

SOUTH AFRICA / JUDGMENT

Moshwana v S (A440/2018) [2020] ZAGPPHC 589 (12 October 2020)

[2020] ZAGPPHC 589

COURT

North Gauteng High Court, Pretoria

BEFORE

Manamela, AC Basson

CASE / FILE NUMBER

A440/2018

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

(1)

REPORTABLE:

YES/NO

(2)

OF

INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED.

CASE

NO: A440/2018

In

the matter between:

MOSHWANA,
OBED HLENGANE
Appellant
and
THE
STATE
Respondent
DATE
OF HEARING: This
matter was enrolled for hearing on 31
AUGUST 2020, but
was dealt with or determined on the basis of the papers and written
argument filed on behalf of the parties, with out appearance
and oral
argument.
DATE
OF JUDGMENT: This
judgment was handed down electronically by circulation to the parties
' representatives by email. The date and time of hand-down
is deemed
to be 10h00 on 12
OCTOBER
2020.

JUDGMENT

MANAMELA, AJ

Introduction

- [1] This is an appeal against conviction of the appellant on one count of sexual assault and another of rape and the sentence imposed on him by the Regional Court of Gauteng (Atteridgeville) ("the Trial Court") on 28 September 2017. The counts relate to the sexual assault and rape of a 13-year-old girl, Miss LPS[1] ("the complainant"), by the appellant. The crimes occurred between January and June 2017 at the home the appellant shared with the complainant, her mother and others in Atteridgeville, Pretoria.
- [2] The Trial Court sentenced the appellant to 5 years for the sexual assault and life imprisonment for the rape, after he had pleaded not guilty to both counts. The Trial Court found no substantial and compelling circumstances to deviate from sentencing the appellant to life imprisonment, which sentence is prescribed as a minimum sentence under the Criminal Law Amendment Act 105 of 1997 ("the Minimum Sentences Act") for raping the complainant. He was consequently also declared unfit to possess a firearm[2] and unfit to work with children,[3] including being recorded in the national register for sex offenders.[4]

- [3] The appeal was enrolled for hearing on 31 August 2020, and decided on the basis of the papers filed, with no appearance and oral argument necessary. The crux of the appeal against conviction is that the Trial Court erred in convicting the appellant on the basis of a single witness and without applying the relevant cautionary rules. As far as his sentencing is concerned he argued that the Trial Court erred in finding that there were no substantial and compelling circumstances warranting deviation from life imprisonment. The State opposed the appeal and supported the conviction of and sentences imposed on the appellant.

Grounds of appeal

- [4] The appellant contended that the evidence adduced in support of the State's case "was fraught with inconsistencies, contradictions" and inevitably there was doubt reasonable enough to sway the Trial

Court not to convict him on either of the charges.

- [5] In support of his contentions the appellant predicated this appeal against conviction and sentence on the following grounds:

[5.1] that , the complainant was unsure of the actual dates of the incidents, particularly the first incident (regarding her sexual assault), which was stated to have occurred on 15 January 2017, but later changed to 14 January 2017;

[5.2] that , there ought to have been doubt regarding the complainant's version of the first incident (i.e. sexual assault) as she did not scream to alert her mother who was doing laundry outside the room or house nor did she " reprimand" the appellant for "fondling" her.

[5.3] that , the State's case was fraught with improbabilities and that the complainant's credibility was doubtful due to the time lapse between the sexual assault and rape, during which period the complainant did not tell her mother that she had been raped or sexually violated;

[5.4] that, the Trial Court failed to properly apply the necessary cautionary rules, despite dealing with the evidence of a single witness, sexual crimes and a child witness;

[5.5] that , the Trial Court somewhat "descended onto the arena" during the trial, thus compromising the appellant ' s right to fair trial.

- [6] The above grounds may be summarised as follows for purposes of determining this appeal: (a) contradictions and/or inconsistencies in the State's evidence; (b) credibility of the complainant; (c) non-application of the cautionary rules, and (d) the Trial Court's conduct and the appellant' s right to fair trial.

