

SOUTH AFRICA / JUDGMENT

M.P.N v S (A41/2021) [2021] ZAFSHC 189 (10 August 2021) [2021] ZAFSHC 189

COURT

Free State High Court, Bloemfontein

BEFORE

Opperman, Chesiwe

CASE / FILE NUMBER

A41/2021

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Policy**IN THE HIGH COURT OF SOUTH****AFRICA****FREE****STATE DIVISION, BLOEMFONTEIN****Appeal****no: A41/2021****In the****matter between:**

M.P.N
Appellant
and
THE
STATE Respondent

CORAM:

Chesiwe, J et
Opperman, J
HEARD

ON:

2 August 2021. The
matter was adjudicated on the Heads of Argument as agreed by the
parties and authorised by the Court in terms of section 19 of the
Superior Courts Act 10 of 2013.

DELIVERED**ON: 10****August 2021.**

JUDGMENT

BY: Opperman, J

I

INTRODUCTION

[1] The appellant enjoys an automatic right to appeal in terms of section 309(1)(a) of the Criminal Procedure Act 51 of 1977 (CPA). The appeal lies against conviction and sentence. He was sentenced to life imprisonment in terms of section 51(1) of the Criminal Law Amendment Act 105 of 1997. No order was made in terms of section 103[1] of the Firearms and Ammunition Control Act 60 of 2000. It was ordered in terms of section 50(1)(a)(i)[2] of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (SORMA) that the appellant's name be included in the register for sexual offenders against minor children.

[2] The case turns on the alleged rape of a 16-year-old girl[3] who is mentally disabled as contemplated in SORMA. The said act defines in section 1:

“a ‘person who is mentally disabled’ means a person affected by any mental disability, including any disorder or disability of the mind, to the extent that he or she, at the time of the alleged commission of the offence in question, was—

- (a) unable to appreciate the nature and reasonably foreseeable consequences of a sexual act;
- (b) able to appreciate the nature and reasonably foreseeable consequences of such an act, but unable to act in accordance with that appreciation;
- (c) unable to resist the commission of any such act; or
- (d) unable to communicate his or her unwillingness to participate in any such act;”

II THE WITNESSES AND THEIR EVIDENCE

[3] Three witnesses testified and they are the major role players in the events that led to the conviction. The incident took place in a small rural town called D[.....]. The parties knew each other before the incident. The incidents happened in 2012.

1. DP is the victim and complainant in the case.

1.1 At the time of the incident both her parents were deceased and she was placed in the care of P.A.S [.....]; a 66-year-old lady.

1.2 At the time of the trial the complainant was 21 years old. A report handed in by agreement and in terms of section 220 of the Criminal Procedure Act drafted by one Professor Calitz dated 1 April 2011, concluded that the complainant had an intelligence quotient of between 21 and 35. He proclaimed in 2011 that the victim was not capable of testifying in a court and that she did not have the mental capacity to consent to sexual intercourse. As said; by the time she testified in 2017 she was 21 years old; born in 1996.[4]

1.3 The complainant was proven to have been 16 years old at the time of the alleged incident. She testified in terms of section 170A of the CPA. The process was proper and cannot be criticized.

1.4 The presiding officer with the wisdom, extreme caution and experience in the handling of matters of this nature for many years, held an extensive inquiry into her ability to testify and came to the conclusion that she is indeed a competent witness. Reading of the record on the issue convinces that the court a quo is and was correct. She described coherently how the appellant had sexual intercourse with her.

1.5 The judgment shows that the court cautioned itself continuously of the dangers a single witness may pose in evidence. The court also dealt carefully with the evidence of the complainant due to the fact that she has a mental disability. He acknowledged the discrepancies in her evidence.

I am taking note of all the different discrepancies with regard to time and any numerical discrepancy, this was not done on purpose and I do understand the rationale behind this as explained above. Surely, she cannot be discredited for this, the nett effect of this is that no reliance can be placed on her testimony with regard to times and dates. Interesting enough as I have said right now the time factor was established through the assistance of the other two witnesses in this instance.

In each one of her ordeals, she explained to us to a certain extent where it was, what has happened and who was the person that did the things to her.

Was there any bias from the complainant against the accused, the flip side of mental retardedness is that it will be almost impossible for any such person to device a master plan to falsely accuse a person. I did not recognise any such demeanour on the side of the complainant, she was just an innocent witness who tried her level best to relay her story to court without bias and prejudice.

1.6 Importantly the court a quo noted that he was satisfied with her evidence. She could reflect on the sexual intercourse in no uncertain terms and the moment her evidence is combined with the evidence of Mrs Setlai and the accused it is exactly clear what has happened to her.

