

SOUTH AFRICA / JUDGMENT

Witfoot v S (A199/2016) [2017] ZAFSHC 41 (23 March 2017)

[2017] ZAFSHC 41

COURT

Free State High Court, Bloemfontein

BEFORE

Reinders, Loubser

CASE / FILE NUMBER

A199/2016

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IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Appeal No.: A199/2016

In the appeal between:-

SIPHO EMMANUEL WITFOOT

Appellant

and

THE STATE

Respondent

CORAM:

REINDERS, J et LOUBSER, AJ

HEARD ON: 6 MARCH 2017

JUDGMENT:

REINDERS, J

DELIVERED ON: 23 MARCH 2017

[1] On 23 July 2014 in the Regional Court for the district of the Free State Province held at Bloemfontein the appellant was charged with rape involving the infliction of grievous bodily harm (count 1) and attempted murder (count 2). The appellant enjoyed legal

representation and pleaded not guilty on both counts. On 7 October 2014 he was convicted and sentenced to life imprisonment and 5 years imprisonment respectively. The appellant appeals against the sentence imposed upon him by virtue of his right of automatic appeal in terms of section 309 (1)(a) of the Criminal Procedure Act 51 of 1977 (the “CPA”).

[2] Heads of arguments on behalf of the appellant was prepared by Mr PL van der Merwe, but Mr Reyneke appeared before us when the appeal was heard. He aligned himself with the submissions advanced by Mr van der Merwe in the written heads of argument in respect of count 1. The main thrust hereof was that the court a quo erred in sentencing the appellant in terms of section 51(1) and not in terms of section 51(2)(b) of the Criminal Law Amendment Act 105 of 1997 (the “Act”). In respect of count 2 Mr Reyneke submitted that the trial court did not err in any way.

[3] Ms Leslie-Shale acting on behalf of the state supported the sentence imposed by the court a quo in respect of count 2. The sentence

imposed on count 1 was not supported. She submitted that the trial court erred in finding that the rape involved the infliction of grievous bodily harm as the evidence by the complainant was that the injuries sustained were only inflicted after the rape. Same was indicative of the fact that the intention of the appellant was not to subdue the complainant to rape.

[4] According to the original indictment the appellant was charged with rape read with the provisions of sec 51(1) of the Act. From the record it can be gleaned that the court a quo informed the appellant that the first count (rape) falls under Part I of Schedule 2 and that the prescribed minimum sentence is life imprisonment. The learned regional magistrate in his judgment reiterates that the first count is read with the provisions of sec 51(1) of the Act and found the appellant guilty as charged.

[8] In handing down sentencing, the learned magistrate indicated that in sentencing he was bound to impose life imprisonment but may impose a lesser sentence if he is satisfied that substantial and compelling circumstances exist. He found none and proceeded to sentence the appellant to life imprisonment in respect of count 1 and 5 years imprisonment in respect of count 2 and ordered that it should run concurrently.

[9] When it comes to interfering with the sentence imposed by the court a quo, it is trite law that the powers of the court of appeal are limited, as was stated in *S v Pieters* 1987 (3) SA 717 (A). Interference is only warranted where the sentence is disproportionate, harsh or where the sentencing court committed a material misdirection.

See also: *S v Makhondo* 2002 (1) SA (SCA) at 43E-F.

[10] In arriving at a guilty verdict on both counts as charged, the trial court summarised the evidence by the complainant as follows:

“She testified on 5 August 2012 that it was on Sunday, she went to the accused’s place. Accused was quiet on that day and when she asked him why he was so quiet accused just stood up and started assaulting her. Accused punched her with fists, kicked her, hit her with an axe and open hands. He then forced her to have sex with him and climbed on top of her, spread her legs and inserted her penis into her vagina. Accused assaulted her with open hands and fists on her face, kicked her until she fell. Accused kicked her on her ribs, punching her neck are (sic). He hit her with the axe on her forehead. Accused stopped when he heard the police vehicle pulling outside his house.”

[11] The complainant testified as follow about the incident:

“He assaulted me like that, kicking me, hitting me, punching me with fists and hitting me with open hands. I was crying, unable to fight for myself. After he assaulted me he wanted us to have sex. I refused. Then he forced me, until I climbed on the bed and he slept with me. He finished his work and carried on assaulting me or beating me. Until I lost conscious (sic). When I came too I found him standing next to me with an axe.

