

SOUTH AFRICA / JUDGMENT

Zungu v S (CA37/2019) [2020] ZANWHC 8 (13 February 2020) [2020] ZANWHC 8

COURT

North West High Court, Mafikeng

BEFORE

JT Djaje, RD Hendricks

CASE / FILE NUMBER

CA37/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH

WEST DIVISION, MAHIKENG

CASE NO: CA 37/2019

In

the matter between:

LUCKY
ZUNGU
Appellant
AND
THE
STATE
Respondent

JUDGMENT**CRIMINAL APPEAL**

HENDRICKS DJP & DJAJE J

DJAJE J

Introduction

- [1] The Appellant was convicted of one count of rape in the Regional Court sitting in Garankuwa and sentenced to life imprisonment. He now appeals against both conviction and sentence exercising his automatic right of appeal.
- [2] The application for condonation for the late filing of the appeal was not opposed by the Respondent and subsequently granted by this Court.

Factual

Background

- [3] The evidence in this matter can be summarised as follows:

On the date of the incident, the complainant a fifteen (15) year old girl, was at home with three of her sisters. An argument ensued between the two older sisters about the usage of electricity. The complainant and the one sister ran away in a bid to avoid being involved in the altercation. They met the Appellant. The Appellant was well known to the complainant as he was staying in the same area. They used to refer to him as 'brother'. Both the complainant and her sister explained their predicament to the Appellant and sought refuge at his house. The Appellant agreed and offered them refuge for the night, indicating that he did not want to intervene in the dispute between the sisters of the complainant. Whilst they were sleeping, the Appellant went into the room and assaulted the complainant's sister. Thereafter, he assaulted the complainant and had sexual intercourse with her without her consent.

- [4] In the morning, they ran home crying and reported to their sisters that the Appellant had sexual intercourse with the complainant. The Appellant's version was that the sexual intercourse with the complainant took place with her consent.

- [5] The doctor did not testify but the medical report was handed in as an exhibit. The doctor on examination found inflammation, bruises and tears on the complainant's private parts. The conclusion by the doctor was that there was forceful penetration.

AD CONVICTION

- [6] The main grounds of appeal raised by the Appellant are that the three minors who testified before the court a quo were not properly admonished. The submission on behalf of the Appellant was that when the complainant was called to testify, the

Regional Magistrate admonished her without first ascertaining if she understood the difference between telling the truth and lying. The same argument was advanced in respect of the other two witnesses, A[...] and J[...]. At the time of testifying they were both seventeen (17) years old. Counsel for the Appellant argued that the court a quo failed to conduct enquiries establishing if they could differentiate between the truth and lies. It is the Appellant's case that failure by the trial court to establish if a child witness understands the difference between the truth and lies is fatal and renders the evidence inadmissible. It is on this basis that the Appellant argued that the conviction should be set aside.

- [7] In contention, the Respondent argued that the record reflects that the witnesses were all properly admonished. Further, that the court a quo did question them to establish if they understood the oath and the difference between the truth and lies.

- [8] Section 164 (1) of the Criminal Procedure Act provides:

“(1) Any person who, is found not to understand the nature and import of the oath or the affirmation, may be admitted to give evidence in criminal proceedings without taking the oath or making the affirmation: Provided that such person shall, in lieu of the oath or affirmation, be admonished by the presiding judge or judicial officer to speak the truth.”

This section requires that the court should satisfy itself that a witness understands the nature and import of the oath or the affirmation

first before deciding to have them admonished. There is a discretion on the presiding officer to first make a finding before a witness can either be sworn in or take affirmation. The same applies to children called to testify.

- [9] In the case of *S v QN* 2012 (1) SACR 380 (KZP) Gorven J (Wallis J and Ngwenya AJ concurring) held that: “In essence there is a need to establish whether or not the child is capable of distinguishing between truth and falsehood. There is no minimum age required for a competent witness; it must be adjudged whether each witness meets the requirement of competence.”

- [10] In *Director of Public Prosecutions Transvaal v Minister of Justice and Constitutional Development and others* 2009

- (2) SACR 130 (CC) Ngcobo J at paragraph 164, 165 and 166 stated as follows:

“[164] Section 164 (1) allows a court to allow a person, who does not understand the nature or the importance of an oath or a solemn affirmation, to give evidence without taking an oath or making an affirmation. However, the proviso to the subsection requires the presiding officer to admonish the person to speak the truth. It is implicit, if not explicit, in the proviso that the person must understand what it means to speak the truth.....