- [7] The issues will be utilised - some in blended form - as subheadings in the discussion, below. But I will revert to the issues after a brief narration of the evidence before the Trial Court.

Evidence before the Trial Court (summarised)

The State 's case

- [8] The appellant was convicted mainly on the evidence of the complainant, who was in or had completed grade 8 and was 11 years of age at the time of her testimony. She testified through an intermediary and through close circuit camera due to her age.
- [9] The complainant's testimony regarding the sexual assault was essentially as follows. From 2016, she, her brother and her mother moved in with the appellant in a house situated in Makurancy or Mkurugenzi street in Atteridgeville. There were four houses at this address. She stayed in the one house together with her brother and the appellant's male offspring, whereas her mother and the appellant occupied another house (colloquially an RDP house). On or about 14 January 2017, the appellant gave the complainant R70 when she went to attend a music event at the stadium. Upon her return from the event, she found her mother busy doing laundry. Her mother sent her to go fetch a laundry basket from the RDP house. She found the appellant in that house sitting on top of the bed. He touched her breast and her thighs. She did not then inform her mother of the incident because she did not want to start a fight between her mother and the appellant in light of the fact that the two were constantly fighting. She also did not tell anyone of the sexual assault, including anyone at school. She testified that she had pushed the appellant's hands away and gave him a look of disapproval. She stuck to her version under cross examination. She also said she respected him as her father and do not know what led him to touch her breast and thighs.
- [10] In respect of the rape incidents, the complainant testified as follows. The rapes occurred at [...], also in Atteridgeville. Her family had moved there to a house belonging to the appellant's employer to "guard the house" ostensibly to prevent it from being vandalised or illegally occupied by strangers. The house had five rooms, but only two bedrooms. She slept in the bedroom next to the dining room and her parents in the other bedroom. One morning in 2017 on a working day after her mother left for work at around 05h30, the appellant entered the complainant's room. At the time the complainant was still sleeping. She heard someone in the room and saw the appellant. The appellant spoke to her and mentioned to her that when he goes back to work he would surprise her by buying her something. The appellant then tried to remove the blankets. She struggled with him but he eventually overpowered her. He removed her clothing, opened her legs, undressed his clothing and raped her. His

penis could not fit but he forced it and managed to penetrate her. She testified that she felt pain. He ejaculated on the bed and used a cloth to clean up and put the cloth inside a bucket with tools. She testified that she was bleeding from her vagina. She washed herself and went to school as she could not go to school daily. She pretended as if nothing happened and told no one at school what happened. She also did not tell her mother as she was afraid. There was a second rape incident on the Monday, two weeks after the first incident. This time she told the appellant that she would inform her mother about the rape but he retorted that there is nothing her mother would do even if she informed her. Again, she did not tell anyone at school as she trusted no one and was concerned they would publicise ("go all over about") her rape ordeal. Also, she did not tell her mother as she was afraid her mother would get angry. There was a third rape incident in June

2017. This time she screamed but the appellant covered her mouth with his hand. She ultimately reported the incidents to her mother one evening when she arrived home late from a dancing event. At the time the appellant was away in Rustenburg for work. Ultimately the matter was reported to the police. Under cross-examination the complainant maintained her version regarding the rapes. When it was put to her that the appellant would deny that he raped her, she testified that she had no reason to implicate the appellant of such "serious things" if he had not done them.

- [11] The medical evidence in the form of a report by the medical practitioner who conducted a medico-legal examination on the complainant (the J88) confirmed that, despite the absence of injuries, the existence of a cleft in the complainant's vagina was suggestive of penetration.
- [12] The complainant's mother was also called as a witness by the State. She confirmed that her daughter reported to her that she had been raped by her boyfriend (the appellant) and that the report was made on 12 June 2017 when she (the mother) arrived home from work in the evening. After the complainant had reported the incidents to her, she requested her (the mother) to look for another place to stay as the appellant was raping her. Under cross-examination the complainant's mother maintained her version given in evidence-in-chief.

