

SOUTH AFRICA / JUDGMENT

S v Moyo (CC 98/12) [2013] ZAKZDHC 77 (8 August 2013)

[2013] ZAKZDHC 77**COURT**

Kwazulu-Natal High Court, Durban

BEFORE

D Pillay

CASE / FILE NUMBER

CC 98/12

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CASE NO CC98/12

DATE 20 SEPTEMBER 2011

STATE versus MLUNGISI NELSON MOYO

JUDGMENT

8 AUGUST 2013

D PILLAY J The accused, was indicted on three counts of rape and three counts of robbery with aggravating circumstances on 9 September, 22 September and 2 July 2011 committed in Glenmore in Durban. The accused tendered a plea of guilty which the State and Court rejected because of the ambiguity in paragraph 3 and 4 which read as follows:

“3.1 I admit that to the facts to which I plead guilty are as stated in the summary of substantial facts as per the indictment.

3.2 Upon my arrest, I informed the police that I was involved in the various offences and indicated to the police my guilt in the matter. The police indicated to me that I can only plead guilty once all the DNA reports had been received from Pretoria, hence the delay in me having to tender my plea of guilty.

3.3 In addition and upon my arrest, I had assisted the police in so far as they required me to do so.

3.4 I had indicated to the police that at time I had committed the offence, I was using muti and may have been influenced by the muti to commit the offences. Upon my arrest, the police had found muti on my possession. I had used the muti to find employment". admit, that I know my actions are both wrongful and unlawful.

In clarification of paragraph 4, counsel for the accused responded that the accused now knows that his actions were wrongful but did not know this at the time he committed the offence. The ambiguity in the plea is patent and the Court could not accept the plea tendered as one of guilty. Accordingly, the Court recorded a plea of not guilty in terms of Section 113 of the Criminal Procedure Act 51 of 1977 (the CPA).

The accused agreed to the tendered pleas being recorded as the S220 of the CPA.

A[...] N[...] N[...], aged 30 with a diploma in Catering Management and employed at KFC testified she was returning from work after 19:00. As she walked along B[...] Avenue, heading to her room, the accused approached her from behind. He asked her for her cellular phone which she gave to him from her pocket. It was a Blackberry 8520. He asked her for her handbag which she also gave to him. He spoke Zulu like a person from Gauteng. He carried a knife which he had bound to the palm of his hand with a T-shirt. He walked past Miss N[...]. She looked at a house with a view to seeking help. Using the knife the accused directed her to a staircase that led to Grosvenor road, using his knife. After descending the staircase, he pulled her by her skirt from behind into the bushes. He walked behind her with the knife. She asked him whether he intended to rape or kill her. He replied that he was not going to rape her because he had a wife. They went inside the bushes. They were near the tall tower from the university which cast light upon them.

Once inside the bushes, he told her that he was going to rape her because he had not tasted someone who was fat. He tore her clothes with his knife. He tied her wrists together in front of her using a piece of her skirt, which was part of her uniform. She saw his face clearly. He told her that he knew that she was going to the police because she was looking at him. When she was completely naked he inserted his penis into her vagina. He told her to sit down. He tied her feet using her clothing and then her feet to her hands which passed through her knees. He took her cash of about R140 in coins and declined her offer of her bank card and pins, saying that he would get caught.

He tied her mouth using her clothing. He stood over her and taunted her to scream. He shoved a piece of her skirt into her mouth and contemplated cutting of her breast or one of her feet, so that she could not run to the police and she would starve to death in a while. The episode lasted about 30 minutes. He communicated normally and showed no signs of being under the influence of any substance.

After a while she managed to push out the gag and untie her feet. Her hands were still bound. Her main concern was her two children aged 9 and 6. Fearing that she might encounter him in the bushes, she proceeded in the direction that was thick with bushes and shrubs. Using her naked body, she broke through the shrubs and eventually merged on Grosvenor Road. She stood in the headlights of a vehicle that was reversing into the garage and got no help from the driver.

Another car had passed and a woman had stopped to help. She informed Ms N[...] that she would try and get help for her. That person left.

