

SOUTH AFRICA / JUDGMENT

S v M.D (CC13/2018) [2022]

ZALMPTHC 1 (25 February 2022)

[2022] ZALMPTHC 1

COURT

Limpopo High Court, Thohoyandou

BEFORE

AML Phatudi

CASE / FILE NUMBER

CC13/2018

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HIGH COURT OF SOUTH AFRICA

LIMPOPO

DIVISION, THOHOYANDOU

CASE

NUMBER: CC13/2018

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(1)

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(3)

REVISED.

DATE:

25/02/2022

THE

STATE

V/S

MD

ACCUSED

JUDGEMENT

AML PHATUDI J

Introduction

- [1] The State charges DM, a 23-year-old male with rape as defined in section 3 read with other related provisions of Act 32 of 2007[1] specifically singled out in the indictment[2]. The indictment incorporates the provisions of section 51(1) of Criminal Law Amendment Act 105 of 1997 (CLAA) that regulates the minimum sentences to impose on convicts.
- [2] In the alternative, the Deputy Director of Public Prosecutions alleges that the accused is guilty of an unlawful and intentional commission of an act of sexual penetration with the complainant, one TPM, a 20-year-old mentally disabled female person who is in law incapable of giving consent to such sexual intercourse[3].
- [3] The accused enjoys legal representation. He pleads not guilty in both main and alternative counts. He exercises his enshrined Constitutional right to remain silent.
- [4] It is trite law that the state is required, when it tries a person for allegedly committing an offence, to prove the guilt of the accused beyond a reasonable doubt. The state must thus prove every element of the alleged offence(s) including the required intention to commit such offence(s). Once the state succeeds, the accused stands to lose his personal liberty, a cherished Constitutional Right.[4]On the other hand, the accused must be acquitted if his/her version is reasonably possibly true.[5]
- [5] During pre-trial stages, an order was issued referring the accused for mental observation as envisaged in terms of section 79 of Criminal Procedure Act 51 of 1977 (CPA). The accused was admitted at both Hayani and Thabamooopo Psychiatric Hospitals respectively. Two doctors, who examined the accused separately at the said Hospitals, came to the same conclusion that '[he does] have the capacity to appreciate the wrongfulness of the alleged offence, and his ability to act in accordance with that knowledge was not impaired by mental illnesses[6].

Factual background

- [6] On 31 October 2015, the complainant (TPM) was sent to the grinding mill by her grandmother. She pushed a wheelbarrow with mealies in a half-full bag. She had money with her for payment at the grinding mill.

- [7] She backed home with mealies not grinded. While walking push the wheelbarrow in the street en-route home, a certain young man calls her standing at the lapa of his homestead. The man lures her for good news. She leaves the wheelbarrow by the street, enters the man's lapa and approaches him. Unbeknown to her, the said man had a knife. He pointed the knife at her. He instructed her to get into the house. She went in the house with the man following her.
- [8] The man ordered her to undress and climb on the bed. She complied. He too climbed on the bed and shortly thereafter on her. He instructed her to open her legs. She complied. He inserted his penis in her vagina and started to make some up and down movements. She later felt wetness on her vagina. Thereafter, the man ordered her to dress up and go home. He did not accompany her or usher her out of the house. She complied and went home. She gave neither the man permission nor consent to what he did.
- [9] She narrated her ordeal to her grandmother at home. She and her grandmother went to the man's place. She pointed the house and the man out to her grandmother. The grandmother identified the man as "Donny" [DM]. The grandmother enquired from Donny as to why he did what he did to TPM. Donny denied knowing her and her accusations. They left Donny's homestead.
- [10] The grandmother arranged transport for TPM to go to her aunt, Mavis, who took her to a clinic and thereafter to the police. TPM went with the police to Donny's place. She pointed out to the police who the perpetrator is and where the incident occurred. Donny was present at all times of the narration of the ordeal to the police there at the scene. The accused was arrested there and then.
- [11] The accused does not deny the allegation as narrated by the complainant but for the usage of the knife. He, for the first time during trial, raises consent as his defence during cross-examination of TPM. TPM denied all versions of 'having made an appointment to meet on the day in question and of them being in love with each other.'
- [12] The complainant's narrated version is largely, corroborated by the accused version and his admissions formally recorded in terms of section 220 of Criminal Procedure Act. The accused admits, among others, that the DNA result of the cervix swabs of TPM matches his DNA result. It is further worth mentioning that the accused accepts 'the contents of a witness statement deposed to by TPM's grandmother, as the truth and correct version of events'.

