

SOUTH AFRICA / JUDGMENT

Mompoti v S (A 86/2018) [2019] ZAFSHC 65 (23 May 2019)

[2019] ZAFSHC 65**COURT**

Free State High Court, Bloemfontein

BEFORE

Murray, Reinders

CASE / FILE NUMBER

A 86/2018

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Policy**IN**

**THE HIGH COURT OF SOUTH AFRICA,
FREE
STATE DIVISION,
BLOEMFONTEIN**

Appeal no:

A 86/2018
MOTSAMAI
ANDRIES
MOMPATI
Appellant
v
THE STATE
Defendant
HEARD

ON:

20 MAY 2019

CORAM:

REINDERS, J
et
MURRAY
AJ

JUDGMENT

BY: MURRAY, AJ

DELIVERED ON: 23 MAY 2019

- [1] The Appellant, MOTSAMAI ANDRIES MOMPATI, was convicted of the Rape of a Minor by the Regional Court Magistrate, Mr J.H.J. Greyvenstein on 1 September 2017. On the same day he was sentenced to Life Imprisonment in terms of S 51(1) read with Part 1, Schedule 2 of Act 105 of 1997. The Appellant therefore exercises his automatic right of appeal.
- [2] The appeal lies against both conviction and sentence. Ms Kruger appeared on behalf of Mr Modise of Legal Aid South Africa for the Appellant and Adv Lesie-Shale of the Office of the Director of Public Prosecutions for the Defence. The State supported the conviction and sentence.
- [3] The State called three witnesses, namely 11-year old R[...] J[...] (the Complainant), J[...] D[...] W[...] (known as “W[...]”), and S[...] L[...].

The trial was held in camera and the Complainant testified through an intermediary. The Appellant was the only Defence witness. He pleaded ‘Not Guilty’, did not file a Plea Explanation and merely denied raping the Appellant.

- [4] The Complainant testified as follows: She was staying in a house at Mafora with her ‘sister’ (her mother’s friend) S[...] and her ‘brother’ ‘W[...]’.

S[...] and W[...] slept in their own bedroom while the Complainant shared a bedroom with S[...]’s 10-year old sister, S[...], her 6-year old brother, S[...], as well as the 30-year old Motsamai (“the Appellant”). The two girls slept in one bed with the 6-year old at their feet, while the Appellant slept in his own bed next to the window.

- [5] In the early hours of the morning the Appellant came to the bed on which the Complainant was sleeping. He picked her up and carried her to the bed on which he had been sleeping. He put her down on her back, removed her panty and took off his clothes. He then took out his penis and inserted it into her vagina. She could feel his penis in her vagina, and it was painful.
- [6] She screamed but he simply looked at the wall. When she then managed to escape, she ran to her sister’s bedroom, clad only in her dress. She woke her brother and told him that the Appellant wanted her to sleep with him. She also told her sister that the Appellant wanted to do strange things to her. She then slept with her brother and sister in their bedroom and when they woke up the next morning the Appellant had already left.

