

SOUTH AFRICA / JUDGMENT

Mazitshana v S (CA&R300/2017) [2019] ZAECHGC 41 (2 April 2019) [2019] ZAECHGC 41

COURT

Eastern Cape High Court, Grahamstown

BEFORE

NG Beshe, GNZ Mjali

CASE / FILE NUMBER

CA&R300/2017

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IN THE HIGH COURT OF

SOUTH AFRICA

(EASTERN CAPE

DIVISION, GRAHAMSTOWN)

Case

No: CA&R300/2017

In

the matter

between:

XOLANI

MAZITSHANA

Appellant

And

THE

STATE

Respondent

JUDGMENT

BESHE J:

- [1] The appellant stood trial before the Regional Court, Port Elizabeth where he was facing two counts of rape.
- [2] In respect of count 1, the allegation was that between the period 29 July 2009 and 27 December 2011 and at Buyambo Street, KwaZakhele, the appellant committed acts of sexual penetration with Ms PS from when she was thirteen (13) years old, against her will and without her consent.
- [3] In respect of count 2, the allegation was that on or about the 25 October 2008 at the same place as in count 1, he committed an act of sexual penetration with Ms SG against her will and without her consent.
- [4] According to the charge sheet, the provisions of Section 51 (1) of the Criminal Law Amendment Act (CLAA) 105 OF 1997 were applicable in respect of count 1, in that in the event of a conviction the appellant was liable to imprisonment for life. The charge in respect of count 2 was to be read with Section 51 (2) of the CLAA where, upon conviction appellant would be liable to a discretionary minimum sentence of fifteen (15) years imprisonment. This was brought to the attention of the appellant at the commencement of the trial.
- [5] Appellant pleaded not guilty to both counts on the 23 July 2013. He was nonetheless convicted on both counts three years after he pleaded to the charges and sentenced to imprisonment for life in respect of each count.
- [6] This appeal is directed at both the convictions and sentences.
- [7] In a bid to prove the case against the appellant the state adduced viva voce evidence from six (6) witnesses.
- [8] It became common cause during the trial that appellant is a traditional healer and that people including the two complainants would visit his place in search of healing.
- [9] According to the complainant in count 1, she was introduced to the practice of the appellant by her elder sisters Bulelwa and Phumeza. They consulted the appellant for help with their business/es which they wanted to see prosper. They took the complainant in order for her to get help so that she could perform well in her studies. The first such visit was in May 2009 at the time when she was thirteen
- (13) years old. It was during that first visit that appellant told complainant and her sisters that she was sick and needed certain rituals to be performed and to accept the calling to become a

sangoma. Complainant was required to join the classes of initiates under appellant's "training" which she did up to three times a week. It was during one of those visits in July of the same year that complainant ended up falling asleep on a bed inside appellant's house after drinking gin during that afternoon's gathering. The sessions complainant attended at appellant's place comprised of dancing and singing, during the course of which appellant would give them tots of brandy and gin. This had the effect of making her feel dizzy, as a result of which she lay down on appellant's bed. When she woke up, only appellant was present. Appellant told her she need not worry about going home because he told her sisters she was not coming home she was going to sleep over at appellant's place. The latter proceeded to undress and told complainant to do likewise. She refused and started shivering. Appellant raised the volume of the television. He told her to undress and lie on the bed so that he can heal her and rid her of demons that were inside her stomach. He also warned her that if she did not agree to the healing there would be suffering. She could even die. Appellant lay next to her, wrapped his arms around her body and then proceeded to have sexual intercourse with her. Appellant warned her not to tell anyone about what happened. Back at her house, complainant did not report the matter to anyone. She carried on attending gatherings at appellant's place thereafter.

[10] During the September holidays, complainant was invited by a cousin to visit them in Pretoria. Appellant advised her against the visit due to her "illness". After one of her sisters interceded on her behalf appellant relented and complainant left for Pretoria. During her stay in Pretoria appellant would call her. During one such call she told appellant of pains she was feeling in her abdomen and of the fact that she had missed her menstrual period. In response appellant told her she should not have left for Pretoria and that she was pregnant with a snake. After her arrival back from Pretoria she

went to appellant's house at his instance. On the day following that he took her to a doctor's place in the city centre.

Appellant told complainant that the reason for the visit to the doctor was for the latter to remove the snake from inside her stomach

as he did not possess powers to do so. At some stage two pills were inserted into her vagina by a doctor. Thereafter she was taken home. Later that evening she experienced severe pains on her abdomen as a result her family took her to another doctor who also inserted tablets inside her vagina. She went home with members of her family. In the early hours of the morning the pain intensified and she could not breathe properly and felt dizzy. She felt as if something was bursting inside her vagina. Her sister made her sit on a bucket as she was bleeding from her private parts. She felt something coming out through her private parts which felt like a piece of flesh that was hanging on a cord.

