

SOUTH AFRICA / JUDGMENT

Mofokeng v S (A185/11) [2012] ZAFSHC 73; 2012 (2) SACR 507 (FB) (19 April 2012)

[2012] ZAFSHC 73

COURT

Free State High Court, Bloemfontein

BEFORE

S. Ebrahim, S. Chesiwe

CASE / FILE NUMBER

A185/11

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FREE STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC OF SOUTH AFRICA

Appeal No. : A185/11

In the matter between:-

BENJAMIN POPO MOFOKENGAppellant

and

THE STATEFirst Respondent

CORAM: EBRAHIM, J et CHESIWE, AJ

HEARD ON: 20 FEBRUARY 2012

JUDGMENT BY: CHESIWE, AJ

DELIVERED: 19 APRIL 2012

- [1] The appellant was convicted in the Regional Court, Petrus Steyn, on a charge of raping the complainant, a nine year old girl. The appellant pleaded not guilty. He was, however, found guilty as charged and sentenced to life imprisonment. He lodged an application for leave to appeal against both conviction and sentence, but was unsuccessful. He subsequently petitioned the Judge President of this Court. His petition was successful and he now appeals to this Court against both his conviction and sentence.

- [2] The facts of the case are that on the 14th January 2006 the complainant was playing with a friend, Karabo, when another friend, Mantwa, arrived and told her that the appellant was calling her. The complainant left and went to Mr. Mokoena's place where the appellant was visiting.
- [3] The complainant testified that on arrival at Mr. Mokoena's place, the appellant allegedly took her into the house and closed the door. The appellant put her on the bed on her back and had carnal intercourse with her without her consent. During this whole process, the appellant used a red cloth to close the complainant's mouth so that she did not make any noise. After the alleged rape, the complainant went home.
- [4] When complainant arrived at home her grandmother asked her where she had been and she informed her grandmother that she was from Mr. Mokoena's place. Her grandmother noticed that she had a R2,00 coin. She questioned the complainant and gave her a hiding. The complainant then told her grandmother that she was given the R2,00 by the appellant after he had raped her. Her grandmother made the complainant take off her panty. She observed that the panty had semen on it and was blood stained.
- [5] Mr. Potgieter, on behalf of the appellant, in his Heads of Argument and in oral submission, argued that the complainant and the second state witness Manto Elizabeth Radebe the 11-year old friend of the complainant, were unable to distinguish between right and wrong because of their youth. He further submitted that the investigation conducted in terms of section 164 of the Criminal Procedure Act, no 51 of 1977 by the presiding magistrate at the trial fell short of what is required when admonishing a child witness to speak the truth. Section 164(1) provides:

"Any person 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, 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, the whole truth and nothing but the truth."

He argued that the correct approach which should have been followed was that encapsulated in DIRECTOR OF PUBLIC PROSECUTIONS, TRANSVAAL v MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT, AND OTHERS 2009 (4) SA 222 (CC) at 279 para 165:

"[165] The practice followed in courts is for the judicial officer to question the child in order to determine whether the child understands what it means to speak the truth. As pointed out above, some of these questions are very theoretical and seek to determine

the child's understanding of the abstract concepts of truth and falsehood. The questioning may at times be very confusing and even terrifying for a child. The result is that the judicial officer may be left with the impression that the child does not understand what it means to speak the truth and then disqualify the child from giving evidence. Yet with skilful questioning, that child may be able to convey in his or her own child language, to the presiding officer that he or she

understands what it means to speak the truth. What the section requires is not the knowledge of abstract concepts of truth and falsehood. What the proviso requires is that the child will speak the truth. As the High Court observed, the child may not know the intellectual concepts of truth or falsehood, but will understand what it means to be required to relate what happened and nothing else.”

At paragraph 166 the Constitutional Court set out the rationale for the procedure required by section 164:

“[166] The reason for 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 what it means 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 a 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.”

[7] Advocate Pienaar, on behalf of the State, argued that the record showed that the complainant and the second witness were properly admonished. An intermediary was used to assist the child witnesses and the court. He indicated that it is clear that the court was satisfied with the evidence of the complainant and the second witness. He emphasised that the demonstration using the dolls, showed that the complainant knew the difference between a lie and the truth.

