

SOUTH AFRICA / JUDGMENT

Mazantsana v S (A593/2015) [2016] ZAGPPHC 751 (25 August 2016)

[2016] ZAGPPHC 751**COURT**

North Gauteng High Court, Pretoria

BEFORE

Molahlehi E, Fabricius H.J, Mphahlele S.S

CASE / FILE NUMBER

A593/2015

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Source record**THE****REPUBLIC OF SOUTH AFRICA****(GAUTENG****DIVISION, PRETORIA)****Case****no:A593/2015****25/8/2016****Not****reportable: Not of interest to other judges****Revised.****In**

the matter between:

SIPHO

MAZANTSANA APPELLANT

AND

THE

STATE RESPONDENT

JUDGMENT**MOLAHLEHI AJ****Introduction**

- [1] The appellant, Mr Manzantsana, an adult male, was charged, convicted and sentenced to 3 years imprisonment by the regional court in Klerksdorp. He was charged with contravention of the provisions of the Criminal Law (Sexual Offences and Related Matters) Amendment

Act,[1] in that he unlawfully and intentionally sexually violated the complainant who at the time was 11 years old.

- [2] The charges against the appellant related to the accusation that he unlawfully and intentionally kissed and touched the complainant on her private parts. The appellant pleaded not guilty to the charge. He was throughout the proceedings legally represented.

Background

facts

- [3] It is common cause that on the day the incident is alleged to have happened the appellant visited the complainant's father. They together with Mr Speak went to buy drinks and on their return they sat in front of the house and consumed the alcohol. After some time the appellant left the complainant's father with Mr Speak and went to another house in the neighbourhood where there was a party. Whilst at the party the appellant was confronted by the complainant's father who was in the company of Mr Speak. Thereafter the appellant was arrested by the police.

The state's case

- [4] The state in support of its case presented the testimony of four witnesses. The first witness was the mother of the complainant, who in brief testified that; on 25 January 2014, the complainant approached her and told her that the appellant called her and

enquired as to what Grade she was doing at school. After informing him that she was in Grade 6, the appellant kissed her, inserted his tongue into her mouth and thereafter touched her buttocks and private parts.

- [5] At the time the complainant reported the incident, her husband and Mr Speak were seated in the veranda. She also testified that she saw the appellant seated with her husband on the veranda as she came back from a visit to their neighbours with her daughter, who was walking behind her. Few minutes later the complainant made the report about the sexual offence by the appellant.
- [6] The second state witness was the complainant's father, who testified that the appellant is a former work colleague and had visited him at his house on the day of the incident. The appellant arrived at the complainant's home at about 07H00.
- [7] It would appear that after the arrival of the appellant, the complainant's father together with the other friend went and purchased alcohol which they consumed on their return. The three of them sat at the veranda of the house.
- [8] According to the complainant's father at some point the appellant left. After the departure of the appellant his wife called him into the house where she reported the incident of the sexual assault on the complainant.

