

SOUTH AFRICA / JUDGMENT

Velaphi v S (CA07/2017) [2017] ZAE CGHC 116 (31 October 2017) [2017] ZAE CGHC 116

COURT

Eastern Cape High Court, Grahamstown

BEFORE

G G Goosen, P T Mageza

CASE / FILE NUMBER

CA07/2017

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO: CA 07/2017

Date heard: 25 October 2017

Date delivered: 31 October 2017

In the matter between

SIPHOSETHU VELAPHI

Appellant

And

THE STATE

Respondent

JUDGMENT

GOOSEN, J.

- [1] The appellant was convicted in the Regional Court in Port Elizabeth on charges of kidnapping, robbery with aggravating circumstances, sexual assault and pointing of a firearm. He was sentenced to 3 years imprisonment for the kidnapping; 15 years imprisonment for the robbery; 5 years imprisonment for sexual assault and to a fine of R2000.00 or 90 days imprisonment on the charge of pointing a firearm. The magistrate ordered that the sentences imposed in respect of the kidnapping, robbery and pointing of a firearm run concurrently. The effective sentence was accordingly 20 years imprisonment.

- [2] The conviction for the offence of sexual assault constituted a competent verdict in respect of the charge of rape for which the appellant was charged. The magistrate found that the state had failed to discharge the onus of proving sexual penetration. He found however that the evidence supported a conviction on the lesser offence of sexual assault.
- [3] The appellant applied for leave to appeal against both the convictions and the sentences imposed. The magistrate granted leave to appeal in respect of the sentences but refused to leave to appeal in respect of the convictions. Subsequently the appellant applied on petition to this court for leave to appeal against the convictions. Leave was granted only in respect of the conviction for sexual assault. Accordingly, what is presently before this court is an appeal in respect of the conviction on sexual assault and an appeal in respect of the sentences imposed on all four counts.
- [4] The appellant was one of three accused persons who were charged with the offences arising from an incident which occurred on 3 of February 2010 at or near Bluewater Bay on the outskirts of Port Elizabeth. The appellant was the only accused charged with all 4 counts arising from the incident. His two co-accused were charged only with kidnapping and robbery with aggravating circumstances.
- [5] In the light of the narrow ambit of the appeal in respect of the convictions the essential factual findings made by the magistrate and findings in respect of the credibility of the witnesses are not in dispute. In this regard it need only be recorded that the magistrate found the complainant to be a credible and reliable witness and rejected the evidence of the accused. All that is in issue, presently, is whether the magistrate correctly found on the evidence before him, that the offence of sexual assault was established.
- [6] On the day in question the complainant made her way to a hiking spot at or near the N2 national road in order to hitchhike to Port Alfred. She explained that she went to the Truck Inn, a garage frequented by long-distance trucks, in order to hitch a ride to Port Alfred. Whilst she was there she was chased away from the area by taxi operators, apparently seeking to prevent members of the public from paying for transport with truck drivers. She then took a taxi from the Truck-Inn back towards Port Elizabeth and alighted at near the suburb of Bluewater Bay. There she stood alongside the road in order to hitch a lift to Port Alfred. Whilst waiting at the side of the road two men (accused 1 and accused 2 at the trial) came and stood in front of her. Another person, whom she later saw to be accused 3, i.e. the appellant, stood directly behind her and pushed a hard object into the small of her back. The two men in front of her removed her necklaces from around her neck and took her purse out of her bag. The appellant asked them what they had got from her and they said they had taken necklaces. He then asked her what she had for him to which she replied that she did not have anything. He then said to her that she does have something, she has a vagina. After this, the appellant, who held his arm around her shoulders with what she then saw to be a firearm pointed at her walked, alongside her towards the bushes

nearby. The other two assailants walked in front of her. They made their way off the road and into a bushy area. When they had walked a short distance, approximately 150 m, the appellant still pointing a firearm at her told her to remove her tracksuit top and lay it down on the ground. He then told her to remove her trousers which she did. He pushed her down onto the ground and then lay down on top of her. Her evidence was that he inserted his penis into her vagina and that he made up and down movements on top of her. The other two men were laughing. She did not resist because she was afraid that he would shoot her. When he had finished, he stood up and then wiped himself on her tracksuit top and told her to wipe herself too. She said that the other men also wanted to rape her but the appellant said no. They argued over the firearm and one of them said that they should shoot her. Whilst this was taking place she managed to hide behind a bush and then flee from the scene.