[8] 8.1 The questioning of Manto Elizabeth Radebe (“Manto”) by the presiding magistrate in terms of section 164 proceeded as follows:

“AANKLAER Kan hierdie saak ‘n oomblik afstaan vir getuies.

HOF Die saak sal ‘n oomblikkie afstaan dankie.

MASJIEN AF / AAN

HOF Sy gaan natuurlik baie kort getuig.

AANKLAER Ja, baie kort getuig Edelaagbare. Baie dankie. Ons volgende getuie is Elizabeth Radebe Agbare. Sy is na bewering 11 jaar oud.

HOF U volle name?

GETUIE Manto Elizabeth Radebe.

HOF Hoe oud sê u is u?

GETUIE 13 jaar oud.

HOF Gaan jy skool?

GETUIE Ja.

HOF Graad?

GETUIE Graad vyf.

HOF Is jy bereid om in die opehof te getuig nê om hier te praat by ons. U is nie bang vir ons nie?

GETUIE Dis korrek.

HOF Weet u wat dit is om die waarheid te praat of om 'n leuen te vertel?

HOF Gaan jy kerk toe?

GETUIE Dis korrek, ek behoort aan die kerk, die United Kerk.

HOF Weet u wat dit is om 'n eed af te lê, voor die Here te sweer om die waarheid te praat?

HOF Wat beteken dit? Kan jy vir my vertel wat beteken dit om te sweer om die waarheid te praat voor die Here of verstaan jy dit nie?

GETUIE Ek verstaan nie mooi nie.

HOF Goed, ek gaan jou waarsku, Goed. Elizabeth, die Hof waarsku jou vandag om die waarheid te praat, die hele waarheid en niks anderste as die waarheid nie. As jy nie die waarheid praat nie kan jy in baie groot moeilikheid belang. Verstaan jy dit?

HOF Die Hof is tevrede sy is 'n goeie getuie dat sy die verskil tussen die waarheid en 'n leuen verstaan. Sy word gewaarsku om die waarheid te praat."

The questioning of the complainant by the presiding magistrate so as to determine her competence to testify proceeded as follows:

"AANKLAER Agbare dankie. Die Staat sal vra dat die Hof oorweeg om op te tree in terme van Artikel 170(a) van die Strafproseswet. Die Staat sal versoek dat die kind deur middel van 'n tussenganger getuig. Agbare, ter ondersteuning

van die Staat se aansoek roep die Staat dan 'n maatskaplikewerkster, Hadiyo Constolation Moloi."

"Die hof is dan ook tevrede dat hierdie persoon nie die meriete van die saak met die klaagster bespreek het nie. Die Hof gaan dan nie verder inlig van hoe die werking is nie aangesien sy al verskeie kere opgetree het as 'n tussenganger. Die Hof kan net vir u vra, watter taal praat u? --- Suid-Sotho.

En die kind? --- Ook Suid-Sotho.

Goed dankie. U verstaan mekaar dan baie goed. --- Dis korrek.

Goed. Die tussenganger kan dan afstaan en verdaag na die vertrek aangrensend tot die Hof.

AANKLAER Edelagbare, die Staat sal dan dieselfde tyd vra dat Lina Radebe, die klaagster geroep word, sodat sy gereed gemaak kan word deur die tussenganger.

HOF Lina Radebe kan dan ook na die getuie toe gaan. Die Hof sal in camera wees. Is die deur toe? U moet net die deur toemaak sodat daar nie mense inkom nie. Die Hof merk op dat ons nou in verbinding is met die tussenganger. Die Hof merk ook op dat daar wel – dat daar aangepaste poppe by haar is. Maak die deur toe. U moet net die deur toemaak asseblief. Kom meneer, hierdie ge-in en uit hier by die bank is nonsens. Goed dankie. Ons is dan in verbinding met die tussenganger. Die klaagster is ook daar. Die Hof merk op dat sy besonder klein is, klein gebou en nog uiters ‘n kind is. Haar volle name?

GETUIE Lina Radebe.

HOF Nou Lina, vertel vir my weet jy self hoe oud is jy nou?

GETUIE Dis korrek, ek weet is tans 11 jaar oud.

HOF Weet jy jou datum van geboorte, dag, maand en jaar van geboorte, uit eie kennis?

GETUIE Ek weet net ek is gebore op die 2de Junie, dieselfde maand, maar ek weet nie watter jaar nie.