- [7] Although it was dark and she could not see the Appellant, she knew it was the Appellant since he was the one who slept in their bedroom. There were only two adult males in the house, namely the Appellant and her brother, W[....], who was sleeping in the other room. The next morning she was taken to her mother and then to a doctor.
- [8] The Complainant's brother, W[....], testified as follows: on the night of 15 October 2017 the Complainant was staying with him and his girlfriend, S[....], where she had stayed for a long time already. The Appellant, one of his co-employees, stayed with them as well and shared a bedroom with the Complainant and the
- other two children.
- [9] During the night the Complainant came to his bedroom where he was sleeping with S[....] and woke him up. She looked frightened and she was crying. She reported to him that the Appellant was doing bad things to her in the bedroom. He woke S[....] to go and see what had happened to the Complainant. According to him, when S[....] returned she said that nothing happened. He nevertheless told S[....] to fetch S[....] from the other bedroom and she and the Complainant then slept with them in their bedroom. When he woke up in the morning the Appellant had already left. He did not return that night or the next night.
- [10] W[....] testified, furthermore, that he and the Appellant were still friends as before and that he had no reason to falsely implicate the Appellant. Although S[....] and the Appellant still got along, the Complainant was afraid of the Appellant and did not want to see him. He also stated that the Complainant told them what had happened when they took her to the elders the next day.
- [11] S[....] testified as follows: On 15 October 2017 she resided with the Complainant and the Appellant in the same house. The Appellant was sleeping with the children in the other bedroom. During the night, while she was asleep, she heard someone crying. She woke up and asked the Complainant why she was crying. The
- Complainant then told her that the Appellant was doing funny things to her and that he had put his penis into her vagina.
- [12] S[....] touched the front of the Complainant's private parts and felt that she was hot. She reported this to W[....] and said that the Complainant could not possibly be lying: what she said the Appellant had done, he indeed did. She told W[....] that they should wait until the morning and then call the elders to check the Complainant. She then put the Complainant in her bed and fetched S[....], her younger sister, to their bed as well.
- [13] When she went to the other bedroom, the kitchen light was already on and it shed some light in that bedroom as well. She found the Appellant sitting on his bed and asked him why he was doing strange things to the Complainant but he did not answer. He then got up from his bed, went to the sitting-room where the lights were on, warmed some food in the microwave and ate while he sat on the sofa.

- [14] S[...] then went back to sleep and the next morning when she woke up, the Appellant had already left. They then took the Complainant to the elders who took her to the hospital. S[...] stated that she had no reason to falsely implicate the Appellant and that the Appellant would be lying if he said he did not rape the Complainant.
- [15] The nurse who examined the Complainant the morning after the rape, recorded in the J88 medical report that the Complainant told her that when she screamed while the Appellant put his penis into her vagina, the Appellant covered her nose and mouth with his hand. That would explain the Complainant's evidence that she could not scream loudly or for a long time.
- [16] No real version of the Appellant's was put to the State witnesses. He testified that on the day of the incident he went to sleep as usual in the bedroom which he shared with the children. In the morning (Saturday) he woke up and everything was fine. He cleaned the house, washed the dishes and went to his sister's house. He did not return that night or the Sunday night because he was at a party and they were drinking. On the Monday he was arrested at his workplace. He denies having done anything wrong and denies having raped the Complainant. In cross-examination he admitted that although they had their differences, he knew of no reason why W[...] and S[...] would implicate him falsely.
- [17] The Court a quo found the Complainant to have been a credible and reliable witness, a remarkable one for an 11-year old, especially since by then more than a year had passed since the incident. I agree with that finding. She was able to describe exactly what happened and remained unshaken in cross-examination. She could specify that it was vaginal penetration: she could feel his penis in her vagina and described the pain and her screaming.
- [18] The emotional state she was in whenever she had to testify about that part of the night, supports the veracity of her version. Both W[...] and S[...] testified that she was crying when she reported the incident to W[,], and S[...] said she even heard her crying during the night. The Appellant did not deny that she was crying when she went to report to W[,], which she did as soon as she escaped. She also reported to S[,], and the next morning also to the elders and to the nurse who examined her.
- [19] The Complainant was honest enough to testify that it was dark and that she did not see the Appellant. Based on that, the reliability of her identification of the Appellant was attacked. It is well-known that because of the fallibility of human observation, courts must approach evidence of identification with some caution. As was held in *S v Mthetwa*[1] it is not enough for the witness to be honest: the reliability of her observation also had to be tested.
- [20] But, although the Complainant on her own version did not see the Appellant, the circumstances of the case as well as the evidence of the other witnesses support the Complainant's identification of the Appellant as her assailant. It is evident that the Appellant was well-known to the Complainant. On S[...]’s and W[...]’s undisputed evidence the Appellant stayed with them virtually permanently, except occasionally during a week-end,

and the Complainant herself had been with them for a long time. The Appellant slept in the same room as the Complainant. It is therefore highly improbable that she would have mistaken someone else for the Appellant, even in the dark.

