

SOUTH AFRICA / JUDGMENT

Zakhura v S (A111/2020) [2021] ZAFSHC 15 (25 January 2021)

[2021] ZAFSHC 15

COURT

Free State High Court, Bloemfontein

BEFORE

Opperman, Raikane

CASE / FILE NUMBER

A111/2020

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IN

THE HIGH COURT OF SOUTH AFRICA,

FREE

STATE DIVISION, BLOEMFONTEIN

Case

number: A111/2020

In

the matter between:

SHAUN
ZAKHURA
Appellant
and
THE
STATE
Respondent

CORAM:

OPPERMAN, J et
RAIKANE, AJ

JUDGMENT

BY: RAIKANE, AJ

HEARD ON: 9 NOVEMBER 2020

DELIVERED ON: 25 JANUARY 2021

INTRODUCTION

- [1] The Appellant was arraigned and convicted on two counts in the court a quo. Count 1, Rape of a minor in terms of the applicable sexual offences legislation as amended together with the applicable section of Act 38 of 2005 to which he was sentenced to life imprisonment. Count 2 contravention of the Immigration Act. He was sentenced to imprisonment with an option of a fine.

The appeal is against Count 1 as he enjoys an automatic right to appeal by virtue of the sentence.

- [2] Further contention on behalf of the Appellant is that the court a quo erred in finding: That the State proved its case beyond reasonable doubt, the contradictions in the testimonies of the state

witnesses are not material, accepting the evidence of the complainant as clear and reliable in all material aspects and rejecting the version of the Appellant and the defence witness as not reasonably possibly true. Submissions by the State is that both the conviction and sentence in brief, is appropriate and befitting to the crime committed.

EVALUATION OF THE EVIDENCE

- [3] The two state witnesses, one being the complainant and L[...] are both minors age 10 and in Grade 5. The complainant is a single witness to the actual rape. They were both declared competent witnesses and testified through an intermediary. The J88 was handed in as an exhibit and formed part of the record by consent.
- [4] The evidence of the complainant is that she knew the accused well as he stays not far from her place. He always speaks with her mum. He fixes electric appliances for the people in the area and sells chicken feet at their school. On the day in question, she was in the company of L[...] and two other minor children K[...] and A[...] and they went to look for one M[...] who stays in the same yard with the Appellant. A[...] wanted him. They found the Appellant next to the gate and M[...] was not in.

- [5] The Appellant sent them to a nearby tuckshop to buy him cigarettes and sweets which he shared amongst them. He invited them to come and wait for M[....] in his shack which is a one room divided with a curtain into a bedroom and kitchen. He instructed the complainant to come write their names on a piece of paper in his bedroom. The others remained in the kitchen and played a game amongst themselves.
- [6] The Appellant threw her on a bed and put Sellotape on her mouth which was in a toolbox next to the bed. He undressed her and himself, smeared her vagina with Vaseline and penetrated her. K[....] came to check as to why was she taking so long to write their names. The Appellant scolded him and told him to go back to the kitchen.
- [7] He ordered her to get dressed and they went back to the kitchen. She felt uncomfortable. He told her not to tell anybody about what happened as he was going to kill her. They left and the Appellant told them it was 9pm. On the way home she told L[....] what happened behind the curtains. She knew what happened to her is rape as they are given lessons on rape in the Life Skills class. The incident occurred around 6pm as when they reach home “Skeem Saam”, a soapy on the television that is aired between 6:30 and 7.00 pm, was still playing and it ended when they got in. They knew then that the Appellant lied to them about time when they left his place. She wanted to report the incident to her mother but could not as she find her quarrelling with her Dad. She left them and went to sleep.
- [8] They saw the Appellant on Sunday at a neighbour’s ceremony and L[....] asked if she did tell her mum what happened to her. Her mum scolded her and threatened to spank her if she does not tell her the truth on what the Appellant did to her which she eventually did. This was four days after the incident had occurred. The matter was then reported to the police and she was taken for medical examinations.
- [9] L[....] collaborated the evidence of the complainant save to say the Appellant when he sent them to the spaza shop, gave the money to the complainant. He also sent them more than once and they bought snacks ‘Simba Chips’ and not sweets. Further that on the day in question the Appellant was standing next to a rock. These were the only contradictions in their evidence. She did not know the Appellant before as she was visiting the area, but she was able to identify him when she saw him at the ceremony.
- [10] The Appellant took the stand and deny knowing the minors nor having met them on the day in question. He provided an alibi that at about 6pm on that day he was with one Tshepo at Biza’s Tavern playing snooker. He then went to another tavern and continued drinking and he only went back home around 9pm. The witness for Appellant who took the stand is not Tshepo but one Mr. Kaotele who testified that he saw the Appellant at Biza’s Tavern round about six and Tshepo was also there. They were playing snooker and he left them there and cannot tell what time he left the tavern.