[11] After the incident complainant and her sisters were grateful that appellant arranged for the snake to be removed from inside her stomach and thanked the appellant.

[12] In January of 2010 appellant again healed her by inserting his penis into her vagina. Later that year around October / November, appellant once again had sexual intercourse with her saying he was healing her.

[13] During the early part of 2011, complainant received a cellular phone which she was told it was from the

appellant. She called the appellant thanking him for the gift. On one occasion appellant also bought her a backpack when she had

accompanied him to go buy another child who was related to him, Kuhle school items. Afterwards appellant had sexual intercourse with her in his room once again.

[14] According to the complainant, the last time appellant committed an act of sexual penetration with her was on the 26 December 2011 still claiming that he was healing her. It was after leaving appellant's place on that occasion that day that complainant attempted to take her life by swallowing tablets she found at her house with a glass of bleach. She later woke up in a hospital. She remained in hospital throughout the remainder of December and the whole of January.

[15] During her stay in hospital, she received counselling from a clinical psychologist. Initially she lied to the practitioner about what led her to want to take her life. Eventually, when she could not keep up with the lies she told the clinical psychologist the reason she wanted to take her life. She also reported the matter to her sisters on her discharge from hospital.

[16] Complainant's version as to how she was introduced to the appellant was corroborated by her two elder sisters Phumeza and Bulelwa. As well as the fact that appellant "saw" that complainant was destined to be a sangoma and should undergo training / initiation in this regard.

[17] Both sisters testified that after complainant's return from Pretoria in September of 2009 appellant informed them that she had been bewitched and was pregnant with a snake – an evil spirit. Further that he took her to a medical doctor who gave her medication to rid her of the snake. They also confirmed that they took the complainant to a doctor because her condition had worsened. During the course of the night complainant started bleeding from her private parts. She was made to sit on a bucket. They observed that a foetus came out through her vagina into the bucket which they later flushed down a toilet.

[18] In her evidence Ms Lumka Mtange told court that during 2009 at about 02h00 complainant's sisters fetched her from her house and took her to their home. There she found their younger sister, P., seated on a bucket. She looked inside the bucket and saw a foetus.

[19] Mr Xolisile Vaaltyn testified that he would see complainant attend initiation classes at appellant's home where he was also staying. He denied that he was involved in an intimate relationship with the complainant. He testified that one morning during December 2011 he saw complainant coming out of appellant's room. Complainant did not greet him with a

smile as she usually did. He learnt that the day complainant left appellant's room she ended up in hospital it being rumoured or alleged that she swallowed tablets in an attempt to commit suicide.

- [20] The complainant in respect of count 2 was introduced to the appellant's practice in 2008. She too, like complainant in count 1, was told by the appellant she was destined / chosen to be initiated as a healer / sangoma and became one of appellant's initiates. In October that same year, whilst attending one healing session at appellant's place, appellant told her to remain behind and not leave when others leave. After the others had left, appellant told her that her ancestors wanted them to combine their bodies which he explained to mean they should be intimate because she had a nail inside of her. She refused saying she would wait for the ancestors to appear to her and tell her to do so. In November she dreamt of them having sexual intercourse. She told appellant about the dream she had. Appellant told her they should "combine their bodies" urgently because the nail that was inside her would turn into a snake. On a subsequent date they met in appellant's room where appellant had sexual intercourse with her saying he was riding her of the nail in her stomach. This is what prompted her to agree to have sexual intercourse with the appellant. She testified that they had sexual intercourse several times thereafter. She testified that it was an ongoing thing until she was expelled from the initiation school by the appellant. This was after he got wind of the fact that complainant in count 2 had told somebody about what appellant did to her.
- [21] She only reported the matter to the police upon hearing that appellant had been arrested in connection with the rape of the complainant in count 1.
- [22] According to the appellant, complainant in count 1 was brought to his practice by her sisters. She was complaining of lower abdominal pains. His diagnosis was that complainant had been bewitched and had a snake inside her stomach. He started treating her by giving her some water. He also consulted with complainant's ancestors who showed him that complainant needed to be initiated as a healer. He also tried rid her of the snake by giving her water and touching her. He confirmed that complainant together with others would be given some brandy and gin as part of the proceedings. He however denied that he was ever alone with her in his room or that he had sexual intercourse with her. He testified that after complainant's return from Pretoria where she was on holiday, her problems persisted and she wanted to go and see a doctor. He then asked one Jwara who had medical aid to assist. They took complainant to a doctor in Pier 14. Upon not getting joy as Pier 14, they took the complainant to another doctor who confirmed that complainant was pregnant. The doctor proceeded to administer some treatment to her. Afterwards complainant's sisters thanked him for healing her. He confirmed buying complainant a cellular phone.

