
SOUTH AFRICA / JUDGMENT

Nyaredi v S (CA27/2016) [2017] ZANWHC 62 (3 August 2017)

[2017] ZANWHC 62

COURT

North West High Court, Mafikeng

BEFORE

R.D. Hendricks, T.J. Djaje

CASE / FILE NUMBER

CA27/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH WEST

DIVISION, MAHIKENG

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CASE

NO: CA 27/2016

In

the matter between: MOSES
NYAREDI
Appellant
and
THE
STATE
Respondent
HENDRICKS
J & DJAJE J
DATE
OF HEARING
:
30 JUNE 2017
DATE
OF JUDGMENT
:
03 AUGUST 2017
COUNSEL
FOR APPELLANT
:
ADV. MADIBA
COUNSEL
FOR THE RESPONDENT
:
ADV. CHULU

JUDGMENT

HENDRICKS J

- [1] The Appellant was arraigned in the Regional Court and charged with the offences of pointing of a fire-arm (count 1), assault (count 2), malicious injury to property (count 3) and rape (count 4). He was convicted on the 25th June 2013 on all four counts and sentenced on count 1 to two (2) years imprisonment; one (1) year imprisonment on count 2; one (1) year imprisonment on count (3); and twelve (12) years imprisonment on count 4. It was ordered that the sentences on counts 1 and 3 should run concurrently and the sentences on counts 2 and 4 should run concurrently. Leave to appeal against conviction and sentence was granted by the trial court.
- [2] The facts can be summarized as follows. On the evening of 20th May 2012, M. M. (“the complainant”) left the tavern that she attended and waited in a street for her boyfriend, A. M., to pick her up with his motor vehicle. Whilst so waiting, the Appellant emerged and started to converse with the complainant. A. arrived and the complainant boarded his motor vehicle and closed the door. When A. was about to drive off, the Appellant pointed him with a fire-arm and instructed him to off-load the complainant. The Appellant picked up a stone and threw it at the windscreen of the motor vehicle. The windscreen was shattered.

- [3] When the complainant alighted from the motor vehicle, she was slapped by the Appellant which caused her to fall to the ground. Further assaults were perpetrated. The Appellant dragged the complainant to a shack which was deserted. He then had sexual intercourse with her without her consent. He kept the complainant for the night. The following morning around 10:00 a friend to the Appellant arrived at the shack. Whilst the Appellant and his friend were busy talking behind the shack, the complainant managed to flee. She fled to A., her boyfriend. She borrowed A.'s phone and contacted the police. The Appellant was then arrested.
- [4] An application for condonation for the late prosecuting of the appeal was made. Leave to appeal was granted on the 23rd October 2015. The notice of appeal was filed with the Registrar of this Court on 18th May 2017. In an affidavit deposed to by the Appellant, the following is stated as the reasons of the delay:

“3.1 It has always been my intention to lodge an application for leave to appeal within the prescribed time limit, which was explained to me by this Honorable Court after My sentence.

3.2.1 The initial reason for my delay was that I had to apply and wait for transcribed records which took a very long time for me to have.

3.3 I was further advised by my then legal representative that my matter will also have referred to the Mahikeng Justice Centre to handle my matter since they are the Center with the High Court unit.

3.3.1 I therefore kept on calling Mr. Charles Moremi of Mahikeng Justice Center who confirmed to me that he is in receipt of my file and that as soon as he has the transcribed records he will advise me as to who is the practitioner handling my matter.

3.3.2 I kept on calling Mr. Moremi about progress in my matter and he kept on telling me that he is still waiting for the transcribed records. Ultimately after a long time he informed me that he is in possession of the Transcribed records and that Mr. Orapeleng Madiba is the practitioner handling my matter.

3.3.3 I then kept on calling my legal representative Mr. Madiba but unfortunately most of the time I could not get hold of him as I was most of the time advised that he was out on Circuit court. But on the rare occasion when I got hold of him he would always that he was busy with other office work and will come and see me as soon as his schedule allows him.

4 In the circumstances, I submit that the delay is not due to fault on my part, and was due to circumstances beyond my control.

4.1 I further submit that there are reasonable prospects of success on an Appeal and another Court may come to a different conclusion in this matter.

4.2 I therefore ask this Honourable Court to condone the late filing of my Appeal on Conviction.”

- [5] Although reference is made to the application for leave to appeal, it is quite apparent that condonation is sought for the late prosecution of the appeal since leave to appeal was already granted by the Court a quo on 23 October 2015.
- [6] Mrs Chulu on behalf of the Respondent, opposed the application for condonation. She contended that the information contained in the affidavit is very vague and scatchy. The steps taken by the Appellant and his legal representative is not clearly outlined. No cogent or good reasons are advanced for the delay which is inordinately long, and the application for condonation should be dismissed.