- [21] The possibility that the assailant might have been W[...] is excluded by the Complainant's and S[...]’s evidence that she woke him up in his bed in the other room to report the Appellant’s actions to him. It is also undisputed that the Appellant and W[...] were the only two adult males in the house on that night. The Appellant admitted that he would have known if another person raped the Complainant in his bed. W[...] testified that he closed the windows and locked the doors the previous night. Both S[...] and the Appellant confirmed that the windows were closed and the doors locked during the night. The Complainant testified, furthermore, that she noticed that the Appellant’s bed was empty before he put her on it.
- [22] S[...] testified, furthermore, that she saw the Appellant sitting on his bed when she went into the children’s room. He was awake and when she confronted him, he got up and went to warm up some food in the microwave. She then saw him sitting on the sofa, eating the food. That contradicts the Appellant’s averment that he went to sleep and woke up the next morning and nothing was wrong. She denied the version put to her in cross-examination, namely that he was still there the next morning and cleaned the house and washed the dishes before he left, and when he tried to change his story to say that he was still there when she cleaned the house, she also denied having cleaned the house that morning.
- [23] The Appellant’s version was therefore contradicted by the evidence of the Complainant, S[...] and W[...] who all testified that he was gone when they woke up the next morning. His denial of having done anything to the Complainant was also contradicted by the Complainant’s evidence that she screamed and S[...]’s confirmation that she heard her cry, as well as by her evidence that the Complainant had told her that the Appellant had put his penis into her vagina and that, when she examined the Complainant’s private parts, the area was still hot.
- [24] There can therefore be no doubt about the reliability of the Complainant’s identification of the Appellant as the person who raped her that night.
- [25] Although there were some minor differences between the evidence of S[...] and W[...], for instance where W[...] alleged that she told him after examining the Complainant that nothing was wrong, while she stated that she told him that the Complainant’s report was true, I agree with the Court a quo that the discrepancies were not material enough to affect their credibility. The same applies to the discrepancy between the Complainant’s evidence that the Appellant did nothing when she screamed and the J88 statement that she told the nurse that he covered her mouth and nose with his hand. Again, it is not a material difference: the J88 report supports her testimony that she was unable to scream loudly or for a long time.

[26] I agree with the Court a quo that S[....]'s version regarding that event can be accepted, rather than W[....]'s. She was the one who examined the Complainant, who saw the Appellant sitting on his bed when she went to fetch her younger sister from the room, who confronted him without getting an answer, who told W[....] that the Complainant's complaint was real and who took the Complainant to the elders the next morning to take her to the hospital. Her version is supported, furthermore, by W[....]'s

own evidence that he told her to bring the girls to their bed to sleep with them for the rest of the night. It is improbable

that he would have done so if he was told that nothing was wrong.

[27] The Court a quo correctly applied caution when it evaluated the testimony of the Complainant since she was a minor as well as a single witness as to the incident in the Appellant's bed. It was alive to the dangers inherent in the evidence of the Complainant and of the need to exercise caution properly, and accordingly properly assessed the evidence and correctly found that the contradictions were not material and did not render the veracity of the Complainant's version suspect.

[28] As held in *S v Carolus*[2] there is no formula for the credibility of a single witness and section 208 of the Criminal Procedure Act 51 of 1977 provides that an accused may be convicted of any offence on the single evidence of any competent witness. The Court a quo found the Complainant to be such a witness. In my view the trial Court correctly weighed the Complainant's evidence,

considered its merits and demerits, as supported or contradicted by the evidence of the other witnesses, and having done so decided that it was satisfied that the truth had been told despite some shortcomings or contradictions in the evidence. In my view the Court then, and after taking all the relevant factors into consideration, correctly accepted the evidence of the State witnesses, while rejecting that of the Appellant as false.

