
SOUTH AFRICA / JUDGMENT

Mokoroane v S (A38/2016) [2017] ZAGPPHC 471 (26 June 2017)

[2017] ZAGPPHC 471

COURT

North Gauteng High Court, Pretoria

BEFORE

T Brenner, J Teffo

CASE / FILE NUMBER

A38/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

REPUBLIC

OF SOUTH AFRICA

Date

of hearing: 8 May 2017

Date

of judgment: 26 June 2017

Case number: A38/2016

REPORTABLE

OF

INTEREST TO OTHER JUDGES

REVISED

In

the matter between: KENNEDY
 THABANG
 MOKOROANE Appellant
 and
 THE
 STATE Respondent

JUDGMENT

IN APPEAL

BRENNER, AJ

1. This is an appeal against sentence only.
2. The appellant, Kennedy Thabang Mokoroane. ("Mokoroane"), was charged In the Schweizer-Reneke Regional Court, with one count of housebreaking with intent to rape and rape, of N D ("D"), committed on 8 November 2009, in Ipelegeng.
3. He was arrested on 10 January 2011 and pleaded not guilty to the charge, while admitting that he had sexual intercourse with D on the day in question.
4. Mokoroane was born on [...] February 1983, and was 26 years old at the date of the offence. D was born on [...] September 1984, and was 25 years old on the date of the offence.
5. On 8 June 2012, Mokoroane was convicted on the charge and sentenced to a term of 12 years' Imprisonment.
6. Leave to appeal against conviction and sentence was refused on 5 March 2014, this by the trial Court. On petition to this Court, on 1 September 2014, leave to appeal was granted In respect of sentence.
7. Mokoroane was legally represented throughout the proceedings.
8. His main ground of appeal is that the trial Court misdirected itself in failing to find substantial and compelling circumstances to justify a lesser sentence.
9. It is common cause that sexual intercourse occurred between Mokoroane and D in the early hours of 8 November 2009. At Issue is whether Mokoroane broke into D's home with the Intent of raping her, and whether he had sex with her without her consent.
10. Two witnesses testified for the State, namely, the complainant, D, and her aunt, K D ("K"). Further documentary evidence was introduced with the consent of the defence, namely, a section 212 statement containing a DNA report, and a Form J88 recording the findings of a medical examination of D at 14h38 on 8 November 2009.

11. D testified that she had left a tavern at about 02h30 on 8 November 2009, accompanied by her sister, B D ("B"), and Mokoroane. She testified that she had drunk between 6 to 8 Savannah beers but was still in control of her senses. She testified that she and B walked to Mokoroane's home, where they left him, then they proceeded to her home. She knocked on the front door and her aunt, K, opened it. D undressed and put on a vest and a pair of panties and went to sleep. The bedroom was occupied by her child and her aunt.
12. D fell asleep and thought she dreamt that someone was having sex with her. She did not resist or feel any weight on her. She said she could not open her eyes because she was dizzy. When she woke up she saw someone standing in the room, wearing a white t-shirt. It was dark so she was unable to see if she knew the person. She then urinated in a bucket in the room and felt pain when she did so. She then observed sperm in her panties. The rooms in the house were searched and in doing so, she found out that a windowpane in the lounge had been broken. She told her aunt that she suspected that Mokoroane had raped her.
13. The police were called and she was sent to a doctor for an examination. The Form J88 revealed no physical injuries and no sign of forceful vaginal penetration. The document also noted two previous pregnancies and that consensual sexual intercourse had taken place on 17 October 2009, a few weeks before the incident. It was noted that she had had two pregnancies.
14. K testified that D and B had knocked on her bedroom window at about 02h30 on the day in question, to ask her to unlock the front door. She proceeded to do so. According to her, six people slept in the same bedroom, namely, K, D, D's brother, D's child, T, and B. She said she heard nothing while the sexual intercourse took place. She woke up when she heard people talking. She observed that a windowpane near the front door had been broken. She testified that D cried and told her that she had dreamt she was having sex and suspected that Mokoroane had sex with her without her consent.
15. The section 212 statement recorded a match between a DNA sample taken from Mokoroane and a swab taken from D's panties.
16. In his defence, Mokoroane said that he had been drinking with D and her sister at Tlotlo Tavern on 8 November 2009. After looking for a place to buy Simba chips and not finding one, they proceeded together to D's house. D told Mokoroane to wait outside for her. Someone opened the door for her and her sister. After a wait of about 15 minutes, D opened the door to let him in. She was dressed in a nightie. They went to the sofa where she suggested they have sex. They had consensual sex and then he left the house. He had no knowledge of how the window came to be broken. He asserted that there was no "bad blood" between him and D before the incident.

