

SOUTH AFRICA / JUDGMENT

Pullen v S (CA&R3319/2013) [2019] ZAECHGC 78; 2019 (2) SACR 605 (ECG) (29 August 2019) [2019] ZAECHGC 78

COURT

Eastern Cape High Court, Grahamstown

BEFORE

S Rugunanan, R E Griffiths

CASE / FILE NUMBER

CA&R3319/2013

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

CASE

NO. CA&R 3319/2013

Date heard: 31 July 2019

Date Delivered: 29 August
2019

In

the matter between:

MOENIEP
PULLEN Appellant
and
THE
STATE
Respondent

JUDGMENT

RUGUNANAN, AJ:

[1] The appellant was charged with two counts of rape in the Regional Court in Port Elizabeth. The offences were alleged to have been committed on 13 January 2013 when he committed acts of sexual penetration with the complainant N[...] Q[.]. In count 1 it was alleged that he penetrated her anus with his penis and in count 2 it was alleged that he vaginally penetrated her. At the commencement of the trial on 13 October 2015

the appellant pleaded not guilty to both counts. He was acquitted on count 2 but convicted on count 1, for which a sentence of life imprisonment was imposed on 28 November 2018, the magistrate having found that the complainant was mentally disabled as defined in the Criminal Law (Sexual Offences And Related Matters) Amendment Act [1] (“the Sexual Offences Act”). The appeal to this Court is in terms of the appellant’s automatic right under section

309(1) of the Criminal Procedure Act[2] and lies against his conviction and sentence.

[2] It was common cause during the trial that the appellant did have sexual intercourse with the complainant when he penetrated her per anum albeit alleging, on his version, that it was consensual and that he never knew she was mentally disabled. The magistrate rejected

this version as false and found that sexual intercourse was not consensual because the appellant knew the complainant was mentally

disabled.

MENTAL DISABILITY

[3] In section 1 of the Criminal Law (Sexual Offences And Related Matters) Amendment Act the definition of a person who is mentally disabled reads as follows:

“A person who is mentally disabled means a person affected by any mental disability including any disorder or disability of the mind to the extent that he or she at the time of the alleged commission of the offence in question was-

- (a) unable to appreciate the nature and reasonably foreseeable consequences of a sexual act;
- (b) able to appreciate the nature and reasonably foreseeable consequences of such an act, but unable to act in accordance with that appreciation;
- (c) unable to resist the commission of any such act; or
- (d) unable to communicate his or her unwillingness to participate in any such act.”

[4] The onus is on the State to prove that a victim is mentally disabled as contemplated in one of the categories mentioned in the definition. In each instance the nature of the mental disability required to be proved is fact specific. It is not sufficient for the State merely to prove that the victim is mentally disabled or retarded or challenged.[3] In my view, the evidence presented by the State fell short of what is required by the definition.

[5] Dr Tabisa Mabusela, a clinical psychologist, conducted a cognitive assessment of the complainant during the period June–July 2013. At the time of the assessment the complainant was 22 years of age. Dr Mabusela compiled a report dated 6 August 2013 in relation to which she testified as follows:

“The findings on that report Your Worship was that the client Noxolo is mentally retarded ... At the time we estimated her mental age to be between the age of 6 to 7 years roughly.”

[6] Relevant to a further report dated 2 June 2015 Dr Mabusela stated: [4]

“To assess whether N[...] is mentally disabled as contemplated in section 1 of Act 32 of 2007 the general sexual knowledge questioning was used to determine her sexual knowledge ...

Noxolo was very shy and uncomfortable to discuss sexual issues ...

... in our assessment of N[...] we concluded that she is a severely mentally retarded young lady with a mental age estimated around 7 years. At the time of the incident she was unable to appreciate the nature and reasonable foreseeable consequences of a sexual act.”

(The emphasis in bold is mine)

[7] Referring to the General Knowledge Questionnaire that was used to determine the complainant’s sexual knowledge, Mr Wessels (who also appeared as defence counsel for the appellant in the trial court a quo), cross-examined Dr Mabusela about several introductory sections [5] that were left incomplete. Dr Mabusela acknowledged that had she dealt with the questions arising from these sections it could have eased the complainant of her reluctance to talk about sexual matters. To this end Dr Mabusela readily conceded that she “missed an opportunity”.

[8] Self-evidently, this concession underscores an anomaly in Dr Mabusela’s testimony. The conclusion that the complainant fell into the specific definitional category of being unable to appreciate the nature and reasonable foreseeable consequences of a sexual act is informed by the complainant’s reluctance to discuss sexual issues. There was a duty on Dr Mabusela to have ensured that the questionnaire was complete and accurate. The failure to have done so was a failure to have put the complainant at ease which meant that the conclusion regarding the definitional category of mental disability ascribed to the complainant was distorted. There is no logical basis on which Dr Mabusela arrived at a defensible conclusion [6] and there was clearly an omission by her to have considered material detail to support that conclusion.[7] Her testimony regarding proof of the fact specific category of mental disability in section 1(a) of the Sexual Offences Act is rendered unreliable.

