

SOUTH AFRICA / JUDGMENT

Mouers v S (CA38/2013) [2016] ZANWHC 35 (7 July 2016)

[2016] ZANWHC 35

COURT

North West High Court, Mafikeng

BEFORE

M M Leeuw, A A Landman

CASE / FILE NUMBER

CA38/2013

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IN THE HIGH COURT · OF SOUTH AFRICA

(NORTH WEST DIVISION, MAHIKENG)

CASE NO: CA 38/ 13

Held at MMABATHO on this the 22nd day of APRIL 2016

BEFORE the Honourable Madrun Justice President LEEUW and Honourable Mr Justice LANDMAN

In the matter between -

JOHN MOUERS Appellant

and

THE STATE

Respondent

HAVING READ ALL documents filed of record and having heard ADV NKHAHLE on behalf of the Appellant and ADV RASAKHANYA on behalf of the Respondent;

IT IS ORDERED

THAT: Judgment be reserved.

THEREAFTER on the 7th day of JULY 2016

THAT: The appeal against conviction and sentence be and is hereby dismissed .

BY THE COURT

REGISTRAR

IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

CASE NO: CA 38/2013

In the matter between:-

JOHN MOUERS

Appellant

THE STATE

Respondent

CRIMINAL APPEAL

LEEUEW JP & LANDMAN J

DATE OF HEARING: 22 April 2016

DATE OF JUDGMENT: 07 July 2016

FOR THE APPELLANT : ADVOCATE NKHAHLE

FOR THE RESPONDENT: ADVOCATE RASAKANYA

J U D G M E N T

LEEUEW JP:

Introduction

- [1] This appeal is against a conviction of rape and life imprisonment sentence imposed by the Regional Court at Lichtenburg. The appeal was filed out of time and condonation for the late filing thereof was granted by this Court.
- [2] The appellant was not represented in the court a quo. His right to legal representation was extensively explained to him by the learned Magistrate, but nonetheless opted to conduct his own defence.

Factual Background

- [3] The complainant was in the company of her younger brother A. M. (A.), at about 23h00, when they were attacked by two male persons at the road near a soccer stadium. One of them grabbed hold of her whilst the other one attacked A.. A. managed to free himself and ran to the direction of the township.

- [4] The two male persons then carried the complainant to a nearby soccer stadium where they both took turns and forcefully, without consent, had sexual intercourse with her. She was threatened with a knife which was in possession of one of her assailants.
- [5] When A. fled to the township to seek help, he entered the premises of Constable Obakeng Bereng (constable Bereng), who was off-duty and not wearing his police uniform. Constable Bereng phoned the police and in the meantime proceeded to the scene accompanied by A.. He drove his private vehicle to the direction of the soccer stadium. When they came to a certain passage leading to the stadium, they walked therein where they saw the complainant and two male persons struggling on the ground. The complainant was half naked in that she did not have any clothes below her waist.
- [6] Constable Bereng approached the appellant who was one of the assailants, and was busy fastening his trouser buttons. The appellant's companion ran away and could not be arrested. The complainant reported the rape to Constable Bereng and A.. Two other police officers, who were on duty also came to the scene and assisted with the arrest of the appellant. The complainant was taken to hospital where she was examined by a medical doctor.
- [7] The medical examination did not reveal any signs of rape. However, the doctor testified that it was not unusual for the complainant not to show any signs of injury on her genital organs because she was a 25 year old woman, who was sexually active and had previously given birth on three occasions. He also noted that the complainant's clothes were dirty or soiled.
- [8] After the close of the state's case, the appellant elected not to give evidence under oath and closed his case without calling any witnesses. However, during cross-examination of the state witnesses, he denied that he was arrested at the stadium, and claimed to have been arrested at Appies Street, which is in the township, a distance further away from the stadium. He also tested the ability of the state witnesses to identify him as the person who attacked and raped the complainant.

Submissions

- [9] It is argued on behalf of the appellant, that there is no evidence that the complainant was raped, in that 1) she did not give a detailed account of the rape and further that the medical evidence does not corroborate that she was raped;
- 2) there were contradictions between the evidence of the state witnesses;
- 3) the appellant who was not represented, was not afforded a fair trial by the learned Magistrate who interrupted and curtailed appellant during cross-examination of the state witnesses, which conduct resulted in the appellant abandoning his line of cross-examination because of the pressure brought bear on him; and

4) regarding the sentence, that the Life Imprisonment sentence imposed, is excessive and induces a sense of shock.

[10] The state submitted that the court aquo did not misdirect itself in considering the facts and further argued that all three state witnesses saw the appellant buttoning his trouser; and that the complainant was found half-naked, and the appellant was arrested at the scene where the complainant was raped. The appellant was never out of the sight of the complainant from the time she was attacked by him and his companion until she was rescued and appellant arrested by the police.

Analysis

[II] The complainant testified that the appellant and his companion sexually penetrated her genital organ. This is sufficient to prove that rape did take place. Section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act no.32 of 2007 (The Sexual Offences Act) defines sexual penetration act including "any act which causes penetration to any extent whatsoever by - (a) the genital organs of one person into or genital organs, anus, or month of another person;...." See *Sindane v S* [2011] JOL 26601 (SCA)

[I2] The evidence of the state starting from the attack on the complainant and her younger brother A. up to the stage where A. sought assistance from Constable Bereng, is consistent, and they corroborate each other on the material issues. All three state witnesses corroborate each other that the complainant was found half-naked on the scene, and that the appellant was busy buttoning his trousers when he was apprehended. The condition in which the complainant was found, suggested that she was sexually assaulted which fact was confirmed by the complainant when she reported that she was raped by the appellant and his companion. The contradictions referred to by the appellant's counsel, namely that there are discrepancies between her statement made to the police and her testimony in court, were dealt with by the Learned Magistrate. She correctly, in my view, found that they were not material.