HOF Dan gaan u skool?

HOF Watter graad is u?

HOF En wat is die skool se naam?

GETUIE Mamafubedi publiekskool.

HOF Behoort jy aan ‘n kerk?

GETUIE Dit is korrek, dit is United Apostolic Unie Church.

HOF Gaan u so nou en dan kerk toe darem?

HOF Nou, het jou ma jou al geleer wat dit is om die waarheid te praat en wat dit is om ‘n leuen te vertel, en wat maak sy met jou as jy ‘n leuen vertel?

GETUIE Dis korrek, my ma het my geleer en as ek leuens praat miskien ek kan sê dat hierdie pop is lelik.

HOF Wat gaan sy, dan jou ma met jou maak?

GETUIE My ma sal vir my raas.

HOF Goed. As ek vir jou sê dat die persoon wat daar sit langs jou ‘n menspersoon is, is dit reg of verkeerd?

GETUIE Dis korrek, dit sal leuens wees.

HOF Leuens wees dankie. Die Hof is dan tevrede op hierdie stadium dat die getuie wel 'n bevoegde getuie is en ook die verskil tussen die waarheid en 'n leuen verstaan. Verstaan u wat dit is om 'n eed af te lê en vir die Here te sweer om die waarheid te praat of verstaan u dit nie?

GETUIE Ek weet en ek kan sweer voor die Here.

HOF Goed. Vertel vir my wat beteken dit?

GETUIE Moet die eed aflê.

HOF Ja, maar wat beteken dit om die eed af te lê?

GETUIE Ek sal voor die Here sweer dat ek moet net die waarheid praat en ek sal ook die Here laat vra om my te help om net die waarheid te sê.

HOF Goed. Blyk dit dat sy wel besef wat dit is om 'n eed af te lê en derhalwe gaan die Hof haar insweer. Sweer sy die getuienis wat sy sal aflê die waarheid sal wees, die hele waarheid en niks anderste as die waarheid nie?

GETUIE So help my God.

LINA RADEBE (Ingesweer) (deur tussenganger) (deur tolk)

HOF Dankie. U moet net besef dat u nou net die waarheid mag vertel, u mag nou glad nie leuens vertel nie, hoor? --- Ek verstaan.

Goed dankie. U kan voortgaan."

[9] In my view, the court a quo correctly applied section 164 of the CPA and warned the witnesses to speak the truth. I am not persuaded by the appellant's argument that the witnesses were unable to distinguish between right and wrong and that the magistrate's investigation was insufficient.

9.1 Manto's evidence was formalistic in nature viz that a man called Popo (she asked him for his name) arrived and called for Lina. Discovering she was not at home, he sent Manto to call her. Manto did not know Popo. She went to Karabo's house, told Lina Popo wanted her. She asked "which Popo". Manto said she did not know. Lina went to Memes house and they told her it was not Meme's Popo, she then went to Mr Mokoena's place. Manto did not go with her. When, in cross examination by the appellant's legal representative, it was put to her that the appellant, Popo, would testify that he did not know her, had not met her on the day in question, a Saturday, and had never, in his lifetime, spoken to her, her response was quick, spontaneous, forthright and logical.

"How are you related to Lina? --- Family.

Do you stay together? --- That's correct I stay at Lina's place.

Okay. Popo will come and testify that he never met you that Saturday. --- I was inside the yard and Popo was asking for her.

He will also come and testify that he never spoke to you on that day. --- He just called Lina. It's then that I came out and asked where is Lina and I said that Lina is not there.

And? --- And then Popo walked down to Mr Mokoena's place.

When did he tell you his name? --- The same day."

When it was put to her pertinently that she was not telling the truth, her answer was indignant.

"It's the truth."

There was no fumbling or hesitancy on the part of this witness in giving her testimony. I have no doubt that this was not due on her part to any practiced art of misleading or lying to persons who were in authority over her, as indeed the learned attorney for the appellant was when cross examining her. The court is an intimidating place for most witnesses and, doubtless, even more so for child witnesses. In the face of such direct scrutiny, bearing in mind that Manto was not testifying through, the medium of an intermediary, but in person in the full view of the appellant, his attorney, the prosecutor as well as the presiding magistrate, I am convinced that had she indeed not been telling the truth, this would have been patent to the court by virtue of her demeanour. In court the content of her evidence also speaks volumes as to her veracity in giving it. It was such a straightforward, simple story that she was called upon to tell to the court that it permitted of no fabrication. In these circumstances and for these reasons, I find that the learned presiding magistrate's enquiry in terms of section 164 of the Criminal Procedure Act in the case of this witness, whilst it may be criticized for its marked brevity, cannot be imputed with invalidity.