[7] In *Melane vs Santam Insurance* 1962

(4) SA 531(A), the following is stated:

“In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised

judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually

relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily

these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked.”

[8] I am in full agreement with the contention by Mrs Chulu. Condonation is not merely for the asking. It is incumbent upon an applicant in an application for condonation to set out inter alia the reasons for the delay, the steps taken in order to prevent further delay and the prospects of success on appeal. The application for condonation lack detail. No proper case had been made out for the granting of the requisite condonation. Furthermore, there are no reasonable prospects of success on appeal. Consequently, condonation for the late noting and prosecution of the appeal should be refused.

[9] The appeal is premised on the following grounds:

“1. The appellant submits that court erred in finding that the complainant despite the fact that J88 showed no injuries to the vagina of the complainant which are consistent with forceful entry.

2. The honourable court erred in convicting the Appellant on charges of malicious injury to property despite the fact that no photos were put before court to proof that indeed the complainant's car windscreen was damages.
3. The Honourable court erred in finding Appellant guilty of pointing a fire arm even though no fire arm was found in possession of the Appellant.
4. The honourable court erred in convicting Appellant for common assault despite contradicting assertions by both the victim and the State witness as to whether or not the State witness was present when the alleged assault took place.
5. It will be argued on behalf of the Appellant that the sentence of twelve years imprisonment is shockingly severe and inappropriate.

That the Learned Regional Court Magistrate overemphasized the seriousness of this offence. That the Learned Magistrate erred

in not properly considering the personal circumstances of the Appellant and time spent by the Appellant in custody whilst awaiting

finalization of this matter. That the Learned Regional Magistrate erred in not suspending part of the sentence given personal circumstances of the Appellant."

[10] As far as the first ground of appeal is concerned, the Regional Magistrate in his well-reasoned judgment dealt extensively with the fact that the medical record (J88) does not indicate that the complainant suffered any vaginal injuries. The Regional Magistrate stated:

"Now it is quite clear, you are raising an important fact when you say the J88 says everything is normal, the doctor says everything is normal."

But what you may not know as a person who is not even legally trained, is that the doctor only expresses his or own opinion and that opinion can bind, or in other situations may not even bind the court. The opinion of the doctor is not a fact as such, it remains his opinion. Now for the J88 to say everything is normal whether there is rape or not can depend on a number of reasons.

At times he J88 can say normal, everything is normal in rapes because of the sizes of the individuals. If, for instance, the lady is bigger than the male, the female is bigger than the male there may not be injuries, obviously. In this particular instance no examination was done on you and therefore no one know about your size and so on.

But the question of everything can be remaining normal can also depend on the positions used during the sexual intercourse, whether it is through consent or not and that is why you may even get injuries where there is consent. So the fact that there are injuries does not say anything about whether there is consent or not, in short it is not conclusive.

The question of injuries on female genitals has got nothing to do with consent more often than not. It can arise, like I have said, out of a number of reasons, but in this particular instance... The third aspect which I should look at, remember, the first one I said it could be the question of size,

the second aspect, I said it could be the position used during the sexual intercourse which negates injuries. The third aspect could be the issue of lubrication in the sense of whether a condom was used or not and the fourth and very crucial aspect, in as far as I am concerned, can be the issue of giving in.

Remember, this lady say you producing a firearm, according to her, she saw how violent you are by damaging the windscreen of your boyfriend and taking her from her boyfriend, where she thought she might be safe. As if that is not enough along the way you produced a firearm and you were driving her to where you want her to go with the firearm. Obviously she must have been in a state of shock.

When the rape so took place she must have been traumatised. It is during that period where she could have resisted if she was not traumatised, but because of trauma and the experience she had she did not offer any form of resistance. This in itself can contribute to the J88 being normal, normal, normal, because she does not offer a match, she is not match to you, she is not resisting anyway. You penetrate has you want and you do as you please with her, so in that particular way there may not be injuries. So that could explain why the J88 says normal, normal, normal, those could be the other reasons as to why the J88... It does not necessarily mean that you never raped her.”

The logical reasoning of the Regional Magistrate cannot be faulted.

[11] As far as the second ground of appeal is concerned, the absence of photographs of the damaged windscreen does not at all mean that the windscreen was not at all damaged. The evidence of the complainant and A., which evidence the trial court accepted, is sufficient to sustain the finding that the windscreen was indeed damaged. The onus on the State is to prove the guilt of the Appellant, as an accused person, beyond any reasonable doubt and not beyond any shadow of a doubt, as correctly pointed out by the Regional Magistrate in his

judgment.

[12] The aspect of the fire-arm was also comprehensively addressed by the Regional Magistrate in his judgment on sentence where the following is stated:

“You are saying the firearm was not found in your possession. There was no way it could be found on your possession because remember your victim ran away. Running away, it was quite clear to you that police are now going to come and how on earth an experienced person like you would have remained in possession of a firearm after the victim had run away. All signs were clear to you the police are now coming, so you had ample time to do away with this firearm.”

