

SOUTH AFRICA / JUDGMENT

Moloi v S (A862/14) [2017] ZAGPPHC 779 (3 November 2017) [2017] ZAGPPHC 779

COURT

North Gauteng High Court, Pretoria

BEFORE

PA Van Niekerk, PM Mabuse

CASE / FILE NUMBER

A862/14

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IN
THE HIGH COURT
OF SOUTH AFRICA
(GAUTENG
DIVISION, PRETORIA)
CASE
NO:A862/14
NOT
REPORTABLE
NOT
OF INTEREST TO OTHER JUDGES
REVISED
3/11/2017
In

the matter between:

KJ
MOLOI
APPELLANT
And
THESTATE
RESPONDENT

JUDGMENT

VAN NIEKERK AJ:

INTRODUCTION

[1]Appellant was convicted by the Nelspruit Regional Court on a charge of rape of a minor girl (13 years) and sentenced to life imprisonment during

2014. On appeal to this Court (per Avvakoumides AJ and Louw J concurring) the conviction and sentence was set aside and appellant was released from Imprisonment. The Director of Public Prosecutions, Gauteng Division, Pretoria, applied for and was granted special leave to appeal against the order setting aside the conviction and sentence to the Supreme Court of Appeal.

[2] On 2 June 2017 the Supreme Court of Appeal, after hearing argument, reinstated the conviction and sentence imposed by the Regional Court and remitted the matter to this court for the appeal to proceed on the merits. The background to this appeal and the reasons for the order appears from the judgment of appeal in the matter of Director of Public Prosecutions, Gauteng Division, Pretoria (Appellant) vs Kingsley Jafta Moloi (Respondent) case number 1101/2015 delivered on 2 June 2017. ("the judgment").

[3]The factual background to the conviction on the charge of rape and a summary of the evidence led in the Regional Court is set out in paragraphs [4] to [14] of the judgment supra.

[4]In the Appellant's heads of argument and during argument before this court, appellant essentially relied on the same grounds for appeal as when this matter was initially argued before Lauw J, and Avvakoumides AJ and the argument can be summarised as follows:

[4.1]The evidence of the complainant was unreliable and contradicted in material respects.

[4.2]The appellant denied having sexual intercourse with the complainant as a result of which the prima facie proof of the statement (relating to the DNA of appellant to samples obtained from the complainant after the rape incident) in terms of Section 212 of the Criminal Procedure Act, 51 of 1977 ("Section 212") was "upset".

[5] Appellant essentially argued that the state failed to prove beyond reasonable doubt that appellant had sexual intercourse with the complainant, due to the fact that the complainant's evidence was unreliable and the evidence relating to the DNA tests has no probative value as a result of the fact that the appellant testified that the DNA tests were conducted on blood samples which were not obtained from appellant, and therefore the test results were "contaminated."

[6]On the reliability of the evidence of the complainant, the following should be considered:

[6.1] At the time of the incident, which took place on 9 September 2005, the complainant was 13 years old and when the trial took place on 11 September 2006, she was 14 years old. It is therefore to be expected that there may be discrepancies in certain respects on her version of the events, as conveyed to different persons from time to time in the lead-up to her testifying in court.

[6.2] On considering the reliability of her evidence, it serves no purpose to refer to isolated instances where divergent versions of fact were provided by complainant, but the reliability of her evidence should be considered in the light of all the available evidence. The test is not whether or not the complainant gave a consistent version of all material and less significant facts, but rather whether or not her evidence on the material issue namely the allegation that appellant had sexual intercourse with her, should be accepted or rejected. This entails a careful consideration of all available evidence.

[7] It was argued on behalf of appellant that the evidence of the complainant should be rejected in toto , for the following reasons:

[7.1] She was not concerned about appellant sharing a bed with her, naked, after he allegedly produced a fire-arm, which evidence is so improbable that it should be dismissed.

[7.2] during questioning by the trial Court, complainant stated that she first fell asleep, whereas in her evidence she "painted a picture of the appellant ordering her to undress after producing a fire-arm and proceeding to rape her..." This, so argue appellant, is improbable. This version of the events also in certain respects does not support the version the complainant gave to the probation officer, to whom she conveyed that appellant went to sleep in a different room and then woke her in the middle of the night carrying a fire-arm.

[7.3] Complainant was a single witness and a child.

[7.4] One of the witnesses, a certain Gigibon,ⁱ testified that complainant

cried when she arrived home the next morning whereas complainant herself testified that she was not emotional and could still smile at somebody she met along the way.

[7.5] This same witness testified that complainant reported to her that she did not undress herself version. which also contradicts the complainant's

[8] On the other hand complainant. notwithstanding rigorous cross examination as well as intensive questioning by the presiding

Magistrate, never waived from her version of the events in certain material respects. inter alia:

[8.1] That it was the appellant who had intercourse with her.

[8.2] That he used a fire arm to intimidate her into compliance with his demands.

[8.3] Where and when the incident took place.

