

SOUTH AFRICA / JUDGMENT

Seruma v S (Mphahlele DJP; Langa AJ) [2021] ZAMPMHC 25 (7 October 2021)

[2021] ZAMPMHC 25

COURT

Middelburg High Court, Mpumalanga

BEFORE

S S Mphahlele, M B Langa

CASE / FILE NUMBER

A22/20

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA

DIVISION, MIDDELBURG (LOCAL SEAT)

CASE

NO.: A22/20

REPORTABLE:

NO

OF

INTEREST TO OTHER JUDGES: NO

REVISED.

07

OCTOBER 2021

In

the matter between:

PENUEL

SERUMA

Appellant

versus

THE

STATE

Respondent

JUDGMENT

This judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be the 7th day of October 2021 at 14h00.

MPHAHLELE J

[1] The appellant was arraigned in the regional court sitting in Ermelo on 2 counts, the details of which are as follows:

Count 1: Rape – that the accused is guilty of the crime of contravening the provisions of Section 3, read with Section 1, 56(1), 57, 58, 59, 60 and 61 of the General Law Amendment Act 32 of 2007, and further read with the provisions of Section 51(1) of Act 105 of 1997. In that on or about December 2017 and at or near Ermelo in the Regional Division of Mpumalanga the appellant did unlawfully and intentionally commit an act of sexual penetration with Z, 11 years of age by penetrating the vagina of the complainant with his penis without the consent of the said complainant.

Count 2: Attempt to commit a sexual offence – that the accused of the crime of contravening the provisions of Section 55(a) read with Chapter 2, 3, 4, Sections 1, 55, 56, 57, 58, 59, 60, 61 and 71(1), (2) and (6) of Act 32 of 2007 – attempted rape. In that on or about July 2018 and at or near Ermelo in the Regional Division of Mpumalanga the accused did unlawfully and intentionally attempt to commit a sexual offence with the complainant to wit Z by dragging her into the bathroom and wanting to rape her without the consent of the said complainant.

[2] The appellant pleaded not guilty but the court found him guilty as charged. He is appealing against the conviction.

[3] The appellant contended that the court erred in finding that the guilt of the appellant was proved beyond any reasonable doubt.

[4] it is trite that the powers of the court of appeal to interfere with the findings of the trial court are limited. An appeal court will only interfere if it is shown that the evaluation of the evidence by the trial court is flawed or tainted by a misdirection

[5] Z (the child victim) related her version briefly as follows: It was in December 2017, whilst watching the television, her brother came into the room and sat next to her. He was drunk. He told her that if she slept with him, all the money (R10-00) he had in his possession would be hers. She refused the offer but the brother dragged her by the hand. He held her so tight and took her to an unoccupied room. In that room, he lifted up her nightdress and then climbed on top of her and inserted his penis in her vagina. She tried to scream but he closed her mouth. She slipped till she fell on the floor. He then got off her and she then went to the kitchen, sat on the floor and cried. One of her sibling came and found her on the kitchen floor crying and she explained to her what happened. She requested her sibling not to report to their grandmother as the brother had threatened to kill her. The brother went away and

never came back that night.

- [6] In July 2018, whilst cooking pap in the kitchen, his brother came in and indicated he wished to repeat what he did previously. He then took her to the same unoccupied room. Just after he placed her on the bed, her sister called out for her. The brother then ran into the toilet. Her sister reported to their mother that she found her and

the brother in the unoccupied room. She was at first hesitant to inform them what happened but eventually/ultimately she informed them that the brother once slept with her and he wanted to repeat the same deed. She told them that she did not report the incident as she was afraid that the brother would kill her. The mother then reported the incident to her grandmother. Upon confrontation, she informed both her grandmother and cousin that she never reported the incident as she was afraid of the brother.

- [7] Her mother blamed her for the incident and mentioned that she was a threat to the other relatives' relationships. The mother then threatened to take her back to Eswatini. The mother then stopped giving her food and as a result she moved and stayed at her aunt's place for about a week.
- [8] The whole ordeal affected her performance at school. Upon interrogation, she reported the whole ordeal to her class teacher and further informed him she wished to be removed to a place of safety. The teacher reported to the principal who in turn arranged for her to be moved to Thuthuzela Care Centre. The police took her statement at Thuthuzela and she was thereafter examined. She also consulted with a social worker who thereafter placed her at a place of safety with Ms

Matlhana. Ms Matlhana takes care of orphans. The family relations are still not good and her mother has since passed on.