Issue

- [13] The crux of the matter to determine is whether the complainant consented to sexual intercourse with the accused on 31 October 2015.

[14] I indicated earlier in this judgement that the state is required to prove the guilt of the accused beyond reasonable doubt. The state must thus prove that the complainant did not consent to the sexual intercourse, which will translate into the accused's actions being that 'he unlawfully and intentionally did commit an act of sexual penetration with the complainant, by inserting his penis in her vagina without her consent'

Law

[16] Consent, as defined in Criminal Law (Sexual Offences and Related Matters) Amendment Act 6 of 2012, means 'voluntary or unforced agreement to do something together'. Put differently, consent is an agreement between

parties to engage in sexual activity. Pressurising someone into sexual activity by using any form of fear does not qualify as consent

by any form.

Evaluation

[17] In my evaluation of the evidence lead, the complainant narrated her version of event especially relating to what transpired from the time she entered and how she left the accused homestead, including, how she narrated to her grandmother, her aunt Mavis, and the nurses at the clinic and to the police.

[18] She testified that the accused had a knife in his hand. He ordered her to lead the way into the house. She complied. She was ordered to undress and she complied. When he ordered her to open her legs, he did not have the knife with him. He inserted his penis in her vagina whereinafter he started doing the ups and down movements. The descriptions of movements are those of a sexual intercourse. The said evidence remained uncontested but for the usage of a knife.

[19] The first person TPM reported the ordeal to, is her grandmother. The grandmother, accompanied by TPM, went to accused homestead. They confronted and charged the accused relating to TPM's allegations on what had happen to her. He denied any wrongdoing and in fact, denied knowing the person in TPM and added thereto, he said that he never saw her on the day in question. He said all these in his mother's presence.

[20] The grandmother made a statement to the Police. The statement was accepted as evidence and the contents thereof regarded as the truth. The grandmother deposed to a statement that reveals what let TPM tell her what happened to her and who the perpetrator is. The grandmother's evidence corroborates that of TPM but for the "undressing" part before the actual sexual intercourse. TPM testified that the accused ordered her to undress, to which she complied. The grandmother's statement indicates that the accused is the person who 'undressed' the complainant's panty. These contradictions are, in my view,

immaterial.

- [21] The accused bare denial on allegations levelled by the grandmother to the accused in his mother's presence, led the grandmother sending TPM to her aunt Mavis, for attendance to the clinic and SAPS.
- [22] RML (Mavis) testified on how TPM narrated the ordeal to her. She repeats what TPM narrated to her grandmother. NSM (Madzivhandela), A police officer in the employ of SAPS, testified on how TPM narrated the ordeal to her, which prompted her to go to the accused homestead. TPM described to her how it started to end and pointed at the scene or where the incident took place. She pointed at the accused as the perpetrator. The Police arrested the accused.
- [23] The state relies on the evidence of a single witness. It is trite law that cautionary rule applies to the evidence of a single witness. Equally, a single witness' evidence is adequate to sustain a conviction, provided that is satisfactory in all material respects.
- [24] The evidence TPM lead is, in my view, satisfactory in all material respect. TPM is a reliable witness. She demonstrated how truthful and reliable she is. She stood firm to her version of events notwithstanding a lengthy cross-examination by the defence. She is truthful in that she would indicate what she recalls and what she is challenged of. Numbers are a challenge to her but firm in facts of what transpired.
- [25] Is the accused version reasonably possibly true? I am afraid not. The accused testified that he agreed with TPM two weeks before the incident of them meeting on the day in question for the said sexual activity. Firstly, TPM denied this version as put to her for the first time during cross-examination. If indeed there was such an arrangement, he would have stated that to TPM' grandmother and his mother at the first opportunity when the allegations were first levelled against him on the very day in question. He would have put that version to Mavis and Madzivhandila during trial.
- [26] The accused remained mum when factual allegations of his denial of TPM and of not having seen her on the day in question on the one hand. On the other hand, he accepts that he had sexual activity with the complainant by admitting the contents of the DNA report that links him positively to the offence. No one will shy away from a consensual sexual activity. If indeed the complainant consented to the sexual activity, the accused would reasonably have pleaded same outright in terms of section 115 of the CPA. The accused version of events is, in my view, not reasonably possibly true.
- [27] I, in the result, find that the State managed to prove its case beyond a reasonable doubt on the main count. I, however, deem it necessary to deal with the alternative count.

