

SOUTH AFRICA / JUDGMENT

Nomqolo v S (A68/2019) [2020] ZAGPPHC 518 (14 September 2020)

[2020] ZAGPPHC 518

COURT

North Gauteng High Court, Pretoria

BEFORE

G.T. Avvakoumides, S.M. Baqwa

CASE / FILE NUMBER

A68/2019

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IN THE HIGH COURT OF SOUTH

AFRICA

(GAUTENG DIVISION, PRETORIA)

(1)

REPORTABLE:

YES/NO

(2)

OF

INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED.

CASE

NO: A68/2019

Appeal

date: 18/11/2019

In

the matter between:

BENJAMINI

NOMQOLO

Appellant

and

THE

STATE

Respondent

JUDGMENT

AVVAKOUMIDES, AJ

INTRODUCTION:

1. The Appellant was charged for one count of rape in the Regional Division of Gauteng, held at Oberholzer. He was legally represented throughout the trial and a plea of not guilty was recorded on his behalf. He was convicted of rape on 10 August 2018 and sentenced to 10 years imprisonment. In addition he was declared unfit to possess a firearm and it was directed that his name be entered into the National Register for Sex Offenders.
2. On 12 September 2018, the Trial Court granted the Appellant leave to appeal against the conviction and sentence.

ISSUES**ON APPEAL:**

3. The appeal rests on three grounds, namely:
 - 3.1 Whether the State succeeded in proving the charge of rape beyond a reasonable doubt; and
 - 3.2 Whether the Trial Court applied the cautionary rule contained in section 208 of Act 51 of 1977. This issue was raised because the State led the evidence of a single witness who was a child at the time; and
 - 3.3 Whether the court sitting in appeal would be justified in interfering with the sentence imposed.

FACTS:

4. The complainant, who was 11 years old at the time testified through an intermediary that on 24 September 2016, she accompanied her mother M[....] N[....] to the hair salon whereafter they returned back home.
5. The complainant and her mother visited their neighbour's home (N[....] T[....].) The complainant noticed that the Appellant was seated on the sofa. N[....] told the complainant that she could sleep at her house that night whereupon the complainant's mother asked N[....] whether the Appellant could be trusted to look after the complainant and M[....]. N[....] confirmed that she trusts the Appellant. The complainant testified that this was the first time that she had seen the Appellant.

6. The complainant's mother and N[...] left the home and the Appellant, complainant and M[...] stayed behind watching television together. Later that evening the complainant and M[...] went to the bedroom to sleep. Whilst asleep, the complainant felt someone inserting a finger into her buttocks. She noticed a person kneeling down and this person placed his belt on the floor and went back to the sofa where he sat down.
7. The complainant who acted by getting out of bed, picking M[...] up on her back and left the home to look for her mother. According to the complainant they first went to Sibara's Place.
8. On their way they met up with one Bololo who accompanied the two minor girls to one Robie's Place, which is apparently a shebeen. Bololo entered the shebeen to call the complainant's mother and reported to her what had happened. The complainant's mother went back into the shebeen to call N[...] and they all returned to N[...]’s house. The Appellant was found sitting on the sofa and N[...] questioned the Appellant as to why he did what the complainant had alleged.
9. The Appellant denied the allegations whereupon N[...] hit him in the face with a fist but was restrained by the complainant's mother who insisted that they should rather call the police.
10. The complainant testified that the Appellant placed his hand into her underwear and inserted one of his fingers into her anus. Whilst he was in the process he had placed his belt on the ground and opened his trouser and zipper to his trouser. He then stood up and the belt fell on the ground where he was kneeling. When police arrived to arrest the Appellant his belt was still in the room where it had fallen.
11. According to the complainant's evidence there was sufficient light on in the room to identify the Appellant. During cross-examination she described that she had been wearing a jumpsuit which is not joined together like an overall.
12. The complainant's mother testified that on 24 September 2016 she visited N[...] with the complainant and N[...] asked her to leave the complainant with her niece M[...] and they could spend the night together. She confirmed asking N[...] if she trusts the Appellant and whether he can be left alone with the children. N[...] assured her that the Appellant can be trusted as he usually visits her and this was not his first time when he would sleep at her house. At approximately 23h00 Bololo called her outside Robie's Tavern and told her that the children were looking for her. She went out and found the complainant crying. The complainant reported to her that the Appellant had inserted his finger into her anus. She then called N[...] from the tavern and they all returned to N[...]’s home where they found the Appellant. She confronted the Appellant about the complainant's allegations but the Appellant never answered. This is when N[...] got angry and hit the Appellant in the face.
13. N[...] N[...], the neighbour, also testified and corroborated the evidence of the complainant's mother. Of importance is that N[...] confirmed that she had seen the Appellant's belt in the bedroom next to the bed where the complainant slept.

