

SOUTH AFRICA / JUDGMENT

Sithole v S (A228/2016, SA56/2016) [2017] ZAGPPHC 633 (22 September 2017) [2017] ZAGPPHC 633

COURT

North Gauteng High Court, Pretoria

BEFORE

C J van der Westhuizen, V V Tlhapi

CASE / FILE NUMBER

A228/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO.: A228/2016

DPP

REF. NO.: SA 56/2016

DATE:

22/09/2017

ARTHUR

SITHOLE

APPELLANT

and

THE

STATE

RESPONDENT

JUDGMENT

VAN DER WESTHUIZEN, A J

[1] The appellant was arraigned on one charge of rape in the Benoni Regional Court to which he pleaded not guilty, although admitting

having sexual intercourse with the complainant, but pleading that it was consensual. The appellant was legally represented in the court a quo. He was convicted as charged and sentenced to 10 years imprisonment.

- [2] With leave of this court, the appellant now appeals against conviction and sentence.
- [3] The matter was previously on the roll and was postponed sine die apparently to afford the appellant an opportunity to file heads of argument. In that regard, the DPP filed a notice calling upon the appellant to file his heads of argument before a specified date. The appellant failed to comply with that request. Consequently, the respondent filed a notice to have the matter struck from the roll. Eventually, on 3 August 2017, heads of argument were filed on behalf of the appellant. It is submitted on behalf to the appellant that no application condoning the late filing of heads of argument is required as the Rules of Court, and in particular that of the old Transvaal Rules relating to the filing of heads of argument in Criminal matters set the time periods for the filing of heads of argument. It is further submitted that there has been compliance with the latter set of Rules. The respondent filed its heads of argument on or about 30 August 2017.
- [4] The complainant in the rape charge is a single witness. However, a number of witnesses were called to support the case for the State, albeit that their evidence dealt with circumstances prior to the commission of the rape and subsequent thereto.
- [5] As recorded earlier, the appellant admitted having sexual intercourse with the complainant. His defence was one of consent. The Court a quo rejected his version of what had happened on the day in question. The appellant's version, in a nutshell, was that a relationship existed between him and the complainant and that they had sexual intercourse on occasions prior to the fateful day; that on the day in question the complainant asked him to buy her a drink which they were to enjoy at his house. That request was made at a place where he was drinking while charging his cell phone inside the house. The complainant suggested that they buy the drink at a tuck shop nearby and that they should use an inconspicuous route to his house. At his house, so he testified, they drank and when he retired to bed, the complainant got into bed with him and they had consensual sex. Afterwards, when they were outside his house waiting to go, the appellant noticed someone approaching. The complainant also went out and on seeing that her husband was at the gate, she dropped to the ground and clamoured rape. The complainant was fully dressed at the time both of them were outside the house. On hearing the commotion, other members of the community came. The police arrived and he was arrested.
- [6] The evidence of the complainant is totally different. The complainant testified that she was at the house of Ma Rosie (where the appellant also was) when the appellant proposed that to have sex with her which proposal she declined. The appellant left the property first. She left after the appellant had left Ma Rosie. When she passed the appellant's house that is close by, he grabbed her and dragged her into his house. The appellant removed her clothing and raped her. She screamed and called for help. When they heard a noise at the gate, the appellant opened the door and her husband was at the gate. She only had clothing on her upper body and was naked from the waist down. She cried and shouted that the appellant had raped her. On hearing the commotion, members of the community came to the scene.

She remained unclothed to indicate to the community that she had been raped. When the police arrived she was still unclothed. After going to the police station, she was taken back to collect her clothing. The appellant was arrested. The complainant denied being in a relationship with the appellant.

- [7] The nub of the case on appeal was that the court a quo had erred in accepting the evidence of a single witness, i.e. the complainant, and rejecting the appellant's version as not reasonably

true. It is submitted on behalf of the appellant that the court a quo had not applied the cautionary rule relating to a single witness appropriately, citing that the complainant's evidence was not clear and satisfactory in every material respect, i.e. not only to be credible, but must also be reliable. (See *R v Mokoena* 1956(3) SA 81 (A) and *S v Olawale* 2009 JDR 0980 (SCA))

- [8] The discrepancies in the evidence led on behalf of the State and relied upon by counsel for the appellant, in my view do not affect the material issues. (See *S v Mafaladiso* 2003(1) SACR 583)

- [9] Further in this regard, a registered nurse, who completed a J88 Medical Report, examined the complainant and indicated in the report certain injuries suffered as a result of the rape. In particular the injuries to the complainant's genitalia were such that it confirmed forceful intercourse.

