

SOUTH AFRICA / JUDGMENT

Kubeka v S (A596/16) [2017] ZAGPPHC 888 (7 December 2017)

[2017] ZAGPPHC 888

COURT

North Gauteng High Court, Pretoria

BEFORE

W. Hughes, B. Rangata

CASE / FILE NUMBER

A596/16

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

Case

Number: A596/16

Not

reportable

Not

of interest to other judges

Revised.

7

December 2017

In

the matter between:

PELICAN

KUBEKA APPELLANT

and

THE

STATE RESPONDENT

Coram:

HUGHES J et RANGATA AJ

JUDGMENT**HUGHES J**

- [1] On 4 March 2015, in the Witbank Regional Court the appellant, Pelican Kubeka, was convicted by Regional Magistrate, Mrs M Greyvenstein, of rape and was sentenced to ten (10) years imprisonment.
- [2] The appellant was legally represented throughout the trial. The charge that was put to him was as follows:

Count

- Rape contravention of section 3 read with sections 1,55,56(1), 57, 58, 59, 60, 61 of A32 of 2007 read with sections 92(2), 94 256, 257, and 260 of Act 51 of 1977 and read further with the provisions of Section 51(2) of the Criminal Law Amendment Act 105, of 1997(the Act).
- [3] It is alleged that on 2 June 2011 in the district of Witbank the appellant had sexual intercourse with the complainant, B. M., without her consent. The State's case is that the appellant and the complainant where at a certain hiking spot in town and as they were both unable to attain transport or a lift. The appellant suggested that they proceeded to another hiking spot. In order to reach this hiking spot they had to transvers through a secluded busy area, which the appellant informed the complainant was a short route to the said spot. As they were going through this busy secluded area, the appellant then proceeded to have sexual intercourse with the complainant without her consent. The details of which Ideal with later in this judgment.
- [4] At the trial, when the appellant was required to plead, he pleaded not guilty to and provided a plea explanation that he had consensual intercourse with the complainant. After he was pronounced guilty and sentenced he applied for leave to appeal and was granted same on both conviction and sentence, hence this appeal.
- [5] The complaint was a single witness who testified that she was a 62 year old female with seven children. Her youngest child was 23 years old. At the time of the offence she was 58 years of age. As stated above, she met the appellant at the hiking spot and as they were being chased by the taxi drivers from the spot, the appellant suggested that they proceed to another spot that he knew. Bearing in mind this was her first encounter with the appellant. He led her through a busy secluded area. At a point he tried to trip her whilst she walked in front of him. Eventually, he told her he wanted to have sexual intercourse with her. The complainant intimated that she was old enough to be his grandmother but he persisted and the eventuality is that according to the complainant he had sex with her without her consent.

[6] The appellant was 25 years of age at the time of the incident. The appellant admitted having sexual intercourse with the complainant at the time and place in question. What he emphasised was that the aforesaid sexual intercourse was with the consent of the complainant,

in fact, he alleges that the sexual intercourse was initiated by the complainant herself.

[7] The complainant was taken to task for not reporting the rape immediately or soon thereafter. She testified that she did not know the appellant and thus could not report the incident. In addition, she explains that she was burying one of her grandchildren and was thus preparing to attend that funeral so she had no time to go and report the incident.

[8] The manner in which the incident eventually gets reported is ironic. Eight days after the incident the complainant is hiking yet again she secures a lift from a couple. On 10 June 2011, whilst travelling with this couple they uplift a male hiker. Guess who, no other than the appellant himself. The female, Helen Lealigile Motla, testified that after picking up the appellant the two passengers were talking to each other as if they knew each other and this was not their first encounter with each other. Ms Motla states that this eventually culminated in the complaint stating that the appellant had raped her. In the circumstances, I find it apt to quote exactly what was said by Ms Metia:

"PP

- ...You gave B. M. a lift, is that correct?

MOTLA -Yes that is correct She is just someone that I met on the road, she was hitchhiking, we did not know each other....I picked up the accused, ...but not at the same spot, at a different area We were driving to Witbank,...and...then the old lady started talking to the accused. She started by saying: "Ja, here we are meeting again..."They were talking, and then B. started crying. I then asked her as to: "What is wrong, old lady," I said to her: "What is wrong, old lady," and then the old lady said: "This boy raped me." I was driving with my husband then we asked the guy, the accused if he knew the old lady. He said he did not know her...We drove...to Verena Police Station...then the police officer, they were two .. . They came to the car to identify that person, and they said: "Ja, we have been looking for you for a long time." We then left B., and him, the guy, at the police station for statements. "

[9] During the appellant's testimony he admitted that he denied any knowledge of the complainant. He did not even give a reason as to why he denied knowing the complainant. Further, in his testimony when he was being accused by the complainant of rape, he states that he informed those in the vehicle that he had sexual intercourse with the consent of the complainant. He also testified that after the sexual intercourse with the complainant, she did indeed complain that she was bleeding and she said that the reason therefore was that she had not had sexual intercourse for a long time. Ironically though in the fact that he said it was the complainant who had a condom with her and she provided him with same to use during the course of their intercourse.

