

SOUTH AFRICA / JUDGMENT

Matsinhe v S (CA 20/15) [2020] ZANWHC 37 (3 February 2020)

[2020] ZANWHC 37

COURT

North West High Court, Mafikeng

BEFORE

M M Leeuw, Samkelo Gura

CASE / FILE NUMBER

CA 20/15

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH WEST

DIVISION, MAHIKENG

CASE

NO: CA 20/15

In

the matter between:

JOSEPH

MATSINHE

APPELLANT

And

THE

STATE

RESPONDENT

JUDGMENT

LEEUEW JP:

Introduction

[1] The appellant was convicted of a crime of rape of a minor child and sentenced to life imprisonment. The appellant appeals against both the conviction and sentence imposed.

Factual

Background

- [2] The complainant who was 15 years old when she testified in the lower court on 20 November 2011, stated that on 6 October 2010 at approximately, 16h00 after school, she was on her way to her parental place, when she walked past a certain house. The appellant who was at the veranda of the house, beckoned her to enter into the yard. He invited her to enter the house. Immediately after entering, the appellant closed the security door of the house.
- [3] The complainant was crying when the appellant locked the security door. The appellant was coerced to undress her clothes and the appellant took off her trousers, shirt and panties. He forcefully pinned her onto the bed and had carnal intercourse with her without her consent. She was crying and tried in vain, to free herself from him.
- [4] When the appellant was done, he let her free and unlocked the security door. She went home where she found her aunt. She did not immediately report the rape to her aunt, the reason being that the appellant had threatened to kill her if she reported the rape to anyone.
- [5] She nonetheless reported the rape to the aunt only after a few weeks because she was experiencing pains in her private parts when she passed water. The aunt reported the matter to the grandmother, who together with the two other aunts and the complainant, went to the appellant's place of residence.
- [6] On arrival, the appellant was confronted about the rape incident and was requested by the grandmother to take the complainant to the clinic. The appellant refused to do so, and denied that the complainant was at his place of residence. He also denied having met the complainant nor having had sexual intercourse with her. They returned home and she was then taken to a medical doctor for examination, who confirmed that she was sexually assaulted.
- [7] Later on the same day after sunset and when it was a bit dark, the appellant came to the complainant's home in the company of his girlfriend and a certain male person, only to reiterate that he was not prepared to take the complainant to the doctor.

Grounds of Appeal

- [8] The appellant submits that the evidence of the complainant is inadmissible and unreliable in that she was not properly admonished, in terms of Section 164 of the Criminal Procedure Act (the Act). [1]
- [9] On sentence, the appellant submits that the sentence of life imprisonment is shockingly inappropriate especially in view of the fact that it is not clear as to whether the appellant was charged in terms of section 51
- (1) or 51 (2) of the Criminal Law Amendment Act[2] . Consequently the appellant was not warned about the possibility of a life imprisonment sentence upon conviction.

- [10] It is further submitted that the Court a quo erred by not imposing a lesser sentence and that the Court did not adequately consider the following factors: that the accused was
- (34) thirty four years old and had three minor children dependant on him ; that the Learned Magistrate did not blend the sentence with a measure of mercy; that at the age of thirty-four, he is capable of being rehabilitated; and that the Learned Magistrate erred in over-emphasizing the seriousness of the offence and did not adequately balance these with the personal circumstances of the appellant.

The Law

- [11] Section 164 of the Act provides that:

“(1) Any person, who is found not to understand the nature and import of the oath or the affirmation, may be admitted to give evidence in criminal proceedings without taking the oath or making the affirmation: Provided that such person shall, in lieu of the oath or affirmation, be admonished by the presiding judge or judicial officer to speak the truth.

- (2) If such person wilfully and falsely states anything which, if sworn, would have amounted to the offence of perjury or any statutory

offence punishable as perjury, he shall be deemed to have committed that offence, and shall, upon conviction, be liable to such

punishment as is by law provided as a punishment for that offence.”

- [12] In *S v Sikhapha*[3] , where the appellant had raised as one of his grounds of appeal, that the Regional Magistrate had not enquired as to whether or not the complainant understood the oath administered to her, the court held that:

“There is no substance in this complaint. Section 164 of the Criminal Procedure Act permits a presiding officer to dispense with the taking of an oath where it appears that a child does not understand the nature and import of the oath. In such circumstances an enquiry should be held as to the level of understanding of the witness, and the presiding officer must admonish the child to tell the truth. But a formal enquiry is not necessary, as long as the presiding officer has formed an opinion that the witness does not understand the meaning of the oath. . . . There is no requirement that the trial court must formally enquire whether a witness understands the oath, nor that the presiding officer must record that fact. Of course a presiding officer must be satisfied that a witness does understand the oath, but he or she may form a view in this regard without formally making an enquiry or recording his or her view. There is nothing at all in the evidence to suggest that either the complainant or her brother were ignorant of the import of the oath.” (emphasis added)

- [13] In *S v Matshivha*[4] the Court stated that:

“Section 164(1) is resorted to when a court is dealing with the admission of evidence of a witness who, from ignorance arising from youth, defective education or other cause, is found not to understand the nature and import of the oath or the affirmation. Such a witness must, instead of being sworn in or affirmed, be admonished by the judicial officer to speak the truth. It is clear from the reading of s 164(1)

that for it to be triggered there must be a finding the witness does not understand the nature and import of the oath. The finding must be preceded by some form of enquiry by the judicial officer, to establish whether the witness understands the nature and import of the oath. If the judicial officer should find after such an enquiry that the witness does not possess the required capacity to understand the nature and import of the oath, he or she should establish whether the witness can distinguish between truth and lies and, if the enquiry yields a positive outcome, admonish the witness to speak the truth.”(My emphasis)

