Court held at Bethulie. The appellant has a direct right of appeal to this court.
- [2] The main grounds of appeal as regards the conviction are that the learned magistrate erred in finding that:
- 2.1. The state had proven the appellant's guilt beyond a reasonable doubt;
 - 2.2. The evidence of the appellant was not reasonably true;
 - 2.3. The complainant was a credible witness;
 - 2.4. The only inference to be drawn from the evidence of the forensic nurse was that the complainant was sexually penetrated by the appellant;
 - 2.5. The complainant's failure to report the rape immediately was excusable;
 - 2.6. There were material contradictions existed between the evidence of the complainant and the state witness, M. F..
 - 2.7. The appellant's conviction was based on circumstantial evidence.
- [3] Having pleaded not guilty, he chose not to give a plea explanation. In support of its case the state led the evidence of four state witnesses. The appellant was the only witness for the defense.
- [4] The complainant testified that she was raped by Terence, the appellant, during January 2012. She and M. went to the appellant's house to do house chores as requested by his wife who was not at the house on that day. As she dried the dishes, the appellant called M. and gave her R20.00 to go buy milk from the shop. The appellant then called the complainant to the bedroom and told her that she should not tell anyone about what he was about to do to her. She protested and threatened to lay charges against him. He apologized and told her to finish her work.
- [5] He later told her to look for his shoes. As she could only find his wife's shoes, he told her to look for his shoes in the whole house while he closed the doors and curtains. Having done so, he told her to look for the shoes in the toilet. She found them and gave them to him. He wore them and told her to come to him. She protested, told him that she was too young and would "open a case against him". As she tried to run out of the room, he grabbed her,

covered her mouth with his hand and dragged her to the bedroom where he undressed her. He did not take all of his clothes off. He unzipped his trousers, took out his penis and inserted it into her vagina as she lay on the bed. The inside of her vagina was painful and she cried.

- [6] After he finished, she ran to the door while he opened the windows and the curtains. He told her to wipe off her tears and threatened to kill her by throwing her over the bridge should she report the incident to anyone. As she still threatened to go to the police, he reminded her where she was at that moment. He threatened to kill her and lock her up in the bathroom and inform M. on her return that she had long left. He noticed that M. had arrived. Before opening the door for her, he once again forbade her to tell M. of the incident. She ran out of the house towards Church Cloetes Park. M. followed her and enquired whether the appellant had beaten or scolded her. She answered negatively. She also did not explain why she was crying.
- [7] They returned to the house to fetch their shoes. She did not want to go into the house and preferred to wait at the gate, but M. insisted that she should wait at the door while she looked for the shoes. She could not find the shoes and she heard the appellant inform M. to look for the shoes in the bedroom. When asked by the appellant whether she said anything to M., she denied having said anything to her about the incident. He encouraged her to continue doing so and not to say a word to anybody. M. came with the shoes and they left.
- [8] She kept quiet about the incident from January until March when she disclosed the incident to one P., a friend with whom she previously did house chores at the appellant's house. The reason she informed him was that each time she met with the appellant, he would threaten her.
- [9] M. confirmed that she and the complainant cleaned the appellant's house in the absence of his wife. She was sent to the shop and on her return she found the complainant crying. She ran to the house to hand over the milk and then ran after the complainant who told her that the appellant had raped her. The complainant had failed to report the matter because the appellant had threatened her and went about telling people that he had promised the complainant R500.00. She testified that when she ran back to the house, the appellant had asked her whether the complainant had told her anything. Her answer was negative. She did not know whether the complainant was raped or not.
- [10] The complainant's grandmother, Ms C. M., an eighty one year old lady testified that the complainant informed her that she was raped by the appellant. She could not identify him in court because she could not see clearly any longer. She did not know him well but she knew his wife well as she grew up before her. The complainant informed her that the appellant had threatened to run her down with his vehicle should she tell anyone.
- [11] Lebusho Elias Tjakata testified that he was a professional nurse and employed as a facility manager at Phillipolis Clinic. He studied a short course in forensic nursing for ten days during 2010. On 15 March 2012 he examined the complainant who was then 15 years old. He

completed the J88 form. On recording her clinical legal findings, there were no marks to show that she was assaulted. An examination of her private parts showed healed tears at the hymen. Though she was not physically assaulted, it did not mean that she was not sexually abused. The vaginal examination disclosed that the vaginal orifice had old scars and a bumped tear of the hymen, leading to the conclusion that there was a possible vaginal penetration. A female hymen is intact but after sexual intercourse or a forced penetration, it would tear and those tears would show after some time. The bumps would remain until sexual activity was resumed.

