

SOUTH AFRICA / JUDGMENT

Mosia v S (A152/11) [2012]

ZAFSHC 85 (3 May 2012)

[2012] ZAFSHC 85

COURT

Free State High Court, Bloemfontein

BEFORE

Rampai, Daffue, Phalatsi

CASE / FILE NUMBER

A152/11

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FREE STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC OF SOUTH AFRICA

Appeal No.: A152/11

In the matter between:-

FANI DANIEL MOSIAAppellant

and

THE STATERespondent

CORAM: RAMPAL, AJP et DAFFUE, J et PHALATSI, AJ

HEARD ON: 19 MARCH 2012

JUDGMENT BY: PHALATSI, AJ

DELIVERED ON: 3 MAY 2012

- [1] The appellant was charged as accused 2 in the regional court in Sasolburg, together with his brother, Thabang David Mosia, on six counts, being, count 1, kidnapping, counts 2 to 5, rape and count 6, attempted murder.
- [2] They were both acquitted on the charge of kidnapping and three counts of rape. They were convicted on one count of rape and attempted murder on 28 April 2004.

- [3] Subsequent to their conviction, the proceedings in the regional court were stayed and they were referred to the high court for sentence, in terms of section 52 of the Criminal Procedure Act, No. 105 of 1977.
- [4] Malherbe JP sentenced them to life imprisonment in respect of the charge of rape and 8 (eight) years imprisonment on attempted murder.
- [5] The appellant then filed an application for leave to appeal, and Cillie J, granted him leave to appeal against sentence, only in respect of the life sentence.
- [6] His co-accused did not appeal and he is therefore not involved in these proceedings.
- [7] The facts of the case are as follows:

the complainant, a mother of five children, the youngest of whom was eight months old at the time of the incident, being 1 March 2002, was on her way going back home after accompanying her sister, who had visited her;

when passing accused 1's house, the latter called her, but she declined and pointed out that she was in a hurry as she had left her child alone at home;

accused 1 pulled her and accused 2 came and pushed her from behind into the house of accused 1;

in the house, both accused hit her repeatedly with iron rods, she fell down and accused 1 raped her. After being raped by accused 1, accused 2 also raped her;

they thereafter instructed her to climb on the drum so that they could hang her, but because of her weakness arising out of the assault, she was unable to climb on the drum;

both accused, who were drunk all along, fell asleep and she managed to escape.

- [8] The medical report of Dr. S. Zylstra, was handed in by agreement as Exhibit "A", and, as both parties agreed to the contents thereof, the need to call him to testify on the contents thereof was dispensed with.
- [9] It is trite that the court of appeal will interfere with sentence only if there was a material misdirection on the part of the trial court.
- [10] The court a quo said the following during sentencing, about the complainant:

"dit was opmerklik toe sy die lengte van die hofsaal gestap het na die getuiebank, hoe swaar sy gestap het en sy het in haar getuienis aan die hof verduidelik dat haar fisiese toestand die resultaat is van die aanranding op die betrokke dag."

This was when the complainant testified in aggravation of sentence, where she said that she was still suffering pain from her hip downwards. According to the medical report, only her ankle was injured.

10.2 The court a quo further held that, although it accepts the fact that the accused were under the influence of alcohol, the brutality of the assault on the complainant overshadowed the possible mitigating effect of drunkenness.

[11] It is therefore clear that the court a quo's finding of absence of compelling and substantial circumstances is solely based on the physical injuries of the complainant.

[12] I firstly want to deal with the evidence in respect of the injuries suffered by a victim of rape, which I will deal with in two categories:

12.1 psychological trauma

Rape is a crime which is inherently traumatic. The court should readily accept the evidence of the rape victim in respect of psychological trauma, even in the absence of expert evidence, because, as I have already said, such psychological trauma is a natural consequence of rape;

It is unthinkable to come across any rape victim who has not been traumatised by the incident, even in the absence of any physical and /or bodily injuries.

12.2 Physical and/or bodily injuries

In respect of physical injuries, the expert evidence of a medical practitioner is indispensable, as human nature dictates that a victim of violence will tend to exaggerate the seriousness of his/her injuries.

12.2.1 Now, in this very case, the complainant testified in court that her face was so swollen that the people from whom she requested help could not even recognise her, that she had suffered genital injuries and that she was bleeding on her private part because of the assault and the rape. But the medical report does not reflect any of these alleged injuries. When she was confronted with this contradiction in cross-examination during the trial, all she could say was that she made the doctor aware of the said injuries and she did not know why they were not reflected in the medical report.

12.2.2 It is fair for the court to accept that the victim is feeling pain on her body, but to accept that the pain is as a result of the assault during the rape, without any expert evidence, is treading on dangerous grounds. The complainant was assaulted in March 2002 and the observations of the court a quo were made during sentencing on 9 September 2004, some 30 (thirty) months after the assault. There is no evidence that she never suffered any further injuries during the said period. Even Cillie J, when granting the appellant leave to appeal, correctly held

that the evidence and observations of the court a quo are not based on any medical evidence.

