

SOUTH AFRICA / JUDGMENT

Sekoai v S (A139/2020) [2020] ZAGPPHC 771 (30 November 2020)

[2020] ZAGPPHC 771**COURT**

North Gauteng High Court, Pretoria

BEFORE

R G Tolmay, E N B Khwinana

CASE / FILE NUMBER

A139/2020

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Policy
IN
THE HIGH COURT OF SOUTH AFRICA
(GAUTENG
DIVISION, PRETORIA)
(1)

REPORTABLE:

NO
(2)
OF
INTEREST TO OTHERS JUDGES: NO
(3)
REVISED
30/11/2020
Case
number. A139/2020

Date:

In

the matter between:

TREVOR
SEKOA
APPELLANT
Versus
THE
STATE
RESPONDENT

JUDGMENT**TOLMAY J:**

- [1] On 12 March 2018, the appellant was convicted in the Regional Court held at Benoni on a charge of house breaking with intent to rape and rape. On 15 May 2018 he was sentenced to seven years imprisonment on count one and to life imprisonment on count two. He was also declared unfit to possess a firearm in terms of section 103(1) of the Firearms Control Act 60 of 2000. His name was entered in the register of offenders. The parties agreed that the appeal could be determined on the papers.
- [2] The appellant appeals both the conviction and sentence in terms of section 10 of the Judicial Matters Amendment Act 42 of 2013.
- [3] The appellant denied having committed the offences and placed identity in dispute. He also raised an alibi defence.
- [4] The complainant was nine years old at the time of the incident and the appellant was warned that the charge of rape fell under section 51 of the Criminal Law Amendment Act 105 of 1997, as amended and that section 51 (1) makes provision for imprisonment.
- [5] The complainant was due to her age, assisted by an intermediary, Ms Danana.
- [6] The complainant testified that she was 10 years old at the time of the trial and was in grade four at [...]. She testified that on 24 March 2017 in the evening, her mother was out with friends. She and two other children, were sleeping, three year old N[...], and four year old N[...], when a man broke the window of the room, entered and start fiddling around. The room was dark. She asked her mother to reprimand the man, but it was only her and the two younger children in the house. The man then approached the bed, apparently took her and removed her tights and panties, and then raped her. He told her not to tell anyone. He picked her up, strangled her and again told her not to tell anyone. After the strangling he put her on the bed and raped her. It is not quite clear from the evidence whether he raped her once or twice. He then lit a match and she saw his face, she said he

was looking around the room. The match went out and the man lit two more matches. During this process she looked at his face. He asked her what she wanted, and she told him she wanted chips. He jumped out of the window, and said he will go and fetch money. The complainant and N[...] also jumped out of the window. N[...] stayed in the room. She then went to her mother and told her what happened and she also identified the rapist. They went back to their home. When the police arrived, they all went to the appellant's house.
- [7] The J88 indicated that the complainant presented with injuries consistent with forceful penetration. Strangulation marks were also found on her neck. There is no doubt that the complainant was raped and assaulted.

- [8] The complainant was insistent that, despite the short time that she saw the perpetrator's face, she had no doubt about his identity. She also pointed out that he was dressed in her mother's pink tracksuit pants when they arrived at his house. What is quite apparent from the complainant's evidence is not only her insistence about her ability to identify the appellant, but also that she was quite ready to make concessions about things that she did not know. The learned magistrate correctly accepted her evidence. despite the application of the cautionary rule.[1]
- [9] The complainant's mother, Ms Bele testified that on the night of 24 March 2017, at about 22:00 the complainant arrived at the shebeen where she was with her friends. When she arrived, she was crying and she told her mother that a Sotho speaking man who often comes to their house had raped and strangled her. Mr Bele was shocked and started screaming. The people who were with her suggested that they should go and investigate what happened. When they arrived at her house, they found that one of the windows were broken. She was by now also concerned about the other two children who were at the house. She unlocked the door and found the one child, N[...], whom she described as her friend's child sitting on the bed crying. The other child, N[...], who was four years old, was not there. The police were called and they went to look for the suspect. One of the people waited for the police at the main street, because the police could not get access to where she stayed. Some people went to look for the little boy who was missing. The cell phone battery of the people who were waiting for the police was running low and she had to go herself to wait for the police and had to call them again.
- [10] She said that when she was in the house, she found a pair of men's jeans behind the door. When the police arrived, she showed them the jeans. She said she told the police that it belonged to the appellant, not to her. She knew it was his, because it was fashionably torn jeans, of which he was very proud and she saw him wearing it, earlier that evening, when he was at the shebeen with her and her friends. The police then suggested that they should go to the appellant's house.
- [11] She also testified that the complainant said that the man who raped her was the Sotho speaking man who regularly came to greet her and share cigarettes with her. She said that the appellant was the only Sotho speaking man who came to her house.
- [12] She went with the police to the appellant's house. The police knocked three times asking him to open the door. She could not remember