[23] He also denied that he had sexual intercourse with complainant in count 2 who was also an initiate. According to him complainant in count 2 was expelled from his school because she wanted to have an affair with another woman. That his ancestors do not allow him to treat people in same sexual relationships. Appellant called a number of witnesses who mostly outlined appellant's

manner of healing. Mr Lusande testified in support of accused's case. His evidence was mainly about the procedure appellant would follow when healing his patients. He also testified that after the ceremony at appellant's place everybody would leave, leaving only appellant behind. He would transport complainant in count 1 to her house. Ms Khanyisa Gomomo also confirmed that everybody would leave after the ceremony. Appellant's grandfather Gomomo also testified in his defence. He confirmed that complainant in count 1 was one of appellant's initiates. According to him she would sleep at his home but that it would be with other children. He also confirmed that he could not be aware of who sleeps in the flats behind his house because he would be asleep. It appears to be common cause that appellant was staying in one of the flats at the back of his grandfather's house.

[24] It was after considering all this evidence that the Magistrate in the court a quo came to the conclusion that the state had proved the case against the appellant in respect of both counts he was facing and convicted the appellant as charged on both counts.

[25] The decision of the Magistrate is assailed mainly on the ground that she failed to exercise the required caution when dealing with the evidence of both complainants who were single witnesses. And that complainant in count 1 was a child witness. She is also criticised for not having dealt with the delay by both complainants in reporting the matter.

[26] The complainant in count 1 may have been a single witness in the strict sense of the word. But she was not of such tender age that there was a need for extreme caution when dealing with her evidence based on this reason. She was thirteen

(13) years old when according to her, the rapes started. She was a few months away from eighteen (18) years when she testified. She cannot be categorised as a young child – young witnesses in my view.

[27] Be that as it may, it is indeed so that when considering certain categories of evidence, the exercise of caution is required. The exercise of caution entails a close scrutiny of the evidence concerned, keeping in mind the dangers inherent in accepting that evidence without careful consideration. It is trite that where evidence calls for the exercise of caution, a conviction will only follow thereon if such evidence is satisfactory in every material respect or if it is corroborated.

- [28] It is clear from the judgment that the Magistrate was alive to the need to consider the evidence of the two complainants with caution. She found complainant in count 1 to have been consistent in her evidence. She acknowledged that she confused dates here and there. The Magistrate attributed that to the lapse of time between 2009 and 2013 when complainant testified. She concluded that her evidence was satisfactory in all material respects.
- [29] I can find no fault with the Magistrate's reasoning in this regard.
- [30] The delay by both complainants in reporting the matter is raised on the basis that the Magistrate failed to deal with it. It was submitted that by so doing the Magistrate misdirected herself.
- [31] The delay in making a complaint usually has an effect on the admissibility of such report. The admissibility of the first report. I did not understand the issue to have been the admissibility of the evidence of the person to whom the first report was made. Be that as it may, the point was made in *S v Dyira*[1] that the complaint is admissible if it was made to a person to whom the complainant would be expected to make, at the earliest opportunity which under the circumstances could reasonably have been expected.
- [32] In this matter both complainants explained that they were made to believe that matters surrounding the conduct of what takes place at the diviner's place during rituals etc. cannot be disclosed. That failure to adhere to this prescript may result in harm which may include death.
- [33] It was only after a failed attempt at taking her life that complainant disclosed that appellant has been having sexual intercourse with her under the pretext that he was healing her or ridding her of a snake / evil spirits in her stomach.
- [34] Complainant in count 2 got the courage to break her silence when she heard about the arrest of the appellant.
- [35] In my view the delay by both complainants in reporting the matter was sufficiently explained.
- [36] It became common cause during the trial that appellant arranged for the complainant in count 1 to be seen by a doctor. Appellant admitted that the doctor confirmed that complainant in count 1 was pregnant. Although according to him the doctor also indicated that the complainant was a virgin. There is evidence that after the doctor's visit, a foetus came out of complainant's stomach. She gave birth to foetus or miscarried.
- [37] This in my view begs the question: Why was the appellant so keen to have complainant examined by a doctor? He knew that complainant has two elder sisters, but did not bother to consult them about complainant's illness. Not to just one doctor but two different doctors. His witness, Mr Ndumiso Mpontshana also known as Jwara confirmed he drove the complainant to a doctor's practice at Pier 14 as well as to doctor Matikinca's room. During cross-examination he also stated that at Pier 14 they visited a clinic. When asked by the

prosecutor what services are provided at that clinic, he had this to say:

“As I said it is a clinic. According to him they are doing things that are done at a clinic. When we got there it was closed but what I heard is that they also do abortions.”