- [12] The crossexamination of the witness brought to light that neither special optical light nor dye was used during the examination as the clinic did not have them. The J88 form was not fully completed as certain parts of the second page were left blank. The witness conceded that he did not know what a synicae was. However, this point was not pursued to indicate its relevance and how it impacted on the evidence. The state case was then closed.
- [13] The appellant testified that he last saw the complainant at his house during the December holidays in 2011, accompanied by M. to ask for mealie meal from his wife. He gave it to them and food to eat where after they left. He knew the complainant's grandmother, as she was his motherinlaw's neighbor. On 6 February 2012, a Monday, he was summoned and went to the complainant's house to answer to allegations of having raped the complainant the previous Friday at his house. He denied having raped the complainant and stated that she falsely accused him.
- [14] On evaluating the complainant's evidence, I find that she testified clearly and truthfully. She spent more than a day in the witness box without deviating from the essence of her evidence. She firmly denied allegations that she could be sleeping around and was consistent that she was at the appellant's house during January 2012 when he raped her. Her evidence is direct and cannot be termed circumstantial as submitted by the appellant's representative. Furthermore, it is not disputed that she was intimidated by the appellant on a continuous basis from the date the incident took place until the day she disclosed to P. that she was raped by the appellant. This part of the evidence was unlocked during the complainant's crossexamination when she was asked what went on in her mind at the time she made the disclosure to P.. She testified that P. was present when the appellant stopped by and enquired whether she had reported the incident. The appellant's uneasiness about the events in the house on that day is shown in M.'s unchallenged evidence when, on delivering the milk from the shop in order to follow the complainant, the appellant asked her whether the complainant told her anything. She denied having been told anything.
- [15] She contradicted the complainant's evidence when she said that the complainant told her of the events that took place in the house and the rape. This contradiction is not material especially when viewed against the backdrop of her testimony that she did not know whether the complainant was raped or not. Save for this contradiction, her testimony is beyond reproach and corroborated the complainant materially. She denied that she had been to the appellant's house on more than one occasion especially during the December

holidays in 2011.

- [16] Section 59 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 provides that in criminal proceedings involving the alleged commission of a sexual offence, the court may not draw any inference only from the length of any delay between the alleged commission of such offence and the reporting thereof. The presence or absence of a report made within a reasonable time after the incident must be assessed in context; and a delay is not necessarily fatal to the prosecution's case: *Principles of Evidence*, Third Edition, Schwikkard and Van Der Merwe on page 113. See also *S v Cornick* 2007 2 SACR 115 (SCA); *Holtzhauzen v Roodt* 1997 4

SA 766 (W).

- [17] The evidence of the professional nurse was not nullified by the crossexamination and corroborated the complainant's evidence that she was sexually penetrated.

- [18] The appellant's version is that the last time he saw the complainant and M. was during the December holidays in

2011 when he gave them mealie meal and food to eat as they were hungry. After washing the dishes they left. On 6 February 2012, a Monday, he went to the complainant's house after receiving a call from his wife. The complainant's grandmother, who testified as a state witness, told him that the complainant had arrived home after midnight the previous Friday as she was at his house where he had raped her. I pause to mention that during crossexamination the state enquired why the grandmother was not confronted with this evidence during her testimony and his response was that he did not know. In a nutshell, his version is that the complainant and the witnesses were accusing him falsely. During crossexamination, it was put to the complainant that she and her friend "are making up this incident and immediately after this incident you all tried to get money from him, R500.00. He says your grandmother even called his wife and tried to arrange for the R500.00 to be paid". These allegations were denied.

- [19] The defense chose not to call the appellant's spouse as a witness and inferences may be drawn against the appellant for having failed to do so. "Our legal system is an adversarial one. Once the prosecution has produced evidence sufficient to establish a prima facie case, an accused who fails to produce evidence to rebut that case is at risk": *Osman and Another v Attorney General, Transvaal* 1998 (4) SA 1224 (CC).

