

SOUTH AFRICA / JUDGMENT

Oliphant v S (A468/2010) [2018] ZAGPPHC 651 (16 April 2018)

[2018] ZAGPPHC 651

COURT

North Gauteng High Court, Pretoria

BEFORE

S.AM. Baqwa, C. Swanepoel

CASE / FILE NUMBER

A468/2010

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

CASE

NO: A468/2010

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

REVISED

16

APRIL 2018

In

the matter between:

BONOLO

MAX OLIPHANT

Appellant

And

THE

STATE

Respondent

JUDGMENT

- [1] The appellant was arraigned before the Regional Court Klerksdorp together with other accused on numerous counts of rape and robbery.
- [2] The appellant was convicted on count 4 of rape and sentenced to life imprisonment.
- [3] He had an automatic right of appeal which he now exercises by appealing against both conviction and sentence.

Background

- [4] 4.1 Though this appeal is in regard to count 4 in respect of which the appellant was convicted, the complainant in respect of that count, KD was in the company of KS; who was also raped and was the complainant in count 5. To that extent therefore the narrative factually involves events pertaining to Kelebogile also and count 5.

4.2 The testimony of both KD and KS was to the following effect On the day in question they were both playing pool at a tavern called Sisto tavern. They arrived there at about 18h00 and left at about 19h00. They did not consume alcohol. As they made their exit accused 3 approached KD and forced her to go with him by threatening her with a knife and hitting her with open hands. At that time Kelebogile was at or near the gate of the tavern. He proceeded with her to a certain shack nearby. At the same time KS was following them in the company of the appellant and accused 5.

4.3 At the shack accused 3 undressed KD and had sexual intercourse with her without her consent on the floor of the Shack. The appellant also had sexual intercourse with KS without her consent. Accused 3 then had sexual intercourse with her for the second time without her consent and so did the appellant. At the same time accused 5 had sexual intercourse with KD on the only bed in the room. After the appellant and his accomplices had finished raping them they allowed them to go home at about 22h00.

- [5] The complainants went to their respective homes but they did not report the incident to their parents that night. The following day, they proceeded to the police station to lay charges.
- [6] The appeal is premised on the grounds that the court a quo erred in convicting the appellant on the charge of rape in terms of section 51 (1) of Act 105 of 1997 which provides as follows:
"Notwithstanding any other law, but subject to subsection (3) and (6), a regional court or High Court shall sentence a person it has convicted of an offence referred to in Part 1 of Schedule 2 to imprisonment for life."
[7] Part 1 of Schedule 2 pertains to cases involving "circumstances where the victim was raped more than once whether by the accused or by any co perpetrator or accomplice."

[8] The main thrust of the appellant's submissions is summarised in the following points

8.1 The charge sheet is ambiguous by referring to the sentencing provisions of section 51 (2) of Act 105 of 1997 resulting in the appellant not being adequately apprised of the fact that he faced a possible life sentence.

8.2 The appellant's right to a fair trial was infringed in relation to the count of rape in that the State did not inform the appellant that he is facing a charge of rape where a minimum sentence of life imprisonment can be imposed.

8.3 The learned trial Magistrate erred in concluding that the evidence on record justifies a finding of rape in terms of section 51 (1) of Act 105 of 1997.

8.4 The learned Magistrate erred in concluding that the case is devoid of substantial and compelling circumstances.

[9] The appellant in his heads of argument poses a rhetorical question as follows:

"Ambiguous charge sheet: whether the appellant was properly advised that he faced a life sentence on the rape charge?"

[10] An answer to the seemingly rhetorical question addresses all the points encapsulated above and it is as follows: it is correct that the charge sheet makes reference to section 51 (2) instead of section 51 (1). The respondent submits that, be that as it may, the appellant was informed by the court and he knew from the outset that the penalty of lifelong imprisonment was applicable in this case. The record shows that in appearances before the court a quo on 7, 10 September and 19 October 2005 (see in particular pages 6 and 12 of the record) the appellant was warned that a minimum sentence of life imprisonment might be imposed upon conviction. The appellant confirmed that he understood the warning and that he would seek legal representation. Life imprisonment is contained in section 51 (1) of Act 105 of 1997. The warning can therefore not be said to have been given in terms of section 51 (2) of the Act.