Another two cars arrived simultaneously with the police and members of the policing forum. Students living nearby offered her a towel and a skirt. One of the gentlemen that stopped gave her his T-shirt that he was wearing as she was naked. After making her statement, she was taken to Addington Hospital where DNA samples were taken and sealed. She identified the accused at an identity parade on 4 November 2011.

In response to questions from the Court, she replied that the accused did not use a condom. Her HIV test proved negative and she was prescribed ARV'S for 28 days. She is still HIV negative.

The impact of this experience was that nowadays she is afraid of males walking behind her. She tries to run from them. She does not trust anyone anymore. She still cries when she thinks about the event. She cannot forget. Not a day goes past without her thinking about it. Anyone who mentions rape and it all comes back. She still has scars on her body and they are a daily reminder of that experience. Her experience affected her family. She informed her father who could not look at her. Her older sister cries for her often. After the incident, she wore long clothing to cover her scars. Once her son saw the scars and enquired about them, she could not explain how they occurred. More significantly she testified and I quote,

“right now I can't walk freely on a road, I am not a free person”.

The second complainant to testify was T[...] B[...] M[...], a woman, 25 years with matriculation and employed at the time at Clicks Rossburgh. She lived in Umbilo. On 2 July 2011, at about 07:30 in the morning, she was walking to work in Umbilo Park, when the accused came alongside her. He greeted her. She asked him his name. He replied that he was Mlu. He had a knife tied to his left hand with a hand towel. He approached from her left. He had asked her for her cellular phone. As she reached into her pocket to take it out, he stopped her and led her into the bushes. After walking two or three minutes into the bushes, he informed her that she would see a couple of bras and handbags in the place where they were going. On the way she saw a large bra. He asked her for her cellular phone and she requested that he return her sim card which he did.

He instructed her to strip. When she was down to her underwear, he instructed her to remove her underwear so that he could see her. She asked him what he was looking for. He replied that he wanted money. He went through her handbag but found no money. He tied her hands with a blanket that was in the place where he had taken her. Then he tied her legs together and then her hands and legs together. He used his knife to cut her underwear. He asked her to bend over. She refused. He pushed her. He put his penis into her vagina. She asked him to use a condom. He said he had none. He used her shirt to stuff and cover her mouth before he penetrated her.

She wanted to ask him whether he was HIV positive but because he had gagged her, she was unable to speak. So she wrote the words HIV on the ground. He replied that he was not positive. She motioned to him that she was. Nevertheless he penetrated her. He messed her work pants. He wiped himself with her sweater which he then used to cover her eyes. He said that he was going to disappear and he left.

She managed to remove her sweater from her eyes. Using her teeth, she freed herself. She put on her pants and her sweater and proceeded to Southway Mall where she bought new clothes.

The accused took her cellular phone and her watch which was cheap. At work, her partner saw her shirt and pants and called the police. She saw a doctor at Addington Hospital where DNA samples were taken from her and sealed. She also made a statement to the police.

The accused communicated with her normally. He told her that she spoke too much, that she should shut up and that she was lucky that he did not have his friends with him.

In response to the Court to comment on his plea, she replied that people who used muti do not behave in the way he had. He was normal and knew what he was doing. He knew that he was committing a crime because he told her step by step what he was going to do to her.

The impact of this experience was that in the month of her birthday which was the following week, she had to take ARV'S for the whole of July. She could not understand why he chose her as his victim. She has suppressed her feelings. She was embarrassed and wondered whether his greeting was an act of decency or a warning. She has sleepless nights. She had to change her workplace and move to a different branch of the same employer. She has no children. She was not a virgin and remains HIV negative. She lives in fear of men. She lacks trust in men. She underwent counselling at Addington Hospital.

She recalled that the accused also stabbed her in the right hand after he raped her. She asked him whether he intended to rape her again and he replied that he would not because he could see that she was a tomboy.

The third complainant who testified was L[...] A[...] M[...], a woman, 30 years with a degree in BCom Economics. At the time, she was employed at Thulani Accounting Services.

