

SOUTH AFRICA / JUDGMENT

Nofemele v S (CA&R 169/18) [2019] ZAECHGC 46 (12 March 2019)

[2019] ZAECHGC 46

COURT

Eastern Cape High Court, Grahamstown

BEFORE

S Rugunanan, G H Bloem

CASE / FILE NUMBER

CA&R 169/18

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, GRAHAMSTOWN)

CASE NO. CA&R 169/18

Date heard: 06 March 2019

Date Delivered: 12 March 2019

TUMELO NOFEMELE

Appellant

and

THE STATE

Respondent

JUDGMENT

RUGUNANAN, AJ

- [1] On 6 March 2018 in the Regional Court, Aliwal North, the appellant was charged with kidnapping (count 1) and rape involving the infliction of grievous bodily harm (count 2). The offences are alleged to have been committed on 12 September 2015. A conviction ensued on each count and on 19 March 2018 the appellant was sentenced on count 1 to 5 years' imprisonment while count 2 attracted a sentence of life imprisonment. The sentences were ordered to run concurrently. The appeal to this court is against the conviction and sentence on both counts. On count 1 it lies with the leave of the trial court, and on count 2 it is in terms of the automatic right of appeal under section 309(1)(a) of the Criminal Procedure Act.
- [1]

- [2] In heads of argument counsel for the appellant, Mr Geldenhuys, identified two issues in the appeal against conviction on count 2, namely; (i) the reliability of the complainant's evidence identifying the appellant as the perpetrator; and (ii) the finding by the trial court that the rape involved the infliction of grievous bodily harm as per Part I of Schedule 2 of the Criminal Law Amendment Act.[2] At the commencement of the appeal Mr Geldenhuys stated that the identity issue was not being pursued, this on an acceptance that the appellant was correctly convicted of rape. The evidence indicates that this concession was correctly made.

FACTUAL SUMMARY

- [3] The appellant pleaded not guilty to both counts. Indicating that the appellant's defence was an alibi because he was with his brother in a different town when the offences were committed, the appellant's legal representative mounted a challenge to the so-called chain evidence of DNA samples obtained from the complainant and the appellant in respect of their marking and safekeeping in the interval before the samples reached the forensic laboratory for analysis. This challenge was abandoned when documentary evidence was handed in by agreement in which the seal numbers of the respective samples that were collected corresponded with the seal numbers contained in the final DNA report. For the appellant, this meant that the samples were a biological match for identification purposes. That being the case, it is considered unnecessary to deal with the chain evidence of all role players involved in the extraction, marking, safekeeping, transit and analysis of the samples.
- [4] The complainant testified that at approximately 8 o'clock on the night in question she had been walking alone in Hilton location. While somewhere in the vicinity of "Babylon Church" she became aware of someone following her. When she looked back she was slapped with an open hand on her face and strangled. This was followed by an immediate struggle between herself and the perpetrator whom she said pulled her against her will to a dilapidated brick structure located in what she described as a brickfield. The complainant identified the structure from an album of photographs that was handed in as evidence. The perpetrator bound her hands and feet using the shoestrings removed from her footwear and gagged her with a "doek" that she had been wearing. When she sputtered out the gag he struck her with his fist and gagged her once again. While lying on the ground she discerned that he was removing his pants. Upon doing so, she tightened her legs. This elicited further blows with fists and hands and a threat that her throat would be slit and her body tossed into a river. With her resistance neutralised, the perpetrator raped the complainant when he forced his penis into her vagina. Thereafter he instructed her to walk with him to his place. While walking on a tarred road near a tavern two young girls were encountered. The perpetrator engaged one of them in

conversation and while doing so the complainant spotted a house nearby with its front door open and saw opportunity to escape by

running off towards it. The perpetrator took flight when she did so. There were several people inside the house, among them an elderly woman who rendered assistance in summoning the police.

GRIEVOUS BODILY HARM

[5] When considering whether grievous bodily harm has been inflicted a general proposition is that the whole complex of objective factors involved in the assault are to be considered, including the results which flowed from the wounds inflicted.[3] The nature, position and extent of the actual wounds or injuries must be considered and the intention of the perpetrator is irrelevant.[4]

[6] During the trial a J88 medical report dated 13 September 2015 was, by agreement between the parties, handed in as evidence without the necessity for formal proof. Paragraph 5 dealing with clinical findings reflects the following detail in respect of the complainant:

“Few scratches on neck. +/- 4 small scratches”

“Bruising and swelling of upper and lower lip”

“No other signs of trauma”

[7] At the onset of the encounter with the appellant the complainant stated that she was slapped in the face and strangled whereafter she was pulled into the dilapidated building. In the progression of events she also testified that she suffered other injuries such as bruises on her back including the left side of her face where she said she sustained a blue mark. Furthermore, she testified being struck with a fist upon spitting out the gag and being further assaulted with fists and hands when she tensed her legs before being vaginally raped.

