

SOUTH AFRICA / JUDGMENT

Zoyikwa v S (A135/2020) [2021] ZAFSHC 9 (25 January 2021)

[2021] ZAFSHC 9

COURT

Free State High Court, Bloemfontein

BEFORE

Reinders, Opperman

CASE / FILE NUMBER

A135/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

FREE

STATE PROVINCIAL DIVISION

Case

No: A135/2020

In

the matter between:

NKOSINATHI
ZOYIKWA
Appellant
and
THE
STATE
Respondent

Coram:

Reinders,
J et
Opperman,
J

Heard:

25
January 2021

Delivered:	The judgment was handed down in court and electronically by circulation to the parties' legal representatives by email and release to SAFLII on 26 January 2021. The date and time for hand-down is deemed to be 26 January 2021 at 15h00.
Judgment:	Opperman, J
Summary:	Appeal - rape - minor - 12 years old - conviction and sentence - evaluation of evidence order On appeal against conviction and sentence by Regional Court Magistrate, Ms. M Khuduga, Botshabelo Regional Court, Free State on 7 June 2017 and 8 June 2017 respectively. (Court a quo case no.: RC 179/2016, A2/2017)
Order:	The appeal against conviction and sentence is dismissed.

JUDGMENT

- [1] The Appellant enjoys an automatic right to appeal in terms of section 309(1)(a) of the Criminal Procedure Act 51 of 1977 (CPA). The appeal lies against conviction and sentence. He was originally charged with rape and assault. He was acquitted on the assault charge and convicted of the rape on 7 June 2017. He was sentenced to life imprisonment in terms of section 51(1) of the Criminal Law Amendment Act 105 of 1997. No order was made in terms of section 103 of the Firearms and Ammunition Control Act 60 of 2000. The Appellant was also ordered to be registered in terms of section 50 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (SORMA).
- [2] The Appellant was represented by counsel during trial.
- [3] The fundamental principle on the evaluation of evidence on appeal is that an appeal court is not inclined to disturb findings by the trial court on the evaluation of the evidence. The advantage of seeing and hearing the witnesses is difficult to surpass.
- [4] The Supreme Court of Appeal reiterated this stance in its judgment on 31 July 2020 in *AM and another v MEC Health, Western Cape* (1258/2018) [2020] ZASCA 89:

Such findings are only overturned if there is a clear misdirection or the trial court's findings are clearly erroneous. That has consistently been the approach of this court and the Constitutional Court as reflected recently in the following passage from *ST v CT*:

'In *Makate v Vodacom (Pty) Ltd* the Constitutional Court, in reaffirming the trite principles outlined in *Dhlumayo*, quoted the following

dictum of Lord Wright in *Powell & Wife v Streatham Nursing Home*:

"Not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judges, and unless it can be shown that he has failed to use or has palpably misused his advantage, the higher court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case."(Accentuation added)

- [5] The same was law seventy-two years ago; and it is still true in the constitutional epoch and especially in cases where sexual offences are involved. If there was no misdirection of facts by the trial court, the point of departure is that its conclusion was correct. The general principles according to which a court of appeal should consider the case are set out in *R v Dhlumayo* 1948
- (2) SA 677 (A). The court of appeal must bear in mind that the trial court saw the witnesses in person and could assess their demeanour.
- [6] The court of appeal will only reject the trial court's assessment of the evidence if it is convinced that the assessment is wrong. If the court is in doubt, the trial court's judgment must remain in place (*S v Robinson* 1968
- (1) SA 666 (A) at 675H).
- [7] Courts of appeal have greater liberty to disturb findings of a court a quo when dealing with inferences and probabilities (*Minister of Safety and Security v Craig* 2011
- (1) SACR 469 (SCA) at [58]). In casu the evidence is of a direct nature.
- [8] The court of appeal does not zealously look for points upon which to contradict the trial court's conclusions and the fact that something has not been mentioned does not necessarily mean that it has been overlooked.
- [9] The Appellant denied all allegations of rape and mentioned an alibi during cross-examination.[1] He denied having sexual intercourse with the complainant at all and ever.
- [10] The complainant was proven to be 12 years old at the time of the alleged incident by herself, the mother and the intermediary.[2] She testified in terms of section 170 of the CPA. The process was proper and cannot be criticized.

