

SOUTH AFRICA / JUDGMENT

Van Heerden v S (A131/2019) [2021] ZAFSHC 275 (3 November 2021)

[2021] ZAFSHC 275**COURT**

Free State High Court, Bloemfontein

BEFORE

Daffue, Reinders

CASE / FILE NUMBER

A131/2019

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****FREE****STATE DIVISION, BLOEMFONTEIN****Reportable:**

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Case

no: A131/2019

In

the matter between:

RICARDO

RODGER VAN HEERDEN

Appellant

and

THE

STATE

Respondent

CORAM:

DAFFUE J et REINDERS J

HEARD

ON:

03 NOVEMBER 2021

DELIVERED

ON: 03 NOVEMBER 2021

JUDGMENT

BY: DAFFUE J

This judgment was handed down electronically by circulation to the parties' representatives by email, and release to SAFLII.

The date and time for hand-down is deemed to be 14:00 on 03 November 2021.

I

INTRODUCTION

[1] On 17 July 2019 the appellant was convicted in the Regional Court held at Bloemfontein of rape in accordance with the provisions of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007, read with the provisions of s 51(1) of the Criminal Law Amendment Act, 105 of 1997. On the same day he was sentenced to life imprisonment.

[2] As a consequence of the imposed sentence, the appellant enjoyed an automatic right of appeal. The notice of appeal was duly filed on 2 August 2019.[1] It appears from the transcriber's certificate that the transcription of the record was completed as recently as 14 June

2021. This explains why the appeal was belatedly set down for hearing. The delay of two years is regrettable.

II GROUNDS OF APPEAL

[3] The appellant raised four grounds of appeal pertaining to his conviction. These are:

3.1 the evidence of the complainant and his mother, to whom he made the first report, differs pertaining to the contents of the report as well as the appellant's response in respect of the mother's enquiry as to what he did;

3.2 the court a quo erred in finding that the appellant "inserted his penis in the complainant's anus";

3.3 the court a quo erred in finding that the mother's boyfriend was present and in doing so finding corroboration in the evidence of the appellant;

3.4 the court a quo erred in rejecting the evidence of the complainant's mother and accepting the evidence of the complainant.

[4] It is alleged in respect of sentence that the court a quo erred in imposing life imprisonment and failing to find any substantial and compelling circumstances, whereas:

4.1 the traditional mitigating factors pertaining to the personal circumstances of the appellant were not considered;

4.2 the complainant did not sustain any physical injuries;

4.3 the imposed sentence was not blended with mercy.

III THE JUDGMENT OF THE COURT A QUO

[5] The court a quo gave a detailed judgment in respect of the appellant's conviction. It considered the following undisputed facts:

5.1 the complainant was 13 years old at the time of the incident and thus a minor under the age of 16;

5.2 identity was not in dispute as the complainant and the appellant are related to each other in so far as the appellant and the complainant's mother are brother and sister and therefore, the appellant is the complainant's uncle;

5.3 during February 2017 (the specific night/day was not set out in the charge sheet or ever mentioned in the evidence) the complainant lived in a shack with his mother, his siblings and the appellant;

5.4 in the early hours of the morning the complainant's mother was woken by the complainant's scream in agony and switching on the light; until then the complainant and appellant were sharing the second bed in the one bedroom shack and she and her other children were sharing the other bed;

5.5 although a criminal case was opened some days after the incident (the complainant's mother was turned away the next morning when she tried to lay a charge) the complainant was only examined by a medical practitioner on 28 March 2017 and while no physical injuries were observed during the examination, sexual penetration could not be excluded;

5.6 appellant was arrested on 30 March 2017.

[6] The court a quo dealt with three inconsistencies. Firstly, the complainant did not explain in his evidence anything about the whereabouts of his mother's boyfriend who arrived earlier that night, whilst the complainant's mother mentioned that her boyfriend left after visiting her. The court a quo found that at the time of the incident the boyfriend was in fact absent from the shack as the mother testified which version the

appellant confirmed. The third ground of appeal does not make any sense in light of this finding.