[11] The submissions therefore that the court a quo erred in concluding that the evidence justified a finding of rape in terms of section 51 (1) pretends that the finding of the court a quo was made ex post facto. If that was the case it would certainly have been a misdirection. (See *Ndlovu v The State* [2017] ZACC 19). This was however not the case in this appeal.

[12] The summation of the law in this regard is contained in *S v Legoa* 2003 (1) SACR 13 (SCA) where Cameron JA (as he then was) said:

"The matter is, however, one of substance and not form, and I would be reluctant to lay down a general rule that the charge must in every case recite either the specific form of the scheduled offence with which the accused is charged, or the facts the State intends to prove to establish it. A general requirement to this effect, if applied with undue formalism, may create intolerable complexities in the administration of justice and may be insufficiently heedful of the practical realities under which charge sheets are frequently drawn up. The accused might in any event

acquire the requisite knowledge from the particulars furnished to the charge or, in a superior court, from the summary of substantial facts the State is obliged to furnish. Whether the accused's substantive fair trial right, including his ability to answer the charge, has been impaired, will therefore depend on a vigilant examination of the relevant circumstances."

[13] In casu, a vigilant examination of the circumstances shows that the appellant was duly informed in the obligatory warning by the court a quo and that the warning prompted an appropriate response from the appellant who there and then not only confirmed his understanding of the warning but also undertook to obtain legal representation. These are precisely the circumstances that were alluded to by Justice Cameron.

[14] The principle is reinforced by Lewis JA in *S v Makatu* 2006

(2) SACR 582 SCA at para 7:

"As a general rule, where the State charges an accused with an offence governed by section 51 (1) of the Act, such as premeditated

murder, it should

state this in the indictment. This rule is clearly neither absolute nor inflexible."

(My emphasis)

[15] It is submitted on behalf of the appellant that the evidence of the state witnesses was riddled with contradictions. The record shows however that whilst there were contradictions none of them were of a

material nature. In *S v Mkhohle* 1990 (1) SACR 95 (A) guidelines in evaluating possible contradictions were laid down:

"Contradictions per se do not lead to the rejection of a witness's evidence, they may simply be indicative of an error. Not every error made by a witness affects his credibility: in each case the trier of fact has to make an evaluation, taking into account such matters as the nature of the contradiction, their number of importance and their bearing on other parts of the witnesses' evidence. No fault can be found with his conclusion that what inconsistencies and differences there were, were of a relatively minor nature and the sort of thing to be expected from honest but imperfect recollection, observation and reconstruction. One could add that, if anything, the contradictions point away from the conspiracy relied on" (98 fg)

[16] In casu what was of essence is that KS corroborated KD by testifying that she saw the appellant and accused 3 raping KS. Accordingly, the court a quo found that Kedibone and Kelebogile corroborated each other in material respects.

[17] Regarding the criticism of the failure to report when the complainant reached her home the following was stated in *Monageng v The State* (590/06) [2008] ZASCA 129 (1 October 2008 at par 24):

"It is further widely accepted that there are many factors which may inhibit a rape victim from disclosing the assault immediately... Significantly, the newly passed Criminal Law (Sexual Offences and Related Matters) Amendment Act provides in section 59, that 'in criminal proceedings involving the alleged commission of a sexual offence, the court may not draw any inference only from the length of any delay between the alleged commission of such offence and the reporting thereof.' Raising a hue and cry and collapsing in a trembling and sobbing heap is not the benchmark for determining whether or not a woman has been raped. There was thus nothing unusual about the complainant's behaviour and her explanation for not immediately reporting the appellant is plausible."

[18] The appellant has also attempted to level criticism at the medical evidence by suggesting that it points to no intercourse. That cannot be correct in my view as the doctor noted in that report that "penetration has occurred".

[19] Over and above the overwhelming evidence presented by the State before the court a quo, the one single hurdle which the appellant has failed to mount is the one presented by the failure to take the witness stand during the trial.

[20] It is common cause that the appellant closed his case without testifying or calling any witnesses. The record also reflects that it was put to KS that the appellant would deny having sexual intercourse with her. Yet, counsel for accused 3 put to KD that when accused 3 came back from fetching water, he found the appellant having sexual

intercourse with her. This was further corroboration of the complainant's version from the appellant's accomplice, accused 3. Despite this damning evidence the appellant opted to close his case without testifying.