- [165] The practice followed in courts is for the judicial officer to question the child in order to determine whether the child understands what it means to speak the truth. As pointed out above, some of these questions are very theoretical and seek to determine the child understands of the abstract concepts of truth and falsehood.....
- [166] The reason for evidence to be given under oath or affirmation or for a person to be admonished to speak the truth is to ensure that the evidence given is reliable. Knowledge that a child knows and understands what it means to tell the truth gives the assurance that the evidence can be relied upon. It is in fact a precondition for admonishing a child to tell the truth that the child can comprehend what it means to tell the truth. The evidence of a child who does not understand what it means to tell the truth is not reliable. It would undermine the accused's right to a fair trial were such evidence to be admitted. To my mind, it does not amount to a violation of s28(2) to exclude the evidence of such a child. The risk of a conviction based on unreliable evidence is too great to permit a child who does not understand what it means to speak the truth to testify. This would indeed have serious consequences for the administration of justice.”
- [11] In this matter, before the complainant could testify, the Regional Magistrate asked her the following questions:
- “WITNESS: M[...] D[...] B[...].
- COURT: Age
- WITNESS: 16 years.
- COURT: Do you attend school?
- WITNESS: Correct your worship.
- COURT: Where?
- WITNESS: At S[...] H[...] S[...].
- COURT: Do you attend church?
- WITNESS: Correct your worship.
- COURT: Which church is it?
- WITNESS: Baptist Church.
- COURT: Just for a while focus on what is said in church if a person commits a crime what do you then think would happen to that particular person according to the teachings of your church?
- WITNESS: That person would be prayed for your worship that he can repent of his ill ways.
- COURT: And if he or she does not repent?
- WITNESS: I do not know.

COURT: Have you not heard anything about what God does and what people are doing in Heaven and you have not heard anything about that?

WITNESS: No.

COURT: Your church does not say anything about for instance God and being fearful of God, it does not say anything?

WITNESS: They do your worship there are services and it is not long that I have been attending that church.

COURT: You never attended church before?

WITNESS: Yes I have been attending the church.

COURT: Which one?

WITNESS: It is somewhere at Singani your worship.

COURT: And even there you did not hear anything about the man called satan?

WITNESS: Yes I have heard about him.

COURT: What did you hear about him?

WITNESS: He causes people to do evil things.

COURT: And then thereafter what happens to those people?

WITNESS: If they die your worship or pass on they would not go to God they would go to him satan.

COURT: And what do you think would happen there?

WITNESS: They would do evil things like him.

COURT: And what happens then?

WITNESS: I do not know your worship.

COURT: Do you think God can punish any individual?

WITNESS: Yes that person can be punished but can also pray for mercy before God.

COURT: What do you think can happen to a person who lies, what do you think God will do with such an individual?

WITNESS: God will punish that person.

COURT: How?

WITNESS: I have got no answer your worship.

COURT: Here in court what do you think the court can do with a person who is not telling the truth?

WITNESS: That person would be arrested.

COURT: And what would happen to him or her?

WITNESS: I do not know your worship.

COURT: You must try and attend church regularly and listen carefully to what they say about God.

WITNESS: Correct.

COURT: Here in court we expect people to tell the truth, nothing else but the truth. Those who deliberately lie to us can be charged and prosecuted and they can be sentenced either it involves a fine or you can be cautioned and discharged, you can be send to an imprisonment term or the question of a fine and imprisonment sentence can be combined.

WITNESS: It is understood your worship.

COURT: So if you lie after having undertaken to tell the truth if you are admonished or you take an oath once you lie you can be prosecuted.

WITNESS: I will only speak the truth your worship.

COURT: Let us admonish her to tell the truth, nothing else but the truth.”

[12] The second witness to testify was A[...]. Again the following appears on the record before she could testify:

“COURT: *Your age madam?*

WITNESS: 17 years your worship.

COURT: Do you know what is meant by telling the truth?

WITNESS: Yes.

COURT: Do you attend school?

COURT: What grade are you doing?

WITNESS: Grade 9.

COURT: Do you attend church?

COURT: You know that God punishes those who are not telling the truth after swearing by his name?

WITNESS: I do your worship.

COURT: How do you think he will punish those for doing this?

WITNESS: Your worship if someone is not telling the truth God is going to punish that person.

COURT: In court if you do not tell us the truth we can also punish you in a way that you may be criminally prosecuted you may be sentenced to an imprisonment term or you may be fined do you understand?

WITNESS: Yes.

COURT: Swear her in.”

[13] The last witness was Jabu. The following appears on the record as well:

“COURT: J[...] B[...] how old are you?”