- [9] The complainant's father together with his friend, Mr Speek, then went out to look for the appellant, who they found at a house nearby where there was a party. According to the appellant on arrival at the neighbour's house, before he could say anything, the appellant said to him that it was not him.
- [10] The complainant was the third witness of the state. Her testimony was presented in terms of Section 170 A of CPA,[2] through the intermediary, Ms Joa.
- [11] The complainant testified that on the day of the incident the appellant stopped her at the gate and then asked her what Grade she was doing at school. After responding to the question the appellant asked her to kiss him. In that process of kissing him, he inserted his tongue into her mouth. Thereafter he touched her once on her buttocks and twice on her private part. At the time of the incident the complainant was wearing jeans and a T-shirt, which means the touching was done on top of her cloths. The appellant said nothing as he was touching the complainant and when she asked him what he was doing he apologised.
- [12] The complainant further testified that she was hurt when the appellant touched her and that she did not approve of what he was doing. She reported the incident to her mother who then informed her father.
- [13] The complainant then accompanied her father with Mr Speek to report the incident to the police. The complainant testified also that the appellant had previously picked her up whenever he visited his father but in those instances he never touched her private parts. During cross examination she testified that although she came to know the name of the appellant, at the police station she had seen him before. She stated that on the day of the incident she saw the appellant seated at the veranda whilst she was playing.
- [14] The complainant confirmed her mother's version, that before the incident they had gone to visit a neighbour. According to her as they were walking back from the neighbour when the appellant stopped her at the gate.
- [15] During cross examination and at the request of the prosecutor the complainant was called into the court where she pointed the appellant and thereafter broke into tears.
- [16] Mr Speek was the last witness for the state. He essentially confirmed the testimony of all the other witnesses in relation to the visit of the appellant and the report of the incident and them going to look for the appellant after the report of the incident and that they found him at the party in the neighbourhood.
- [17] The appellant in his defence testified that he knew the complainant from the time when he worked with her father at Affox. He confirmed that he visited the complainant's home on the day of the incident. He arrived there at 19h15 and left after about 15 minutes. The appellant further testified that he did not see the complainant on that day.

The grounds for appeal

[18] The essence of the appellant's case is that the learned Magistrate in arriving at the decision as she erred because:

- (a) The state witnesses were not credible.
- (b) The other witnesses did not corroborate the testimony of the complainant.
- (c) The complainant mistaken the appellant for the person who was seating with her father at the veranda in the afternoon of the incident of the sexual assault.
- (d) There were material contradiction in the state's case.
- (e) The probabilities favoured the case of the appellant.
- (f) The evidence of the appellant was reasonably true and was corroborated by Mr Speak.

The magistrate's judgment

[19] The Court a quo (the Court) in arriving at the conclusion that the state had proved beyond reasonable doubt that the appellant was guilty as charged, summarised the evidence of each of the witnesses and thereafter analysed, it in its totality. In this respect it found that the testimony of all the state witnesses to be credible and truthful in relation to what happened on the day in question.

[20] The Court correctly notes that none of the state witnesses except for the appellant, could give evidence as to how the sexual assault happened. The only person who could testify about the assault was the complainant.

[21] In relation to the testimony of the complainant the court accepted the discrepancies between her testimony and that of her mother regarding how the mother presented the first report and what the appellant herself said. The Court found in this respect that there was no basis for finding that the complainant was lying or fabricated her testimony.

[22] The testimony of the complainant was accepted as consistent both in evidence in chief and during cross examination, in particular

relating to how the appellant carried out the sexual assault. In dealing with the cautionary rule in sexual offences the Court relied on the provisions of Section 60 of the Sexual Offences Act 32 of 2007 which provides:

"Notwithstanding any other law, a court may not treat the evidence of a complainant in criminal proceedings involving the alleged commission of a sexual offence pending before that court, with caution, on account of the nature of the offence."

[23] The Court thereafter, dealt with the approach to adopt when dealing the capacity of observation and the sufficient intelligence of the child to give reliable evidence in court. In applying the relevant test the Court found that the complainant was sufficiently

intelligent to observe and relate to the Court what happened on the day in question.