- [7] In addition to the complainant's evidence the prosecution tendered a J88 medico-legal report which was admitted by agreement. The examining medical doctor was not called to testify. The prosecution also tendered, by way of an affidavit in terms of s 212(4) of the Criminal Procedure Act, 51 of 1977, the results of DNA analysis conducted on the underclothes of the complainant. The J 88 medico-legal report provides no assistance in establishing whether sexual penetration. No physical injuries were noted. The DNA test results indicated that DNA material was present on the complainant's panty but that the appellant was not the donor of such DNA material.
- [8] All three of the accused testified in their defence. For the reasons already mentioned it is not necessary to traverse the evidence of the appellant.
- [9] The complainant's evidence was unequivocal in regard to the nature of the assault perpetrated upon her. She explained that when she was told to lie down she was told, by the appellant, to open her thighs. She did so and when the appellant lay down on top of her she closed her eyes. She said the appellant inserted his penis into her vagina. Whilst was happening the others were laughing.
- [10] It should be emphasised here that there is no question that the perpetrator of this assault upon the complainant was the appellant.

The trial court accepted the evidence of the complainant regarding the identity of the perpetrators and the particular role played by each of them. The court accepted the complainant's evidence of the events described by her in the bushes where she was taken.

- [11] The trial court noted in its judgment that the issues for determination at the trial were limited to the following:

The issues in dispute is (sic) whether the three accused persons before court are the ones who kidnapped, robbed, and pointed the complainant with a firearm; further whether accused number three raped the complainant after they forced her to go with him to the bushes.

[12] The court then analysed the evidence as to the identification and found that the complainant's identification of each of the accused, including the appellant, was credible and reliable.

[13] Central to the trial court's conviction of the appellant upon the competent verdict of sexual assault is the following:

Having regard to the evidence as a whole, the court has no doubt that the three accused persons acting in common purpose did rob complainant on the day in question. And further that she first had to walk with them into the bushes against her will whilst being pointed with a firearm by accused number three. And when they were at the bushes complainant undressed herself, being instructed by accused number three to do so. And accused number three also undressed himself and got on top of the complainant.

Now the question that needs to be answered by the court is whether accused number three after he got on top of the complainant did in fact penetrate complainant sexually when one looks at the evidence that is before this court. The evidence before this court falls short in that respect. It is not clear from the J 88 whether there was penetration or not. No findings were made in the J88 by the doctor after he examined the complainant. And the court fails to understand why the doctor was not called to explain his observations and why he did not write down his findings on the J88.

[14] Based upon the inconclusive contents of the J88 and the fact that the DNA test results excluded the appellant as being the donor of the DNA material the trial court concluded, in effect, that no penetration had occurred.

[15]

Analysis

of this portion of the judgment indicates that the trial court, notwithstanding its finding as to the credibility of the complainant, did not rely upon her unequivocal evidence as to penetration. I am not at all certain that the trial court was correct in its reasoning. While the medical evidence may not corroborate the evidence of penetration, it certainly does not preclude it. The same is true of the DNA evidence which establishes only that the DNA material recovered was not that of the appellant. I need however, say no more than this. The question of the guilt of the accused on a charge of rape is not before this court. The trial court's finding as to the absence of penetration is not a matter that that this court is called upon to consider. What is before this court is whether, having concluded that sexual penetration was not established beyond reasonable doubt, the court was correct to find on the evidence that the appellant had committed an act of sexual assault.

[16] In this regard the court relied upon the evidence of the complainant that she was made to undress by the appellant and to lay down on the ground and that the appellant then lay down on top of her and that he made certain movements and when he was finished that he wiped himself off on her tracksuit top. This evidence, together with the presence of a bruise mark on the anterior side of her right thigh, which is reflected in the J 88, led the court to conclude that there had been an act of a sexual nature performed by the appellant.

[17] This is however not the only basis outlined in the judgment. The trial court was alert to the totality of the relevant evidence. The trial court stated that:

The court is also convinced that the accused persons took complainant to the bushes in order for accused number three to get the vagina that he wanted from the complainant. The evidence is to the effect that they robbed her in the main road, so there could have been no reason or no other reason to take her to the bushes other than to sexually assault her. And by the time complainant was going with them she had believed already that she was going to be sexually assaulted or something was going to happen to her and as such when she was asked to undress, she did not resist, she just begged for her life and complied with the instruction.