[7] The second inconsistency related to the content of the complainant's report to his mother. According to the complainant's version he informed his mother that the appellant penetrated his anus with his (the appellant's) penis. He testified in Afrikaans as follows: "Ek het vir haar gesê dat hy sy penis in my, in my bas gesit, gedruk het..."[2]. The mother's version is that he only told her about the pain in his buttocks. The court a quo accepted the

testimony of both witnesses that the complainant's pants were lowered at that stage. As a result of the complainant's scream, his mother examined his buttocks and observed skin peeling off.[3] Consequently the court a quo held that although inconsistencies could be identified, no material contradiction was found.

- [8] The third inconsistency dealt with the appellant's response to his sister's question as to what he had done. According to the complainant the appellant said he did nothing, whilst his mother testified that the appellant mentioned that he had a dream.[4] Notwithstanding the inconsistency the court a quo held that it is apparent from the appellant's version that he denied that he had done anything wrong.
- [9] The court a quo found the evidence of the complainant in so far as he was a single witness to be satisfactory in all material aspects as "he could not have imagined it nor was he open to suggestion..."[5] Furthermore, it found that the complainant and his mother were credible witnesses.[6]
- [10] The court a quo pointed out that the appellant's version was "quite confusing." [7] Several improbabilities, both internal and external, were identified and it eventually found that the appellant's version could not be accepted as reasonably possibly true.[8]
- [11] The court a quo considered the medico-legal report, the J88, which was completed on 28 March 2017, more than a month after the incident, but found it to be neutral.
- [12] In respect of sentence the court a quo held that no compelling and substantial circumstances existed in order to deviate from the prescribed minimum sentence of life imprisonment. It held that the appellant's youthfulness could not play any role during the sentencing process, bearing in mind the numerous aggravating factors put on record.[9]

IV ADJUDICATION OF THE APPEAL

- [13] A court of appeal will not likely intervene with the credibility findings of the trial court. In the absence of an irregularity or misdirection the court of appeal is bound by such credibility findings, unless it is convinced that such findings are clearly incorrect.[10]
- [14] When an appeal is lodged against the trial court's findings of fact, the court of appeal should take into account that the trial court was in a more favourable position than itself to form a judgment because it was able to observe the witnesses during their questioning and was absorbed in the atmosphere of the trial.[11] Therefore, the court of appeal will normally accept factual findings made by the trial court, unless there is some indication that a mistake was made. More recently the Supreme Court of Appeal summarised the approach as follows:[12]

“Before considering these submissions it would be as well to recall yet again that there are well-established principles governing the hearing of appeals against findings of fact. In short, in the absence of demonstrable and material misdirection by the trial Court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong. The reasons why this deference is shown by appellate Courts to factual findings of the trial court are so well known that restatement is unnecessary.”

- [15] In concluding the topic and to reiterate: if the court of appeal is merely left in doubt as to the correctness of the factual conclusions arrived at by the trial court, it will uphold them. The Supreme Court of Appeal restated the principle as follows in Naidoo:[13]

“In the final analysis, a Court of appeal does not overturn a trial Court’s findings of fact unless they are shown to be vitiated

by material misdirection or are shown by the record to be wrong.”

- [16] No judgment is perfect and the fact that certain issues were not referred to does not necessarily mean that these were overlooked. It is accepted that factual errors do appear from time to time, that reasons provided by a trial court are unsatisfactory or that certain facts or improbabilities are overlooked. As shown supra the court of appeal should be hesitant to search for reasons that are in conflict with or adverse to the trial court’s conclusion.

However, in order to prevent a convicted person’s right of appeal to be illusory, the court of appeal has a duty to investigate the trial court’s factual findings in order to ascertain their correctness and if a mistake has been made to the extent that the conviction cannot be upheld, it must interfere.[14]

V EVALUATION OF THE COURT A QUO’S JUDGMENT AND THE PARTIES’ SUBMISSIONS PERTAINING TO CONVICTION

- [17] The State must prove its case beyond reasonable doubt and there is no onus on an accused to convince the court of his innocence. He is entitled to an acquittal if his version is reasonably possibly true, even if it appears to be improbable.[15] I also accept that caution had to be applied in so far as the court a quo not only had to deal with the evidence of child witness, but also a single witness in respect of what happened in the bed during the middle of the night.
- [18] Mr Van der Merwe submitted on behalf of the appellant that penetration was not proven. According to him the mere assertion that penetration has occurred is insufficient. He submitted that the court a quo could not rely on the evidence of the complainant’s mother in order to find that there was indeed penetration. He tried to find support in the unreported judgment in this division of Deminey[16] and S v MM.[17] I made enquiries and established that no written judgment exists in Deminey as an ex tempore judgment was delivered at the end of a criminal trial. In the latter judgment Wallis JA held that “the slightest penetration” would be sufficient for a conviction on a charge of rape,[18] but concluded that the State did

not prove its case notwithstanding the fact that the appellant's evidence was rejected. The appeal succeeded and the conviction of rape was altered to one of indecent assault.[19] In casu the complainant's version was not attacked at all and his mother's examination corroborated that version.