- [9] In the sweep of the evidence presented by the State in its attempt to prove that the complainant was mentally disabled and fell within the ambit of the statutory definition in the Sexual Offences Act, nothing emerges from the record that could be of assistance in deciding whether the complainant's mental disability was such that she was unable to appreciate the nature and reasonably foreseeable consequences of a sexual act. To this end it is considered unnecessary to recapitulate the testimony by the witnesses N[...] S[...] G[...] (the complainant's younger sister), A[...] L[...] (also known as L[...]) M[...] (the complainant's niece), and Warrant Officer Zola Dabuza (the police officer who took a statement from the complainant the morning after the incident).
- [10] In summary, there is no other evidence that can meaningfully contribute to proof of mental disability in the category of section 1(a) of the Sexual Offences Act. Mr Wessels correctly submitted that the trial magistrate's mere reliance on the testimony of Dr Mabusela (coupled with the magistrate's assertion of other evidence which she did not specify) led her to make an erroneous finding that the State proved that the complainant was mentally disabled as defined in the Sexual Offences Act.

DID THE APPELLANT KNOW THAT THE COMPLAINANT WAS MENTALLY DISABLED AS DEFINED IN THE SEXUAL OFFENCES ACT

- [11] The evidence on this issue is circumstantial as is borne from the following material:
- (a) The parties lived and grew up in the same neighbourhood. Their houses were in the same street but separated by a gravel road with the appellant living on the corner and the complainant living on the opposite side of the road a bit further beyond;
 - (b) The appellant and the complainant's brother M[...] were friends; they played soccer and drank together;
 - (c) The appellant's mother and the complainant's mother knew each other; they sold chips and sweets at the local school that he once attended with the complainant's sister Stella although he and Stella never usually spoke to each other;
 - (d) On various occasions the appellant would see the complainant going to fetch cows or going to the shop, or they would meet at the shop but that he would just greet her without conversing with her;
 - (e) Although her speech and language sounded immature, outwardly, the complainant's physique appeared normal for her age. On this

latter aspect there was evidence from Dr Mabusela by way of a concession during cross-examination that nothing untoward or obvious

about the complainant's appearance indicated that she was mentally retarded;[8]

- (f) The appellant confirmed that he knew of a minibus that came to collect the complainant and others to go to school but that he did not know to which school she went with the bus; on this aspect he denied knowing that she went to a special school.
- [12] On these facts the magistrate found that the appellant knew the complainant and her family, but that his denial that he knew she was mentally disabled was inconsistent and improbable.
- [13] In regard to these facts, Mr Mdolomba who appeared for the State submitted that the appellant's state of mind or knowledge can only be determined by his actions or be deduced from the surrounding circumstances viewed objectively. I have difficulty with this submission. The cumulative effect of the evidence does not cloak it with a degree of relevance and persuasion to support the

conclusion

that the appellant knew the complainant was mentally disabled as contended by the State. The evidence does not muster the test in *R v Blom*

- [9] and, at best, merely establishes that the appellant knew the complainant by sight and that he knew her family.
- [14] In effect, the State adduced no evidence that the appellant knew that the complainant was mentally retarded. In point, the record reflects that the denial by the appellant that he knew the complainant was mentally disabled was not pertinently challenged in cross-examination. Tritely, there is an obligation on a party to challenge material evidence in cross-examination; a failure to challenge such evidence leaves the party who called the witness entitled to assume that the unchallenged testimony is accepted as correct.[10]
- [15] Given the fact that the complainant's mental disability has not been proven, it remains to consider the matter on the basis of her own evidence. She is a single witness regarding what had happened between her and the appellant at the old house where the alleged incidents of rape occurred. Relying on the trial magistrate's failure to have properly evaluated the complainant's evidence due to its numerous inconsistencies and contradictions, Mr Wessels submitted that the evaluation ought to have been subject to the cautionary rule applicable to the evidence of a single witness.[11] The record plainly reflects that the complainant's evidence reads unsatisfactorily in numerous respects which Mr Wessels had demonstrated in his heads of argument. It is necessary only to accentuate a few of these instances:
- (a) The complainant was not clear about the day on which the incidents occurred. She initially stated it was a Friday and not a Sunday. In cross-examination she vacillated in stating that it was a Sunday, then on a Friday and then again on a Sunday;
- (b) She testified that while walking with one Lele to go and fetch calves, she saw the appellant sitting in the company of his friends Tobile and Pati at a tavern. Later she said that the appellant was sitting alone. During the course of her testimony she denied having seen Tobile and Pati but later she agreed that the appellant was sitting with them while drinking

and playing cards. As cross-examination progressed she testified that the appellant's mother was also seated outside and the appellant even assaulted his mother with a fist before L[...] was injured with a stone which the appellant threw at her. In the same breadth she stated that L[...] was injured before the appellant assaulted his mother with a sjambok;