- [11] The court invited Dr. Coetzee, who amongst his qualifications has done Clinical Forensic Medicine, to provide expert clarification on the clinical findings on the J88. He did not do the examination on the complainant per se. He confirmed that confirmatory injuries of rape do not usually happen as in most cases this depends on the extent of the penetration.
- [12] He also stressed the fact that especially in children, any injuries if they do happen, heal within a few hours. This is why the J88, where the examination was done after four days of the incident, noted no injuries on the complainant but penetration cannot be excluded. Also, that it is common that children tend to leave out information when testifying which does not mean certain things did not happen. This is part of their cognitive developmental stages.

AD CONVICTION:

- [13] The trial court was alive to the fact the complainant, in respect of the rape itself, was a single witness; a minor who was prompted to an extent of being spanked to tell the truth, applied the cautionary rule when assessing her evidence. The reliance on *S v Sauls and Others* 1981 (3) SA 172 (A) at 180-G where it was stressed that “The exercise of caution must not be allowed to displace the exercise of common sense”. The trial court also considered section 208 of the CPA as amended which states that “Conviction may follow the evidence of a single witness. An accused may be convicted of any offence on the single evidence of any competent witness.”
- [14] The court a quo also considered the demeanour of both the complainant and that of the state witness. The complainant, at her age was calm. She showed some fatigue, was able to relate on what transpired behind the curtains and describe how the bedroom looked like. Her evidence remained uncontroverted. L[...] collaborated the evidence in all material aspects. The contradictions did not purge any holes in the crucial evidence per se.
- [15] I find no reason to interfere with the credibility findings as stated. In *S v Francis* 1991(1) SACR 198 (A) at 199 A it was held that a court of Appeal will interfere with such if the trial court materially misdirected itself in so far as its factual and credibility findings are concerned. I find no such misdirection in the present matter.
- [16] The issue on the alibi of the Appellant was correctly dealt with as the person who was mentioned by the Appellant was one Tshepo. The person who took the stand could not take the Appellant’s case any further as it provided no collaboration.

AD SENTENCE:

- [17] It is trite law that imposing a sentence is a matter falling within the discretion of the trial court, and that such discretion should not be eroded. In *S v Rabie* 1975 (4) SA 855 (A) 857 D-F the court emphasized that any sentence imposed should only be altered if the discretion has not been ‘judicially and properly’

exercised.

- [18] Another guiding principle is that interference with a sentence must only occur if it is found that it is totally out of proportion to the gravity or magnitude of the offence, or it invokes a feeling of shock or outrage.
- [19] However with the offence in casu, the minimum sentencing regime is applicable. It must be imposed unless substantial and compelling circumstances are present to justify deviation. There is no exhaustive list to which a sentencing court can turn for guidance. Each matter is assessed on its own circumstance.
- [20] *S v Malgas* 2001 (1) SACR 469 (SCA) at 482 -1 further introduced the ‘determinative test’: “If the sentencing court on consideration of the circumstances of a particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of the society, so that an injustice would be done by imposing that sentence, is entitled to impose a lesser sentence.”
- [21] In *S v Dodo* 2001 (3) 382 CC in entrenching the constitutionality of the minimum sentence, the court outlined the fact that ‘gross disproportionality’ must be applied to determine whether a sentence mandated by law is inconsistent with the offender’s constitutional right and an offender not to be punished in a cruel, inhuman and degrading way.
- [22] I am of the view that the traditional mitigating factors of the Appellant cannot be discarded from preventing the sentencing court from deviating from the minimum sentence, especially the submissions on behalf the Appellant of being able to be rehabilitated through a lengthy imprisonment sentence instead of the life imprisonment sentence imposed. Submissions that the Appellant at 49 years of age, is a first offender, a bread winner of note, he was crippled after a motorbike accident that left him with disproportionate legs and a recurrent backache. The court also witnessed the discomfort the Appellant was experiencing during the trial and at times endorsed that he should receive medical attention. This should have persuaded the court otherwise.
- [23] Time spent awaiting trial is a factor that at least the court should have taken into consideration although there is no mechanical formula that can be used to determine the extent to which a sentence can be reduced.
- [24] Nowhere in the record can it be discerned that the sentence was blended with an element of mercy as per *Rabie* (supra). The gravity and callousness of the offence cannot and should not be understated.
- [25] The court’s overemphasis on the nature and seriousness of the offence, the interest of the society against the interest of the Appellant and balancing same became clouded and there is no obvious balancing act that ultimately resonates with the reasoning of the court a quo.
- [26] Resultantly, the following order is made:
1. The appeal against the conviction is dismissed;

2. The appeal against sentence succeeds. The sentence of life imprisonment is set aside and replaced with the following: “The Appellant is sentenced to 20 (twenty) years imprisonment in terms of section 276(1)(b) of the Criminal Procedure Act 51 of 1977”;
3. The order in terms of section 50(2) of the Criminal Law (Sexual Offence and Related Matters) Amendment Act 32 of 2007 is confirmed;
4. The order in terms 103(1) of the Firearms Control Act 60 of 2000 is confirmed.

T.V. RAIKANE, AJ

I concur.

M. OPPERMAN, J

APPEARANCES:

On behalf of the Appellant Adv S Kruger

Instructed by:

Legal Aid South Africa

BLOEMFONTEIN

On behalf of the Respondent Adv T Sekhonyana

Instructed by: Office

of the Director of

Public Prosecutions: Free

State

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