As far as the complainant herself is concerned it is clear to me also that the learned presiding magistrate did, in fact, satisfy himself as to this witness's ability to give a full, proper and truthful account of the relevant incident. This he did by virtue of questions put through the medium of the intermediary, eliciting direct, logical and sequential responses from the complainant. The content of the complainant's evidence also bears out the correctness of the learned magistrate's ruling that she was a competent witness.

9.3 Accordingly, Mr Potgieter's submission that insufficient examination of these two witnesses in terms of section 164 of the Criminal Procedure Act was evident from the record of the trial proceedings indicating a failure by the learned magistrate to satisfy himself that the child

witnesses knew the difference between what it is to tell the truth and what it is to lie, cannot, and does not, find favour with this court. I find, and it is my conclusion, on a reading of the conspectus of the evidence of the child witnesses as a whole, that, whilst these witnesses might not (and it is by no means clear to me that they in fact did not) have an appreciation of the abstract concepts of truth and falsehood, they nevertheless were perfectly able and did, in fact, convey to the court a quo what had happened to them on the day in question as regards the rape charge laid against the appellant.

- [10] On the merits, Mr Potgieter challenged the conviction on the basis of the state's failure to present positive DNA evidence linking the appellant to the crime. He argued that the fact that the complainant's hymen was bruised on examination of her genitalia immediately after the alleged intercourse with the appellant was, on its own, not corroborative of rape.
- [11] It appears that the preliminary DNA tests in this matter were negative and as a result thereof no DNA comparison could be carried out. The records showed that the grandmother, Mrs Radebe, washed the child's panty when she saw semen on it.
- [12] The appellant admitted that he was in Petrus Steyn on Saturday 14 January 2006, the day of the alleged rape. He admitted being at Mr Mokoena's house with Simon Lephutleng. He said the complainant and her friend, Lina, arrived. He denied raping her.
- [13] In my view, the complainant, despite her young age, was a truthful and reliable witness. She was cross-examined at length but did not change her version at all. The appellant could not refute her version except through his bare denial. There is no evidence that showed that the complainant met any other person who could have had sexual intercourse with her. After being in the appellant's company, which is common cause she went home directly. Her grandmother discovered that there was something wrong with her and, upon her arrival, questioned her, after which she related what the appellant had done to her. Her grandmother immediately confronted the appellant with the said allegations. The complainant was consistent in her version, and explained in detail what the appellant did to her. Quite correctly the trial court came to the inescapable conclusion that the appellant was the only person who had had the opportunity to rape the complainant. It follows that there is no room for interference with the conviction
- [14] I turn now to the appeal against the sentence. Advocate Pienaar acknowledged that the appellant is young and has no previous convictions. Nevertheless he supported the sentence on the basis that this court was only at large to interfere if the court a quo had committed a misdirection in sentencing the appellant.
- [15] Advocate Potgieter, on behalf of the appellant, submitted that the mitigating factors of this case and the personal circumstances of the appellant cumulatively amounted to compelling and substantial circumstances, which justified the court a quo imposing a sentence less than the prescribed minimum sentence. He highlighted the following:

the appellant's youthfulness at the time of commission of the crime;

the appellant was still a scholar doing Grade 10;

the appellant had spent three years and three months in custody awaiting trial.

