15/12/2017

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION - PRETORIA

Case No.: A301/2016

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

15/12/2017
DATE

SIGNATURE

In the matter between:

SHADRACK NOKA Appellant

and

THE STATE Respondent

JUDGMENT

MNGQIBISA-THUSI J:

[1] The appellant is appealing against the decision of the court *a quo*, handed down on 18 April 2016, to convict him on a charges of kidnapping (count 1) and rape (count 3).

[2] The appellant was initially also charged with assault with intent to cause grievous bodily harm (count 2) to which he pleaded guilty and was sentenced to 18 months imprisonment.

[3] It is common cause that before the relevant incident occurred, the appellant and the complainant were involved in a romantic relationship. Further that the appellant had assaulted the complainant and that the complainant and the appellant had had sex. The issues which the court a quo had to determine were whether:

3.1 the appellant had forcefully dragged the complainant to his house; and

3.2 the appellant had sex with the complainant without her consent.

[4] The appellant is appealing against his conviction on the ground that the court *a quo* misdirected itself in finding that the State had proven his guilt beyond a reasonable doubt as the complainant was a single witness with regard to the rape, that her evidence was full of contradictions and improbabilities, and should have been rejected. Further that the complaint's evidence was not corroborated even by the medical evidence submitted.

[5] As appears from the J88 admitted during the trial, the medical examiner concludes that there are no vaginal injuries but that "absence of genital injuries does not exclude sexual assault".

[6] The complainant's version is that on 23 September 2015 she had gone to a tuck shop where she met the appellant who appeared to be drunk. The appellant accosted her, held her by her hand and dragged her to his house where, after locking the bedroom door, had ordered her to undress and had sex with her without her consent. It is the complainant's evidence that whilst raping her, the appellant was assaulting her by slapping and throttling her. After the first rape the appellant went to the kitchen to look for cigarettes which he did not find. He returned to the bedroom and continued to rape her again. At some stage the appellant had left the bedroom and the complainant tried to escape through an open window but was stopped from leaving by the appellant. However, the complainant testified that she managed ultimately to escape through a window after looking the door of the bedroom and taking the key with her. On reaching home her daughter with whom she stays was not there. She took a bath and went to bed. The following morning (24 September 2015) she took a bath and went to the police station to report the incidents of the previous night. The complainant testified that even though her daughter was at home when

she left in the morning for the police station, she did not tell he about the alleged rape as the daughter was still sleeping when she left.

[7] With regard to the kidnapping charge the complainant testified that as the appellant dragged her to his house, there was milling crowd of youngsters who witnessed the incident.

[8] Constable Casey Thomas Matshete confirmed that the complainant came to the police station on 24 September 2915 and reported that the appellant had assaulted and raped her. He testified that the complaint's neck had bruises and one of her eyes was swollen. According to Constable Matshete, the complainant further informed him that the appellant was her boyfriend but that they were no longer in a relationship.

[9] The appellant's version is that at around 19h30 on the relevant day the complainant came to his home and had consensual sex after drinking alcohol. Later he discovered that an amount of R300.00 which was under a pillow complainant was no longer there. An argument ensued between himself and the complainant. The complainant ran away, taking the key to his house. The complainant returned later and he assaulted her. He then gave the complainant R200.00 for electricity.

With regard to the money stolen the appellant presented different versions. Although initially the appellant had testified that he kept R100 after giving the complainant R200 for electricity, he testified that he never recovered the R300. Under cross examination the appellant testified that he had given the complainant R100 to buy beers.

[10] In convicting the appellant of kidnapping and rape the court a quo accepted the evidence of the complainant as true[1].

[11] In terms of section 208 of the Criminal Procedure Act an accused can be convicted on the evidence of a single witness if that evidence is clear and satisfactory in all material respects and rejected the appellant's evidence as false.

[12] In *Mahlangu v S*[2] the court stated that:

"[21] The court can base its finding on the evidence of a single witness as long as such evidence is substantially satisfactory in every material respect or if there is corroboration. The said corporation need not necessarily linked the accused to the crime".

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[1] In *R v Dhlumayo and Another* 1948 (2) SA 677(A) at 705 the court stated that the trial court's findings of fact and credibility are presumed to be correct because the trial court has had the advantage of seeing and hearing the witnesses, and is in the best position to determine where the truth lies.

