

SOUTH AFRICA / JUDGMENT

Kekana v S (A348/2019) [2019] ZAGPPHC 223 (6 May 2019)

[2019] ZAGPPHC 223**COURT**

North Gauteng High Court, Pretoria

BEFORE

Mokose, Thobane

CASE / FILE NUMBER

A348/2019

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Policy**REPUBLIC OF SOUTH AFRICA****IN THE HIGH COURT OF SOUTH****AFRICA****GAUTENG DIVISION, PRETORIA****(1)****REPORTABLE:**

NO

(2)

OF

INTEREST TO OTHER JUDGES: NO

CASE NO: A348/2019

6/5/2019

In the matter between:

STEPHANUS

MATSOBANE

KEKANA

Appellant

and

THE

STATE

Respondent

JUDGMENT**MOKOSE J**

- [1] The appellant was charged in the Regional Court of Pretoria with three counts of rape in contravention of Section 3 of Act 32 of 2007 read with the provisions of Section 51 of Aa 105 of 1997, one count of kidnapping, one count of assault and one count of assault through threats. The appellant pleaded not guilty but was found guilty of rape and one count of kidnapping. He was found not guilty of assault and assault through threats.
- [2] The appellant was sentenced to life imprisonment on all the rape counts and 4 years' imprisonment for kidnapping which sentence was ordered to run concurrently with the sentence in respect of rape. Furthermore, the appellant was declared unfit to possess a firearm.
- [3] On an automatic right of appeal in- terms of Section 10 of the Judicial Matters Amendment Act 42 of 2013, the appellant appealed against both conviction and sentence. The appellant appealed on the following grounds:
- (i) that the court did not treat the complainant's evidence with the necessary caution of a single witness;
 - (ii) that the court erred in that there were contradictions in the complainant's evidence and despite the improbabilities in the evidence weighing heavily against the State, the court found for the State; and
 - (iii) that the court erred in finding that the cumulative effect of mitigating factors does not constitute substantive and compelling circumstances.
- [4] The charges arise from an incident on 19 February 2015 when the appellant was arrested for unlawfully and intentionally committing an act of sexual penetration with R[....] N[....] M[....] who was sixteen
- (16) years old at the time of the incident. The complainant's case is that she had moved to Mamelodi a month before the incident and was in a relationship with the state witness, T[....] L[....] B[....] at the time.
- [5] The complainant testified that she and her boyfriend went to a secluded spot where they sat and kissed. The appellant, who was unknown to the appellant, suddenly approached them, threw a brick at the complainant and threatened them with a knife. T[....] B[....] then ran away, whereupon the appellant dragged the complainant into
- the bushes. She tried to scream but was throttled and bitten on the cheek. The complainant testified further that the appellant raped her three times and kept her for approximately seven (7) hours in the bushes. The appellant then told her that she must meet with him the next day at the same place so that he could give her R200,00.

- [6] The next day, the complainant, her mother and the police went looking for the appellant. They went to the site of the rape being the place the appellant had suggested they should meet the next day. They could not find him at the appointed place. As the complainant walked back with her mother, she saw the appellant and pointed him out to her. He was then accosted by members of the community who then handed him over to the police.
- [7] The appellant's case is that he was in a relationship with the complainant for almost three months. He also testified that the complainant had told him that she was twenty- five (25) years old. He testified further that he had seen the complainant in the company of a young man whom she accused of taking her phone. She subsequently told him that she alone would collect the phone from him on another occasion.
- [8] The appellant testified further that he had wanted to have sexual intercourse with the complainant at his house as his wife and child were not present but that the complainant had insisted that his home was too far. It is for this reason that they had consensual intercourse in the park.
- [9] In cross-examination and in response to questions about their relationship, the appellant suggested to the court that after he had met with the complainant, he would set an appointment for the next meeting. He explained further that they never contacted each other by cell phone. He averred further that if he could not meet her as agreed, he would inform her by going to the meeting place to inform her personally that they could not meet.
- [10] The appellant did not call any witnesses.
- [11] It is trite law that the onus of proof rests with the State to prove the guilt of an accused beyond reasonable doubt. It is not for the appellant to rebut an inference guilt by providing an explanation. If the appellant's version is only reasonably possibly true he would be entitled to be acquitted. The court a quo referred to the matter of *Shackle v S*[1] where the court said the following:

“The court does not have to be convinced that every detail of an accused's version is true, if the accused's version is reasonably possibly true, in substance, the Court must decide the matter on acceptance of that version. Of course it is permissible to test the accused's version against the inherent probabilities; but it cannot be rejected merely because it is improbable. It can only be rejected on the basis of inherent probabilities if it can be said that it will be so improbable that it cannot be reasonably possibly true.”