[10] When questioned by the prosecutor with regards to him denying any knowledge of the complainant, the appellant did not proffer an answer instead he gave reason for the incident not being that of rape.

[11] In the argument advanced by counsel for the appellant much ado was made about the fact that the magistrate misdirected having failed to take into account that the complainant was a single witness. I do not agree with this submission at all. In my view, the magistrate was well aware that the complainant was a single witness as she states as follows:

"Now when a Court has to decide on whether there was consent or not, the situation will always be that we have the version of the complainant that says she gave no consent as opposed to the version of the accused that would say that there was consent. Usually when people have sex, there is no other people watching, that is the norm, and so usually we will have a single direct witness for the State, and a single direct witness for the accused but it does not stop there, the Court must look at the surrounding circumstances to establish whether it points to no consent or consent." This, in my view is as clear as crystal that she was mindful of the fact that she was dealing with a single witness.

[12] Another aspect raised in argument for the appellant was the fact that the complainant had failed to report the incident immediately

thereafter but only did so eight days after the event. The magistrate dealt with this issue adequately, in my view, she makes reference to the relevant section, being section 59 of the Criminal Law Sexual Offences and Related Matters Act 32 of 2007. It was submitted on behalf of the appellant that this section in fact means that "prohibits a court to draw negative inference "only" from the length of delay. It is submitted that the wording of s 59 does not prevent a court to take the lengthy delay of reporting the alleged rape into account with other factors present in the case." This was exactly what the magistrate was alive to, in my view, when she considered the evidence in totality. The error made by counsel for the appellant is that he failed to add the reasoning that appears immediately after she states what the section advises. The magistrate explains that: "So one cannot simply, because a women did not report, draw a negative inference, one must look at the circumstances. In this case it is a mourning grandmother who does not know the person that attacked her..."The magistrate further took into account the fact that the complainant was traumatised as a result of the death of her grandchild and the medical issues that arose as a result of her being raped. That being that she was now menstruating at age 58 after not doing so for so many years and the fact that she now could not hold her urine in, urine incontinence. I cannot find fault with the manner in which the magistrate dealt with the delay in reporting and the other factors pertaining to the rape.

[13] The trial court also was alive to the fact that the evidence had to be addressed in totality and that the states' case could not be examined in isolation. In my view, without realisation, the appellant in fact through the contradictions in his evidence, he in fact corroborated the evidence of the complainant. He stated she told him that she had not had sexual intercourse with a man and yes indeed she explained why, as she was a widow. Further, the injuries the

complainant states she sustained, as regards her menstruating again and urine incontinence, after the rape cannot be indicative of sexual intercourse with consent. Notably, is the fact that the complainant who had not had sexual intercourse for a long time, even on the appellants' version having been told this, is in fact the one who produces the condom for the appellant to use during their sexual episode? It cannot be accepted as true and was correctly rejected and not considered by the magistrate.

- [14] In the circumstances I cannot find that the magistrate misdirected herself when she evaluated the evidence and pronounced the appellant guilty of the offence charged.
- [15] In dealing with sentence, it is trite that the appeal court would not interfere with the sentence imposed by the trial court. See *S v Rabie* 1975 (4) SA 855 (A). The sentences imposed are the minimum sentences required to be imposed for the offences that the appellant has been convicted. In *Director of Public Prosecutions v Mngoma* 2010 (1) SACR 427 (SCA) at para [11]; See also *S v Michelle and Another* 2010 (1) SACR 131 (SCA) at para [11] as well, where Bosiello JA stated:

"[11] The powers of an appellate court to interfere with a sentence imposed by a lower court are circumscribed. This is consonant with the principle that the determination of an appropriate sentence in a criminal trial resides pre-eminently within the discretion of the trial court. As to when an appellate court may interfere with the sentence imposed by the trial court, Marais JA enunciated the test as follows in *S v Malgas* 2001 (1) SACR 469 (SCA) (2001 (2) SA 1222; [2001] 3 All SA

220) at 478d-g:

'A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate Court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate Court is at large. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate Court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate".'

- [16] It is, in my view, clear that the Regional Magistrate endeavoured to strike a balance between the personal circumstances of the appellant, the crime and the interests of society and as such I cannot conclude that there exists a misdirection on the part of the trial court.

- [17] In the circumstances I make the following order:

[17.1] The appeal against conviction and sentence is dismissed.

It is so ordered

W. Hughes

Judge of the High Court Gauteng, Pretoria

I concur

B. Rangata

Acting Judge of the High Court Gauteng,

Pretoria

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