[29] I am satisfied, furthermore, that the Court a quo did not commit any misdirection in finding that rape had indeed been committed even though the J88 report showed no evidence of any injuries to the Complainant's private parts. The Complainant was clear in her evidence that she felt the Appellant's

penis in her vagina and that it hurt badly enough for her to scream. Section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 defines 'rape' as an unlawful and intentional act of sexual penetration without the other person's consent. Section 1 of the said Act defines 'genital organs' as including the whole or part of the female genital organs and 'sexual penetration' as including any act which causes penetration to any extent whatsoever. The same Act determines that a child under the age of 12 cannot give consent. The Court a quo therefore correctly, after considering the relevant provisions of that Act and the facts of this case, concluded that what had occurred, indeed amounted to rape.

- [30] Where the Court a quo did go wrong, however, was to state that the incident was penetration 'where severe damage was done'. The J88 did not record any evidence of severe physical damage, nor was such evidence led in court. It is not clear, therefore, whether the Court was referring to psychological damage or making an inference based on the Complainant's age.
- [31] Such a finding does not affect the conviction, however, since damage or injuries are not prerequisites for a conviction of Rape of a Minor in terms of Section 51(1) read with Part 1 of Schedule 2 of Act 105 of 1997. It might have influenced the severity of the sentence which the Magistrate was obviously intent on imposing according to his remarks in the sentencing judgment, referred to below.
- [32] I am therefore satisfied that the Court a quo properly assessed the totality of the evidence regarding the conviction placed before it and correctly found the Appellant guilty of rape. Accordingly, the appeal against his conviction must fail.
- [33] The same does not apply to the sentence, however. The Appellant was sentenced to the relevant prescribed minimum sentence of life imprisonment after the Court a quo found there to be no substantial and compelling circumstances to justify a deviation. It was submitted that the trial court erred in doing so.
- [34] The Appellant chose not to testify in mitigation and did not call any witnesses to do so, either. Instead, his attorney put his personal circumstances before the Court a quo, namely that the Appellant was a first offender; that he was the sole breadwinner for his siblings since his parents passed away, that he was allegedly also the primary caregiver of his own 2-year old child who resides with its mother in Delareyville where she does odd jobs around the farm; that he had worked since January 2017 as a maintenance worker for Transnet and that he earned R3 000 a month. Significantly, however, he also submitted that it was not a rape case that can be described as a 'worst case scenario' and therefore does not warrant the imposition of the ultimate sentence of life imprisonment.
- [35] The State submitted in aggravation that the Appellant had abused the Complainant's and his hosts' trust. He had shown no remorse. As for the interests of the community, the prosecutor submitted that rape was incredibly prevalent in Bloemfontein, increasingly so regarding young persons.
- [36] No assessment of the long-term effect of the rape on the Complainant was submitted, but an English version of a victim impact report in the form of a handwritten note in Sesotho by the Complainant herself in which she described the impact the rape had had on her life was read into the record. In it she stated that, whereas she had always been 'a good child' who did her homework, delivered excellent school work and passed her Grades, played with other children and attended church, her life changed. She no longer played with other children and no longer paid attention

in class or listened to her teacher. Her school work deteriorated. She stopped attending church and only went out of the house when she was sent somewhere.