On the evening of 22 September 2011, she had alighted from a taxi and was on her way home. She was walking along Grosvenor Road, when the accused approached her from the bushes in front of the road. He was alone. He asked for money which she did not have. He was armed with a knife. he pulled her into the bushes. He instructed her to undress. She refused. He forcefully undressed her down to her underwear. She requested that he use a condo. He continued without using one. He forced her to sit. He threatened that he would stab her. He penetrated her vagina with his penis. After raping her, he tied her hands and feet and then tied her to the bush. From her wallet he took about R30 and her cellphone an LG290.

Ms M[...] heard someone calling out her name and saying that they were in the company of the police. As she was gagged she could do no more than mumble. The police found her and photographs were taken of her in the condition in which she was found.

In response to questions from the Court, she replied that the bruises apparent from the photographs were caused when the accused dragged her for quite some distance in the bushes.

As for the impact of this experience, she said that she was afraid of males and became aggressive towards them, even to her brother.

So afraid had she become, that she could walk to the shop barely two minutes away or be alone in a room. She felt hatred within herself. Until this incident, she used to walk freely to friends and family but is now too afraid to step out of the door. She was and remains in a relationship. She was tested for HIV and remains negative. She did not take ARV'S. She was not a virgin and has no children. The experience impaired her performance at work and she eventually had to leave work. Her life could not be the same. She could not wipe off this experience from her mind. Her family was sympathetic and comforted her. She received and continues to receive counselling which she finds helpful. Having lost her employment, she had to return to the Free State to stay with her family. She had not found employment since.

That was the evidence of the three complainants.

The police witnesses to testify were firstly, Warrant Officer Thathaphi Enock Mdlalose. He testified that he was based with the Organised Crime Unit (OCU). On 25 October 2011, he received information which took him to Amawoti in search of a suspect.

He was accompanied by a task force of about ten policemen. He identified the accused by the clothing he wore for which he had a description. When the police ordered the accused to stop, he started to run. The police pursued and arrested him. Once arrested, he was no trouble. He led the police to his room, from where the police recovered a black leather jacket, a black handled silver knife, a makeup bag, a cellphone bag and a rucksack. The items were taken to the Cato Manor OCU Offices. The accused was detained in Cato Manor Police Station.

The police found no muti or strange substances in the rucksack. Under cross-examination he was asked whether the police had found either a brown kitbag or a black CD pouch, he denied that they had found such a pouch. He handed the accused over to female Sergeant Ngubo who was working on the matter. He did not witness the accused admitting to the crimes to any of the policemen nor did the accused appear remorseful. He was in charge of the accused after his arrest. None of the police officers who accompanied him and the accused, questioned the accused in his presence.

Under re-examination, he clarified that the accused was not questioned about his motive in his presence. In response to questions from the Court, Warrant Officer Mdlalose, testified that he had arrested the accused as a suspect in two rape cases committed in Umbilo.

The State called two further warrant officers who effected the arrest of the accused. They were Mervyn Terry Bishop and Sizwe Professor Bekwa. Both corroborated each other and Warrant Officer Mdlalose. In response to the Court's invitation to Warrant Officer Bishop to respond to the issues in dispute arising from the accused's tendered plea, he testified that upon his arrest, the accused admitted committing the two rapes for which he was being arrested.

The last witness to testify was the Investigating Officer Warrant Officer Marshall Paton based at the Family Violence and Child and Sexual Offences Unit. He arrested the accused for the July incident in counts five and six on 14 August 2012. Thereafter he took over the investigation of the September incident in counts one to four.

Following his discussions with Captain De Beer, it became clear that the suspect had a particular modus operandi. This led to warrant officer Paton enquiring from Warrant Officer Vera Thomas of the Biology Unit about the DNA samples taken in all the cases. It is now common cause that the DNA linked the accused to all three offences. The accused admitted that he had committed the offences in the presence of his attorney and declined to make a statement. Warrant Officer Paton was cross-examined, during which it transpired that the accused made a confession on 27 October 2011, two days after his arrest.

Warrant Officer Paton denied that he or any of the other police officers in his presence, informed the accused that his plea of guilty would not be accepted until the DNA reports were in. He confirmed that the accused co-operated with the police but Warrant Officer Paton was not able to say whether the accused regretted his actions.