WITNESS: 17 Years.

COURT : And do you attend school?

COURT: What Grade are you doing? Nine?

WITNESS: Grade 9 your worship.

WITNESS: Yes I know.

COURT: (Inaudible)

WITNESS: No objection your worship.

COURT: (Inaudible) and that person swears by the name of God that person will be expected to tell us the truth, nothing else but the truth?

WITNESS: Correct.

COURT: And are you also aware that there may be a religious sanction if you swear by the name of God and the next thing you did not become honest?

WITNESS: Yes.

COURT: What sanction do you think God can impose on those who are not honest, who are not telling the truth?

WITNESS: God will punish them and furthermore they will not go to Heaven.

COURT: I see. Even that can be true but also even in court if you do not tell the truth and you swear by the name of God we can still prosecute you, you can be found guilty, you can be sentenced and you can also be fined do you understand?

WITNESS: I know that.

COURT: You know that. Right let us just swear her in.”

- [14] A close reading of the questions referred to above in respect of all the witnesses does indicate that the Regional Magistrate did establish from the witnesses what it means to tell the truth. In paragraph [167] of the case *Director of Public Prosecutions Transvaal v Minister of Justice and Constitutional Development and others*, supra Ngcobo J went on further to state that “The purpose of questioning a child is not to get the child to demonstrate knowledge of the abstract concepts of truth and falsehood. The purpose is to determine whether the child understands what it means to speak the truth.”
- [15] The Regional Magistrate went to great lengths to ensure that the witnesses understood what it meant to tell the truth. He even went to the extent of asking them about God and satan. The response from the witnesses was enough for the court a quo in the exercise of his discretion, to continue to have them admonished. There can be no doubt that the witnesses understood what it meant to speak the truth and as such there was no misdirection by the court a quo accepting their evidence.

AD SENTENCE

- [16] The submissions by the Appellant were that the sentence of life imprisonment is shockingly inappropriate in that the Appellant was only twenty seven (27) years old and a first offender. Furthermore, that the court a quo erred in finding that the complainant was sixteen (16) years old when there was no authentic proof to that effect. This, despite the evidence of the mother that the complainant was sixteen (16) years old.
- [17] In *S v Bogaards* 2013 (1) SACR 1 (CC), the Constitutional Court held:
- “[41] Ordinary, sentencing is within the discretion of the trial court. An appellate court’s power to interfere with sentence imposed by courts below is circumscribed. It can only do so where there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it. A court of appeal can also impose a different sentence when it sets aside a conviction in relation to one charge and convicts the accused of another”*

- [18] In the matter of *Marota v The State* (300/15)

- [2015] ZASCA 130 (28 September 2015) Petse JA stated as follows:

“The imposition of sentence is primarily a matter of judicial discretion by a sentencing court save where the legislature has decreed otherwise. This requires that a sentencing court should have regard to, inter alia, the peculiar facts of each case, the nature of the crime and the personal circumstances of the offender. (See eg: S v Zinn 1969

- (2) SA 537 (A) at 540G). Accordingly, a court of appeal will interfere with the exercise of such discretion only on limited grounds.”

See also: *S v Malgas* 2001 (1) SACR 469 (SCA)

- [19] Rape is a very serious offence. The appellant in this matter was known to the complainant and he took advantage of that. He assaulted her and the sister when they sought refuge from him to get away from the family squabble. He knew that the complainant was vulnerable and he failed to protect her. The Appellant was staying in the same area with the complainant and he surely knew how young the complainant was. The complainant also testified that they used to address the Appellant as 'brother' and he called their mother 'grandmother'. This relationship that the complainant and the Appellant had was a close one. That should have prevented the Appellant from taking advantage of her. His actions leaves much to be desired.
- [20] At the time of sentence the Appellant was twenty eight (28) years old, unemployed and a first offender. The offence, the personal circumstances of the appellant and the interest of society should be balanced in determining an appropriate sentence. The Regional Magistrate correctly found that there are no substantial and compelling circumstances present in this case which warrants a deviation from imposing the prescribed minimum sentence. There is no reason for this Court to interfere as there was no misdirection.

Order

[21] Consequently, the following order is made:

The appeal against conviction and sentence is dismissed.

J T DJAJE

JUDGE OF THE HIGH COURT

I agree

R D HENDRICKS

DEPUTY JUDGE PRESIDENT OF HIGH COURT

NORTH WEST DIVISION, MAIKENG

APPEARANCES

DATE OF HEARING

: 07 FEBRUARY 2020

DATE OF JUDGMENT

: 13 FEBRUARY 2020

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