THE LEGAL POSITION: CONVICTION

14. It is trite that a court, sitting in appeal, will be hesitant to interfere with the factual findings and evaluation of the evidence by the Trial Court. The Court of Appeal will only interfere where the Trial Court materially misdirected itself insofar as the factual and credibility findings are concerned. (See: R v Dhlumayo and Another 1948 (2) SA 677 (A)). In S v Francis 1991 (1) SA CR 198 (A) at 198J-199A, the approach of an Appeal Court to findings of fact by the Trial Court is summarised as follows:

"The power of a Court of Appeal to interfere with the findings of fact of the Trial Court are limited. In the absence of any misdirection the Trial Courts' conclusion, including its acceptance of the witness evidence is presumed to be correct. In order to succeed on appeal, an appellant must therefore convince the Court of Appeal on adequate grounds that the Trial Court was wrong in accepting the witness evidence; a reasonable doubt will not suffice to justify interference with the findings. Bearing in mind the advantage which a Trial Court has of seeing, hearing and appraising a witness. It is only in exceptional cases that the Court of Appeal will be entitled to interfere with the Trial Courts' evaluation of oral testimony".

15. In S v Radebe & Others 1997 (2) SACR 641 (SCA) at 645E-F, the court held the following:

".. in absence of demonstrable and material misdirection by the Trial Court its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong."

16. Section 208 of the Criminal Procedure Act 51 of 1977 deals with an accused being convicted of an offence based on the evidence of a single and competent witness. A court can base its finding on the evidence of a single witness as long as such evidence is satisfactory in every material respect or if there is corroboration. (See: S v Mahlangu and Another 2011 (2) SACR 164 (SCA).
17. The Appellant testified that he did enter the room where the girls were sleeping because he was looking for a blanket. He explained that N[...] did not leave blankets for him. This is contradicted by the complainant who testified that when she entered N[...]s home and saw the Appellant for the first time she noticed that there were blankets on the sofa. He testified further that it was dark inside the bedroom and there was no light. What remains unclear is why the Appellant's belt was found next to the bed where the children were sleeping.
18. Lastly the Appellant, in his evidence, confirmed that the children were watching a movie with him and they went to sleep after the movie. He testified that he asked the children for a blanket but they did not bring any blanket for him. Thereafter he went to the room to search for a blanket but the room was dark. He testified that he moved his hand over the bed and could feel the children and then went back to the television. Under cross-examination he conceded not having asked the children where they were going when they left the house after the incident. When the question was later repeated he amended his version to say that he did ask them where they were going but they did not answer. Why he, who was supposed

to look after the children did not go after the children when they suddenly left the house, remains a mystery.

19. On the basis of the legal submissions made, the contents of the record and the respective heads of argument I cannot find any reason to interfere with the finding of the Trial Court on the conviction and accordingly the appeal against the conviction must fail.

THE LEGAL POSITION: SENTENCE:

20. The imposition of a sentence falls within the discretion of the Trial Court. See *S v Romer* 2011 (2) SACR 153 at 159C. In order for the Appeal Court to interfere with the sentence by the Trial Court, an appellant must show that the sentence is:

20.1 Disturbingly in appropriate;

20.2 Totally out of proportion to the magnitude of the offence;

20.3 Sufficiently desperate;

20.4 Showing that the Trial Court exercised its discretion unreasonably;

20.5 No other reasonable court would have imposed such sentence.

21. There is no dispute that the conviction falls within the ambit of section 51 of Act 51 of 1977. In terms of section 51 prescribed minimum sentences are provided for. A Trial Court is only permitted to deviate from the prescribed minimum sentences if such court is satisfied that substantial and compelling circumstances exist, which justify the imposition of a lesser sentence. In deciding whether substantial and compelling circumstances exist, the court is required to look at all the traditional factors, and to consider the cumulative effect thereof. Only if the court concludes that the minimum sentence is disproportionate to the conviction to the extent that an injustice would be done to the accused. The minimum sentences

so prescribed are not to be departed from lightly. See *S v Dyanti* 2011 (1) SACR 540 (ECG) at 547G.

22. In respect of the sentence the Appellant explained his personal circumstances, that he spent 8 months in custody awaiting trial and that the victim and the other child were neglected by their parents who went out to drink, leaving the children in the custody of a drunk Appellant. He further contended that only a finger was inserted and that the complainant did not suffer any injuries. This the Appellant explained constitutes substantial and compelling circumstances.
23. The State handed in a Victim Impact Report reflecting the effect that the incident had on the complainant. The report explains that the incident has deprived the complainant of joy and happiness as a child and she no longer plays with her friends. She appears to be shocked and this has also affected her family.

24. Having regard to the evidence, the authorities and legislation pertaining to minimum sentences in sexual offences and, particularly to explanation proffered by the Appellant in litigation, I find that there is no reason for this Court to interfere with the sentence imposed on the Appellant. The appeal against the sentence must accordingly fail.

ORDER:

25. In the circumstances I make the following order:

25.1 The appeal against conviction and sentence is dismissed.

G.T. AVVAKOUMIDES

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

I agree and it is so ordered

S.M. BAQWA

JUDGE OF THE HIGH COURT

Representation for the parties:

On behalf of the Applicant:

HL Alberts

On behalf of the First Respondent: SMV Mathambo

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Prepared on 13 October 2026 · Esheria