- [10] The court a quo held that the medical evidence, the evidence of the complaint's husband and that of the owner of Ma Rosie, corroborated the version of the complainant. In particular it was held that the evidence that the complainant was naked from the waist down was in direct contradiction of the appellant's version that she was fully clothed when the complainant's husband, the members of the community and the police arrived. The police constable who attended at the scene confirmed that the complainant was naked from the waist down. That crucial difference was not explained. Furthermore, the evidence of the owner of Ma Rosie did not support the appellant's

version of a relationship and what happened at that house.

- [11] The evidence of the complainant's husband supports her evidence. He had no knowledge where she was and by chance heard the complainant's cry for help when he happened to pass the appellant's house. He found her half naked and in distress.

- [12] The appellant called a witness to support his case. That witness did not advance the version of the appellant. It was non-committal and did not assist in determining any of the issues in dispute.

- [13] Further in my view, the evidence aliunde, recorded earlier, supports the version of the complainant and is in direct contrast with that of the appellant. It does not give credence to the appellant's version being reasonably true. In that regard, the material difference of whether the complainant was half naked or fully dressed, was never explained by the appellant. The court a quo correctly rejected the appellant's version.
- [14] It follows that the appeal against the conviction cannot succeed.
- [15] The appellant also appeals against the sentence imposed upon him. In this regard, it is submitted on the appellant's behalf that the sentence of 10 years is shockingly harsh and inappropriate. It is further submitted that the court a quo erred in not concluding that that there were substantial and compelling circumstances to deviate from the prescribed minimum sentence.
- [16] The alleged substantial and compelling circumstances are submitted to be the following:
- (a) The appellant's age, 43 years;
 - (b) He has 6 children, five of whom are in Mozambique and one in South Africa, albeit from different mothers;
 - (c) At the time of his arrest he was employed as a sub-contractor building RDP houses and earning R7 000,00 per month;
 - (d) The appellant was a first offender;
 - (e) There was no indication that the appellant had a tendency to direct violence against women;
 - (f) There was no evidence that excessive violence was involved in committing the rape with no serious injuries to the complainant.
- [17] It was submitted on behalf of the appellant the no serious injuries were recorded on the J88 form, and hence that the rape "was not of a worse kind of rape". That submission belies the act of rape committed. It is probably the worst invasion of a woman's dignity, privacy and security. The rape may be committed with aggravating effect, but rape remains the worst type of violation perpetrated against a woman.
- [18] Counsel for the appellant further submitted that the court a quo was obliged to have called for, and considered, a psychological report in respect of the psychological effect upon the complainant.

Thus it is submitted that this court should find, in the absence of such a report, that substantial and compelling circumstances exist to warrant a departure from the prescribed minimum sentence of 10 years.

- [19] The appellant chose not to testify in mitigation. The appellant was content that his personal circumstances be placed before court through his legal representative. He clearly did not show remorse. (See Matyityi 2011(1) SACR 40 (SCA))

- [20] There are aggravating circumstances. The appellant proposed sexual intercourse at Ma Rosie's and exhibited an intention to have sexual intercourse with the complainant. He carried his intention out and flaunted the fact that he had intercourse with the wife of another when he was confronted. Furthermore, the complainant was of small physique, and the J88 form records that there was blood in her private parts and that she was not menstruating at the time.
- [21] It is trite that a court sitting as appeal court in respect of a sentence imposed by another court can only intervene when it is found that the court imposing the sentence had misdirected itself on material issues or when it is held that the interest of justice requires an intervention. (See *S v Malgas* 2001(2) SA 1222 (SCA))
- [22] In my view it has not been proven that the court a quo had committed any misdirection in imposing the sentence. No submission was made that it would be in the interest of justice to intervene in respect of the sentence imposed. Furthermore, it has not been proven that substantial and compelling circumstances exist to deviate from the prescribed minimum sentence of 10 years for a first offender.
- [23] It follows that the appeal against sentence cannot succeed.
- I would dismiss the appeal against both the conviction and sentence.

C J VAN DER WESTHUIZEN

ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered.

V V TLHAPI

JUDGE OF THE HIGH COURT

On behalf of Appellant: F van As

Instructed by:

Pretoria Justice Centre

On behalf of Respondent: Ms L Williams

Instructed by:

Director of Public Prosecutions

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Prepared on 23 October 2026 · Esheria