[19] The law is clear: "sexual penetration" includes inter alia "any act which causes penetration to any extent whatsoever by:

- a. the genital organs of one person into or beyond the genital organ, anus, or mouth of another person;
- b. any other part of the body of one person or any object including any part of the body of an animal, into or beyond the genital organs or anus of another person;"[20] (Emphasis added).

It is accepted that proof of "direct or indirect contact" between such organs and/or object would not suffice for a conviction of rape in so far as the definition of sexual violation covers this.[21]

[20] The complainant testified in examination in chief that his anus was indeed penetrated by the appellant's penis and it is irrelevant to what extent and how far. The aforementioned definition is clear and unambiguous. During cross-examination the complainant admitted that he did not know with what he was penetrated and I quote:

"Mr Seitheisho: I am correct to say that you do not know what was inserted in your anus?"

(The complainant did not understand and the question was repeated somewhat differently by the intermediary).

"Tussenganger: Luchen, is dit reg om te sê jy weet nie wat dit was wat tussen jou boude ingegaan het nie?"

Mr L van Heerden: Nee (No)

Mr Seitheisho: You did not see that thing?

Mr L van Heerden: Nee (No)"[22]

When asked who lowered his pants, he indicated that he knew although he did not see who did that. However, he confirmed his belief that it must have been the appellant. Seen in context, it could be nobody else.[23] The mere fact that the complainant could not see what happened behind his back does not assist the appellant's case. It is reiterated that the appellant did not deny that the complainant's anus was penetrated that night. In fact, it was put to the complainant that the appellant was having "wet dreams" and that he did "not know what he did whilst he was having these wet dreams."[24]

[21] The court a quo delivered a thorough and well-reasoned judgment in respect of the conviction of the appellant. If all the undisputed facts are taken into consideration together with the facts that were in dispute, but proven by the State, the court a quo came to the correct conclusion in respect of the charge of rape. In my view the conviction cannot be faulted. For the sake of completeness, I shall briefly refer to some aspects:

21.1 the complainant and appellant were not only related, but friends who played together and socialised; there is not an iota of evidence that there was bad blood between them;

21.2 the manner in which the complainant and the appellant lay in the bed before the incident, the pulled down pants, the complainant's screams and his reaction by jumping out of the bed and switching on the light, his mother finding it necessary to examine his buttocks and observing the peeling off of the skin (aptly described in Afrikaans: "velletjies wat af gewees het hier tussen sy kloof van die sterre") [25] together with the conversation with the appellant and his reliance on a dream all point in only one direction and that is that the appellant raped the complainant;

21.3 if nothing strange occurred with the complainant that night, there was firstly no reason to jump out of the bed with his pants down, screaming in agony, and secondly, for not returning to the same bed after he calmed down, but instead he got into his mother's bed where he was sleeping before her boyfriend arrived;

21.4 the complainant was in pain and no doubt afraid to return to the bed in which the appellant was sleeping;

21.5 it is common cause that by that time the boyfriend had already left;

21.5 against this background the appellant's inherently improbable and different versions must be considered. [26]

[22] Once a detailed and critical evaluation of each and every component in the body of evidence is undertaken, and a step back is taken in order to consider the mosaic as a whole, it is only then possible to see the wood from the trees. [27] If this is done, it is apparent that the appellant's testimony was correctly rejected as not reasonably possibly true. In fact, his version at one stage that he was asleep and totally unaware of the events and the commotion next to him is so improbably that it is safe to say that it is outright false.