Alternative count

- [28] The State proffers the alternative count, being rape, with a rider: "...a 20-year-old mentally disabled [female] person who in law is incapable of giving consent to such sexual intercourse...".

[29] The first witness called by the state is Mr R, a Clinical Psychologist. He brought to the fore the mental condition of TPM. He opined that the “Vineland Social Maturity Scale (VSMS) suggest that TPM is functioning at a social age value of 07 years 4 months, which is 14 years 05 months below her chronological age of 21 years 07 months. The VSMS also suggest that her intellectual functioning could be estimated to be within the Moderate Range of Intellectual Disabilities. After assessing TPM, R concluded that:

1. She was unable to see the nature and foresee the possible consequences of a sexual act.
2. She was unable to act in accordance with the appreciation (mentioned above)
3. She was unable to resist the commission of such act (sexual act).
4. She does not have the capacity to communicate her unwillingness to participate in the act (sexual intercourse).
5. She does not have cognitive to enter into consensual sexual intercourse due to her mental condition.
6. She will find it difficult and might cause some emotional difficulty if she testifies in an open court.
7. She will find it difficult to testify due to her inability to comprehend instructions and poor memory.
8. She will be unable to narrate step by step as to what happened on the day in question. She only remembers very little information regarding the incident.
9. She meets full diagnostic criteria of Moderate Intellectual Disability.

[30] Counsel for the state submitted prior to TPM taking the witness stand that she will be able to testify in an open court. He called TPM to take a stand. When I greeted her before administering the oath, TPM’s face puckered. I realized that she might find it difficult to testify without any assistance of easing her emotions. Court proceedings can be robust to an extent of breaking someone’s emotions especially witnesses. Bearing the recommendations of R in mind, I ordered that she testify through the services of an intermediary.

[31] This is perhaps an opportune time to indicate what R stated in his report. He penned that ‘[TPM] was accompanied by the police officer and her aunt [Mavis]. She was fairly groomed with fairly clean clothes. Her mood was euthymic with reactive effect. She was continually avoiding eye contact and looking down. She was cooperative, however had short attention span. She was able to follow instructions. She was well oriented to person and place but not to time. She demonstrated poor insights and judgement regarding her current situation. She had poor planning and abstract thinking abilities’. He penned further that ‘there were no indications of delusions or hallucinations. She was alert and awake. Her immediate, recent and remote memory was very poor as evidenced by her inability to recall significant events/incidences. Due to her cognitive deficits, she was unable to cope with the cognitive demands

of psychometric tests. Only a self-report questionnaire was completed with the assistance of her aunt. Based on the above information (collateral from the aunt, court documents, and test results) the following conclusions can be drawn about [TPM] in order to answer the referral questions:'

- [32] The complainant testified through an intermediary. She recalled vividly what transpired on the 31 October 2015. She recited the event from the time of its occurrence, first report to grandmother up to the report to the police. No hesitations whatsoever. She recalled the day, but for the date and time. She exited herself very well even during cross-examination notwithstanding R's opinion that she will be "unable to narrate step by step as to what happened on the day in question. She was only unable to tell the court her actual date of birth and her actual age.
- [33] The question to determine is whether TPM is mentally disabled. If so, is she capable of giving consent to sexual activities?
- [34] A mentally disabled is '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,[7]
- [35] Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 defines the word consent to mean voluntary or uncoerced agreement and under what circumstances a person is presumed not to have consented to sexual intercourse.
- [36] Section 1(2) stipulates: 'For the purposes of sections 3, 4, 5 (1), 6, 7, 8 (1), 8 (2), 8 (3), 9, 10, 12, 17 (1), 17 (2), 17 (3) (a), 19, 20 (1), 21 (1), 21 (2), 21
- (3) and 22, 'consent' means voluntary or uncoerced agreement.
- [37] Section 1(3)(d)(v) states that 'circumstances in subsection (2) in respect of which a person ('B') (the complainant) does not voluntarily or without coercion agree to an act of sexual penetration, as contemplated in sections 3 and 4, or an act of sexual violation as contemplated in sections 5 (1), 6 and 7 or any other act as contemplated in sections 8 (1), 8 (2), 8 (3), 9, 10, 12, 17 (1), 17 (2), 17 (3) (a), 19, 20 (1), 21 (1), 21 (2), 21 (3) and 22 include, but are not limited to: (d) where B is incapable in law of appreciating the nature of the sexual act, including where B is, at the time of the commission of such sexual act- (v) a person who is mentally disabled. In simpler terms, a disabled person cannot consent to sexual intercourse.

