

SOUTH AFRICA / JUDGMENT

S v Matana [2010] ZAECGHC 96 (21 October 2010)

[2010] ZAECGHC 96**COURT**

Eastern Cape High Court, Grahamstown

BEFORE

Chetty, Van Zyl, Dambuza

CASE / FILE NUMBER

CA 59/2009

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REPORTABLE**IN THE HIGH COURT OF SOUTH AFRICA****(EASTERN CAPE, GRAHAMSTOWN)**

In the matter between: Case No: CA 59/2009

TUNKIE MATANAAppellant

And

THE STATERespondent

Coram: Chetty, Van Zyl and Dambuza JJ

Date Heard: 12 October 2010

Date Delivered: 21 October 2010

Summary: Criminal Law – Rape – Complainant aged 14 and a single witness – Evaluation of evidence – Complainant’s evidence clear and satisfactory – Trial court’s factual findings unassailable – Sentence – Life imprisonment – No misdirection alleged – Sentences said to induce a sense of shock – Sentences commensurate with crimes – Appeal dismissed

JUDGMENT

Chetty, J

- [1] The appellant, a forty four year old male, was arraigned for trial in the regional court, Port Elizabeth on three counts of raping a fourteen year old female child on the 8th, 24th and 27th of June 2001, respectively. At the commencement of the trial on 11 April 2002, the

appellant pleaded not guilty to the charges and denied complicity therein. After the adduction of evidence, including that by the complainant and the appellant, the latter was duly convicted on 6 August 2002 and the matter referred for sentence to the High Court pursuant to the then operative provisions of s 52 (1) (b) (i) of the Criminal Law Amendment Act¹. On 8 November 2002, the appellant appeared before Kroon J, for the imposition of punishment. No evidence, either in mitigation or aggravation of sentence was adduced, counsel for the appellant and the state content to merely present argument thereanent.

- [2] In his judgment on sentence the learned judge found that none of the factors relied upon by the appellant's counsel as constituting substantial and compelling circumstances passed muster and sentenced the appellant to life imprisonment on each of the three counts. Four years later on 18 December 2006 the appellant sought leave to appeal and simultaneously therewith, condonation for the belated application. A further two years elapsed and the application was finally argued before the learned judge on 2 February

2009. There is no indication in the record for this inordinate delay.

- [3] Mollified, no doubt, by the argument advanced on behalf of the appellant that the conviction was based primarily on the magistrate's acceptance of the testimony of the complainant, a single witness, who may have had reason to falsely implicate the appellant, the learned judge granted the appellant leave to appeal against both the convictions and the sentences imposed. Emboldened by success before Kroon J, Mr. Van der Spuy, who appeared on behalf of the appellant in the appeal, urged us to uphold the appeal both as regards the convictions and sentences

imposed. He submitted that the trial court misdirected itself in accepting the complainant's testimony as truthful and reliable

and rejecting the appellant's protestations of innocence. In the alternative he argued that the sentences imposed were shockingly

/startlingly inappropriate.

- [4] A court of appeal's power to interfere with a trial court's factual findings is not unlimited. In the absence of recognized grounds warranting interference, the trial court's factual findings remain undisturbed. In urging us to uphold the appeal counsel for the appellant referred us to what he considered to be the generally unsatisfactory features in the complainant's evidence which he submitted impacted upon her credibility. There are indeed certain discrepancies between the complainant's evidence in chief and that tendered under cross-examination. These are, in my view, of no real merit and do not, in the slightest, deleteriously affect the reliability of her evidence. The magistrate delivered a careful and well reasoned judgment. He considered the criticism leveled at the complainant's evidence but concluded that upon an overall assessment of the testimony adduced, he was satisfied that she was truthful. That finding is, in my view, unassailable. It is undoubtedly so that the complainant returned to what may aptly be described as a house of horror after the first

rape. It is a fact, moreover, that she continued to do so even after the second rape. Her conduct must however not be viewed in isolation but in the context of her own young life. She was to all intents and purposes a waif, the only roof over her head, that provided by the appellant. Without it she was a street child with all its negative ramifications. The sheer perversity of the appellant's conduct ultimately however became so intolerable that after the third rape she fled, initially to the home of Mrs. Nomakhaya Ngesi, and thence, in a fruitless search for her mother.