- [38] Even more perplexing is why was it necessary for the appellant, a healer, to take the complainant to a doctor for purposes of having the snake, an evil spirit removed from inside her stomach instead of him doing so, instead of him using his healing powers to do so? Is he not a traditional healer with powers to banish evil spirits? He had already divined that she was bewitched. There is evidence that after the visits to the two doctors’ practices, complainant continued attending at appellant’s practice. So he continued tending to or treating her. Why was it necessary to take her to medical doctors for an illness caused by evil spirits? The inescapable conclusion is that he realised that he had rendered the complainant pregnant and wanted her to have an abortion.
- [39] I am unable to find any misdirection on the part of the Magistrate in her finding that appellant’s denial of having sexual intercourse with the two complainants is not reasonably possibly true. For these reasons, the appeal against the convictions in respect of both counts must fail.
- [40] It is trite that in an appeal against sentence interference is limited to instances where the trial courts’

reasoning is vitiated by a misdirection or where the sentence is startlingly inappropriate to induce shock. In respect of the sentence

in count 1, it is submitted that the sentencing court committed a misdirection by not considering whether the prescribed sentence was just or in accordance with justice. It was also submitted on behalf of the appellant that the Magistrate committed a misdirection in sentencing the appellant to imprisonment for life in respect of count 2.

- [41] In this regard, counsel for the respondent conceded that according to the charge sheet, the charge was to be read with Section 51 (2) of the Criminal Law Amendment Act, 51 of 1997 and that consequently the discretionary minimum sentence is imprisonment for a period of not less than fifteen (15) years. This

much was explained by the Magistrate to the appellant at the commencement of the trial. In *S v Tshoga*[2] the question was asked: Why charge an accused with a particular statute that calls for a particular sentence, and only after he or she is convicted, change and sentence him to a period that does not form part of the charge for which he stood trial and for which he was convicted? Put simply, such a trial is a trial by ambush which is neither desirable nor permissible in a constitutional democracy underpinned by a Bill of Rights”. The same applies in the present case. Accordingly interference with the sentence imposed in respect of count 2 is warranted.

- [42] The Magistrate is not criticized for not having found that substantial and compelling circumstances did not exist or were not present. Her decision is assailed on the basis that she considered herself bound to impose the discretionary minimum sentence having found that no such circumstances exist. It was submitted that she failed to take a step further and consider whether the prescribed sentence was just and in accordance with justice.
- [43] Obviously this is not an enquiry to be made in a vacuum. The court must balance the nature of the crime, personal circumstances of the offender and the interest of the society. Can it be said that the circumstances of this case render the imposition of the prescribed sentences unjust in that it is disproportionate to the crimes, the criminal and the needs of the society?
- [44] The appellant started raping the complainant in count 1 when she was thirteen (13) years old. He continued doing this for three years. He did this under the pretext that he was healing her. The same modus operandi was used to rape complainant in count 2. By so doing, he took advantage of the vulnerability of the complainants. When he realized that he had rendered the complainant in count 1 pregnant, he arranged for her to have an abortion. Complainant in count 1 had nowhere to run to. In instances when she tried to avoid the appellant, he would ask one of her elder sisters to prevail on her to go to his place. Clearly he also betrayed the trust of complainant's sisters who had introduced her to his practice in search of healing for her. This carried on until complainant could not bear it anymore and sought to free herself from appellant's tentacles by attempting to take her life. One also has to take into account the prevalence of rape in our country, so much that we now speak of a "rape culture". In my view, the Magistrate did not misdirect herself. The circumstances of this matter did not render the imposition of the prescribed sentences unjust.
- [45] In the result, the following order is made:
1. The appeal against both convictions is dismissed.
 2. The appeal against sentence is partially upheld.
 - (a) The appeal against sentence of imprisonment for life in respect of count 1 is dismissed.
 - (b) The appeal against the sentence of imprisonment for life in respect of count 2 is upheld.
 - (c) The sentence imposed by the court a quo in respect of count 2 is set aside and substituted with the following:

"The accused is sentenced to undergo fifteen (15) years imprisonment."

NG BESHE

JUDGE OF THE HIGH COURT

MJALI J

I agree.

GNZ MJALI

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Date Heard : 5 December 2018

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[1] 2010 (1) SACR 78 t 82 [4].

[2] 2017 (1) SACR 420 SCA at 437 [47].

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