whether he opened, or whether the policed pushed the door open. They asked her to wait outside, while they went inside with the

complainant. She heard the complainant confirming that he was the one who raped her. The police then asked her to come in and whether she knew the person. She confirmed that she knew him and saw that he was wearing her pink tights and a t-shirt. She told the police that he was wearing her tights, she described it as leggings that women wear. She recognised that it was hers, as she saw a black patch almost behind the knee,

- [13] It was put to her that appellant would say that he did not own such a pair of jeans. The appellant would say that he knew Ms Bele and that they drink at the same place and knew each other. It was put to her that he would deny visiting the tavern and drinking with her on the night that the incident occurred. It was put to Ms Bele that the appellant would testify that he was wearing three quarter pink pants, which he got from Crystal Park, when he was arrested and that it did not have a stain on it. He said that the pink pants that were booked into the SAP 13 was not the pants that he wore at the time.
- [14] Despite several postponements the state could not succeed in ensuring the presence of the investigating officer at the trial, as he apparently could not remember anything or even identify the exhibit. This happens too often, and often the ineptitude of police officers lead to perpetrators walking away, to commit the same horrific act to yet another innocent person. Fortunately, in this instance the ineptitude of the police did not result in that.
- [15] The appellant testified that he did not know the complainant or her mother, but also said that he knew they stay in the same area and had seen them there. He however denied ever going to their house. He said that he knew nothing about the incident and that at the relevant time he was asleep at his house, where he lived alone. If he knew where they lived one can reliably accept that at the very best for him, they knew each other from sight.
- [16] He testified that the police, the complainant and her mother arrived at his house during the course of the night. He testified that the police took his jeans and pink underpants which he was wearing at the time. He said the jeans was blue Guess jeans torn in the front. This must be seen in the context that it was put to Ms Bele that the appellant would deny owning jeans torn in the front. He also in contradiction to what was put on his behalf, namely that he was wearing three quarter pink pants when he was arrested. Also contrary to what was previously put on his behalf. He then testified that the pink pants were old clothes thrown away by white people.
- [17] He testified that he never spoke to Ms Bele, nor did he touch her. He could not explain satisfactorily why it is that she knew that he spoke Sotho if he had never spoken to her.
- [18] He testified that Ms Bele pointed him out as the man who raped her daughter, even before the complainant could say anything. This was never put to the complainant or Ms Bele.
- [19] Although the minor child was a single witness regarding the rape and her evidence should be approached with caution,[2] her evidence is corroborated by the fact that jeans, similar to those the appellant wore earlier that evening, according to Ms Bele, were found in Ms Bele's house. Furthermore, he was wearing pink pants when the police arrested him. These pants

were identified by both Ms Bele and the complainant as belonging to Ms Bele. The appellant contradicted himself pertaining to where he found the pink pants, and about what he was wearing when he was arrested. The appellant also contradicted himself in that it was put to Ms Bele that they knew each other as they drink at the same place, but when he testified the appellant denied using any alcohol at all or ever having spoken to Ms Bele. It was also never put to the witnesses that he was wearing blue jeans when he was arrested.