- [11] The J88; medico-legal examination was handed in by agreement. Unfortunately, the examination took place weeks after[3] the incident but it is of some assistance to the court. The report confirmed the age of the victim. The report; uncontested, showed that the complainant had had sexual intercourse before and she admitted it. She alleged that it was with a 16 years old boy and only once. This was before the Appellant allegedly raped her and in June before September when the Appellant had intercourse with her.
- [12] The uncontested evidence is that, tragically the examination proved the complainant contracted a sexually transmitted disease. She did not complain of this before or after the rape. She carried this burden in silence until she collapsed and had to be taken home. This brought the incident to the fore. What is immensely frustrating is that the perpetrator was not tested for this disease. This is a crucial oversight by the authorities.
- [13] The witnesses consisted of the complainant, her mother, grandmother and P S[....]; a friend. The Appellant testified in his own defense. The witness on the alibi was not called by either party.
- [14] The magistrate acknowledged and applied the following in the

judgment:

1. That the complainant was a single witness and a minor and that her evidence must be regarded with care and circumspection. The evidence of the complainant must have veracity and corroboration.
 2. That the State must prove the guilt of the Appellant beyond reasonable doubt; if the version of the Appellant is reasonably possibly true, he must be given the benefit of the doubt and go free.
 3. That the conspectus of evidence must be regarded.
- [15] The evidence of complainant was evaluated by the court with caution. The court found the complainant to be an honest, credible and reliable witness. Honest enough to tell the court she had engaged in prior sexual intercourse. She had the opportunity to lie but did not. Her evidence was corroborated by the testimony of the mother and grandmother on issues that were denied by the Appellant. There was no motive to falsely implicate the Appellant. The poor quality of the Appellants' evidence in the face of the State's case strengthened her case. Reading of the record brings the detail of her evidence to the fore. Her explanation for not reporting the incident immediately is good.
- [16] The facts found to have been proven are that during the early evening of the day of the incident the Appellant called the complainant from where he stood at the gate of his dwelling. He was a neighbour at that stage. He instructed her to go and buy him a cool drink. On her return he was inside the house, told her to put the drink on the

table and requested to have sexual intercourse with him. She refused and told him he was old. She tried to escape from him and tripped over a curtain that divided the rooms. He got hold of her, threatened her with a knife and put her on the bed where he raped her. Afterwards he gave her R200.00 because, according to him, he saw that he hurt her. She managed to get out of the house and went home. She did not report the rape because the Appellant threatened to kill her if she does so.[4] She became ill and on the day she collapsed she was interrogated by her mother and her grandmother about the incident. She was afraid to talk about the rape due to the threats by the Appellant. When they called the police, she reported the whole incident.

- [17] The grandmother confirmed the issue of the R200.00. The grandmother was unaware of the rape when the Appellant came to her shortly after the incident and said that he accidentally gave the complainant R200.00 instead of R20.00. The Appellant denied this.
- [18] The complainant testified that she had cooked for the Appellant previously and that he had send her to the shop on occasion. He denied this. The mother corroborated this evidence of the complainant and even mentioned that the Appellant send some food home with the complainant.
- [19] The grandmother and mother presented as good witnesses. Their testimony reflected the shock and sadness of the incident but a respect for the truth and the justice system.
- [20] The Appellant was a poor witness and his evidence seriously lacked veracity if compared with the evidence in the case for the State. The court a quo correctly rejected it. Apart from his performance in court the submissions of counsel for the State at paragraphs 7.12 to 7.14 add to his guilt. His behaviour after the incident does indeed invoke suspicion against him and corroborate the fact that he raped the complainant.
- [21] The grounds of appeal are in general that the court a quo erred in finding that the State proved its case beyond a reasonable doubt and erred in finding that the evidence of the complainant, as a single witness, was clear and satisfactory in all material aspects.
- [22] The Appellant launched an attack on the status of the complainant as minor and single witness. The trial court dealt with this aspect in detail and correctly declared that the complainant was an excellent witness with sufficient corroboration of her evidence.
- [23] The corroboration can be described as spontaneous in most instances. The grandmother did not know about the relevance of the R200.00 to the rape but when the mother arrived home and told her about it, she recalled the incident of the R200.00 with the Appellant. In addition, the complainant admitted the R200.00 and informed that she bought toiletries for her and her sister with it. The complainant admitted that she did not tell of the rape and lied about the reason for receiving the R200.00 at that stage because she was afraid of the Appellant. Counsel for the State correctly mentioned the spontaneous emotional reaction of the complainant during her testimony at this stage: "As I am speaking, I am remembering the day that he was doing this to me." This added credibility to her evidence.

