

SOUTH AFRICA / JUDGMENT

Mandlazi v S (A765/2016) [2018] ZAGPPHC 395 (22 May 2018)

[2018] ZAGPPHC 395

COURT

North Gauteng High Court, Pretoria

BEFORE

Tuchten, S Mokose

CASE / FILE NUMBER

A765/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

(1)

NOT

REPORTABLE

(2)

NOT OF

INTEREST TO OTHER JUDGES

CASE

NO: A765/2016

22/5/2018

In

the matter between:

LUCKY

MANDLAZI

Appellant

THE

STATE

Respondent

JUDGMENT

Tuchten J:

1 The appellant was charged in a regional court with one count of housebreaking with intent to rape and one count of raping the 65 year old complainant. The appellant was about 41 years old when the offences were committed.

2 The undisputed evidence is that the complainant was severely disabled at the time the offences were committed. She was at home alone, asleep, on 3 April 2012, on the sponge she used as a mattress when a man broke open the door to the dwelling, raped her and left the premises. The assailant left behind a form of underwear called in the evidence a BVD.

3 The complainant herself was so traumatised by the events I have described that she was unable to give evidence. But the complainant's niece, Ms M, testified and described how, immediately prior to the events I shall proceed to recount, she gave the complainant food and then returned to her nearby home. At about 22h45, she heard the sound of a door opening and went outside. There she saw a man who looked like the appellant approaching her, pulling up his trouser as he walked.

4 Ms M heard the complainant screaming for help. She saw that the lock to the complainant's door had been broken. The complainant

reported that she had been raped and that she had injuries to her neck and waist. The complainant pointed out the BVD to Ms M.

5 The rape was reported to the police. Pursuant to the police investigation, a swab from the BVD and a vaginal swab from the complainant were sent for DNA analysis. For purposes of analysis, DNA samples were taken from the appellant. The analysis results showed that the vaginal swab showed DNA matching that of the appellant. Statistically, the chance that this could have emanated from a man other than the appellant was 1 in 230 000. The swab from the BVD matched with an equivalent statistical coincidence chance of 1 in 2,3 trillion people. The appellant lived in the same village as the complainant and Ms M.

6 The complainant was examined by a medical practitioner during the day following the attack upon her. She had a swollen cheek, red marks on both sides of the neck and presented with genital injuries and other incidents consistent, when taken together, with assault, attempted strangulation and forced vaginal penetration. She presented further with a severe osteoarthritis of both hips, a profound hearing loss and difficulty with speech.

7 The appellant testified in his own defence. He denied breaking into the complainant's house or raping her. But this evidence cannot be reasonably possibly true in the light of the DNA evidence and the incontestable fact shown by the medical evidence that the complainant had been raped.

[1]

8 Counsel for the appellant argued that the trial had been unfair. The record shows that the prosecutor had formulated the rape charge in three separate ways when she put this charge to the appellant at the trial. After both the first and second attempts to put the rape charge to the appellant, the record simply noted that the court adjourned. What transpired during these adjournments does not appear from the record. The appellant was legally represented throughout. On none of the three occasions I have described or at any stage during the trial was there any objection to the short adjournments or any suggestion that the appellant had been hampered in his defence. Nor is there any suggestion on appeal that anything untoward or improper happened during these adjournments.

9 The argument for the appellant is that it was not clear to what charges the appellant had to plead. Counsel drew our attention to the fact that during one of the attempted readings of the rape charge, the complainant was described as disabled woman, although there is no reference to her disability in the written charge.

10 The Criminal Procedure Act[2] provides that the "charge" which an accused person faces may be inspected by the accused at any time.[3] The "charge" is defined to include a summons or indictment.[4] An objection to a charge must be made in writing.[5] An accused person may in writing request further particulars to the charge and further particulars must be "delivered" to the accused.[6]

11 I therefore conclude that the scheme of the Act is that the charge and any objection to it, request for further particulars or reply to such request must all be in writing. From this it follows that the charges which the appellant faced were those in the charge sheets.

12 No doubt, cases may arise where the accused person is confused by a discrepancy between the written charge and what the prosecutor puts to the accused person as being the charge when the matter is called in court. In such a case the confusion of the accused person may result in an unfair trial.

13 But that is not what happened in this case. The appellant and his representative knew from the outset what case the appellant had to meet. In my view there is no substance in this point.

14 In a related argument, counsel submits in his written argument that in the light of the adjournments and the different oral formulations of the rape charge, "judicial interference in the decision what charges should be put and the format of the charges cannot be excluded".