- [20] The learned magistrate correctly found that the state succeeded in proving its case beyond a reasonable doubt and found him guilty on both counts.
- [21] The accused had one previous conviction of stock theft and was sentenced to a fine of R2 000-00, or twelve months imprisonment on 17 November
2015. It is trite that sentencing falls within the discretion of the trial court and an appeal court can only intervene if there was a misdirection, or the sentence is shockingly inappropriate. In this instance section 51(1) of the Criminal Law Amendment Act find application as it concerns the rape of a minor, the prescribed minimum sentence is life imprisonment.
- [22] A probation officer's report was obtained as well as a victim impact report and the learned magistrate dealt extensively with the contents of both reports and clearly applied his mind, when considering the appropriate sentence.
- [23] The appellant was 30 years old at the time. He came from Lesotho and his parents passed away when he was young. He was raised by his grandmother. He had a good childhood experience and was never exposed to any abuse, violence or neglect. The appellant left school in standard one. He has a wife, a child and his grandmother who still lives in Lesotho, He came to Gauteng to look for work. The learned magistrate took all of his personal circumstances into consideration. The contents of the probation report were also taken into account. It was also taken into account that the appellant spent one year and two months in jail awaiting trial.
- [24] The learned magistrate also took the victim impact report into consideration. The complainant comes from a very disadvantaged

background.

Her mother is unemployed and relies on a child support grant. The complainant's school performance declined during 2017, after the incident occurred. It has since then improved. She is scared of being alone in the house and to walk alone. She does not trust men in general and experiences anger towards them. She feels degraded and victimised as a result of the incident. She suffered physical discomfort due to the strangulation and rape. It is recorded that she cried during the interview and was clearly still traumatised by the incident.

- [25] It is now trite that substantial and compelling circumstances should be shown to exist to allow for a deviation from the prescribed minimum sentence and flimsy reasons will not suffice,[3] In my view the learned magistrate was correct to find that no such circumstances exist.
- [26] The complainant and the two toddlers who were with her, and who witnessed this truly horrendous act, are from the most vulnerable and disadvantaged part of society. If their house had burglar bars and an alarm system and if they were not left alone at night this incident might not have occurred. The appellant preyed on their vulnerability. In this instance only one child was raped, but three children were exposed to this deed. In a society where women and children are treated with so much disdain and violence the courts can no longer be seen to be too sympathetic or soft on the perpetrators. Nothing but imprisonment for life can be appropriate for the rape of a child, unless truly exceptional circumstances are present. In an ideal society the impact on the two toddlers who witnessed this would also have been investigated and they would have been provided with psychological support. We know the one little boy went missing that night. We do not know where this four-year old child went and what happened to him. The three year old child was found crying on the bed. We do not know how all of this impacted on her wellbeing. They are victims too. The seven years sentence for housebreaking with intent to rape is also appropriate. Both sentences are appropriate and no misdirection by the magistrate is apparent nor is the sentence shockingly inappropriate. The violence against children and the effect on them is the only thing that is truly shocking in this case.

[27] In the light of all the facts the appeal on convictions and sentence should be dismissed.

[28] The following order is made:

The appeal against both conviction and sentence is dismissed.

R G TOLMAY

JUDGE OF THE HIGH COURT

I AGREE:

E N B KHWINANA

ACTING JUDGE OF THE HIGH COURT

DATE OF HEARING

11 NOVEMBER 2020

DATE OF JUDGMENT:

30 NOVEMBER 2020

ATTORNEY FOR APPELLANT: MR M B KGAGARA

PRETORIA JUSTICE CENTRE

ATTORNEY FOR RESPONDENT: ADV P C M LIJYT

NPP

[1] S v Mthetwa 1972(3) SA 766 A

[2] Mthetwa, supra, p 76B A-c, see also S v Chabalala 2003(1) SACR 134 (SCA)

[3] S v Malgas 2001(1) SACR 469 (SCA)

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