- [38] R, a Clinical Psychologist, is an expert with uncontested credentials. There is no other evidence led to counter his testimony and evidence. He testified and handed in a report pertaining to TPM's mental condition. His conclusion is that TPM 'meets full diagnostic criteria of Moderate Intellectual Disability. This condition, in my view, falls within the definition of a mentally disabled person as defined in the Act.
- [39] In the result, TPM is mentally disabled and thus presumed, rebut ably so, unable to consent to sexual intercourse. This translates that the accused, having failed to rebut the statutory presumption that TPM is incapable of consenting to sexual intercourse, is guilty of the alternative offence set out in the indictment.
- [40] I digress to mention what bothered this court during trial. Mavis testified that TPM's family, of which she is part, arranged and facilitated a marital or sexual relationship between TPM with another man. Mavis further testified that out of such a relationship, a child is born. What is worrying the most is that Mavis testified that TPM could not perform any of the house chores unless told or instructed. She corroborated the evidence of R that TPM is unable to appreciate the nature and reasonably foreseeable consequences of a sexual act. Rubbing it in, Mavis testified that TPM does not have the capacity to communicate her unwillingness to participate in the sexual intercourse. If indeed, TPM could not and cannot perform any action without being told or instructed, was she then instructed by her family (including Mavis) to open her legs for the other man to engage in sexual activity? The said arrangement, as is evident from Mavis' testimony, is, in my view, a clear transgression of the provisions of section 24 of Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. For ease of reference, the section provides- 'if a person who arranges or facilitates a meeting or communication between C and B by any means with the intention that C will perform a sexual act with B, is guilty of the offence of promoting the sexual grooming of a person who is mentally disabled'.
- [41] I, based on the arrangements made by TPM's family between TPM and another man, am of the view that the registrar must forward a copy of this judgment to National Director of Public Prosecution for investigation.

[42] I, in the result, make the following order.

Order

42.1 The accused is guilty of the offence of rape, both in the main count and in the alternative, as set out in the indictment.

42.2 The registrar is directed to forward a copy of this judgment to the National Director of Public Prosecutions.

AML PHATUDI

JUDGE OF THE HIGH COURT

- [1] CRIMINAL LAW (SEXUAL OFFENCES AND RELATED MATTERS) AMENDMENT ACT 32 OF 2007
- [2] RAPE: CONTRAVENING SECTION 3 READ WITH SECTIONS 1, 56(1), 57, 58, 59, 60 AND 61 OF ACT 32 OF 2007. ALSO READ WITH SECTION 256, 261, AND 262(1) OF ACT 51 OF 1977. ALSO, READ WITH SECTION 51(1) AND SCHEDULE 2 OF THE CRIMINAL LAW AMENDMENT ACT 105 OF 1997. In that on or about the 31st of October 2015 and at or near Mashau Village, in district of Vuwani, the said accused unlawfully and intentionally commit an act of sexual penetration with the complainant to wit [TPM] a female person by inserting his penis in her vagina without her consent.
- [2] RAPE: CONTRAVENING SECTION 3 READ WITH SECTIONS 1, 56(1), 57, 58, 59, 60 AND 61 OF ACT 32 OF 2007. ALSO READ WITH SECTION 256, 261, AND 262(1) OF ACT 51 OF 1977. ALSO, READ WITH SECTION 51(1) AND SCHEDULE 2 OF THE CRIMINAL LAW AMENDMENT ACT 105 OF 1997.

In that on or about the 31st of October 2015 and at or near Mashau Village, in district of Vuwani, the said accused unlawfully and intentionally commit an act of sexual penetration with the complainant to wit [TPM] a female person by inserting his penis in her vagina without her consent.

- [3] Ibid-Indictment
- [4] S v Zuma and Others [1995] ZACC 1; 1995
- (2) SA 642 (CC)[1995] ZACC 1; ; 1995
- (4) BCLR 401 (SA) at para 25 citing Woolmington v Director of Public Prosecutions [1935] UKHL 1; [1935] AC 462 (HL) at 481; see also R v Ndhlovu 1945 AD 369 at 386.
- [5] State v Vander Meyden 1999 (1) SACR 447(w) @ 448.
- [6] Forensic Psychiatric Observation Report
- [7] CRIMINAL LAW (SEXUAL OFFENCES AND RELATED MATTERS) AMEN... Page 7 of 74 <http://juta/nxt/print.asp?NXTScript=nxt/gateway.dll&NXTHost=juta&function>

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