- [37] The trial Court simply listed some of the Appellant's personal circumstances, namely that he is 30 years of age; a first offender; had completed Std 9 at school; is the father of a 1 year old child who lives with his mother in Delareyville; was working for the railways and earned R 3 000 a month. It made no attempt whatsoever to evaluate them. It does not indicate which of these factors it considered to be mitigating, if any, or which factors it considered to be weighty or neutral, or which factors individually or cumulatively it weighed up against the factors which it considered to be aggravating. It simply stated that there were no substantial and compelling circumstances.
- [38] What the Court a quo did instead, was to discuss at great length the seriousness and prevalence of rape, calling the rape of young children 'pandemic', before finding the offence in casu to have been an extremely serious one because the Appellant was trusted and in effect stayed with S[...]and W[...] for free. The Court then indicated that the 'entire sentence must be a good indication to all and sundry' that the Court would not budge, and would adhere to legislation regarding the prescribed minimum sentence.
- [39] The trial Court concluded that a court may only deviate from what is prescribed by the legislator 'if there is [sic] really good reasons available'. In a lengthy diatribe on the concept of stare decisis, or the doctrine of precedence, the trial Court concluded that it was bound by certain rules which it was not allowed to discard, inter alia that a court of final jurisdiction is bound to its own previous decisions from which it can only depart if that decision is clearly wrong. After discussing at length the need for predictable sentences, the Court then warned that "if anyone is closely associated with the court they must know the type of sentence I am going to deliver".
- [40] One is therefore left with the distinct impression that the Court a quo made no effort to determine if there were indeed substantial and compelling circumstances, but was determined to impose life imprisonment simply because the legislator ordained that as the prescribed minimum sentence for the rape of a minor and because that was what the Court a quo always imposed as 'an applicable sentence'. It then relied on the doctrine of precedent to justify its failure to test the proportionality of the sentence in the specific circumstances of this case.
- [41] In so doing, however, despite its reference to the doctrine of precedence, the Court a quo ignored the various Supreme Court decisions which referred to the discretion which the legislator had bestowed upon the courts to take into consideration all the relevant circumstances of each specific case to determine if life imprisonment was proportionate to that particular offence.
- [42] Marais JA, as he then was, stated in *S v Malgas*[3], for instance:

The Legislature has however deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored. The residual discretion to decline to pass the sentence which the commission of such an offence would normally attract plainly was given to the courts in recognition of the easily foreseeable injustices which could result from obliging them to pass the specific sentence come what may.

[43] The Court a quo's failure to take into consideration as a significant mitigating factor the fact that the rape in this case is not one of the worst kinds of rape, militates directly against what Majiedt JA stated in *S v Mudau*[4]:

I hasten to add that it is trite that each case must be decided on its own merits. It is also self-evident that sentence must always be individualised, for punishment must always fit the crime, the criminal and the circumstances of the case. It is equally important to remind ourselves that sentencing should always be considered and passed dispassionately, objectively and upon a careful consideration of all relevant factors. Public sentiment cannot be ignored, but it can never be allowed to displace the careful judgment and fine balancing that is involved at arriving at an appropriate sentence. Courts must therefore always strive to arrive at a sentence which is just and fair to both the victim and the perpetrator, has regard to the nature of the crime and takes account of the interests of society.

[44] It is contrary, too, to the cases in the Supreme Court of Appeal in which it was held that there are different degrees of seriousness of rape and that a trial court had to make provision for such differences in sentencing.

[45] In *S v Mahomatsa*[5], for instance, the Court held that

... there are bound to be different degrees of seriousness of rape, even in cases where life imprisonment is the prescribed minimum sentence in terms of the Act. It is the duty of the court to consider all those factors before it imposes sentence.

[46] In *Rammoko v Director of Public Prosecutions*[6] in *Mpati JA* cautioned that life imprisonment is the heaviest sentence a person can be legally obliged to serve. He made it clear that the fact that a victim may be under the age of 16 years is not the only criterion necessary for the imposition of life imprisonment, but that the objective gravity of the crime plays an important role:

Even in cases falling within the categories [of rape] delineated in the Act there are bound to be differences in their degree of seriousness. There should be no misunderstanding about this: they will all be serious but some will be more serious than others and, subject to the caveat that follows, it is only right that the differences in seriousness should receive recognition when it comes to the meting out of punishment.

As this Court observed in *S v Abrahams*[7] “some rapes are worse than others and the life sentence ordained by the Legislature should be reserved for cases devoid of substantial factors compelling the conclusion that such a sentence is inappropriate and unjust.