[21] It is true that the appellant acted within his rights by choosing to remain silent. This was however unfortunate in that the court a quo was left totally dependent on the evidence for the prosecution in deciding whether the State had proved its case beyond reasonable doubt. See *S v Buda and Others* 2004 (1) SACR 9 (T) at 15h.

[22] Further, in *S v Boesak* 2001 (1) SACR (1) (CC) at 11 e f the following was said:

"(ii) The fact that an accused person is under no obligation to testify does not mean there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence."

[23] From the evidence tendered by the State there was more than just a prima facie case against the appellant which he failed to rebut. The court a quo was thus perfectly entitled to conclude that the totality of the evidence "taken in conjunction" with appellant's "silence" dispelled any reasonable doubt regarding his guilt. Put differently, the prima facie evidence became conclusive proof. See *S v Theron* 1968

(4) SA 61 rn at 63H 64A; *S v Chabalala* 2003 (1) SACR 134 (SCA) at 142h.

On Sentence

[24] It is an established principle of Criminal Law that a court sitting on appeal should always guard against eroding the trial court's discretion regarding sentence and that it should interfere where the discretion was not exercised judicially. Further, misdirection that would justify interference by a court exercising appeal jurisdiction ought not to be trivial but of such a nature, degree or seriousness that it shows that the trial court did not exercise its discretion at all or exercised it improperly or in an unreasonable manner. See *S v Barnard* 2004 (1) SACR 191 (SCA) at 194 c d.

[25] The appellant submits that the court a quo overemphasised the seriousness of the offence and the interests of the community resulting in a sentence that is inappropriately harsh.

[26] The provisions of section 51 (1) of the Criminal Law Amendment Act No. 105 of 1997 are applicable in casu. The appellant was convicted of an offence referred to in Part 1 of Schedule 2 of the Minimum Sentences Act as amended by Act 38 of 2007. The victim was raped more than once by the appellant and his accomplice in the execution or furtherance of a common purpose.

[27] The court a quo was therefore obliged to impose the prescribed minimum sentence in the absence of substantial and compelling circumstances.

[28] It is evident from the facts of the case that the crime was premeditated and planned. From the time the victims were accosted,

the appellant and his accomplices knew exactly what to do and where to take them. They moved in unison and followed the same route to the shack where the victims were raped simultaneously.

[29] No remorse was shown by the appellant who continued to disavow his deeds even before the court a quo.

[30] An apt description of the crime of rape and its consequences is contained in *S v Matyityi* 2011

(1) SACR 40 SCA at 45h 46b where it was held:

"But, with respect, to restrict the enquiry to permanent physical injuries, as the learned judge appears to have done, is to fundamentally misconstrue the act of rape itself and its profound psychological emotional and symbolic significance for the victim. As it was put by the court in *S v De Beer*: 'Rape is a topic that abounds with myths and misconceptions. It is a serious social

problem about which , fortunately, we are at last becoming concerned. The Increasing attention given to it has raised our national consciousness about what is always and foremost an aggressive act. It is a violation that is invasive and dehumanising. The consequences for the rape victim are severe and permanent."

The complainant was subjected to this heinous crime at the tender age of 19 years. The complainant was raped by the appellant whilst accused 3 proceeded to watch and vice versa. Furthermore, accused 3 was trying to kiss her whilst the appellant was raping her. She had become an object of utter degradation, humiliation and dehumanisation.

[31] In light of the abovementioned factors, and the law I find that the appellant was properly convicted and that the cumulative effect of all factors pertaining to sentence, life imprisonment is not disproportionate to the nature and seriousness of the crime, the interests of the community and the personal circumstances of the appellant.

[32] In the result I propose that the following order be made:

The appeal against conviction and sentence is dismissed.

S.AM. BAQWA

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

I agree.

C.SWANEOEL

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

Heard on:

16 April 2018

Delivered on: 16 April 2018

For the Applicant: Advocate J. Haremzen Du Toit

Legal Aid

For the First Respondent: Advocate B. E. Maoke

Instructed by: The Director of Public Prosecutions, Pretoria

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