

SOUTH AFRICA / JUDGMENT

Ncombo v S (CA&R91/2017) [2017] ZAECHGC 94; 2017 (2) SACR 683 (ECG) (28 August 2017) [2017] ZAECHGC 94

COURT

Eastern Cape High Court, Grahamstown

BEFORE

G H Bloem, J W Eksteen

CASE / FILE NUMBER

CA&R91/2017

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

CASE

NO. CA & R 91/2017

In

the matter between:

THOKOZANI

NCOMBO

Appellant

and

THE

STATE

Respondent

APPEAL

JUDGMENT

Bloem J.

[1] The appellant was charged in the regional court at Port Elizabeth with assault, kidnapping and rape in contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act[1]. Despite his plea of not guilty he was convicted as charged. The three counts were taken together for purposes of sentence. The appellant was sentenced to sixteen years' imprisonment.

[2] In the notice of appeal the appellant appeals against the convictions and sentence. Counsel also drafted their heads of argument as if the magistrate had granted the appellant leave to appeal against conviction and sentence. Although the order made by the magistrate is not a model of clarity, in my view he granted leave to appeal against the sentence in respect of the rape count only. Regarding the conviction on the three counts, the magistrate said inter alia:

"Taking their evidence in totality, the court came to the conclusion that he be found guilty on all the counts and I do not see anything wrong with that"

and in respect of sentence, the magistrate said:

"... the court took all the legal requirements necessary, but there is, I have spotted one fault with regard to sentence. That is the sentence was wrong in the sense that it ought to have been 10 years' imprisonment with regard to rape and therefore the court will grant leave to appeal".

[3] It is clear from the above quotes that the magistrate, when he sentenced the appellant, laboured under the belief that the minimum prescribed sentence on the rape count was life imprisonment. In the judgment on sentence he referred to S v Nkomo[2] wherein the Supreme Court of Appeal set aside a sentence of life imprisonment because such a sentence was found to be inappropriate

and unjust. Without attempting to compare or distinguish the facts of this matter with those of S v Nkomo, the magistrate imposed a sentence of sixteen years' imprisonment, apparently because that sentence was imposed in S v Nkomo. From the above quotes in the judgment on the application for leave to appeal, it is similarly clear that the magistrate laboured under the belief that he had faulted and that the sentence on the rape count "ought to have been 10 years' imprisonment".

[4] Mr Mtsila, counsel for the state, submitted that the sentence of 16 years' imprisonment was appropriate and that the magistrate

erred when he thought that he should not have imposed that sentence. Mr Charles, counsel for the appellant, submitted that the magistrate was correct to concede that he had made a mistake when he imposed a sentence of 16 years' imprisonment. The resolution of that issue depends on the facts of this case.

[5] The facts found proven by the magistrate are that on the evening of 22 January 2012 the complainant and her boyfriend, T., were

conversing on the pavement near Vista University at Missionvale, Port Elizabeth when the appellant ran towards them. The complainant had a love affair with the appellant but it ended during 2008. The appellant was angry when he saw the complainant with her boyfriend. He demanded her to walk with him but she refused to go with him. He slapped her on her head. He had a knife in his other hand. She informed her boyfriend to leave. She was afraid that the appellant might injure her boyfriend. He then forced the complainant to go with him. He took her to a friend's shack. He put the knife on a table inside the shack, undressed himself and asked the complainant why she was having an affair with T.. He then requested her to undress. She said that she could not have sexual intercourse with him because she was menstruating. The complainant ultimately relented. Her evidence in this regard was as follows:

"Ja? --- I indeed undressed according to his instructions and then he told me to get onto the bed. When I undressed I climbed onto the bed as he was already on the bed.

Ja? --- After that he climbed on top of me and touched me. After that he inserted his hand into my vagina.

His whole hand? --- His fingers.

Ja? --- After that he inserted his penis into my vagina. After that he told me that I am giving him difficulties, he cannot ejaculate, I must please be accommodating and be free and do as he does and free myself.

Ja? --- After he ejaculated he climbed off from me or get out from me and then he said that he is aware that as soon as he is finished I am going to report him to my mother, then my mother will call the police.

Ja? --- After that he climbed again on top of me and inserted his penis for another round."

[6] Before the magistrate imposed the sentence on the appellant the public prosecutor submitted that "life imprisonment is a suitable sentence" and asked the magistrate to impose it. The magistrate, with reference to *S v Nkomo*, seems to have found that a sentence of life imprisonment would be inappropriate and unjust. He accordingly imposed a sentence of sixteen years' imprisonment. It is apparent from the above that, when he sentenced the appellant, the magistrate laboured under the belief that section 51 (1) of the Criminal Law Amendment Act[3] applied to the facts of this case.