- [24] There was indeed a contradiction between the mother and the complainant about the R200.00. The mother overheard that the Appellant promised to pay it monthly until she is healed but the complainant indicated it to be a once off payment. The contradiction is not of such a grave nature in the totality of the circumstances. The fact remains that the Appellant denied that he gave the complainant any money that day. He was not even there according to him.
- [25] Another contradiction highlighted by the Appellant is the testimony of the complainant that she first told her mother of the incident, but in cross-examination she testified that she told her friend Rethabile about the rape. The explanation of the complainant was as follows and cannot be criticised in any manner: "She also heard information about the incident and she persistently asked me about it, and I ultimately told her yes I did sleep with him, and now what does it have to do with you if I slept with him?" The complainant explained that her reaction was out of anger and they were sitting amongst other people. The situation cannot, in context, be defined as a report of the rape.
- [26] An active or even promiscuous[5] sex life does not disqualify a person; a woman or a girl, a man or a boy, from being a victim of a sexual offence. In this instance the case involves the alleged rape of a 12-year-old girl, NM[6]. One wonders, on the facts of this case, why the cross-examination of the complainant started with the first question to be: "N this previous sexual intercourse that you had did you inform your mother about it? --- I did not tell her." In the Heads of Argument of the Appellant an argument for dismissing the evidence of the complainant was that she was sexually active and that she contracted a sexually transmitted disease.[7] The previous sexual history of a victim of sexual offences is just as irrelevant as that of the accused. Counsel must refrain from the practice to vilify complainants in this manner. Courts must not allow it.
- [27] It has often been said that the reporting of sexual offences is not an exact science. Counsel for the State pointed out that there is sufficient evidence on record to corroborate that the Appellant threatened to kill the complainant should she report the incident to anyone.
- [28] The manner in and time at which a victim of sexual offences reports the rape will depend on the facts of each specific case. The tendency to, as it was in the horrible history of our law, expect a report within a certain prescribed number of hours or at a specific moment must be forced from the minds of all legal practitioners and presiding officers. Even if a victim was forced to report a rape and even if years go by before she does; it does not in itself negate the rape.
- [29] In fact, section 58 of SORMA decrees that: "Evidence relating to previous consistent statements by a complainant shall be admissible in criminal proceedings involving the alleged commission of a sexual offence: Provided that the court may not draw any inference only from the absence of such previous consistent

statements.” In addition, section 59 decrees that: “In criminal proceedings involving the alleged commission of a sexual

offence, the court may not draw any inference only from the length of any delay between the alleged commission of such offence and the reporting thereof.”

[30] Not taken as a ground of appeal but of concern is the evidence of Puseletso S[...] that is hearsay evidence upon hearsay evidence. The evidence is that unknown people saw the complainant coming from the house of the Appellant and alleged that she had intercourse with him. There was no ruling on the admissibility of the evidence. The neglect

of the court, the prosecutor and the defence to deal with this properly could have caused a grave irregularity and as it stands may not be regarded as evidence against the Appellant. The excellent quality of the other evidence and the interest of justice save the case for the State. Officers of the Court must have more regard for the fair trial of perpetrators as well as victims of crime.

[31] The same can be said of the alibi that was presented by the Appellant. The Court had to enter the arena to get clarity on the facts thereof. More should have been done by both the State and the counsel for the defense. Again, it has the element of an unfair trial and again the officers involved; including the presiding magistrate, must be vigilant of the effect of conduct of this nature.