[47] In my view life imprisonment in the circumstances of this case is inappropriate and disproportional to the seriousness of the rape. Although rape of a minor is always a very serious infringement of the victim’s dignity, freedom, self-respect and psychological well-being, one needs to take into consideration that the Complainant did not sustain physical injuries and was not threatened or assaulted or perpetrated with violence other than what is inevitably part of

the rape itself. It is definitely not one of the worst types of rape.

[48] In my view the trial Court erred in failing to find substantial and compelling circumstances based on the cumulative effect of the Appellant’s personal circumstances, namely: (a) that he did lead a productive life by being employed and earning a regular income; (b) that he maintained not only his own child but also his younger siblings as their sole breadwinner; (c) that, although he did not show remorse, the fact that he has a clean record as first offender could be indicative of prospects of rehabilitation, as was accepted by Lewis JA in *S v Nkomo*[8], and, furthermore, (d) the fact that the Complainant did not suffer apparent physical injuries which, although not individually and by itself a substantial and compelling circumstance due to s 51(3)(aA)(ii) of Act 105 of 1997, is nevertheless a relevant factor

which the Court, in order to prevent an unjust sentence, needs to take into account as indicative of the lesser objective gravity of the rape (See: *S v MM*[9]); and (e) the fact that there is no evidence of lasting psychological trauma on the Complainant.

[49] These factors, cumulatively, in my view do amount to substantial and compelling circumstances which outweigh the aggravating factors submitted by the State, namely the gravity and prevalence of the crime, the present effect on the Complainant, the Appellant’s lack of remorse and the Complainant’s young age.

[50] In my view this is a clear instance in which, as was also held in *S v Hewitt*[10], the trial court committed a misdirection of such a nature, degree and seriousness as to show that it did not exercise its sentencing discretion reasonably, which allows this Court of Appeal to interfere in the sentence.

[51] The sentence therefore stands to be substituted with a lesser one more appropriate and proportionate to the circumstances of the offence in this particular case; one which would still be severe enough to do justice to the gravity of the crime and the interests of the community, and to serve the purpose of retribution and prevention, but will give due weight to the personal circumstances of the Appellant and will also contain a measure of mercy.[11]

[52] In the result the following order is made:

1. The appeal against conviction is dismissed.

2. The conviction is confirmed
3. The appeal against sentence is upheld.
4. The sentence of life imprisonment imposed upon the Appellant is set aside and the following sentence is substituted:

‘The Appellant is sentenced to 20 (TWENTY) years’ imprisonment.’

5. In terms of Section 51(1)(A)(i) of the General Criminal Law Amendment Act Sexual Offences and Related Matters, Act 32 of 2007 the Appellant’s name is to be included in the register for Sexual Offenders against minor children.
6. In terms of Section 3 of the Firearms Control Act, Act 60 of 2000 the Appellant is automatically declared unfit to possess a firearm.

H MURRAY AJ

I concur and it is so ordered.

C REINDERS J

For the Appellant:

Mr T J Modise

Attorney for the Appellant

Instructed by Legal Aid SA

BLOEMFONTEIN

For the Respondent:

Adv K E LESIE-SHALE

Office of the Director of Public Prosecutions

Bloemfontein Justice Centre

[1] 1972 (3) SA 766 (A) at 76 A - C

[2]

[2008] ZASCA 14; 2008 (2) SACR 207 (SCA) at par [15]

[3] 2001 (1) SACR 469 (SCA) at 481

[4] 2013 JDR 0938 (SCA) at par [13]

[5] 2002(2) SACR 435 (SCA) at par [[17]

[6] 2003(1) SACR 200 (SCA) at par [12]

- [7] 2002 (1) SACR 116 (SCA) at par [29]
- [8] 2007 (2) SACR 198 (SCA)
- [9] 2013 (2) SACR 292 (SCA) at 302b – g at par [26]
- [10] 2017 (1) SACR 309 (SCA) at par [8]
- [11] Corbett JA in S v Rabie 1975 (4) SA 855 at 866 A - C
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