- [9] Z was adamant that both incidents took place. She denied that she reported the matter because the aunt was chastising her.
- [10] Her version that the whole ordeal affected her performance at school was corroborated by the evidence of her class teacher, Mr Sfiso Sidwell Mathebula. He testified that the child victim was a top performer and her performance has since dropped. It is worth noting that the evidence of the class teacher is wholly uncontested.
- [11] The other important aspect of the teacher's evidence was that Z was a quiet child who only spoke when prompted. She used to be obedient and her attitude towards the teachers has drastically changed. She would even backchat which never happened before.
- [12] Noticing the change, the teacher, in a letter, summoned the parents to the school for a discussion. The aunt attended but reported that she did not know the reason for the child's change in behaviour. The child's behaviour changed for the worse. At some stage two local women approached the principal raising concerns about the child's behaviour. This uncontested evidence contradicts the version of the appellant that Z was a naughty child.

- [13] The teacher eventually confronted the child. At first, she was hesitant but eventually, some days later, burst into tears and mentioned that she was sexually abused by the brother (her aunt's child). She reported that it happened not once but twice. The second time around it took place in a toilet when the brother was forcing himself on her. The aunt walked in on them. The grandmother apparently knows about the abuse and gave her R100-00 to silence her (not to tell anyone).
- [14] The evidence is further corroborated by the evidence of Mduduzi Lucky Ngubeni, a Sergeant in the South African Police Services. On 28 August 2018 he received a complaint from a Social Worker from Thuthuzela Care Centre to attend to the child victim. He took the child to her whereat they found the family members, three of whom were males. The child, without any hesitation, pointed out the appellant as the perpetrator. He later returned to arrest the perpetrator. He explained the constitutional rights to him more than once. The perpetrator admitted to him that he had sexual intercourse with the child victim because he was giving her money. The sergeant did not write down the admission as the appellant indicated that he will disclose everything to his attorney. The defence only denied that any admissions were made to Sergeant Ngubeni. As a result, the remainder of his evidence remains uncontested.
- [15] The appellant denied having any sexual intercourse with the child. The defence took issue with the child's failure to testify that the grandmother after becoming of the ordeal offered her money to silence. Further that Z initially stated that at the time of the rape she was not wearing a panty but proceeded to inform the teacher that she in fact had her panty on. Further that Z initially mentioned that the second incident took place in the unoccupied room but informed the teacher that it took place in a toilet. It must be noted that the incident took place in December 2017 when Z was 11 years old at the time and only testified on 05 September 2019. These issues taken up by the defence are not material under the circumstances of this case.
- [16] The appellant confirmed that there was no bad blood between him and the child victim as well as between him and Sergeant Ngubeni. There are 4 men staying in the house with Z and her family and the appellant only come to the house in the mornings. Notwithstanding the aforementioned, Z pointed him out as the perpetrator. He was adamant that the reason he was implicated and pointed out amongst the 3 males who were present at the time, is the child had an altercation with his mom, who happens to be the child's aunt over the unbecoming behaviour of the child. This piece of evidence was never put to the teacher who testified that Z used be a quiet child and further that the aunt indicated that she did not know the reason for the change in behaviour of Z.
- [17] Insofar as the actual deeds of the offences are concerned, Z who is a minor was a single witness. This called upon the trial court to be more cautious in dealing with her evidence. The child victim made a favourable impression on the court. She spontaneously told her version without being led by the prosecutor. From the outset in her first report to one of her

siblings, then her mother, subsequently to the teacher and eventually to the sergeant she maintained that it was the appellant who violated her. He pointed out the appellant to the Sergeant. The appellant was among three other males who stay at the the house. There is therefore no doubt about the identity of Z's attacker in this matter.

[18] The circumstances of this case justify the guilty finding of rape as well as attempted rape. The court was correct in finding that Z did not falsely implicate the appellant. The trial court was further correct in rejecting the evidence of the appellant.

[19] Therefore, the appellant's appeal against both convictions stands to fail.

[20] In the result, the appellant's appeal against both convictions is hereby dismissed and the conviction on both charges of rape and attempted rape is hereby confirmed.

pp S S MPHAHLELE

DEPUTY JUDGE PRESIDENT

MPUMALANGA HIGH COURT, MIDDELBURG

I agree,

M B LANGA

ACTING JUDGE

FOR THE APPELLANT: Adv T Malanguti

INSTRUCTED BY: Middelburg Justice Centre

FOR THE STATE: Adv FW Van Der Merwe

INSTRUCTED BY: THE NDPP

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