The appellant 's case

- [13] The appellant testified in his own defence. He denied giving the complainant money for the music event (despite this aspect having no bearing on the molestation); denied touching her breast and thigh; denied the rapes; and denied threatening to chase the complainant and her family out of the house. He attributed the cause of the fights between the complainant's mother and himself to be the fact that Colin (the complainant's brother) had been brought to stay with them without him having been informed thereof. He also testified that another motive for the complainant ' s accusations could be due to the fight he had with the complainant's mother over money on 05 June. For the most part of his evidence, the appellant simply ventured " I know nothing" or "I know nothing about .. ." when responding to questions , both in his evidence-in- chief and cross-examination. The appellant was the only person to testify in his defence at the trial.

Conviction and sentence by the Trial Court

- [14] After consideration of the evidence, the Trial Court concluded that the complainant was an impressive witness even at 13 years of age. The Trial Court remarked that she had matured beyond her years. The Trial Court also found the complainant to have been confident , clear- minded and honest in her testimony during the trial: she was "a good, credible, honest witness doing her best to tell the court what she recalled, what she perceived, to the best of her ability; honest and forthright" . The Trial Court was so impressed with the testimony of the complainant ' s mother and found her to be " a good witness and her demeanour [to be] impressive ... credible, forthright, honest and reliable witness".

- [15] On the other hand, the Trial Court found the appellant to have been "an unimpressive unconvincing witness . . . evasive" and to have just denied everything. In the end the Trial Court accepted the evidence adduced on behalf of the State and held that there was no reason for the complainant to falsely implicate the appellant. She also had nothing to gain by falsely accusing the appellant. The Trial Court therefore rejected the appellant's version as not being reasonably possibly true and convicted the appellant on both the sexual assault and rape.
- [16] The Trial Court recited the remarks on the "triad" relevant to sentencing referred to in *S v Zinn*, [5] namely "the crime, the offender and the interests of society". The Trial Court viewed the crimes committed by the appellant in a serious light particularly because the complainant regarded the appellant as her father. Yet he raped her a number of times. The Trial Court took into consideration that the complainant endured rental scarring as a result of the despicable deeds of the appellant. The Trial Court also took into consideration the fact that the appellant was out of prison on parole at the time he committed these heinous deeds. He had already served 16 years for previous rape convictions and had been paroled in July 2014. [6] Ultimately, the Trial Court found no substantial and compelling circumstances to deviate from imposing a life sentence for the rape. The Court further sentenced the appellant to a 5-year jail term for the sexual assault.

Appellant's grounds of appeal (discussed)

Contradictions, inconsistencies and/or improbabilities in the State's case or evidence

- [17] As stated above one of the appellant's grounds of appeal is that there were contradictions, inconsistencies and improbabilities in the evidence adduced for the State. The complaints in this ground, in the main, revolve around the evidence of the complainant.
- [18] It was submitted that the complainant was unsure of the actual dates of the sexual assault and rape by the appellant, particularly the date of the sexual assault. The complainant was not certain whether she was sexually assaulted on 14 or 15 January 2017, but she knew it happened when she returned from the stadium where she had attended a music event. As a result the State had to seek an amendment of the charge sheet in order to vary the date from 15 January 2017 to 14 January 2017.
- [19] As already pointed out, the complainant was adamant that she was sexually assaulted on the date she came back from the stadium and that the next day was a Sunday and that she was supposed to go to church. In this regard she testified as follows:

"PROSECUTOR: ...

...

When you were supposed to go to church was it before you go to the stadium to see the DJ? ---
Your Worship, the day that I was supposed to go to church was on the 15th, Your Worship.

And when did you go to the stadium, did you go on the 14th or the 15th ? --- On the 14th, Worship.

And when did [the appellant] touch your breast and thighs? --- On the 14th when I came back from the stadium, Worship."