[18] This finding is fully supported by the evidence of the complainant. In cross-examination by the legal representative for accused 2 and that conducted by the appellant's representative at the trial, the complainant stated that she knew and believed that she was being taken off to the bushy area to be raped. She believed that something of a sexual nature would happen to her in the bushes.

[19] Section 5 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the 'Act') defines the crime of sexual assault as follows:

- (1) A person ('A') who unlawfully and intentionally sexually violates a complainant ('B'), without the consent of B, is guilty of the offence of sexual assault.
- (2) A person ('A') who unlawfully and intentionally inspires the belief in a complainant ('B') that B will be sexually violated, is guilty of the offence of sexual assault.

[20] The term "sexual violation" is defined to include a broad range of acts, including direct and indirect contact between genital organs or anus, the breast of a female, the use of objects, the mouth of a person etc. excluding an act of sexual penetration. mean:

[21] It is clear from the evidence of the complainant that absent sexual penetration, as found by the trial court, the requirements of both section 5 (1) and section 5 (2) of the Act are established. That being so, the finding in relation to sexual assault is unassailable.

[22] It follows therefore that the appeal against conviction in respect of the sexual assault must fail.

[23] I turn now to the question of the sentences imposed upon the appellant. The appeal against sentence proceeded on the basis that the magistrate had erred in not finding that substantial and compelling circumstances were present to warrant imposition of a sentence other than

that prescribed in respect of the robbery count. It was submitted in this regard that the court ought to have found that the appellant's personal circumstances namely that he was a first offender aged 29 years, was single with no dependents and was employed at the time of the commission of the offence, constituted substantial and compelling circumstances. It was also submitted that the appellant had spent approximately 4 years in custody awaiting trial and that this too ought to have been considered.

[24] The appeal was also founded upon the contention that the magistrate had failed to order that the sentences run concurrently and accordingly that the cumulative effect was unduly harsh.

[25] This latter submission may be easily disposed of inasmuch as it is apparent that the magistrate gave due and careful consideration to the question of ordering concurrency of sentences and in fact ordered that the sentences in respect of count 1, namely the kidnapping and count 4, the pointing of a firearm, run concurrently with the sentence imposed in respect of the robbery. The court accordingly

took into consideration that the sentence in respect of the robbery and the sexual assault should not run concurrently and did not order that they should.

[26] Counsel for the appellant raised the argument that the fact that the magistrate had ordered that the sentence imposed upon another accused run concurrently with a sentence that he was already serving reflected a failure to consider concurrency in relation to the appellant's sentences. The submission is without foundation. An order that a sentence run concurrently with one that an accused person is already serving only arises where such accused has in fact been sentenced for another offence. In this instance that circumstance does not apply. In any event it is apparent that the magistrate in fact gave due consideration to the concurrency of sentences which he imposed.

[27] Counsel for the appellant could point to no misdirection in relation to any aspect dealing with the imposition of sentence and, accordingly, was constrained to argue only that the cumulative effect of the sentences was unduly harsh and therefore shockingly inappropriate.

[28] There being no misdirection on the part of the magistrate the only basis upon which this court can intervene in respect of the sentence is if it is satisfied that the sentence that it would impose when compared to the sentence that the trial court imposed induces in it a sense of shock such that it is able to conclude that the sentence imposed upon the appellant by the trial court is vitiated by a failure to exercise the sentencing discretion judicially.

[29] When consideration is given to the nature and gravity of the offences committed by the appellant and regard is had to the nature of the sexual assault perpetrated by the appellant then there is in my view no basis to conclude that the sentence is shockingly inappropriate. The trial court gave consideration as to whether to order the concurrent serving of the respective sentences and, as is reflected in its reasoning, properly exercised the discretion

vested in the sentencing court. There is accordingly no basis for this court to interfere with that discretion.

[30] In the result the following order is made:

The appeal is dismissed

G. G. GOOSEN

JUDGE OF THE HIGH COURT

MAGEZA, AJ.

I agree.

P. T. MAGEZA

ACTING JUDGE OF THE HIGH COURT

Appearances: For the Appellant

N. M. Mazibukwana

Grahamstown Justice Centre

For the Respondent

D. Els

Director of Public Prosecutions

Grahamstown

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