[32] The record shows that on the day the report was made to the police there was not any official available to do the forensic examination. This is unacceptable. The evidence is that the complainant suffered physically and mentally due to the incident and the torture was protracted by a lack of facilities and personnel.[8]

[33] It was clear to all an everybody that the complainant was injured and suffered physical effects from the rape. A sexually transmitted disease was diagnosed that she still suffers from. It just does not make sense that nobody demanded that the Appellant be tested therefor. This brings me to the issue of the sentence.

[34] Ironically, the Appellant; in his affidavit in the Notice for Appeal at paragraph 7.3 disclosed to the court that he is HIV positive and “feel that this should be taken into consideration with regards to the sentence that was imposed.” In the Victim Impact Statement the mother of the complainant describes that the complainant still suffers from the effects of the disease she contracted. It must be noted that all evidence shows that her symptoms only started after the rape. It is unknown when the Appellant contracted the disease but this is now water under the bridge.

[35] The Appellant was 28 years old at the time of the incident, was employed and earned R3000.00 per month. His highest qualification is grade 8. He was a first offender at the time of sentencing and in custody for a period of eight months awaiting trial. None of the factors can be described as substantial and compelling, specifically, when it is compared with the circumstances surrounding the rape.

[36] The sentence of life imprisonment is not shockingly harsh; and the court did not err in the emphases of the crime. The crime and the consequences are atrocious. The appellant raped the 12-year-old child of his neighbour. He threatened her not to tell and she lived in fear of him. The impact of the incident was physically and emotionally

severe. As the mother testified; the appellant ruined her child's life. Most disturbing is the fact that the complainant expressed her feelings about the incident by stating that she wished the Appellant rather killed her than having caused her the trauma. Counsel for the State correctly pointed out that for a young innocent mind to reach such a conclusion is a bitter reminder of the impact these crimes have on victims.

[37] Terblance[9] aptly stated as follows:

"It is regularly stated that balance is an important consideration in sentencing. Balance, in this context, has been said to mean that the trial court should consider all the relevant facts, factors and circumstances evenly, and strive for the attainment of all the purposes of punishment."

As long as balance is understood in these terms there is little objection to its use. This is not, however, balance in the ordinary

sense of the word. The seriousness of the crime may totally outweigh the mitigating factors and the personal factors of the offender.

This cannot amount to balance, since the scales would be heavily weighed against the offender. It would therefore be more accurate to state, as in *S v De Kock*, that the three factors of the Zinn triad have to be considered in conjunction with one another and that each should be afforded a certain weight depending on the facts of the case."

[38] I must add it is here about the young victim; the triad must be squared and apart from the personal circumstances of the Appellant, the seriousness of the crime and the interest of society, the brave girl that was put through the trauma of the trial and stigma demands special mention.

[39] The Appellant was correctly convicted and the sentence is appropriate in the circumstances of the case. The appeal against conviction and sentence must be rejected.

[40] ORDER

The appeal against the conviction and sentence is dismissed.

M. OPPERMAN, J

I concur

C. REINDERS, J

APPEARANCES

On behalf of Appellant

Advocate S Kruger

Legal Aid South Africa

Bloemfontein

On behalf of Respondent

Advocate AM Ferreira

Office of the Director Public Prosecutions: Free State

- [1] During cross-examination of the complainant on page 27 at line 3 it was put to her that: “He was not even there that day; he was at his parental home.” At page 44 it was put on behalf of the accused that he was at 1299 K section not at his home.
- [2] It is highly advisable that a birth certificate of the minor victim of sexual offences be handed in as a rule. It was not done in the instance.
- [3] The incident allegedly took place on 16 September 2016; the examination was on 4 October 2016.
- [4] In her Victim Impact Statement her fear for the Appellant was reiterated at page 126 of the record.
- [5] The meaning is of course in the eye of the beholder.
- [6] Full name of the complainant not used.
- [7] At paragraph 2.9.2.
- [8] Record at page 36 line 3.
- [9] A Guide to Sentencing in South Africa, Last Updated: 2016 - Third Edition at Chapter 6 at 5, <https://www.mylexisnexis.co.za/Index.aspx> on 18 January 2021.

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