[20] It was also submitted that the complainant's mother contradicted herself, included when she said that the rape was on three occasions,

whereas the complainant stated that she was raped more than three times. As the appellant was charged and convicted of only one count of rape, I fail to see the materiality of the alleged contradiction or how it affects the conviction of the appellant. The Trial Court, viewing the evidence of the complainant's mother in totality, correctly in my view, accepted same to be credible and of probative value. Also, it would be remarkable if there were no inconsistencies in a testimony of these witnesses, especially the complainant, a minor child, who endured despicable crimes perpetrated by a relentless appellant.[7]

Credibility of the complainant

[21] The appellant submitted that the fact that the complainant did not inform her mother about the sexual assault and rape from January 2017 to June 2017 casts doubt on her credibility. There is no merit in this submission. Further, the submission is unmindful of section 59 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 which provides that "[i]n criminal proceedings involving the alleged commission of a sexual offence, the court may not draw any inference only from the length of any delay between the alleged commission of such offence and the reporting thereof". The appellant also criticised the explanations tendered by the complainant for not telling her mother about the sexual assault. I have already referred to her evidence in this regard namely that she wanted to avoid contributing to the frequent fights between her parents and that she was afraid the appellant would chase them from the house. There is no reason to disbelieve the complainant and I can find no reason to interfere with the Trial Court's conclusions regarding the credibility of the complainant and that of her mother.

Non-application of the cautionary rules

[22] The appellant submitted that the Trial Court failed to apply the relevant cautionary rules. There is no merit in this submission: the Trial Court was conscious of the fact that it was dealing with the evidence of single witness; a minor and with sexual crimes and that there was a need to treat the evidence with the necessary degree of caution.

Evidence of a single witness

[23] Section 208 of the Criminal Procedure Act 51 of 1977 provides that an accused person "may be convicted of any offence on the single evidence of any competent witness". In *Modiga v The State*,^[8] the Supreme Court of Appeal ("the SCA") confirmed (with reference to *S v Snyman*)^[9] the continued force of the longstanding "salutary warning ... that even when dealing with the evidence of a single witness, courts should never allow the exercise of

caution to displace the exercise of common sense". However, the single witness must still be credible.[10] This principle was also confirmed in *S v Teixeira*[11] where the SCA held as follows regarding the evidence of the single witness : "a final evaluation can rarely, if ever, be made without considering whether such evidence is consistent with the probabilities". [12]

Sexual crimes

[24] The appellant contends that the Trial Court failed to apply the cautionary rule relating to sexual crimes. There is no merit in this argument. As already mentioned, the Trial Court was acutely alive to this requirement. The stereotype approach to sexual crimes was debunked in the well-known matter of *S v Jackson*[13] where the Court held as follows:

"In my view, the cautionary rule in sexual assault cases is based on an irrational and out-dated perception. It unjustly stereot7es

complainants in sexual assault cases (overwhelmingly women) as particularly unreliable. In our system of law, the burden is on the State to prove the guilt of an accused beyond reasonable doubt

- no more and no less. The evidence in a particular case may call for a cautionary approach, but that is a far cry from the application of a general cautionary rule." [14]

[25] The dicta in *S v Jackson* was cited with approval by the Constitutional Court in *S v Tshabalala and Another*[15] under the rubric "discourse on rape in South Africa". The Constitutional Court referred generally to "a number of embedded patriarchal gender norms in the procedural rules of evidence in relation to rape" and specifically to the cautionary rule for evidence relating to sexual crimes as one of the "legal impediments to the conviction of a rape offender".[16]

[26] In the present matter, the Trial Court meticulously dealt with the evidence before arriving at the conclusions it did, including regarding the credibility of the witnesses . In the result, I can find no reason to interfere with the judgment of the Trial Court in this regard.

Conduct of the Trial Court and the appellant's right to fair trial

[27] The appellant submitted that the presiding magistrate interfered with the adduce evidence to such a degree that he "bordered on descending on to the arena". The presiding magistrate is alleged to have taken over from the State Prosecutor in leading of the witness and directing or "stimulating" particular responses from the witness(es). There is no merit in this submission. There is also nothing on the record to substantiate the allegation that the presiding magistrate crossed the permissible limit of involvement or that he unduly interfered or sought to benefit or disadvantage either side through his intervention. It should also be borne in mind that the appellant was represented by an able legal representative throughout the trial.