[I3] Furthermore, the appellant made an issue about A.' estimation of the time it took him to reach constable Bereng's place and back to the scene, which he estimated at 5 hours. Constable Bereng testified that it took him about 5 minutes to drive to the scene. The court established that A. did not understand the difference between hours and minutes, thus rendering his estimation of time unreliable. These and other contradictions relied upon by the appellant during the trial were irrelevant and immaterial.

[14] There is nothing on record to gainsay the evidence of the state in respect of these material issues because the appellant elected not to testify under oath despite being urged and advised on several occasions, to do so by the Learned Magistrate during the trial.

[15] The following remarks :In *S v Boesak* [2000] ZACC 25; 2001

(1) SACR 1 (CC) at para [24], by Langa DP are opposite:

"[24] The right' to remain silent has application at different stages of a criminal prosecution. An arrested person is entitled to remain silent and may not be compelled to make any confession or admission that could be used in evidence against that person. It arises again at the trial stage when an accused has the right to presumed innocent, to remain silent and not to testify during the proceedings. The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence. What is stated above is consistent with the remarks of Madala J, writing for the Court, in *Osman and Another v Attorney -General, Transvaal*, when he said the following:

'Our legal system is an adversarial one. Once the prosecution has produced evidence sufficient to establish a prima facie case, an accused who fails to produce evidence to rebut that case is at risk. The failure to testify does not relieve the prosecution of its duty to prove guilt beyond reasonable doubt. An accused, however, always runs the risk that, absent any rebuttal, the prosecution's case may be sufficient to prove the elements of the offence. The fact that an accused has to make such an election is not a breach of the right to silence. If the right to silence were to be so interpreted, it would destroy the fundamental nature of our adversarial system of criminal justice.'

[16] In the present case, there is evidence implicating the appellant that he sexually assaulted or raped the complainant. He was arrested at the scene whilst trying to button or fasten his pants. The appellant had a case to answer but he elected not to testify. I find no merit in the submissions that the state evidence was unsatisfactory.

Was the appellant afforded a fair trial?

[17] Counsel for the appellant submitted that the appellant, who was unrepresented, was, curtailed and interrupted during cross-examination by the Learned Magistrate. On perusal of the record of proceedings, it is evident that appellant was assisted and guided by the Court on how to conduct his cross-examination. The learned Magistrate interrupted the appellant during cross-examination, when the appellant asked irrelevant questions and in some cases repeated the same questions which were already answered by the witnesses. He was also afforded an opportunity to cross-examine on a statement made by the complainant to the police, even though the court had found that the statement was inadmissible in that it was not read back to the complainant by the policeman who took down the statement. The appellant was advised to call the police officer who took down the statement as a witness, which right he failed to exercise. I find no merit in the in the submission that the appellant was not afforded a fair trial.

[18] I am of the view that the state has proved the case against the appellant beyond reasonable doubt. The appeal against conviction

should fail.

Sentence

[19] It is submitted on behalf of the appellant, that the sentence imposed is excessive and that this court should interfere therewith and consider sentence afresh.

[20] The appellant was given an opportunity to make submissions in mitigation of sentence. He refused to do so. He exhibited a violent

attitude toward the court a quo. Nonetheless, the Court took into account that the appellant was 33 years old and that he was not a first offender in that he had a previous conviction of Housebreaking with intent to steal and theft dated 26 July 2011. The Court also took into account, the seriousness of the offence as well as the interests of the society. The fact that the complainant was raped by the appellant and his companion and further that he did not show any remorse, also counted as aggravating circumstances. The Learned Magistrate cannot be blamed for the appellant's refusal to present mitigating factors on his behalf. The court a quo found that there were no substantial and compelling circumstances.

[21] The appellant committed a gang rape and a knife was used in order to force the complainant into submissions. In *S v Kwanape* 2014 (1) SACR 405 (SCA) Petse JA held that:

"[17] Rape is undeniably a despicable crime. In *N v T* 1994 (1) SA 862 (C) at 864G, it was described as a horrifying crime and... a cruel and selfish act in which the aggressor treats with utter contempt the dignity and feelings of [the] victim'. In *S v Chapman* 1979 (2) SACR 3 (SCA) at 5a-d this court said it is 'a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim'. Its gravity in this case is aggravated by the fact that the victim was a 12 year old child. In *S v Jansen* 1992 (2) SACR 368 (C) at 378h-379a rape of a child was said to be an appalling and perverse abuse of male power."

[22] There is nothing on record to suggest that the Learned Magistrate misdirected herself in considering sentence. This Court will

therefore not interfere with the sentence of life imprisonment imposed.

Order:

[23] I accordingly make the following order:

The appeal against conviction and sentence is dismissed.

M M LEEUW

JUDGE PRESIDENT OF THE HIGH COURT

I agree

A A LANDMAN

JUDGE OF THE IDGH COURT

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Prepared on 13 October 2026 · Esheria