[23] The court a quo stated that "(W)hen I look at the said facts that is the only inference that the court can draw in any event." [28] Although it did not specifically link this to the inference of guilt, there is no doubt that this is what the court meant. It would be appropriate to convict the appellant by way of an assessment of circumstantial evidence. In assessing circumstantial evidence, a court should be careful not to approach the evidence upon a piece-meal basis. The following dictum of Davis AJA in *R v De Villiers* [29] should be adhered to:

“The Court must not take each circumstance separately and give the accused the benefit of any reasonable doubt as to the inference to be drawn from each one so taken. It must carefully weigh the cumulative effect of all of them together, and it is only after it has done so that the accused is entitled to the benefit of any reasonable doubt which it may have as to whether the inference of guilt is the only inference which can reasonably be drawn. To put the matter in another way; the Crown must satisfy the Court, not that each separate fact is inconsistent with the innocence of the accused, but that the evidence as a whole is beyond reasonable doubt inconsistent with such innocence.” (Emphasis added)

Zulman AJA (as he then was) aptly referred to the following well-known quotation in *S v Reddy and Others*:^[30]

“A number of circumstances, each individually very slight, may so tally with and confirm each other as to leave no room for doubt of the fact which they tend to establish..... Not to speak of greater numbers, even two articles of circumstantial evidence, though each taken by itself weigh but as a feather, join them together, you will find them pressing on a delinquent with the weight of a mill-stone...”

If the accepted evidence is considered, the only reasonable inference to be drawn from the established facts is that the complainant was raped by the appellant. In the words of Marais JA, ^[31] the weight of circumstantial evidence is so great and the plausibility of the appellant’s defence so weak that the well-known test set forth in *R v Blom* and amplified in *R v De Villiers* are fully satisfied.

VI IMPOSITION OF LIFE IMPRISONMENT

^[24] A victim impact statement was presented by the State and handed in as exhibit “D”.^[32] It was taken down on 28 March 2018 and thus about 13 months after the incident. By that time the complainant was taken out of his mother’s care and placed in a children’s home. The complainant’s version, which is in Afrikaans, was translated as follows:

“ · It was very nice at my mother’s place; · Every Saturday we went swimming; · And we practice soccer at school; · I was very happy; · My heart was very sore, and I cried a lot; · I was scared and had to go to the hospital; · It was very bad.”^[33]

^[25] In his viva voce evidence the complainant testified as follows:^[34]

“PROSECUTOR : Luchen, ever since this incident happened to you did it affect your life

in any way, how did it make you feel?

MR L VAN HEERDEN : Sleg (Bad)

PROSECUTOR : Did it affect your life in any way?

MR L VAN HEERDEN : Nee (No)

PROSECUTOR : You told the Court that you are now living in a children’s home, is that correct?

MR L VAN HEERDEN : Ja (Yes)

PROSECUTOR : How does it feel that you are no longer living at home with your mom and siblings?

MR L VAN HEERDEN : Sleg (Bad)”

Although it cannot be down-played that the complainant must have experienced the incident as traumatic, it is apparent from both the Victim Impact Statement and his viva voce evidence that the medical examination, but more particularly the separation from his mother and siblings after having been taken to a children’s home was of greater concern to him.

[26] Having recognised the definition of rape as quoted supra and the seriousness of the offence, the following factors have not been considered sufficiently by the court a quo:

26.1 the small age difference between the complainant and the appellant, to wit six years: complainant was 13 years old and the appellant 19 years at the time and they were apparently more than brothers than nephew and uncle, bearing in mind that they used to play together;

26.2 there is no evidence of the duration of the sexual deed;

26.3 there is no evidence of the depth of penetration into the anus;

26.4 the less than ideal circumstances, bearing in mind the two beds in the one bedroom shack and the fact that the complainant shared the one bed with the appellant that night.

[27] Too much emphasis was placed by the court a quo on the fact that the complainant gained employment since the incident, that he acted as a mature adult and that there was no evidence of any immaturity during the time of the incident. The appellant’s youthfulness and his chances of rehabilitation should have been given greater attention in order to arrive at a more balanced approach.

[28] In my view the court a quo misdirected itself pertaining to the imposition of sentence by refusing to consider the aforesaid factors and particularly the appellant’s youthfulness, his chances of rehabilitation and the circumstances under which the offence was committed. Therefore, I am of the opinion that the factors mentioned above should have been regarded as substantial and compelling circumstances in order to deviate from the minimum sentence of life imprisonment. A sentence of 15 years’ imprisonment will serve the objects of punishment, to wit retribution, prevention, deterrence and reformation, well. In my view such a sentence will have due regard to the interests of the community, the severity of the crime and the personal circumstances of the appellant. Both legal representatives are essentially in agreement with such a sentence although Adv Giorgi on behalf of the State submitted that a sentence between 15 and 18 years would be appropriate.