- [12] Heher AJA in the matter of *S v Chabalala* 2003 (1) SACR 134 (SCA) at page 140 A- B said:

“The correct approach is to weigh up all the elements which points 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 to the accused's guilt. The result may prove that one scrap of evidence or one defect in the case for either party (such as failure to call a material witness concerning an identity parade) was decisive but that can only be on an

ex post facto determination and a trial court (and counsel) should avoid the temptation to latch onto one (apparently) obvious aspect without assessing it in the context of the full picture in evidence.”

- [13] The appellant avers that the complainant was a single witness. In casu, the evidence of T[....] B[...] that he witnessed a part of the assault on the complainant and the medical evidence corroborate the complainant's version. Guidelines were enunciated in the matter of S v Sauls[2] where the court said:

"There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of a single witness...the trial judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether despite the fact that there are shortcomings. Or defects or contradictions in his testimony, he is satisfied that the truth has been told. The cautionary rule may be a guide to a right decision but it does not mean that the appeal should succeed if any criticism, however slender, of the witnesses' evidence were well founded....It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense.”

- [14] The appellant testified in his own defence and called no witnesses. He submitted that the court a quo had no reason to reject his version which is reasonably possibly true and is accordingly entitled to an acquittal.
- [15] There were no material contradictions in the evidence of the State. The evidence of the State witnesses corroborated that of the complainant. In consideration of all the evidence, it is evident that the appellant's submissions were clearly false. In view of the evidence presented, this court is of the view that it will not interfere with the credibility findings of the court a quo and accordingly dismisses the appeal against the conviction.
- [16] The appellant appealed against the sentence imposed by the court a quo in the grounds that the court erred in finding that the cumulative effect of mitigating factors does not constitute substantive and compelling circumstances. Furthermore, the sentence is shockingly harsh and induces a sense of shock.
- [17] It is trite law that sentence is pre-eminently at the discretion of the trial court. The court of appeal may interfere with the sentencing discretion of the trial court if such discretion had not been judicially exercised. The test which has been enunciated in numerous cases is whether the sentence imposed by the trial court is shockingly inappropriate or was violated by misdirection. The trial court considers for the purposes of sentence, the following:
- (i) The seriousness of the case;
 - (ii) The personal circumstances of the Appellant;
 - (iii) The interests of society.

[18] The provisions of Section 51(1) of Act 105 read with Part 1 of Schedule 2 of the Criminal Law Amendment Act 51 of 1977 were explained to the Appellant prior to him pleading to the charges. The section states that an offender shall be sentenced to imprisonment as per the minimum sentence unless there are compelling and substantial

reasons to deviate from the prescribed minimum sentence. The specified sentences are not to be departed from for flimsy reasons

and must be respected at all times. *S v Matyityi* 2011 (1) SACR 40 (SCA) at 53 E-F.

[19] There is no definition of what constitutes compelling and substantial reasons. The court must consider all the facts of the case in determining whether compelling and substantial circumstances exist. The overall guiding principle is that the sentence must befit the crime.

[20] In mitigation of sentence, the court a quo considered inter alia, the following circumstances of the appellant:

- (i) that he was a first offender and had two minor children;
- (ii) that he was gainfully employed and supported his family;
- (ii) that he was educated up to Grade 10;
- (iv) that the appellant had spent over 3 years in custody awaiting the finalisation of the trial.

[21] In aggravation of sentence, the following circumstances were considered:

- (i) the seriousness of the offence committed;
- (ii) the effect of the rape on the complainant resulting in her not feeling comfortable even among her friends;

[22] To arrive at an equitable sentence this court is enjoined to weigh the personal circumstances of the accused against the aggravating

factors, in particular, the interests of the society, the prevalence of the crime, and its nature and seriousness.

[23] Given the seriousness of the crime as well as the mitigating and aggravating circumstances which were taken into consideration by the Magistrate in the court a quo, I am of the opinion that the Magistrate did not err in sentencing the Appellant. There were no substantial and compelling reasons to sentence the appellant to a lesser sentence than that prescribed by the provisions of Section 51(1) of Act 105 read with Part 1 of Schedule 2 of the Criminal Law Amendment Act 51 of 1977 nor is there any evidence of the discretion of the Magistrate having been incorrectly exercised.

ORDER

[24] In the premises, the following order is made:

- (i) the appeal against the conviction is dismissed;
- (ii) the appeal against sentence is accordingly dismissed.

MOKOSE J

Judge of the High Court
of South Africa

Gauteng Division,

Pretoria

I agree and is so ordered

THOBANE AJ

Acting Judge of the High Court

Gauteng, Division,

For the Appellant:

Mr MB Kgagara instructed by

Pretoria Justice Centre

For the State:

Adv CP Harmzen instructed by

The Office of the Director of Public Prosecutions

Date of hearing: 22 May 2019

Date of judgement: 6 May 2019

[1] 2001(1) SACR 279 (SCA) at 288 E - F

[2] 1981 (3) SA 172 (A)

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