17. D's evidence was corroborated by K in several material respects. She confirmed that D complained of having dreamt that she had had sex then she saw someone in the house. She said that D realised that she had actually had sex when she had pain in her vagina and she cried a lot. K did not admit Mokoroane into the house when she opened the door for D and her sister.
18. The findings in the Form J88 are not inconsistent with the rape of a person who offered no resistance during sex because she was Intoxicated and believed she was dreaming about having sex. She was also sexually mature and had experienced two pregnancies. The section 212 statement confirmed that Mokoroane's DNA was found on D 's panties, and Mokoroane admitted having had sexual intercourse with D on 8 November 2009.
19. D and K's evidence that the windowpane in the lounge was broken on the day of the incident is consistent with housebreaking with intent to rape and rape. There was no evidence of anyone else having been in the house at the time of the rape. The intercourse appears to have been silent, probably because D was intoxicated and thought she was dreaming. This may serve to explain why the other occupants of the house were not disturbed by the act.
20. We refer to the sentence of 12 years' Imprisonment. No previous convictions were proved by the State. Mokoroane was a first offender in regard to the rape of D. Mokoroane volunteered that he had committed robbery before the rape and had been convicted and sentenced in 2010. He was sentenced to 7 years' imprisonment, of which half was suspended. He was arrested In this case on 10 January 2011 and spent 17 months in custody pending trial. However, if he was sentenced on the robbery charge in 2010, the period spent in custody pending the rape trial ran In parallel with the period in custody serving his sentence on the robbery conviction.
21. It should be noted that both robbery and rape involve a level of violence. Albeit that no physical harm was caused to D, and she was not threatened into submission with the use of any weapon, the rape still involved non-consensual sex, which in tum connotes some level of coercion. In the circumstances in casu, since D was sleeping in an inebriated state, she was more vulnerable to this coercion.
22. There was no evidence concerning any ongoing psychological or emotional trauma to the complainant. She· was sexually mature and active, and had experienced two pregnancies.
23. It is common cause that D and Mokoroane had been drinking alcohol. The fact that D thought she was dreaming when the Intercourse occurred and her assertion that she felt dizzy at the time, draws one to the irresistible conclusion that she was intoxicated.
24. Although Mokoroane did not assert that he was drunk on the day of the Incident, he confirmed that he and D had been drinking at Tlotlo tavern before the rape.
25. Mokoroane was single at the date of trial, and had three children, all of whom lived with their mothers. He lived with his parents.

26. Concerning the appropriateness of the sentence in casu, for various other reasons, there are grounds to interfere.
27. In terms of section 51(2)(b) of the Criminal Law Amendment Act, 105 of 1997 ("the CLAA"), the rape itself falls within the purview of schedule 2 part 111. For a first offender, the minimum sentence is 10 years' imprisonment. For a first offender for breaking and entering with intent to commit an offence, the minimum sentence is 5 years' imprisonment. Vide section 51(1)(c) read with schedule 2 part IV.
28. Mokoroane was charged with one count of housebreaking with Intent to rape, and rape. The housebreaking and rape were part of one overall transaction, or incident. Mokoroane could have remained silent on his previous conviction but showed a level of bona fides in volunteering his previous conviction for robbery. There was no evidence of major damage caused during the housebreaking, in that only a windowpane was broken.
29. There was no use of a lethal weapon and D did not sustain any permanent physical injury nor did she testify that continuing emotional trauma had been caused to her. She was sexually mature.
30. Mokoroane was 25 years of age at the date of the offence, and comparatively youthful.
31. The inference is irresistible that both Mokoroane and D were inebriated at the time, and this would have compromised Mokoroane's sense of judgment. Just before the rape, Mokoroane and D had been familiar with one another by drinking together at the tavern and this may have led Mokoroane to believe, in his inebriated state, that D might have been amenable to sexual intercourse with him.
32. We are therefore not persuaded that the housebreaking simpliciter justified the imposition of a further 2 years' Imprisonment on Mokoroane. On the totality of the evidence, a period of 10 years' imprisonment on the charge is a fair sentence.
33. In the result, the following order is made:
 - 33.1. The appeal against the sentence is upheld and the sentence of the trial court is set aside and replaced with the following:
 - I. "The appellant is sentenced to 10 years imprisonment on the count of housebreaking with intent to rape and rape;
 - II. The appellant is declared unfit to possess a firearm in terms of section 103 of Act 60 of 2000."
 - 33.2. In terms of Section 282 of the Criminal Procedure Act, number 51 of 1977, the substituted sentence is antedated to 8 June 2012, being the date on which the appellant was sentenced.

T BRENNER

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

26 JUNE 2017

I agree

J TEFFO

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

Appearances

For the Appellant:

Adv Moloi

Instructed by:

Pretoria Justice Centre (Legal Aid SA)

Counsel for Respondent: Adv M Molatudi

Instructed by:

The Director of Public Prosecutions

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