[14] In *Director of Public Prosecution, Transvaal v Minister of Justice and Constitutional Development & Others* 2009 (2) SCAR 130 (CC) at para 166, the Court held that:

“The reason for the evidence to be given under oath or affirmation or for a person to be admonished to speak the truth is to ensure that the evidence given is reliable. Knowledge that a child knows and understands what it means to tell the truth gives the assurance that the evidence can be relied upon. It is in fact a pre-condition for admonishing a child to tell the truth that the child can comprehend what it means to tell the truth. The evidence of a child who does not understand to tell the truth is not reliable. It would undermine the accused’s right to a fair trial were such evidence to be admitted. To my mind, it does not amount to a violation of section 28(2) to exclude the evidence of such a child. The risk of conviction based on unreliable evidence is too great to permit a child who does not understand what it means to speak the truth to testify. This would indeed have serious consequences for the administration of justice.”

[15] In the present case, the Learned Magistrate admonished the complainant as follows:

“COURT: M, who is your principal?

WTNESS: His name is Mr B.

COURT: Do you attend church, M?

WTNESS: Yes.

COURT: To which domination do you belong?

WTNESS: The name of my church is Shembe, your worship.

COURT: What at your church or let me say first at your church what are you encouraged to do?

WTNESS: Not to tell lies and that we must tell the truth, your worship.

COURT: You say you are in Grade 6.

WITNESS: Yes

COURT: Tell me what your teachers encourage you in that school?

WITNESS: That we must not play with boys, your worship.

COURT: And what else? Are you allowed to lie at school?

WITNESS: No, they would not.

COURT: Now in this court we want the truth only. It should be the truth and if something you don't know you should say so because we do not want to say something you might have heard from someone.

WITNESS: Yes.

COURT: We do not want something that you were told by someone to come and tell us. It should only be that we should know and only that which is within your knowledge, is that clear?

COURT: That you promise to tell the truth?

WITNESS: Yes.”

[16] The nature of the enquiry conducted by the Learned Magistrate clearly indicates that he was alive to the requirement that it is necessary to establish whether a child understands what it means to tell the truth. I am of the view that there is no merit in the submission that the child was not properly admonished in terms of section 164(1).

[17] Counsel for the appellant submitted that in as far as the merits of the case are concerned, the state has succeeded to prove, beyond reasonable doubt, that the appellant did commit the offence of rape. I am of the view that such a view cannot be faulted.

On sentence

[18] The charge of rape proffered against the appellant was read with the provisions of “Section 3 and 1, 56 (1), 57, 58, 59, 60 and 61 of Act 32 of 2007 together with the provisions of Section 51 Schedule 2 of the Criminal Procedure Act 105 of 1997. It is evident from the charge sheet that the state did not clearly stipulate that either the provisions of section 51 (1) or 51 (2) of Schedule 2 of the Criminal Law Amendment Act are applicable.

[19] However, it is clear from the Learned Magistrate’s judgement in paragraph [44] that he convicted the appellant of an offence of rape read with the provisions of Section 51(2) of the Criminal Law Amendment Act. This relates to Part III of Schedule 2 and not Part I of Schedule 2, which provisions have a bearing on the nature of the imprisonment sentences to be imposed.

[21] It is the trite law that a Court cannot impose a sentence prescribed under Section 51 (1) when the state has relied on Section 51(2) in the charge sheet or indictment. See *Ndlovu v The State*[5], where the Constitutional Court expressed the view in Para 46 that:

“In the light of this, I can do nought but conclude, inexorably, that the Regional Court did not have jurisdiction to impose life imprisonment in terms of section 51(1) of the Minimum Sentencing Act. Mr Ndlovu was convicted of rape, read with section 51(2);

accordingly, the Regional Court was required in terms of section 51(2) to impose a minimum sentence of 10 years (as he was treated as a first offender). The Regional Court's jurisdiction was limited in terms of section 51(2) to imposing a maximum sentence of 15 years."

[21] I am of the view the irregularity which was committed by the Learned Magistrate during the sentencing process, this Court is at liberty to interfere with the sentence imposed.

[22] In as far as the personal circumstances of the appellant are concerned, I am satisfied that the learned Magistrate fully considered same and that safe for the misdirection referred to above, the personal circumstances do not entitle the appellant to be granted a lenient sentence. I am of the view that the sentence of 15 years imprisonment is appropriate.

Condonation

[23] The respondent did not oppose the application for condonation based, on the fact that the appellant's

appeal on sentence had reasonable prospects of success. I agree that condonation should be granted.

Order:-

1. The appeal against conviction of rape is dismissed and the appeal against sentence succeeds.
2. The sentence of Life Imprisonment is set aside and replaced with the following:

"15 years imprisonment. The sentence is antedated to the 18 December 2012."

M M LEEUW

JUDGE PRESIDENT OF THE HIGH COURT

NORTH WEST DIVISION

I agree

SAMKELO GURA

JUDGE OF THE HIGH COURT

Date of Hearing

: 02 AUGUST 2019

Judgment

Handed Down on

: 03 FEBRUARY 2020

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Ref:10/2/5/1-24/15(Adv. Rasakanya)

[1] Act 51 of 1977 as amended.

[2] Act 105 of 1997.

[3] 2006

(2) SACR 439 (SCA) at para 13. See also S v B 2003(1) SACR 52 (SCA).

[4] 2014

(1) SACR 29 (SCA) at para 11. See also Mangoma v S (155/13)

[2013] ZASCA (2 December 2013).

[5] 2017(2) SACR 305 (CC)(15 June 2017) and S v Kolea 2013 SACR409 Also S v Ndlovu 2003(1) SACR 331 (SCA),S v Makatu 2006 (2)SACR582 (SCA).

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