[7] For purposes of this appeal section 51 (1) provides that a regional court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life, unless substantial and compelling circumstances exist which justify the imposition of a lesser sentence. Mr Mtsila submitted that the rape committed by the appellant is referred to in Part I of Schedule 2 because it was committed "in circumstances where the victim was raped more than once ... by the accused ...".

- [8] The issue whether repeated acts of penetration constitute one or many separate acts of rape has received judicial attention in the Supreme Court of Appeal and various provincial divisions.[4] In *S v Blaauw Borchers J* had the following to say at 300a-d:

“Mere and repeated acts of penetration cannot without more, in my mind, be equated with repeated and separate acts of rape. A rapist who in the course of raping his victim withdraws his penis, positions the victim's body differently and then again penetrates her, will not, in my view, have committed rape twice. This is what I believe occurred when the accused became dissatisfied with the position he had adopted when he stood the complainant against a tree. By causing her to lie on the ground and penetrating her again after she had done so, the accused was completing the act of rape he had commenced when they both stood against the tree. He was not committing another separate act of rape.

Each case must be determined on its own facts. As a general rule the more closely connected the separate acts of penetration are in terms of time (ie the intervals between them) and place, the less likely a court will be to find that a series of separate rapes has occurred. But where the accused has ejaculated and withdrawn his penis from the victim, if he again penetrates her thereafter, it should, in my view, be inferred that he has formed the intent to rape her again, even if the second rape takes place soon after the first and at the same place.”

- [9] The above quote was referred to in *S v Tladi*. [5] Saldulker AJA (as she then was) did not criticise any portion thereof. The learned Judge would certainly have criticised any portion of the quote if such criticism was due. It is therefore accepted that it was referred to with approval.
- [10] The facts in *S v Blaauw* against which Borchers J had to decide whether the complainant had been raped more than once are reported as follows at 298e-i:

“The complainant supplied the following details: somewhere near a bridge the accused grabbed her, threw her on the ground, tore off her shorts and panties and had intercourse with her. When he had finished he took her to a tree, which she estimated to be about 12 metres away, made her stand against it and penetrated her again. The position which he adopted was uncomfortable, at least for the complainant, for she said that she hurt her leg and suffered grazes from the tree trunk in the process. The accused himself said that he had not ejaculated and then made her lie on the ground at the foot of the tree where he again had what she described as 'full intercourse' with her. She stated that this entire episode took about two hours, though again there must be some doubt as to the reliability of this estimate. She testified that she tried at one time to cry out for help from people she heard passing nearby but the accused threatened to stab her if she did. She did not see a knife during this period, so the threat may have been an empty one, but it silenced her. She was not asked for further details of the events so it is not known how long each

individual act of intercourse took, how long the intervals between them were or what they did in those periods.

When the accused ceased to rape the complainant she went on towards her home and he accompanied her.”

[11] On the above facts Borchers J found that the complainant was the victim of “at least two separate acts of rape”. The first was near the bridge. That rape commenced when the accused inserted his penis into the complainant’s vagina and terminated when he ejaculated and withdrew his penis. The second rape took place some undefined time later about 12 paces away and a different position was initially adopted by the accused. Borchers J was of the view that the difference in time, place and position between those two incidents was sufficient to constitute two separate acts of rape.

[12] In *S v Maxabaniso* the appellant took the complainant to his home. Upon their arrival he ordered two young boys who were present to leave. When the complainant realised that he had plans with her, she escaped when she thought that it was opportune to do so. He caught her, took her back into the house, locked the door, undressed her and himself and penetrated her. At some stage he stopped, withdrew from her, informed her that he was not finished with her and left the room to go to the toilet. When he returned from the toilet, he threw the complainant onto a mattress on the floor and penetrated her again. Against the above

factual background Plasket J, with whom Sandi J concurred, found that the magistrate’s finding that the appellant raped the

complainant twice was correct. The learned Judge said the following:

“This was not one continuous course of conduct or, as in one of the rapes in S v Blaauw supra, an interruption in an act of rape to change the position of the victim. Rather, two distinct acts of penetration occurred, in different places in the room, with the first interruption by the appellant withdrawing from the complainant and leaving the room for a period.”

[13] In *S v Tladi* the appellant was charged with two counts of rape. He overpowered the complainant in his room. She fell onto a sponge. He unzipped his trousers, removed her panty and had sexual intercourse with her twice without her consent. He was convicted on both counts and sentenced to life imprisonment. Saldulker AJA found that on the evidence, only one act of rape had been proved beyond reasonable doubt. At 291d-f the learned Judge stated the following:

“There is no evidence from the complainant as to how the appellant raped her for the second time. The complainant’s evidence does not suggest that there was an interruption in the sexual intercourse to constitute two separate acts of sexual intercourse and, therefore, two separate acts of rape. The complainant’s evidence suggests that the sexual acts were closely linked and amount to a single continuing course of conduct. There is no suggestion in her evidence that there was any appreciable length of time between the acts of rape to constitute two separate offences. The evidence against the appellant is therefore limited and is insufficient to establish his guilt on two separate counts of rape. The trial court should have analysed the state’s evidence and should have concluded that only one act of rape had been proved beyond a reasonable doubt.”