- [5] The further criticism was directed at her alleged suppression of the fact of the rapes to Mrs. Ngesi. Again this must be seen in context. Mrs. Ngesi was embroiled in a fight with the father of her children when the complainant approached her and, given the turmoil in her own mind, the real possibility exists that Mrs. Ngesi may very well have forgotten what the complainant said to her. Furthermore the mere fact that the complainant merely stated that the appellant wanted to bed her is of no real significance. When the complainant's search for her mother yielded no results the complainant returned to Mrs. Ngesi's home and, in her absence, made a full report to one Lindiwe.
- [6] The suggestion that the complaint falsely implicated the appellant because of his alleged involvement in the death of her father is a spurious one. This was never put to the complainant as it should have been, if, indeed, that was the appellant's case. The only reason advanced was her profound displeasure at not being provided with a dress. The complainant's evidence was that the appellant had a peripheral role in her father's demise, the perpetrator being the appellant's son. During the

initial period of her stay with the appellant, the relationship between them appears not to have been beset by any animosity, the

complainant grateful for the haven provided by the appellant. The belated attempt to invoke her father's death as a reason for her incriminating testimony is therefore without substance.

- [7] The trial court furthermore analyzed and evaluated the appellant's evidence before concluding, correctly in my view, that it was palpably false. It is unnecessary to deal with the appellant's evidence or the magistrate's reasoning in rejecting it in any detail because, upon a conspectus of the totality of the evidence, I am satisfied that the trial court was correct in finding that the state had discharged the onus resting upon it.
- [8] The rape of minors is, unfortunately, an unending feature of life in this province and the country as a whole. Repeated warnings by the courts that this intolerable state of affairs cannot be countenanced go unheeded. Courts are instead swamped with cases of similar ilk. Counsel for the appellant however submitted that notwithstanding the heinousness of the crimes, it could not be classified as the worst category of cases justifying the imposition of the ultimate sentence. Recently I had occasion to say the following when a similar argument was made:-

“[2] The principal submission advanced on behalf of the appellant was that factually the rapes could not be classified as “the worst category of cases” justifying the imposition of the ordained sentence. In support of his submission, counsel referred to the cases of S v Mahomotsa² and S v Nkomo³ as authority for his proposition that a sentence of life imprisonment be reserved for the worst category of rapes. Reliance on Mahomotsa and Nkomo for the proposition advanced is, in my view, entirely misplaced. Both judgments recognized that there are, as in any other offence, degrees of seriousness but as Mpati JA was at pains to point out⁴ in Mahomotsa: -

[19] Of course, one must guard against the notion that because still more serious cases than the one under consideration are imaginable, it must follow inexorably that something should be kept in reserve for such cases and therefore that the sentence imposed in the case at hand should be correspondingly lighter than the severer sentences that such hypothetical cases would merit. There is always an upper limit in all sentencing jurisdictions, be it death, life or some lengthy term of imprisonment, and there will always be cases which, although differing in their respective degrees of seriousness, nonetheless all call for the maximum penalty imposable. The fact that the crimes under consideration are not all equally horrendous may not matter if the least horrendous of them is horrendous enough to justify the imposition of the maximum penalty.’

[3] Although the majority in Nkomo referred with approval to the remarks of Cameron JA in S v Abrahams⁵, I do not understand the judgment to lay down, as a general rule, that a sentence of life imprisonment be reserved for the worst case rape scenario. What Abrahams in fact held was that “life imprisonment should be reserved for cases devoid of substantial factors compelling the conclusion that such a sentence is inappropriate and unjust”. That is a far cry from saying that a sentence of life imprisonment should only be imposed in the worst imaginable cases of rape.”

[9] The well reasoned judgment on sentence demonstrates unequivocally that the learned judge gave full and proper consideration to all factors relevant to sentence. It is not suggested that the learned judge misdirected himself in any respect, the principal argument advanced being that the sentences induce a sense of shock. I am not imbued with any similar sentiment. This was an appalling crime, accompanied by violence and threats of violence on a defenseless child who was moreover placed in the care of the appellant. Given the familial relationship between them he should have been her protector. Instead he treated her as his chattel in the most despicable manner imaginable. The nature of the crimes and the method of execution imperatively called for the ordained sentences.

[10] In the result the following order will issue:-

The appeal against the convictions and sentences are dismissed.

D. CHETTY

JUDGE OF THE HIGH COURT

Van Zyl, J

I agree.

D. VAN ZYL

Dambuza, J

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1Act No, 105 of 1997

2 2002

(2) SACR 435 (SCA) at 443-444

3 2007

(2) SACR 198 (SCA) 202i-204h

4At para [19] at p444

5 2002

(1) SACR 116 (SCA) at para [29]

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