PROSECUTOR: I just want to clarify if you recall. You said you lost your consciousness at some stage. What I want to know is that, at the moment when you lost your consciousness, had he already inserted his penis inside your vagina? Or he inserted it after you regained consciousness?---No, he only inserted his penis into my vagina after I regained consciousness.”

[12] The trial court in my view correctly found that the accused had sexual intercourse with the complainant without her consent and that the injuries that she sustained all over her body and on her face, coupled with the blood stained axe, were indicative thereof that appellant were attempting to kill the complainant.

[13] As quoted in paras [10] and [11] above, it can be gleaned that the complainant was not assaulted with the intent to subdue her to rape. I share the views of both Ms Lesie-shale and Mr Reyneke that the assault by appellant and the rape constituted separate acts and did not constitute rape as is envisaged in Schedule 2 Part I where rape involves the infliction of grievous bodily harm. Section 51(2)(b)(i) prescribes the minimum sentence for a first offender convicted of an offence referred to in Part III of Schedule 2, as imprisonment for not less than 10 years. In this regard I am of the view that the learned magistrate erred.

[14] Although the appeal lies only against sentencing, I am of the view that the trial court misdirected itself materially in sentencing the appellant in terms of section 51(1) of the Act to life imprisonment in respect of the rape charge. As such we are at large to interfere and consider the sentence in regards to the rape charge afresh.

[15] It was held by Marais JA in *S v Malgas* 2001 (1) SACR 469 (SCA) that all factors traditionally taken into account in sentencing should be considered and none is to be excluded in considering whether substantial and compelling circumstances can be found to warrant a deviation from the prescribed minimum sentence ordained by the legislature. A deviation should however not be for flimsy reasons.

[16] The appellant is a first offender in respect of the rape and attempted murder. He is 32 years of age, the father of one child and resides with his mother. Before his arrest he was gainfully employed and earned R 2000,00 monthly. He receives treatment for TB and have been in custody since 2013 (there is no indication that appellant was granted bail pending the outcome of this appeal) and he indicated that he had remorse about the incident. The crime of which the appellant was found guilty on charge 1 is so serious that the legislature ordained minimum sentences to be imposed. Our courts have described rape as a “brutal invasion of the dignity and the person of the victim.”

See: S v Chapman

[1997] ZASCA 45; 1997 (2) SACR 3 (SCA).

Masiya v Director of Public Prosecution, Pretoria and Another 2007

(5) SA 30 (CC)

[16] In regards to the charge of attempted murder, the injuries sustained by the complainant were serious. Being hit on the head with an axe, coupled with the bruising and swelling noted on the J88, is indicative of the trauma and pain that the complainant suffered at the hand of her intimate partner. The impact that the rape and injuries had on the complainant was not addressed by the court a quo as no evidence were led and a victim impact report was absent. It is important that such information should be placed before the trial court in order to take into consideration the negative impact that the incident had on the victim.

[17] The community no doubt has an interest therein that violence against women should not be tolerated. A clear message must be sent out by the courts in this regard in imposing sentences which would not only give the community a sense of security, but also deter would-be offenders from these pervasive abuses of male power.

[18] I do not find any substantial and compelling circumstances to justify the imposition of a lesser prescribed sentence than ten years imprisonment in respect of count 1.

[19] In applying the test laid down in Pieters supra I do not find any reason to fault the sentence imposed by the trial court in respect of count 2. It is evident from the record that the court a quo properly took into account all the applicable trite factors to arrive at a just sentence.

[20] Accordingly the orders of the court a quo are set aside and replaced with the following:

1. The appeal succeeds to the extent that the conviction and sentence on count 1 are set aside and replaced with the following:

“Count 1: Guilty of rape read with the provisions of section 51(2)(b) of the Criminal Law Amendment Act 105 of 1997 (Part III of Schedule 2).

The accused is sentenced to ten years imprisonment.”

2. The appeal against the conviction and sentence of five years imprisonment on count 2 is dismissed.
3. It is ordered that three years of the sentence imposed on count 2 is to run concurrently with the sentence imposed on count 1.
4. These sentences must be deemed to have been imposed on 7 October 2014.

C. REINDERS, J

I agree.

P.J. LOUBSER, AJ

It is so ordered.

On behalf of appellant: Mr D. Reyneke

Instructed by:

Bloemfontein Justice Centre

Legal Aid SA

BLOEMFONTEIN

On behalf of respondent: Adv K.E. Lesie-Shale

Director of Public Prosecutions

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