In response to questions from the Court, Warrant Officer Paton, confirmed that the charges in counts 5 and 6 arose entirely from

police work and not from any co-operation or evidence from the accused.

That summarised the evidence for the State. The defence declined to testify and closed its case without calling any witnesses.

Shall we take the lunch adjournment.

COURT ADJOURNS

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ON RESUMPTION

JUDGMENT

(continued)

D PILLAY J Continuing with the judgment, the State's case was bolstered by the usual admissions in terms of Section 220 of the CPA. This allowed the medical evidence in the J88, the chain of events relating to the DNA and the ensuing reports to be entered as unchallenged evidence.

Following the accused's admission in paragraph 3.1 of his tendered plea and the unchallenged direct evidence of the three complainants, I find that the accused committed the acts for which he was charged. Did he commit them under the influence of any substance? His failure to testify results in this assertion amounting to no defence at all.

Furthermore, all the complainants testified that he was normal. From their evidence a pattern of planned criminal conduct emerges. The venue for the commission of his crimes in all three cases was the same, that is in Glenmore on Grosvenor Street or in its vicinity. He knowingly took the complainants deep into the bushes. He attacked either at about seven in the morning or in the evening as the complainant's were going to or returning from work. He chose his victims between the ages of 20 to 30 years. He used a knife to threaten them into submission. He tied their hands and legs so that they would have difficulty escaping.

He demanded their cellphones and money. He refused to wear a condom. He was mindful that he could get caught because he refused the offer of a bank card to take money out of the account of Miss N[...]. He was also conscious that Miss N[...] could report him and identify him to the police and therefore threatened to cut of her leg or her breasts, so that she could starve in the bushes.

His conduct therefore amounts to a systematic method of attacking and raping his victims, which defeats the defence that he was acting under the influence of any substance.

Police witnesses also denied that he informed them on arrest that at the time of committing the offences, he was using muti and that he was under the influence of muti. They also denied finding any muti or other substance in his possession on arrest.

Did he know at the time he was committing the crimes that he was acting unlawfully? The evidence detailed above of his planning and the way he conducted himself, shows that he knew at that time that he was acting unlawfully. Most incriminating, is the evidence of Miss N[...], that he was aware that she could report him to the police. If he was not mindful of committing any offences, he would not have been afraid of being reported to the police.

In all the circumstances, I find the accused GUILTY AS CHARGED ON ALL 6 COUNTS

SENTENCE 8 AUGUST 2013

PILLAY J I went into great detail to obtain and record the evidence of the complainant's witnesses. I particularly wanted to establish what impact the rapes had on each of them. This was also to spare them having to testify a second time in aggravation. I have detailed their suffering in my judgement resulting in the conviction. The victim impact statements I am assured by the prosecutor confirms their evidence in Court.

Ms P[...] S[...], the mother of Ms M[...] also presented an affidavit setting out the impact of the rape on her child and on the family. Her affidavit corroborated Ms M[...]’s evidence of her fears and suspicions of men. She also attests to the fact that the rape on Ms M[...] affected Ms S[...]’s own relationship with her husband in so many ways. It was difficult and uncomfortable to be intimate with him. She did not trust him. Ms M[...], did not trust him even though he had been a father to her for many years. Ms M[...] had nightmares. Ms S[...] and the siblings would wake up at night to comfort her and relive the horror of her experience.

Ms M[...], was in a relationship and was to be married but that relationship dissolved because she was having difficulty with males. Ms M[...] was badly injured, disfigured and bruised all over to the extent. Ms S[...] had to take a month’s leave to look after her. Ms M[...], lost much weight and has difficulty walking. She has changed so much. Once the lady on high heels and suits in a promising career as an economist working for a large accountant and investment firm, is now a dependant in the care of the family. She cannot hold a job. She cannot go alone anywhere and cannot make decisions. Her cognitive functions have declined to being almost not functional. She is on anti-depressants and behavioural control treatment. She is moody and violent at times. She snaps at people when previously she could not even hurt a fly.