- [20] Having taken proper account of the inherent strengths and weaknesses, probabilities and improbabilities in both the state and defense cases, I am persuaded that the state succeeded in proving its case beyond reasonable doubt and that the appellant's version is not reasonably true. I am therefore satisfied that the conviction should stand.

- [21] The grounds of appeal as against sentence are succinctly set out as follows:

21.1 the court found that there were no substantial and compelling circumstances for the imposition of a lesser sentence;

21.2 the learned Regional Magistrate overemphasized the effect of the crime on the complainant and failed to appreciate the impact that his imprisonment would have on his employees and his minor children;

21.3 the appellant had a clean record since 2007;

21.4 appellant's lack of remorse was due to his belief in his innocence and not to his disregard for the victims of rape and sexual abuse;

21.5 the learned magistrate erred in finding that the appellant offered the complainant the amount of R500.00 in the absence of testimony to that effect;

21.6 too much weight was attached to the severity of the crime and less weight to the appellant's personal circumstances.

[22] In sentencing, the aim is to impose a balanced sentence and, as stated in *S v Zinn* 1969 (2) SA 537 (A) 540 GH, the court must consider "the triad consisting of the crime, the offender and the interests of society". The question that crops up is whether the trial court did an injustice in imposing the sentence it did on the consideration of the circumstances in casu. In passing sentence in terms of section 276(1) (B) of the Criminal Procedure Act read with section 51 Act No 105 of 1997, the magistrate found that there were no substantial and compelling circumstances which could make the court to deviate from the imposition of the minimum sentence. She referred and read from a presentence report which was handed in by the defense attorney stating in

detail the appellant's personal circumstances, his family, income, education and that his business gave employment opportunity to fortyfive workers. Even though he had a previous conviction in respect of which he was sentenced to four years' imprisonment of which one year was suspended for a period of four years for sexual and indecent assault; it was an old conviction and the court found that to be a mitigating factor as he had kept a clean record for a long time.

[23] On 20 January 2000 the appellant was convicted of the crime of rape and sentenced to a term of twelve years imprisonment. He was released on parole supervision until 10 November 2013. At the time of the commission of the instant offence he was still on parole. In the pre sentence report, it was advised that imprisonment was the suitable option as the appellant was not a first offender, committed a crime against a minor and was a danger to the community and himself. The rape had a severe emotional impact on the complainant as she became withdrawn and stayed indoors. The fear of the appellant and seeing his car made her a truant and her school grades suffered as a consequence.

[24] It is evident that the appellant lacked remorse as indicated from the notice of appeal. "Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error": *S v Matyityi* 2011 (1) SACR 40 (SCA) at par 13. In *S v Rabie* 1975 (1) SA 855 (A) 857 DF it was stated that the court hearing the appeal should be guided by the principle that punishment is "pre eminently a matter for the discretion of the trial Court" and that the court hearing the

appeal should be careful not to erode such discretion. The test is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate. In *S v Pillay* 1977 (4) SA 531(A) at 535FG it was said that the enquiry is not whether the sentence was right or wrong but whether the court in imposing it, exercised its discretion properly or unreasonably. A mere misdirection is not by itself sufficient to entitle interference with the sentence; it should be of such a nature, degree or seriousness that it shows, directly or inferentially, that the court did not exercise its discretion at all or exercised it improperly or unreasonably.

[25] The correct approach to applying the prescribed minimum sentence was set out in *S v Malgas* 2001

(1) SACR 469 (SCA). Courts must be conscious that the Legislature has ordained life imprisonment as the sentence that should ordinarily be imposed for the listed crimes in the specified circumstances. This would happen in the absence of weighty justification which should be determined upon the consideration of the circumstances of the particular case. It is incumbent upon a court in every case to assess whether the prescribed sentence is indeed proportionate to the particular offence before it imposes a prescribed sentence. In my view the court a quo correctly concluded that there was no weighty justification to warrant a departure from the sentence that should ordinarily be imposed. In the circumstances, there is no basis upon which the imposed sentence can be interfered with.

[26] Consequently, the appeal against the conviction and sentence is dismissed.

J.J. MHLAMBI, AJ

I concur

M. H. RAMPAL, J

On behalf of the appellant: Adv. A. Sander

Instructed by:

Van Wyk & Preller Attorney's

BLOEMFONTEIN

On behalf of the respondent: Adv. C. Steyn

Director: Public Prosecutor

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