[28] It was further argued that, by allowing an amendment to the charge sheet substituting the date of 14 January 2017 for the date of 15 January 2017, the presiding officer acted erroneously. There is no merit in this submission. The appellant has also not indicated how the evidence by the complainant was rendered inconsistent by the change of dates. Also the amendment was allowed without a demur from the appellant's legal representative.

Sentence

[29] The severity of the crimes of which the appellant was convicted of, cannot be understated: he betrayed the trust the young victim had in him and violated their relationship. The complainant's evidence was that she considered him as a "father" even though he was only her mother's boyfriend. It also cannot be discounted that these crimes may have a lifelong adverse psychological effect on the complainant. I am of the view that the appellant was deservedly sentenced to life imprisonment for the rape and that there were no substantial and compelling circumstances justify in a deviation from the minimum sentence imposed by the legislature. It is also a significant aggravating circumstance that the appellant was out on parole when he committed the sexual crimes and that he had been previously imprisoned for rape.

[30] Sentencing or punishment is pre-eminently at the discretion of a trial court. A court at the appellate level is entitled to interfere with the exercise of such discretion by the trial court only where there is misdirection; the sentence imposed is shockingly or disturbingly inappropriate or there is an irregularity originating from the trial court not properly and judicially exercising its discretion.[17] No such circumstances exist in the present matter.

Conclusion

[31] In my view, the Trial Court in this matter discharged its responsibilities judiciously in respect of both conviction and sentence. This Court, sitting at appellate level, is thus precluded from interference with the judgment of the Trial Court. Consequently, the appeal must fail both in respect of conviction and sentence.

Order

[32] In the result, I propose that the following order be made:

- a) The appeal against conviction and sentence is dismissed;
- b) The conviction and sentence by the Regional Court for the Regional Division of Gauteng, Atteridgeville or the Trial Court is confirmed.

K. La M. Manamela

Acting Judge in the High Court

AC BASSON

Judge in the High Court

I agree and it is so ordered

Appearances:

For the Appellant

: Martin Kubayi Attorneys, Pretoria

For the Respondent : Adv JP van der Westhuizen

(the State)

: Director of Public Prosecutions

Gauteng Division, Pretoria

[1] Real name withheld to protect her privacy.

[2] See section 103(1) of the Firearms Control Act 60 of 2000.

[3] See section 120 of the Children's Act 38 of 2005.

[4] See section 50(2)(a) of the Criminal Law (Sexual Offences & Related Matters) Amendment Act 32 of 2007.

[5] S v Zinn 1969

(2) SA 537 (A) at 540G.

[6] In terms of the appellant's record of previous convictions the appellant had previous convictions of three counts of rape , one count of housebreaking and indecent assault. He was sentenced to jail terms ranging from 1 year to 10 years for the crimes. Some of the sentences ran concurrently .

[7] S v Sauls 1981

(3) SA 172 at 180H .

[8] Modiga v The State [2015] 4 All SA 13 (SCA) at pars [32]- [33].

[9] S v Snyman 1968 (2) SA 582 (A) at 585G; [1968] 3 All SA 18 (A).

[10] See S v Sauls 1981 (3) SA 172 (A) at 180C- H. See further Wigmore JH A Treatise on the law of Evidence vol 3 at par 2034 at 262.

[11] S v Teixeira 1980 (3) SA 755 (A).

[12] See S v Teixeira at 761.

[13] S v Jackson 1998 (I) SACR470 (SCA).

[14] Ibid at 476E-F.

[15] S v Tshabalala and Another 2020

(2) SACR 38 (CC).

[16] Ibid at 80.

[17] See R v Dhlumayo 1948 (2) SA 677 (A); S v Rabie 1975

(4) SA 855 (A) at 857D-E]. See further S v Pillay 1977 (4) SA 531 (A) at 535D-F.

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