[8] There is a disconnect in the complainant’s oral testimony and the objective findings in the medical report. Firstly, concerning the injuries set out in the report, the complainant did not testify as to how or in what manner were they inflicted. The same applies to the bruises on her back and the mark on the left side of her face. Secondly, she did not testify as to the specific location on her body where the blows administered to her after spitting out the gag and tightening her legs, had landed. Nor did she say what injuries she sustained because of such blows. In each of these instances no

attempt was made to elicit the required evidence from the complainant. Significantly lacking in the medical report is any detail regarding injuries sustained by the alleged blows and injuries in the nature of bruises on the complainant’s back and left

side of her face where she allegedly sustained a blue mark.

- [9] Confronted by these shortcomings and anomalies Mr Sinclair, who appeared for the respondent, correctly and fairly conceded that the state failed to discharge the onus of proving that the rape that the complainant was subjected to involved the infliction of grievous bodily harm. That being the case the rape of which the appellant was convicted is referred to in Part III (and not Part I) of Schedule 2 of the CLAA.

SENTENCE

- [10] The finding by this court that the state did not prove that the rape involved the infliction of grievous bodily harm has the result that the sentence of life imprisonment is rendered inappropriate and the provisions of section 51(2)(b)(i) of the CLAA become applicable in so far as a mandatory minimum sentence of 10 years' imprisonment is sanctioned for a first offender (such as the appellant) convicted of rape.
- [11] In considering the issue of substantial and compelling circumstances initially when imposing the sentence of life imprisonment and the minimum sentence of 5 years' imprisonment for kidnapping, the magistrate concluded that these circumstances were absent for the purpose of justifying a departure from the prescribed sentences on both counts. There is no basis to depart from that finding where the same issue arises as regards the prescribed minimum sentence of 10 years' imprisonment for rape and 5 years' imprisonment for kidnapping.
- [12] The appellant did not testify in mitigation of sentence. Through his legal representative his personal circumstances placed on record were that: he was 25 years old at the time of being convicted; he is unmarried and has no dependent children; he has little formal education; prior to his arrest he did casual work for a living, and both his parents died when he was relatively young. The appellant admitted his previous convictions which entail, in the period 2006 to 2011, three counts of theft, one count of robbery, and three counts of assault with intention to commit grievous bodily harm.
- [13] Rape is a serious offence. For the complainant, the magistrate correctly summed up the ordeal as "devastating". The appellant sprang upon her. The attack on her was by surprise and she was defenceless. By its nature the offence constitutes a humiliating and brutal invasion of the privacy and dignity of the victim invading the most intimate zone of a woman and strikes at the core of her personhood.[5] The courts are duty bound to ensure that the rights to dignity, privacy and integrity of every person which rights are basic to the ethos of the Constitution are protected.[6] Undoubtedly the community interest demands that violence against women should not be tolerated. Under the CLAA courts are enjoined to regard the prescribed mandatory sentences as generally appropriate for the specified crimes which sentences should not be departed from without weighty justification. A clear message must be sent out by the courts in imposing sentences that would not only give the community a sense of security, but also deter would-be offenders.

[14] In the judgment on sentence the magistrate set out in detail the circumstances of the offences as well as the personal circumstances of the appellant while at the same time being cognisant of the interests of the community. The cumulative effect of the magistrate's evaluation is that no room is left for concluding that any one of

these considerations was overemphasised at the expense of the others. In the circumstances there is no basis for finding that the

magistrate did not properly apply her mind to the existence or otherwise of substantial and compelling circumstances when the sentence of life imprisonment was imposed (including the sentence for kidnapping). Employing the same considerations as did the magistrate in her evaluation of the evidence, this court considers the prescribed sentence of 10 years' imprisonment to be

appropriate.

[15] In the result:

- (i) The appeal against conviction and sentence on count 1 (kidnapping) is dismissed.
- (ii) The conviction and sentence imposed by the magistrate on count 1 is confirmed.
- (iii) The appeal against the conviction on count 2 is dismissed.
- (iv) The sentence of life imprisonment on count 2 is set aside and substituted by a sentence of 10 years' imprisonment.
- (v) The sentence on count 1 shall run concurrently with the sentence on count 2.
- (vi) The sentences are antedated to 19 March 2018.

S RUGUNANAN

ACTING JUDGE OF THE HIGH COURT

I agree.

G H BLOEM

JUDGE OF THE HIGH COURT

Appearances:

For Appellant: Adv. D. P. Geldenhuys instructed by Legal Aid South Africa,

Grahamstown

For Respondent: Adv. L. W. Sinclair instructed by the Office of the National Director of Public Prosecutions,

Grahamstown

- [1] Criminal Procedure Act, 1977 (Act No. 51 of 1977), as amended
- [2] Criminal Law Amendment Act, 1997 (Act No. 105 of 1997), as amended
- [3] S v Maselani and Another 2013 (2) SACR 172 (SCA) at paragraph [12]
- [4] R v Jacobs 1961 (1) SA 475 (AD) at 478 A. See also DPP, Gauteng Division, Pretoria v Moabi 2017 (2) SACR (SCA) at paragraph [15]
- [5]; S v Vilakazi 2009 (1) SACR 552 (SCA) at 555h and S v SMM 2013 (2) SACR 292 (SCA) at 299a-b.
- [6] S v Chapman [1997] ZASCA 45; 1997 (2) SACR 3 (SCA) at 5 C
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