- [14] Mr Mtsila submitted that the first rape occurred when the appellant inserted his fingers into the complainant's vagina and that the second rape occurred when he inserted his penis into her vagina after the withdrawal of his fingers. Applying the principles that emanate from the above authorities to the facts of this case, I conclude that the complainant's evidence described one continuing course of conduct consisting of the insertion of the appellant's fingers and, upon the withdrawal thereof, the almost immediate insertion of his penis into her vagina. That evidence does not suggest that there was an interruption in the appellant's conduct between the time that he withdrew his fingers and the insertion of his penis sufficient to constitute two separate acts of rape.[6] Mr Mtsila's submission, that the two separate rapes had occurred when the appellant inserted his fingers and thereafter his penis into the complainant's vagina, can accordingly not be sustained.
- [15] However, the evidence does support a finding that the appellant raped the complainant twice. The first rape was completed after the appellant had ejaculated and "he climbed off from or get out from me". The appellant then had a discussion with the complainant about her reporting him to her mother and her mother calling the police. It was only after that discussion that the appellant penetrated her again. Although there is no evidence as to the time lapse between the withdrawal of his penis at the conclusion of the first rape and the subsequent insertion of his penis, the discussion that he had with the complainant caused a sufficient interruption in the appellant's conduct for those incidents to constitute two separate acts of rape. When the appellant climbed on the complainant again and penetrated her, "he formed the intent to rape her again, even if the second rape [may have taken] place soon after the first and at the same place." [7] Mr Mtsila's submission, that the appellant raped the complainant more than once, must accordingly be sustained with the result that Mr Charles' submission to the contrary cannot be sustained.
- [16] In view of the fact that the complainant was raped more than once by the appellant, the prescribed minimum sentence in terms of section 51
- (1) as read with Part I of Schedule 2 of the Criminal Law Amendment Act is imprisonment for life, unless substantial and compelling circumstances exist which justify the imposition of a lesser sentence. The magistrate did not impose imprisonment for life because, so it appears from the judgment, such a sentence would have been disproportionate to the offence, the appellant and the interests of society.
- [17] The appellant was 27 years old when he committed the above offences. He passed grade 8. At the time of his arrest he was employed as a general worker earning a salary of R250.00 per week. He is single and does not have children. He assisted his family with his income. Who those family members were and to what extent they were dependent on his salary were not cleared up. On 26 May 2010 he was convicted of one count of theft and five counts of fraud and sentenced to 12 months' imprisonment for the theft and 24 months' imprisonment for fraud.

[18] Rape is a very serious[8] and prevalent offence. Members of society expect courts to deal harshly with persons who abuse women. What aggravates the rape in this case is that the complainant was violently taken away from her boyfriend by the appellant who had a knife in his hand. Before he took her away he assaulted her in full view of her boyfriend. I agree with the magistrate that imprisonment for life would be disproportionate[9] if regard is had to the nature and seriousness of the offence, the interests of society and the appellant's circumstances.

The sentence imposed by the magistrate, considering the offence, the interests of society and the appellant's circumstances, is, in my view appropriate and does not induce a sense of shock. The appeal against sentence must accordingly be dismissed.

[19] In the result, the appeal against sentence is dismissed.

G H BLOEM

Judge of the High Court

Eksteen J,

I agree.

J W EKSTEEN

For the appellant:

Adv H Charles of the Grahamstown Justice Centre, Grahamstown.

For the state:

Adv S S Mtsila of the office of the Deputy Director of Public Prosecutions, Grahamstown.

Date of hearing:

23 August 2017

Date of delivery of the judgment:

28 August 2017

[1] Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007)

[2] S v Nkomo 2007 (2) SACR 198 (SCA) to which the magistrate wrongly referred as S v Mlambo.

[3] Criminal Law Amendment Act, 1997 (Act No. 105 of 1997).

- [4] S v Tladi 2013 (2) SACR 287 (SCA); S v Blaauw 1999 (2) SACR 295 (W) and S v Maxibaniso 2015 (2) SACR 553 (ECP).
- [5] S v Tladi at 290h-291b.
- [6] S v Tladi 2013 (2) SACR 287 (SCA).
- [7] S v Blaauw at 300d.
- [8] S v Chapman 1997 (3) SA 314 (SCA) at 344J and S v Hewitt 2017 (1) SACR 309 (SCA) at 313d-f.
- [9] S v Vilakazi 2009 (1) SACR 552 (SCA) at 560c-g.
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