[13] The contention on behalf of the appellant is that the complainant and A. contradicted each other as to whether or not the assaults were perpetrated in the presence of A.. It was submitted that these contradictions are material. The Regional Magistrate addressed the issue of contradictions in his judgment. The following is stated:

“You may have, when you touched on the evidence, when you addressed me on the facts, you correctly pointed out the differences in the versions of state witnesses.

In that regard one has to look at, when it comes to the contradictions you have alluded to, that is common cause that indeed there are contradictions, but the issue here is those contradictions must or can be dealt with like they were dealt with in the matter of *S v Mkohle* 1990 (1) SACR 95 (A).”

[14] In *S v Mkohle* 1990 (1) SACR 95 (A), it is stated that contradictions per se does not necessarily lead to the rejection of the witness’ evidence. It may be indicative of a mistake. Regard must be had to the circumstances and the facts of a particular case in order to evaluate the contradictions in a proper context. From the facts of this case, it is quite apparent that the incident happened quite unexpectedly. One moment the Appellant was still conversing with the complainant. When A. arrived, she boarded his motor vehicle. All-of-a-sudden the Appellant brandished a fire-arm at A. and damaged the windscreen of his motor vehicle with a stone. The complainant then alighted. He then assaulted the complainant with an open hand which caused her to fall to the ground.

[15] Understandably, both the complainant and A. were taken by surprise and shocked at what happened. They observed and experienced it differently. It is not surprising that there will be differences in their evidence. However, these discrepancies or rather minor

blemishes does not go to the root of the matter. It does not negate any of their testimonies. They corroborate each other on the material aspects.

[16] The Regional Magistrate made strong credibility findings in favour of the state witnesses and against the Appellant. These credibility findings cannot be faulted. Cogent reasons are advanced in this judgment for the acceptance of the evidence and testimonies of the state witnesses. Furthermore, the Regional Magistrate also took into consideration the probabilities and possibilities and even looked at motive.

[17] The Regional Magistrate correctly in my view, convicted the Appellant on all four counts. The appeal against conviction should therefore fail and the conviction must be confirmed.

[18] With regard to sentence, no misdirection is to be found in the judgment on sentence. The Regional Magistrate correctly took into account the personal circumstances of the Appellant; the nature and seriousness of the offences as well as the interest of society. The sentence imposed is a carefully balance sentence and none of the factors taken into consideration when imposing a suitable sentence was either over-or under-emphasized. To guard against imposing too a severe sentence and in order to show mercy towards the Appellant, some of the sentences were ordered to run concurrently. The actions of the Appellant on the night in question were quite abhorrent. That is why the Regional Magistrate remarked as follow:

“It is quite wrong of you to have just raped this lady simply because you feel that she is having sexual intercourse with foreigners when you are there. That is quite wrong of you.”

[19] Sentence is pre-eminently in the discretion of the trial court and a court of appeal will not lightly interfere with the sentencing

discretion of the trial court. Unless a court of appeal is convinced that the discretion was exercised improperly; unreasonably;

capriciously or if the sentence is vitiated by an irregularity or is shockingly severe, disturbingly inappropriate and totally out of proportion with the offence(s) committed, it will not interfere with the sentence.

See: *S v Saddler* 2000 (1) SACR 331 (SCA)

S v Coetzee 2010 (1) SACR 176 (SCA)

[20] It was contended on behalf of the Appellant that the sentence of twelve (12) years for the rape (count 4) is excessively long and it induces a sense of shock that warrants interference by this Court. For this submission reliance was placed on the cases of *S v Mahomotsa* 2002

(2) SACR 435 (SCA) and *S v Nkomo* 2007 (2) SACR 198 (SCA). I do not agree. In my view, the sentence is quite fitting if regard is had to the circumstances under which the offences were committed. Each case must however be decided on its own merits.

[21] The following aggravating features must be taken into account:

The complainant was waiting for her boyfriend, A., to arrive with his motor vehicle to take her home. Whilst she was waiting, the Appellant approached her and asked her why she is waiting next to the street. She told him that she was waiting for her boyfriend; who is known to the Appellant. He asked her why she was falling in love with a foreigner whilst he is there. He pointed A. with a fire-arm. He damaged the windscreen of A.'s motor vehicle with a stone. He forcefully removed the complainant at gun point, and assaulted her in the presence of her boyfriend, A. and took her to a deserted shack. He raped her and kept her for the whole night. In my view, the appeal against sentence should also fail.

Order

[22] Consequently, the following order is made:

- (i) Condonation for the late noting and prosecution of the appeal is refused.
- (ii) The appeal against conviction and sentence fail.
- (iii) The conviction and sentence are confirmed.

R.D. HENDRICKS

ACTING DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG

I agree

T.J. DJAJE

JUDGE OF THE HIGH COURT

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