

SOUTH AFRICA / JUDGMENT

Mandlazi v S (A668/13) [2014]

ZAGPPHC 711 (12 September 2014)

[2014] ZAGPPHC 711

COURT

North Gauteng High Court, Pretoria

BEFORE

N V Khumalo, Mushasha

CASE / FILE NUMBER

A668/13

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION. PRETORIA)

CASE NO: A668/13

DATE; 12 SEPTEMBER 2014

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

ALI JACK

MANDLAZI.....APPLICANT

and

THE

STATE.....RESPONDENT

JUDGMENT - LEAVE TO APPEAL

KHUMALO J

- [1] Applicant is seeking leave to appeal against the judgment of this court delivered on 20 March 2014, upholding the conviction and sentence of ten (10) years imprisonment imposed upon him on a charge of rape by the Regional Court of Mpumalanga in Witbank on 26 June 2012.

- [2] Before the Application could be heard the Respondent raised a point in limine relying on s 16 in Chapter 5 of the Superior Court Act 10 of 2013 ("the Act"), that the court lacks jurisdiction to hear the matter. The parties were allowed an opportunity to address the court on that point as we were informed and the Applicant confirmed that the point was brought to the attention of the Applicant prior to the hearing of the Application.
- [3] Counsel for the Respondent, having introduced the subject made no submission or any further contribution in relation thereto except submitting two unreported decisions of the High Court; Western Cape Division, in the matter of Lucky Imador v ; Case no: A167/2013 delivered on 3 April 2014 and Tuntubele v S; Case no: A524/12 delivered on 6 June 2014.
- [4] s 16 (1) in Chapter 5 provides that:- Subject to section 15 (1), of the Constitution and any other law-
- (a)....
- (b) an appeal against any decision of a Division on appeal to it, lies to the Supreme Court of Appeal upon leave having been granted by the Supreme Court of Appeal; and
- (c) an appeal against any decision of a court of a status similar to the High Court, lies to the Supreme Court of Appeal upon leave having been granted by that court or the Supreme Court of Appeal, and the provisions of section 17 apply with the changes required by the context.
- [5] The word Appeal in s 1 of the Act is defined in the context of Chapter 5 as not to include an appeal in a matter regulated by the Criminal Procedure Act, 1977 (Act 51 of 1977), or in terms of any other criminal procedural law.
- [6] The wording of the Act is self- explanatory, evidently the sections under Chapter 5, specifically the provisions of s 16 are not applicable to this matter. Counsel's contention is ill-advised and has no basis. It was therefore not necessary in our deliberations to consider the authorities he referred to.
- [7] In considering the Application for leave to appeal, we are enjoined to have due regard to:
- [7.1] whether there are prospects of another court coming to a different conclusion, advocating that another court may find that the court a quo erred in its assessment of facts or its application of the law to the facts.
- [8] The facts of the case are dealt with extensively in my judgment, therefore not necessary to be repeated and the reasons for not finding any misdirection on the part of the court a quo are also comprehensively detailed in the judgment.
- [9] Applicant in its heads of argument submit that another court might come to a different conclusion on his conviction and refers the court to Applicant's amended Notice of Appeal to confirm a contention of an unfair trial that did not form part of the Notice to Appeal that was part of the record in front of the Honourable Court. Counsel further, with reference to the

Heads of Argument contends that paragraph 30 of the judgment is factually incorrect. The principle to be followed is clearly enunciated in our judgment that 'the burden of proof play a very important role with regard to matters that are decided merely on the record and that only the examination of the record should persuade the Appeal Court that the trial court had or not erred in its assessment.'

- [10] The heads of argument are also contradictory in term, on one hand alleging that both the court a quo and Appeal Court erred by adopting a global view of the totality of the evidence to reject the evidence of the Appellant, whilst conversely alleging, that the Honourable Judges did not follow the rules of assessing the Applicant's evidence in the context of all the evidence to determine whether his defence was reasonably possibly true. The issue was dealt as is directed in *S v Chabalala* where Hefer AJA concluded that:

"The correct approach 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."

- [11] As indicated in the judgment, the whole body of evidence considered in its totality lends credence to the version of the complainant and cast serious doubts to that of the Applicant and his alibi supporting the findings of the court a quo.

- [12] The Applicant further alleges that the court should have found the complainant to be unreliable due to her evasive questions, sudden loss of memory and her asking questions instead of answering them. In his submissions Counsel argued that this created doubt to the correctness of the court's decision and in such an instance the conviction should have been set aside: The judgment extensively dealt with the evidence of the complainant, mainly how it was assessed by the learned magistrate to determine if the criticism by the Applicant is reasonable, reference is made to paragraph 19 -34 dedicated to the assessment of all the evidence.

- [13] The contention Applicant advances on the question: of doubt that arises on the correctness of the court a quo's assessment of facts was dealt with in *S v Robinson* 1968

- (1) SA 666 at 675H, where the court opined that:

"let the trial court's decision stand, if in doubt (that the court a quo's assessment was wrong (on facts and reasons)).

Also in *Kunz v Swart* 1924 618 at 615 as well as in *Taljaard v Sentrale Raad* 1974

- (2) SA 450 (A), it was confirmed that mere doubts in the trial court's correctness on the facts have been found insufficient to set aside the court's decision. More especially if the doubt is on facts that are not of material relevance.

[14] The Applicant has criticized the court also on the sentence it imposed, for failure to recognize the absence of physical injury to the complainant as lessening the moral blameworthiness of the Applicant and at the same time referred to S v MM 2013

(2) SACR 292 SCA at para 26 F that reads:

"the provision does not preclude a court sentencing for rape to take into consideration the fact that a rape victim has not suffered serious or permanent physical injuries , along with other relevant factors, to arrive at a just and proportionate sentence. To this, one must add that it is settled law that such factors need to be considered cumulatively and not individually "(my emphasis)

[15] As indicated by the bold sentence in the quotation the fact of the physical injury is to be, and was weighed against the other factors including the prolonged trauma and emotional harm that the complainant suffered.

[16] With regard to the fact that Applicant is a first offender, not having committed a crime till the age of 41, it is trite that the fact of being a first time offender and therefore a candidate for rehabilitation is already considered in the- legislation of the prescribed minimum sentence and therefore cannot be a factor to be considered as a substantial and compelling circumstance envisaged by the Act. The court dealt with all the other factors that were submitted in mitigation and aggravation before the court a quo, including the presentencing reports to consider if it properly exercised its judicial sentencing discretion, painstakingly

probing the progression to its decision and found no misdirection. Regarding the exercise of the discretion Matjied JA stated in S v MM supra, that:

"...I hasten to add that it is trite that each case must be decided on its own merits. It Is also self-evident that sentence must always fit the crime, the criminal and the circumstances of the casz.'(my emphasis)

[17] For the reasons illustrated hereinbefore, we stand by our judgment and are of the view that there are no prospects of another court arriving at a different conclusion. We therefore make the following order:

[17.1] Application for leave to appeal is dismissed

N V KHUMALO J

JUDGE OF THE HIGH COURT

GAUTENG DIVISION: PRETORIA

I concur

MUSHASHA ACTING

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