- [16] The crime, which the appellant was convicted of, falls within the provisions of the Criminal Law Amendment Act, 105 of 1997 as amended (“the Act”). In terms of section 51(4) read with part 1 schedule II, where a person is convicted of an offence of rape and the victim is a person under the age of 16 years, the sentence of life imprisonment must be imposed unless subsections (3) and (6) provide there are substantial and compelling circumstances which will justify the imposition of a lesser sentence.
- [17] In order to determine whether in a particular case substantial and compelling circumstances exist, a court has to follow the guidelines as set out in *S v MALGAS* 2001 (1) SACR 469 (SCA) at 482 c and consider the trite triad of factors propounded in *S v ZINN* 1969 (2) SA 537 (A) relevant to sentence: the crime, the criminal and the interests of society.
- [18] It was submitted on behalf of the appellant that the rape was not of such a serious nature, but the fact that the child was nine years old at the time of the crime, in itself is very serious. Rape of a child violates the child’s dignity. The record shows that the impact of the crime on the complainant is such that her performance in class has been affected. She is no longer an active participant and she lacks concentration in class.
- [19] A court of appeal may interfere with the sentence imposed by a trial court only where the sentence imposed is so disproportionate to the crime committed that it is unjust or where the trial court in sentencing the offender failed to exercise its discretion properly or exercised it unreasonably.
- [20] In my view the trial court did not accord due weight to the personal circumstances of the appellant; the fact that he was nineteen years of age and a scholar when the offence was committed; that he is a first offender with good prospects of rehabilitation, and that he had spent 3 years and 3 months in custody while awaiting his trial. The trial court found that the aggravating circumstances of the case outweighed the mitigating factors as the underlying rationale for imposing the prescribed minimum sentence of life imprisonment.
- [20] That approach, in my view, constituted a misdirection entitling this court to interfere. A comprehensive pre-sentence report was compiled in respect of the appellant and admitted in evidence. It indicates that there is room for the rehabilitation of the appellant. The learned magistrate had regard for the fact that the appellant had connived and planned to rape the complainant and had lured her with money and death threats into having sexual intercourse with him against her will.
- [21] I am in agreement with the sentiments expressed by the learned magistrate in his judgment where he emphasises the seriousness of the crime of child rape and that it be punished severely. Undoubtedly, in arriving at this conclusion in the appellant’s case, he took into account that the appellant had connived and planned beforehand to rape the complainant and that he had achieved his aim by luring her with money and stifling her resistance with the threat of death. But despite his lack of remorse for his actions, I am not persuaded that the sentence of life imprisonment imposed by the learned magistrate is warranted in the appellant’s case. I say so in light of the fact that the appellant is a youthful first offender who

has been determined by expert evidence to be capable of being rehabilitated, given the opportunity. These are weighty factors, which cumulatively must redound to his benefit as substantial and compelling circumstances justifying the imposition of a sentence less than the minimum prescribed (*S v MALGA* supra). In my view to allow the appellant to be imprisoned for the rape of the complainant, despite the seriousness thereof, for the rest of his life would amount to endorsing punishment which is disproportionate to his offence which would be unjust.

[22] In *S v PHULWANE AND OTHERS* 2003 1 SACR 631 (T) at 635 H – I, the court held that when a youth or juvenile strays from the path of rectitude to criminal conduct, it is the responsibility of the judicial officer invested with the task of sentencing such a youth to obtain all the relevant information, in order to structure a sentence that will best suit the needs of and interests of the particular youth. I am of the view that every judicial officer who has to sentence a youthful offender must ensure that whatsoever sentence he or she decides to impose will promote the rehabilitation of the particular youth. See also *S v NKOSI* 2002 (1) SACR 135 W.

[23] A fine balance needs to be struck between society's needs to punish crime whilst not overlooking the right and interest of a juvenile offender to be accorded an opportunity to be rehabilitated in suitable and appropriate cases. Taking into account all the relevant factors in the appellants case leaves me with the conviction that a sentence of 15 years imprisonment would be an appropriate sentence, which would serve the retributive, deterrent and rehabilitative aims of punishment. That sentence should also reflect a credit to the appellant for the time which he spent awaiting his trial.

[24] I would accordingly make the following order:

24.1 The appeal against the conviction is dismissed. The appellant's conviction of rape in the Regional Court, Petrus Steyn, is confirmed.

24.2 The appeal against the sentence succeeds. The sentence of life imprisonment is set aside and in its place a sentence of 15 years imprisonment is substituted, which sentence is to be ante dated to 16 November 2009, in terms of section 282 of The Criminal Procedure Act, 51 of 1977.

24.3 Three (3) years of the sentence of 15 years imprisonment are to be deducted when calculating the date upon which the sentence is to expire.

S. CHESIWE, AJ

I concur.

S. EBRAHIM, J

On behalf of appellant: Adv. Hendrik Potgieter

Instructed by:

Giorgi & Gerber Attorneys

BLOEMFONTEIN

On behalf of respondent: Adv. F.J. Pienaar

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