[9] Apart from this, the evidence further clearly supports the objective evidence based on a medical examination of the complainant namely that she had experienced sexual intercourse with penetration at the time alleged by her, and this is consistent with the reports she made to a family member the next morning as soon as she arrived home.

[10] It was further an uncontested fact that the complaint and the appellant stayed under one roof for the duration of the night of the incident. The appellant testified that he found some young boys at this house with the complainant during the course of the evening, and that he believed that one of them could be the perpetrator. It was however as far as this issue was taken by the appellant during the trial.

[11] Considering the aforesaid, and based on the evidence presented as a whole, the complaint's version that she had experienced sexual intercourse at a time and place which brings her into very close proximity with the appellant cannot be rejected, and this fact was clearly also conceded by appellant during the trial. The question then to be considered is whether or not her evidence relating to the identity of the alleged perpetrator should be rejected or not? In my view, there is no reason to reject this evidence, based on the following:

[11.1] Complainant was clearly of an age where she had the necessary ability to identify her perpetrator, to appreciate the consequences of the incident, and to report the incident cogently.

[11.2] No proper basis was advanced by appellant to infer any mala-fide motive to complainant for implicating appellant.

[12] Turning now to the submission that no reliance can be placed on the DNA evidence, the following brief summary of the evidence in this respect is relevant:

[12.1] A statement was handed in at the trial in terms of Section 212(4), the effect of which was that DNA tests conducted on samples obtained from the complainant the day following the incident and compared to a blood sample obtained from the appellant during the investigation preceding the trial, indicated that there is in excess of a 99% probability that the sample obtained from the complainant emanated from the appellant.

[12.2] As a result of an issue with the "chain evidence" regarding the first sample of blood obtained from appellant and which was used to link appellant to the sample obtained from the complainant, a further blood sample was obtained from appellant on 22 February 2012 and according to test results this blood sample was obtained from the same person from whom the original blood sample referred to supra was obtained, therefore establishing a link between the sample obtained from the complainant and appellant.

[12.3] Evidence was led on the modus operandi of the taking of the sample on 22 February 2012 and the administrative and logistical process to ensure the identity of the provider of the blood sample remains certain.

In the context of the aforesaid facts, the appellant's argument as set out in par [4.2] supra relating to the probative value of such evidence should be considered. Put otherwise, should this prima facie evidence be ignored on the basis that the appellant denied having sexual intercourse with the appellant? On behalf of appellant argument was advanced the effect that there is no duty on an accused to provide evidence to prove his/her innocence, and to hold otherwise, would be "unconstitutional.

[13] In my opinion, this argument is based on a misconception of the meaning and implication of the term "prima facie proof" as it appears in section 22(4) supra. In *Ex Parte Minister of Justice: In re R v Jacobson and Levy* 1931 AO 466 at 478 Stratford JA held:

"If the party on whom lies the burden of proof, goes as far as he reasonably can in producing evidence and that evidence "calls

for an answer" then, in such case, he has produced prima facie proof, and, in an absence of an answer from the other side, it becomes conclusive proof..."

In this regard, also compare *R v Mantell* 1959(1) SA 771(k) on 776H.

[14] The prima facie proof relating to the DNA evidence which links the appellant to the samples obtained from the complainant, in its totality, therefore constitute proof of the fact that appellant had sexual intercourse with appellant and this proof "calls for an answer". By answering with a mere allegation that the samples were "contaminated" based on the rationale that it cannot be the samples of the appellant that were tested because he denies having committed the act of sexual intercourse with the complainant, without at least providing any factual basis in support of the "contamination" argument, simply is no answer.

[15] Considering the aforesaid evidence relating the DNA testing together with the evidence of the complainant, albeit the evidence of a single witness and minor, leaves no reasonable doubt that it was the appellant who had sexual intercourse with the complainant on 9 September 2005.

[16] Regarding circumstances under which the offence took place, the age of the complainant, and the provisions of section 51 and 52 of Act 105 of 1997, there are no reasons for this court to interfere with the sentence imposed by the Regional Court, suffice to note that the Magistrate clearly acted ultra vires in terms of Section 276B of the Criminal Procedure Act 51 of 1977 when ordering that the appellant shall not be eligible for parole.

[17] In the premises the appeal on both the conviction and sentence is dismissed with the proviso that the sentence is amended to strike out the words "Die hot gelas verder dat u nie oorweeg sal word vir parool nie."

PA VAN NIEKERK

ACTING JUDGE GAUTENG DIVISION PRETORIA

I concur

PM MABUSE

JUDGE GAUTENG DIVISION PRETORIA

APPEARANCES:

FOR APPELLANT: ADV. ALBERTS

INSTRUCTED BY: PRETORIA JUSTICE CENTRE

FOR RESPONDENT: ADV. HARMZEN

INSTRUCTED BY: THE STATE ATTORNEY

DATE OF HEARING: 30 OCTOBER 2017 .,

DATE OF JUDGMENT: 3 NOVEMBER 2017

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