15 But there is simply no evidence of such interference or of any conduct of the regional magistrate which was not approved of by the appellant and his legal representative. This is not a point which was raised at any stage before the submission of counsel's written argument and there was no complaint at all prior to the submission of counsel's written argument that anything untoward had happened. Counsel suggests that the point be referred to the regional magistrate for comment. I disagree. There is no basis for any such conclusion. It remains open to the appellant to bring the proceedings in the court below on review. Unless and until that is done, there is no basis on which this court ought to intervene in this regard.

16 The appellant was therefore rightly convicted as charged. I turn to the question of sentence.

17 The appeal against sentence must be seen in the light of the provisions of the minimum sentence regime imposed by the Criminal Law Amendment Act.[7] The regional magistrate found the appellant guilty of rape involving three scenarios contemplated in rape referred to in Part 1 to Schedule 2 to the Amendment Act: rape more than once, rape of a disabled person rendered particularly vulnerable by the disability

and rape involving the infliction of grievous bodily harm. I shall assume in favour of the appellant that rape more than once was not proved beyond a reasonable doubt.

18 Counsel's argument is that the charge should specify the specific facts on which the State intends to rely to render the accused person liable to the minimum sentence in question. Thus, goes the argument, before the regional magistrate was empowered to implement the provisions of Schedule 2 Part 1 read with 51(1) of the Amendment Act, the charge should have alleged in terms that the complainant was a physically disabled person who, due to such disability, was rendered particularly vulnerable or that the rape had involved the infliction of grievous bodily harm.

19 I do not agree. The cases go no further than to require that the section rendering the accused person liable to the minimum sentence

in question be identified in the charge or that the provisions of these sections be explained to the accused person. In the present

case, the charge specifically provided that it was to be read with

... s 51(1) or 51(2)(b) and Schedule 2 of the ... Amendment Act.

20 After the charges were put to the appellant but before the appellant pleaded, the regional magistrate explained to him that

... if convicted on a charge of rape as listed in Part 1 of Schedule 2 [of the Amendment Act] then a minimum sentence of life imprisonment is applicable.

21 The regional magistrate asked the appellant if he understood what she had told him and the appellant said that he did. At no stage during the trial did the appellant or his legal representative suggest that the appellant had not understood that he faced a life sentence. In his address to the court below in mitigation of sentence, the appellant's legal representative addressed only the appellant's personal circumstances.

22 In my view, the passage in *S v Ndlovu*,^[8] relied upon by counsel for the appellant, is in fact against the appellant. That passage is authority for the proposition that where the charge is "rape read with the provisions of s 51(2) [of the Amendment Act]", a conviction on a charge of rape read with the provisions of s 51(1) cannot properly give rise to a conviction of rape read with the provisions of s 51(2). The charge in *Ndlovu* was found by the Constitutional Court to be complete and not defective. A defective charge can however be remedied in some instances by evidence

under s 88 of the Criminal Procedure Act.

23 In the present case, therefore, the procedural barrier to a conviction of rape read with the provisions of s 51(1) is simply not present. It was not suggested that absent the barrier, the court below could not have regard to the evidence of disability and vulnerability and grievous bodily harm.

24 The provisions of s 51(1) are engaged when a rape victim is proved to have been disabled and rendered particularly vulnerable by the disability immediately prior to the rape. The regional magistrate found that the complainant was rendered particularly vulnerable by her disability because she suffered from speech and hearing disabilities and suffered from severe osteoarthritis. Counsel submitted that a finding of particular vulnerability could only properly be made on the evidence of a medical expert. I do not agree that this can be correct in the circumstances of the present case. The disabilities meant that she could not hear the approach of her

attacker or call for help or evade his attack to the same extent that a regularly abled victim could have done. No specialist medical

evidence is needed to draw these conclusions.

25 Counsel challenged the finding that the rape had caused the complainant grievous bodily harm. Counsel's argument overlooks the unchallenged

evidence that the result of the rape was that the complainant was unable to move and was thus confined to a wheelchair and unable to care for herself. Grievous bodily harm was therefore proved.

26 In a thorough evaluation, the regional magistrate considered the factors relevant to sentence and particularly the question whether, under s 51(3)(a) of the Amendment Act, substantial and compelling circumstances existed which justified the imposition of a sentence

less severe than the prescribed minimum. The regional magistrate concluded that no such circumstances were present. That finding has not been attacked on appeal. It is therefore unnecessary for this court to enlarge on the question of sentence.

27 The appeals against conviction and sentence can therefore not succeed. I make the following order:

The appeals against conviction and sentence are dismissed and the orders of the court below are confirmed.

NB Tuchten

Judge of the High Court

22 May 2018

S Mokose

Acting judge of the High Court

- [1] There was no suggestion at the trial that the penetration of the complainant had been consensual.
 - [2] 51 of 1977
 - [3] Section 80
 - [4] Section 1
 - [5] Section 85
 - [6] Section 87
 - [7] 105 of 1977
 - [8] 2017 2 SACR 305 CC para 45
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