VII

CONCLUSION

[29] In conclusion, there is no reason to overturn the court a quo's credibility and factual findings pertaining to the appellant's guilt. I am satisfied, after carefully perusing the record, that no misdirections have been committed and therefore, the appeal against conviction should fail. Interference with the imposed sentence is warranted for the reasons advanced supra.

VIII THE ORDERS

[30] The following orders are issued:

1. The appeal against conviction is dismissed.
2. The appeal against sentence is upheld and the sentence of life imprisonment is set aside and replaced with the following:

"The accused is sentenced to 15 years' imprisonment."

3. The sentence is ante-dated to 17 July 2019.

JP DAFFUE J

I concur

C REINDERS J

On behalf of the Appellant: Mr P Van Der Merwe

Instructed by:

Legal Aid Board

BLOEMFONTEIN

On behalf of the Respondent: Adv S Giorgi

Instructed by:

Office of the DPP, Free State

[1] Record p 200

[2] Record p 46/5; p 49/24 – p 50/9; p 51/21-24

[3] Record pp 78, 79, 82 & 90

[4] Record pp 48/22 – 25, 65/10, 66/12 – 14, 80, but for appellant's version see pp 63, 93, 110, 113, 114 & 119 – 121

[5] Record p 155/22

[6] Record p 155/17-20

[7] Record p 157/8

[8] Record p 157 & 158

[9] Record p 181/9

[10] S v Francis 1991 (1) SACR 198 (A) at 204 c-e; S v Mkohle 1990 (1) SACR 95 (A) at 100e

[11] Schmidt and Rademeyer, Law of Evidence, LexisNexis ed para 3 – 40 & judgments relied upon

[12] S v Hadebe 1997 (2) SACR 641 (SCA) at 645e-f

[13] S v Naidoo & others 2003(1) SACR 347 (SCA) at para 26; see also the following dictum of the SCA in Beukes v Smith 2020

(4) SA 51 (SCA) at para 22: “It is trite that the powers of an appeal court to overturn factual findings by a trial court are restricted. But where the

findings of a trial court are based on false premises or where relevant facts have been ignored, or where the factual findings are clearly wrong, the appeal court is bound to reverse them.”

[13] S v Naidoo & others 2003(1) SACR 347 (SCA) at para 26; see also the following dictum of the SCA in Beukes v Smith 2020

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findings of a trial court are based on false premises or where relevant facts have been ignored, or where the factual findings are clearly wrong, the appeal court is bound to reverse them.”

[14] S v M 2006

(1) SACR 135 (SCA) para [40]

[15] S v V 2000 (1) SACR 453 (SCA) at 455 a-c and S v Chabalala 2003 (1) SACR 134 (SCA) para 15 where Heher AJA (as he then was) dealt with probabilities as follows: “The correct approach is to weigh up

all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking

proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weigh so heavily in favour of the State as to exclude any reasonable doubt about the accused’s guilt.”

[16] S v Deminey, case number 51/2016, an unreported judgment delivered by Musi J (as he then was) on 29 November 2018

[17] 2012

(2) SACR 18 (SCA)

[18] S v MM at para 21

[19] Ibid at para 23

[20] Section 1 of Act 32 of 2007

[21] Ibid

[22] Record p 61/11-20

[23] Record p 61/21 – 62/20

[24] Record p 63/6-14

[25] Record p 79/4

[26] Appellant's versions appear on inter alia pp 63, 93, 110, 113 & 119 – 121

[27] S v Hadebe 1998 (1) SACR 422 (SCA) 426 e–h and S v Shilakwe 2012 (1) SACR 16 (SCA) para 14

[28] Record p 158/7-8, bearing in mind the preceding paragraph

[29] 1944 AD 493 at 508/9

[30] 1996 (2) SACR 1 (A) at p 8i

[31] S v Hadebe 1998 (1) SACR 422 (SCA) 429h

[32] Record pp 192 - 196

[33] Record p 195

[34] Record p 58 & 59

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