Ms S[...] had to give up her house worth 2.2 million which was sold for a mere 1.4 million to get rid of it in order to move out of Durban. It had so many bad memories. The children refused to go out to play, even to the swimming pool. Windows, curtains, doors, burglar bars were always closed and they lived like prisoners in their own house. Ms S[...] gave up her job as an internal medicine registrar and took up a lower position as a Medical Officer in a rural hospital where they feel safer. Her daughter younger than Ms M[...], who was at the University of Pretoria that year doing her first year dropped out of university. That was the impact of the rape on Ms M[...], on her family, her mother and her siblings. It illustrates the seriousness and pervasiveness of this crime.

The accused on the other hand, raised defences in the plea he tendered but failed to dignify those defences by testifying in Court.

The Court pointed out to him and his counsel that the defence that he “may” have been under the influence of muti did not go far enough. He had to show a causal connection between the muti and his actions. Notwithstanding he still persisted in the defence.

He persisted in his further defence that he made a clean breast of his crimes to the police on arrest, that he told them that he had committed them under the influence of muti and that he co-operated fully with the police. As I found that he failed to prove that defence and that defence. He lied and his conduct in this Court and the way he conducted his defence reflects those assertions.

So, not only was there no substance to his defence from the manner in which he conducted his defence, he not only wasted the Court’s

time in leading evidence that could have been dispensed with but also belied any suggestion of remorse on his part which would have been consistent with his alleged defence. Quite telling too was the fact that at the time of his arrest, he admitted to only two of the rapes. The third rape in Count five was uncovered by good police work. Again no remorse.

Commendably, his counsel Mr Sivakumoor, conceded that there was no substantial and compelling circumstances. Ms Alamchand for the State requested that the minimum sentence imposed by the legislations be imposed for all the crimes committed.

In *Dodo v S* 2001 SACR 594 (CC), the Constitutional Court endorsed the constitutional validity of the minimum sentence legislation. In my minority

judgment

in *MLungisi Patrick Mabaso v S* AR 250/12, a full bench decision, I likened rape to discrimination, more specifically to racial discrimination. The United Nations Convention on the Elimination of all forms of Discrimination Against Women adopted by South Africa on 15 December 1995, notes that crimes against women amount to discrimination.

Two appellate decisions namely *S v Selzwedel and Others* 2000 (1) SA 786 (SCA) and *S v Van Wyk* 1992 (1) SACR 147 (NmS), pointed out that discrimination should be considered as an aggravating factor in sentencing.

More recently in *S v Combrink* 2012 (1) SACR 93 (SCA) and in the full bench decision of *S v Botes* 2011 (1) SACR 439 (GNP), the Appellate Courts endorsed and applied *Selzwedel*.

Those cases dealt with racial discrimination. This case deals with gender and sex discrimination. Rape is a crime against women. It violates not only their rights not to be discriminated and their rights to equality but also their constitutional rights to freedom, freedom of movement, freedom of thought, freedom to live. Rape violates in the same way as apartheid and racial discrimination impeded these freedoms. These reasons reinforce the legitimacy of the minimum sentence legislation for rape.

As Ms Alamchand points out, tomorrow, 9 August, is a day of celebration for women. However, the complainants in this case are so far from enjoying that day. For these reasons, the Court agrees with the prosecution in imposing the minimum sentence as prescribed.

In imposing the sentences that are due, there is no ambiguity about this accused and his capacity to conduct himself lawfully as a normal human being. There is no excuse for his actions. He has transcended the boundaries of being human. He is a sexual predator and a danger to society. The order that I grant is the following:

On the rape counts, that is on count 1, 3 and 5, the accused is sentenced to a term of life imprisonment on each count.

In relation to the robbery counts, 2, 4 and 6, he is sentenced to a term of imprisonment of SEVEN (7) years on each count. The robbery counts shall run concurrently with the life imprisonment on the rape counts.

IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

CASE NO: CC98/12

DATE: 08 AUGUST 2013

STATE

versus

M N MOYO

BEFORE THE HONOURABLE MADAM JUSTICE D PILLAY

ON BEHALF OF STATE: MS. ALAMCHAND

ON BEHALF OF DEFENCE : MR SIVAKUMOR

INTERPRETER : MR MJAMBOZI

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