[13] I therefore find that the reliance of the court a quo on its own observations and on the evidence of the complainant on the nature of her physical injuries and the effects thereof, is a material misdirection which entitles the court of appeal to interfere with its sentence.

[14] I have had an opportunity to read the incisive judgment of my Brother, Rampai AJP. I, unfortunately, differ with him in respect of the following aspects:

14.1 firstly, he states that Ms. Kruger, who appeared on behalf of the appellant during the appeal, could not give any sound reason as to why the medical report of the doctor should be preferred to the testimony of the victim and the live observations made by the sentencing judge. I have already dealt with this aspect, finding that the evidence of the complainant and the observations of the sentencing judge are unreliable, as they are not based on any specialised medical knowledge and expertise. Indeed, no judge can make any finding based on his/her own observations, as such observations do not constitute evidence. The medical report on the physical injuries and the effects thereof is the only independent, objective, expert and reliable evidence. It can never be accepted, as counsel for the state argued, that the report is unhelpful, only because it does not support or corroborate the evidence of the complainant. The state could not remedy the “inadequacy” of the medical report by the testimony of the complainant or observations of the sentencing judge, but could only do it by further expert medical evidence.

14.2 the second aspect that I want to comment on, is the fact that Ms. Kruger cannot, for the first time on appeal, raise the argument of the seriousness of the physical injuries sustained by the complainant. The court of appeal must deal with all the issues covered by the record. To hold otherwise can lead to serious miscarriage of justice. It often happens that a legal practitioner does not adequately, or at all, deal with an issue, because he/she thinks it is not important, only for the court in its judgment to find that it is an important issue. To refuse the appellant to deal with the issue on appeal could lead to unfair results. The other concern is that it often happens that the point could not be raised because of the ineptness of the legal practitioner and to punish a litigant because of the ineptness of his/her legal representative, could lead to severely adverse consequences for the litigant.

In casu, the very argument raised by Ms. Kruger, is the core of the judgment of both the sentencing judge and my Brother. To therefore hold that she could not rely on this argument would mean that the appellant had not been heard. I have already alluded to the fact that the victim’s version of her physical injuries was not corroborated by the medical evidence, and this is a matter which is evidently clear from the record. I therefore see no reason why the court of appeal cannot deal with it, even if it is raised for the first time on appeal. The court of appeal is confined to the record, but not to the arguments of the appellant in the court a quo.

[15] Now, in the light of my finding that the reliance of the court a quo on the evidence of the complainant and its own observations was a material misdirection, can it still be said, based on the physical injuries of the complainant as depicted on the medical report, that this is the worst case scenario imaginable.

15.1 it is trite that the courts will always deal with the fact that a person is a first offender differently from repetitive offenders. Indeed, this fact is even acknowledged by the legislature in that, in minimum sentencing legislation, the legislature makes a distinction in respect of sentence on certain offences based on the fact whether that person is a first, or further offender.

15.2 In casu, other than the appellant being a first offender, at the age of 36, he had minor children that he was supporting, he was drunk during the commission of the crime and he was in prison for a period of 30 (thirty) months before being sentenced.

15.3 in deciding the appropriate sentence in a crime involving violence, like rape in the present case, the degree of violence will always be considered by the court in aggravation or mitigation of sentence. The violence in respect of the rape should be distinguished from the one in respect of attempted murder, for the purpose of sentence on the charge of rape. Failure to do that will amount to the accused being sentenced twice for the same conduct, which would be unfairly prejudicial to the accused. It would simply vitiate against the principle that the sentence should fit the crime.

[16] I therefore find that in the present case, the cumulative effect of the factors mentioned above, constitute substantial and compelling circumstances, which justify deviation from the imposition of life imprisonment.

[17] This, however, does not detract from the fact that rape is a very serious offence and that more so if, as in the present matter, it is rape of the victim by more than one person.

[18] Taking into account the seriousness of the crime, the traumatic effect on the victim and the physical violence as set out in the medical report, I am of the view that the appropriate sentence should have been one of 20 (TWENTY) years imprisonment.

[19] I consequently make the following order:

19.1 The appeal should succeed;

19.2 The conviction stands;

19.3 The sentence of life imprisonment imposed on the appellant by the court a quo should be set aside and substituted with the following:

“Accused no. 2 is sentenced to 20 (twenty) years imprisonment.”

19.4 The sentence should be antedated to 24 September 2004, being the date on which the accused was sentenced.

19.5 The said 20 (twenty) years imprisonment should run concurrently with the 8 (eight) years sentence in respect of attempted murder.

N.W. PHALATSI, AJ

On behalf of appellant: Attorney S. Kruger

Instructed by:

The Justice Centre

BLOEMFONTEIN

On behalf of respondent: Adv. E. Liebenberg

Director: Public Prosecutions

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