- (c) While walking with L[...] she stated that the appellant threw a stone at L[...] and told her to go home. In cross-examination she denied that the appellant had said anything to Lele but went on to say that she did not know why L[...] went home;
- (d) She testified that at the old house the appellant smacked her and took one of her shoes and threw it on top of the roof. In cross-examination, she confirmed that the house had no windows and no roof but claimed the appellant threw her shoe and phone on top of the roof; In cross-examination L[...] stated later the afternoon she saw the complainant closing the gate for the calves and noticed that she was wearing shoes;
- (e) She testified in chief that the appellant never inserted his penis into her vagina; he penetrated her anus from behind. Upon being confronted by her written statement to the police (made on the day of the incident) she was questioned about the averment that the appellant forced his penis into her vagina but responded that he only inserted it from behind. She maintained that she made no mention about being vaginally penetrated when that statement was recorded. In a second statement made to the police a day after the first one, it is also recorded that she was raped in her anus and in her vagina. She agreed that this was correctly recorded;
- (f) The complainant stated that she was still a virgin at the relevant time and that her sister Stella had examined her on at least three previous occasions to confirm this. Stella contradicted the complainant when she testified that nobody examined her.

[16] Although it is plainly evident from the record that the complainant's evidence is unsatisfactory it is doubtful if a cautionary approach is warranted. Section 60 of the Sexual Offences Act states:

"Court may not treat evidence of complainant with caution on account of nature of offence"

Notwithstanding any other law, a court may not treat the evidence of a complainant in criminal proceedings involved the alleged commission of a sexual offence pending before that court, with caution, on account of the nature of the offence."

[17] The section does not have an automated effect which suggests that the version of the complainant will be persuasive, however unsatisfactory it might be. The ultimate question for determination is whether in the totality of all the evidence the guilt of the appellant has been proven beyond reasonable doubt. In the final analysis no onus rests on an accused person to convince the court of the truth of any explanation which he gives. He should be acquitted if there exists a reasonable possibility that his evidence may be true. Whether a court subjectively believes the accused is not the test. A court does not have to reject the State's case in order to acquit an accused. A court is bound to acquit him if there exists a

reasonable possibility that his evidence may be true.[12]

- [18] Keeping the above in mind what remains for consideration is the appellant's version in the context of the medical evidence regarding sexual penetration. The appellant testified that he penetrated the complainant in her anus and that this was consensual. Moreover, the complainant did not want him "to do it in front ... because she did not want her parents to know about it." This evidence must be evaluated in the circumstance of the complainant's own knowledge of sexual matters when, in cross-examination, it emerged that she knew that sexual intercourse between a male and female may result in the birth of a baby and that it was wrong for a schoolgirl to become pregnant.
- [19] Dr Pumla Mahlaba examined the complainant on 14 January 2013 at about 13h00 and compiled a J88 medical report in respect of the examination. Regarding the complainant's gynaecological examination, the gist of Dr Mahlaba's findings is that she noted no injuries to the vagina; the hymen was intact and no genital injuries were present. Vaginal penetration was thus excluded. The anal examination revealed multiple tears of the orifice at 5 o'clock to 7 o'clock. The tears were indicative of positive signs of forced anal penetration along the para anal area. Dr Mahlaba testified that the penetration occurred with an object inserted into the complainant's anus from the outside. This excluded constipation that would induce injury through an object moving from the inside to the outside. In addition, although the complainant's panty was noted to have been bloodstained at the time of the examination, Dr Mahlaba was unable to state if this was menstrual blood or blood from the anal injuries.
- [20] It emerges that the medical evidence is silent on the degree of severity of the injuries and is neutral on the issue of consent. In the circumstances, it is my view that the magistrate was palpably incorrect in rejecting the appellant's evidence. Whilst she may not have subjectively believed the appellant, it is reasonably possible that his evidence in this regard may be true.
- [21] In the result:
- (i) The appeal against conviction and sentence is allowed.
 - (ii) The conviction and sentence imposed by the magistrate are set aside.

S. RUGUNANAN

ACTING JUDGE OF THE HIGH COURT

GRIFFITHS J:

I agree.

R. E. GRIFFITHS

JUDGE OF THE HIGH COURT

Appearances:

For the Appellant: Adv. J. W. Wessels

Instructed by NN Dullabh & Co.

Makhanda / Grahamstown

For the Respondent: Adv. Z. Mdolomba

Instructed by the Office of the

National Director of Public Prosecutions

Makhanda / Grahamstown

[1] Act No. 32 of 2007, as amended

[2] Act No. 51 of 1977, as amended

[3] S v Mguni 2014 (2) SACR 595 (GP) paragraph [4]

[4] Record volume I page 18 : 19-22; page 19 : 4-5; page 24 : 15-19

[5] These deal with male and female physiology

[6] Prinsloo v RAF 2009 (5) SA 406 (SECLD) at 411 A

[7] Schneider NO and Others v AA and Another 2010 (5) SA 203 (WCC) at 211 H

[8] Record Vol I 51:16-53:11

[9] 1939 AD 188

[10] President of the RSA v South African Rugby Football Union 2000 (1) SA 1 (CC) paragraph [61]

[11] Stevens v S

[2005] 1 All SA 1 (SCA) paragraph [17]

[12] S v Van Der Meyden 1999 (2) SA 79 (WLD) 80 I-J and 81 D; (R v Difford 1937 AD 370 at 373; and S v Kubeka 1982 (1) SA 534 WLD at 537 F- G.

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