Evolution /analysis

- [24] The key issue in dispute in this matter is not whether the incident occurred but rather relates to the identity of the perpetrator. There are two conflicting versions; that of the appellant and that of the complainant. The complainant says the person who assaulted her was the appellant whilst he on the other hand the appellant disputes that it was him. In his version the appellant suggested that the complainant may have been assaulted by someone. In other words he was a victim of mistaken identity.
- [25] There Court was thus faced with having to resolve the conflicting versions, which it did by correctly adopting the trite principle of resolving conflicting versions in trial matters. It did so by determining and making a credibility finding in as far as this issue was concerned. It found the complainant to have been a credible witness and accordingly accepted her version. The version of the appellant was rejected. The record of the proceedings, in my view supports that finding. This should also be understood within the trite principle of our law that the determination of credibility is a matter that lies in the terrain of the trial court. On appeal the Court will not readily interfere with such a finding unless as stated in *Mofokeng v S.*[3]
- "...the ambit for the interference by the appeal court on a finding of fact and credibility is restricted to few instances. It is only allowed in instances where there is a demonstrable and material misdirection by the trial court where the recorded evidence shows that the finding is clearly wrong."
- [26] In my view, having read the record and the judgment of the Court, there is no basis for interfering with the finding of the Court.
- [27] In relation to the identity of the appellant, there was no dispute in as far as the other witnesses were concerned. There was also more importantly, for the purpose of this judgment no dispute of fact that the appellant visited the father of the complainant on the day of the incident. His arrival and departure coincide with the period when the incident is alleged to have happened. These critical facts are not denied by the appellant. It is important to also note that until the incident the appellant had a good relationship with the family of the complainant. The appellant also had a good relationship with the complainant. In this respect the appellant testified that about two years before the incident, whenever he visited the family, he would on those occasions pick up the complainant and hug her.
- [28] The above analysis in my view destroys the defence of possible mistaken identity, as suggested by the appellant. The fact that the complainant picked up the name of the appellant at the police station when the incident was being reported by her father to the police, is irrelevant for the purpose of the identity of the appellant by her.
- [29] In my view, the above analysis indicates very clearly that appellant is the perpetrator of the sexual assault on the complainant.

- [30] In addition to the above analysis, the evidence indicate that it is highly improbable that any of the witnesses fabricated the story against the appellant, in order to get him into trouble.
- [31] Another point that needs to be made, in case there is a suggestion that the complainant consented to what happened to her, is that during cross examination she conceded that she agreed when the appellant requested her to kiss him. This is in my view, is not surprising and does not in fact assist the case of the appellant. The probabilities indicate that the kiss was offered as an innocent affectionate feeling towards a fatherly figure, who the child saw as part of the family by virtue of the relationship with the father. In inserting his tongue into the mouth of the innocent child and touching her inappropriately the appellant did not only commit a criminal offence but also breached the trust that the child had in him.
- [32] In light of the above discussion I find no basis for faulting the finding of the Court in relation to the conviction. Accordingly the appellant's appeal stands to fail and therefore the conviction is to be confirmed.

The sentence imposed

- [33] The appellant has already served the major part of his sentence. It was reported during the hearing in this Court, that he has already been released on parole. It was agreed during argument by both counsels that the sentence imposed by the Court should be set aside and be replaced with a 3 years sentence, half of which be suspended.
- [34] In other words they agreed that the sentence that should be imposed is 3 years suspended on condition the appellant does not commit the same offence, sexual assault prohibited in terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act. The Court accepts and agrees with this proposition.

Order

[35] In the premises the following order is made:

1. The decision of the Court a quo on conviction is upheld, and accordingly the appeal on conviction is confirmed.
2. The sentence imposed by the Court a quo is set side and replaced with the order to the effect that:
 - i. The accused is sentenced to 3years imprisonment, half of which is suspended for a period of 3 years on condition that he does not commit any offence contemplated in section 51 read with Sections 1, 56 (1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.
 - ii. The sentence is ante dated to the 8 October 2014.

Molahlehi E

Judge of the Gauteng Division

I agree

Fabricsius H.J

Mphahlele S.S

[1] Criminal Law Sexual Offences and related matters Amendment Act, 32 of 2007

[2] Section 170A of the CPA reads as follows: "Evidence through intermediaries (1) Whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness under the biological or mental age of eighteen years to undue mental stress or suffering if he or she testifies at such proceedings, the court may, subject to subsection (4), appoint a competent person as an intermediary in order to enable such witness to give his or her evidence through that intermediary."

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[3] A170/2013) [2015] ZAFSHC 13 (5 February 2015).

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