2. The second role player and witness was Mrs Setlai.

2.1 Mrs Setlai is a family member of the complainant and also her guardian. The witness takes care of orphans on behalf of the Department of Social Development and under the guidance of the social workers.

2.2 The appellant confessed to her that he had sexual intercourse with the complainant. Her testimony is as follows:

One day in 2014 I remember the time it was 08:00 in the morning I was on my way to the project when I met with M.P.N [...] next to the shop called K [...], after greeting each other with Nkunyana as they call me by my nickname B[....] he told me that he is the one that impregnated D.

He was sober and as an elderly person I thought that he was disrespecting me by telling me that he impregnated my child and I was also shocked.

The only thing that he explained is that he impregnated her and he was going to marry her. She reported the matter to the police.

2.3 She was an excellent witness both as experienced by the court a quo and on record. The confession by the appellant cannot be faulted on her evidence. It was made freely, voluntarily and spontaneously. The appellant was sober of mind. Mrs P.S.S [...] showed no bias towards the appellant and was caught off-guard by the confession.

3. The appellant was 49 years old at the time of the trial.

3.1 According to him he met the complainant in December 2012 and she asked him for money. In his own words:

After giving her money and she told me she was thirsty I proposed love to her and told her that I love her and I was only joking with her I was not serious.

3.2 He denies the confession to Mrs P.A.S [...]. He maintained that he never had sexual intercourse with the complainant. He did not realise she was mentally disabled.

3.3 The appellant did not make a favourable impression on the court. The court a quo found that the he lied and gave the reasons for the finding. The finding cannot be faulted. The complainant explained and described

the intercourse with him in detail, she is clearly and visibly retarded and he knew her from before. She was 16 years old at the

time and still a child. The accused confessed beyond a reasonable doubt to Mrs Setlai that he did have intercourse with the complainant.

3.4 The absence of DNA prove goes to the circumstances of the case. The complainant was not taken for medical forensic examination after the sexual intercourse occurred and the foetus(s) were not linked with the appellant. That is because it was either not tested or due to the fact that other men also had sexual intercourse with the complainant.

III THE GROUNDS FOR APPEAL

[4] The grounds for appeal are the following:

1.1 AD Conviction:

- a) That the Court erred in finding that the state proved its case against the appellant beyond reasonable doubt. Appellant was arrested following revelations that the complainant was pregnant and she claimed that accused is the one that caused pregnancy. It is not in dispute that appellant was in custody when complainant fell pregnant. Evaluation report suggest that complainant cannot give consent nor testify in court. This was confirmed by testimony of the complainant as she insisted that accused is the father of her child even though it was explained to her that it was not possible.

She indicated that she knew appellant for three months, appellant was released on parole on 16 November 2012 and the case was opened on 15 January 2013 which makes it two months. The guardian of complainant became aware of incident on 08/01/2013 and only reported to police on 10/01/2013. Complainant told guarding that Nkunyana is her boyfriend which she visited at Phahameng and never told her about rape as alleged. Evidence of complainant clearly corroborated expert and guardian, and state failed to find corroboration to link appellant.

- b) That the Court erred in accepting the evidence of the State witness, who was the single witness failed to apply cautionary rules regarding evidence of a single witness. Complainant claim that she was raped twice and during court questions she indicated that she was raped three times. Court erred in making factual finding that complainant was raped three times and further indicated that it is not sure how many times at different places.
- c) That the court did not attach any weight to the fact that there was no paternity results linking appellant as the pregnancy is the reason for this matter to be opened. Complaint(sic) further mentioned names of two people who impregnated her and that was new evidence in contrast to evidence that she only slept with appellant.
- d) That the court erred in not attaching weight to the manner in which rape was reported. The guardian of complainant testified that she took complainant to clinic on suspicion of pregnancy which was confirmed. The same witness testified that she reported rape against accused for incident when she sent children to Pep stores. No evidence supported such allegations. Court only wanted reason to convict appellant and was prepared to justify discrepancies and poor investigations of the State case.

IV THE FUNDAMENTAL PRINCIPLES ON APPEAL

- [5] The fundamental principle on the evaluation of evidence on appeal is that an appeal court is not inclined to disturb findings by the trial court on the evaluation of the evidence. The advantage of seeing and hearing the witnesses is difficult to surpass.
- [6] The Supreme Court of Appeal reiterated this stance in its judgment on 31 July 2020 in AM and another v MEC Health, Western Cape (1258/2018) [2020] ZASCA 89:

Such findings are only overturned if there is a clear misdirection or the trial court's findings are clearly erroneous. That has consistently been the approach of this court and the Constitutional Court as reflected recently in the following passage from *ST v CT*:

'In *Makate v Vodacom (Pty) Ltd* the Constitutional Court, in reaffirming the trite principles outlined in *Dhlumayo*, quoted the following

dictum of Lord Wright in *Powell & Wife v Streatham Nursing Home*:

"Not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judges, and unless it can be shown that he has failed to use or has palpably misused his advantage, the higher court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case." (Accentuation added)

- [7] The same was law seventy-two years ago; and it is still true in the constitutional epoch. If there was no misdirection of facts by the trial court, the point of departure is that its conclusion was correct. The general principles according to which a court of appeal should consider the case are set out in *R v Dhlumayo* 1948
- (2) SA 677 (A). The court of appeal must bear in mind that the trial court saw the witnesses in person and could assess their demeanour.
- [8] The court of appeal will only reject the trial court's assessment of the evidence if it is convinced that the assessment is wrong. If the court is in doubt, the trial court's judgment must remain in place (*S v Robinson* 1968
- (1) SA 666 (A) at 675H).
- [9] Courts of appeal have greater liberty to disturb findings of a court a quo when dealing with inferences and probabilities (*Minister of Safety and Security v Craig* 2011 (1) SACR 469 (SCA) at [58]). In casu the evidence is of a direct nature.
- [10] The court of appeal does not zealously look for points upon which to contradict the trial court's conclusions and the fact that something has not been mentioned does not necessarily mean that it has been overlooked.

V

CONCLUSION

- [11] An independent reading of the record combined with the findings and rationale of the trial court directs to the fact that the outcome a quo cannot and may not be faulted. The grounds of appeal are devoid of substance if the mosaic of evidence is regarded.

VI THE SENTENCE

- [12] The sentence is in compliance to the decree in the prescribed Minimum Sentences law as written in the Criminal Law Amendment Act 105 of 1997.
- [13] The appellant had sexual intercourse with a severely mentally retarded 16-year-old girl on more than one occasion. She forms part of the most vulnerable in society. Due to unlawful sexual intercourse with her by other men and the appellant, she had to undergo an abortion. The evidence shows that she is still looking for her child; she realised and understood she was pregnant but did not comprehend the abortion.

[14] Terblance[5] aptly stated as follows:

It is regularly stated that balance is an important consideration in sentencing. Balance, in this context, has been said to mean that the trial court should consider all the relevant facts, factors and circumstances evenly, and strive for the attainment of all the purposes of punishment.

As long as balance is understood in these terms there is little objection to its use. This is not, however, balance in the ordinary

sense of the word. The seriousness of the crime may totally outweigh the mitigating factors and the personal factors of the offender.

This cannot amount to balance, since the scales would be heavily weighed against the offender. It would therefore be more accurate to state, as in *S v De Kock*, that the three factors of the Zinn triad have to be considered in conjunction with one another and that each should be afforded a certain weight depending on the facts of the case.

- [15] I must add it is here about the young victim; the triad must be squared and apart from the personal circumstances of the appellant, the seriousness of the crime and the interest of society, the brave girl that was put through the trauma of the trial and stigma demands special mention.
- [16] The appellant was married with one child. The child resides with the mother. He does not support the child financially. The child is 26 years old. His highest educational level is standard two. He did part time jobs in town. He disclosed to the court that he is HIV positive and on medication for this. The appellant was released from prison on 16 November 2012 after being incarcerated for attempted rape for which he was sentenced to ten years imprisonment. He was arrested on the matter in casu within about two months of his release. The appellant was in conflict with the law since 1985. Apart from the attempted rape he was sentenced to six months imprisonment for indecent assault in 1996. He was also convicted of assault with the intent to do grievous bodily harm in 2011.
- [17] The sentence is in order and this court may and shall not interfere with it. The appeal on the conviction and sentence is dismissed.

VII ORDER

The conviction is confirmed. The sentence of life imprisonment in terms the Criminal Law Amendment Act 105 of 1997 and resultant orders in terms of the Firearms Control Act 60 of 2000 and the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 are confirmed.

M. OPPERMAN, J

I concur

S CHESIWE, J

APPEARANCES

On behalf of Appellant Advocate V Abrahams

Legal Aid South Africa

Bloemfontein

On behalf of Respondent Advocate

T Sekhonyana

Office of the Director Public Prosecutions: Free State

- [1] The section referred to at page 243 is clearly a typing error. The substance of the order is correct.
- [2] The section referred to at page 243 is clearly a typing error. The substance of the order is correct.
- [3] Section 1 of SORMA: “child” means a person under the age of 18 years and “children” has a corresponding meaning; [Definition of “child” substituted by s. 1 of Act No. 5 of 2015.]
- [4] Exhibit A; the birth certificate.
- [5] A Guide to Sentencing in South Africa, Last Updated: 2016
- Third Edition at Chapter 6 at 5, <https://www.mylexisnexis.co.za/Index.aspx> on 18 January 2021.

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