[2] 2011 (2) SACR 164 (SCA).

[13] I am of the view that the evidence of the complainant as to the events of the day in question was clear and satisfactory in every material respects and is sufficient proof beyond reasonable doubt. I am satisfied that the court *a quo* in dealing with the evidence of the complainant, the court a quo was alive to the fact that she was a single witness with regard to the rape.

[14] I am of the view that the court *a qou* did not misdirect itself in accepting the evidence of the complainant and rejecting the appellant's version. Nothing turns on the fact that there is no evidence of vaginal injuries to confirm the rape or the fact that the complainant did not report the rape to her daughter. She has given a plausible explanation as to the reason she did not inform her daughter about the rape. The contradictions in her evidence are not as material as to render her evidence unreliable. As indicated in *S v Mkhothle*[3] :

> "Contradictions per se do not lead to the rejection of a witness' evidence. They may simply be indicative of an error. Not every error made by a witness affects credibility. In each case the trier of fact has to make an evaluation, taking into account such matters as the nature of contradictions, their number and importance and their bearing on other parts of the witness' evidence."

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[3] 1990 (1) SACR 95 (AD).

[15] I am therefore of the view that the appeal against conviction ought to be dismissed.

[16] On the issue of sentence appellant's counsel argued that the sentence imposed was disproportionate to the offence committed.

[17] The imposition of sentence falls within the discretion of the trial court and an appeal court may only interfere with a sentence if it is satisfied that the trial court discretion in sentencing was not judicially and properly exercised[4].

[18] From the evidence of the complainant it appears that the complainant was raped more than once. In terms of the charge sheet, the appellant was charged with rape read with the provisions of section 51 and schedule 2 of the Criminal Law Amendment Act[5]. In terms of the appellant's conviction, his sentence would fall within the purview of section 51(1)(a) of the Act read with Part 1 of Schedule 2 which prescribes a minimum sentence of life imprisonment for multiple rapes. From the record it does not appear that the court was alive to the fact that it convicted the appellant for multiple rapes. In sentencing the appellant the court found no substantial and compelling existed

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[4] *S v Pieters* 1987 (3) SA 717 (A) at 727 F – 728 C.

[5] Act 105 of 1997.

justifying the imposition of a sentence less than the prescribed minimum. It appears that the court a quo sentenced the appellant, as a first offender, in terms of section 51(2)(b) read with Part III of Schedule2 of the which provides that:

> "Notwithstanding any other law but subject to subsections (3) and (6), the regional court or a High Court shall-
>
> (a) if it has convicted a person of an offence referred to in Part III of schedule 2, sentence the person, in the case of-
>
> (i) a first offender, to imprisonment for a period not less than 10 years".

[19] Notwithstanding the misdirection of the court *a quo* in sentencing the appellant, I am of the view that, contrary to the State's submission that the matter be remitted to the court a quo for re-sentencing, the appellant should be granted the benefit of the section under which he was sentenced particularly as his appeal on sentence is premised on the sentence actually imposed.

[20] It is the appellant contention that the sentence imposed is disproportionate to the offence committed in that the court a quo misdirected itself in not finding substantial and compelling circumstances justifying a lesser sentence if one takes into account that the appellant was in custody for six months prior to the finalisation of his trial. Further, it was submitted that the court a quo erred in

overemphasising the seriousness of the offence and the interests of the community as against the appellant's personal circumstances.

[21] At the time of the commission of the offence, the appellant was 45 years old, married with four minor children, was employed, and had gone up to standard 8 at school. Furthermore, the appellant had been in prison for approximately six moths prior to his sentence. Although the appellant had previous convictions, he was treated as a first offender as those were committed more than 10 years prior to the current conviction.

[22] In imposing the sentence of 10 years imprisonment, the court a quo took into account the purposes of sentence, the seriousness of the offence, the personal circumstance of the appellant and the interests of the community. The court took into account the aggravating factors present and came to the conclusion that there were no substantial and compelling circumstances justifying a sentence lesser than the prescribed minimum.

[23] I am of the view that the court a quo did not misdirect itself in not finding that substantial and compelling circumstances exist justifying a deviation from the prescribed minimum sentence. Taking into account the seriousness of the offence, the fact that the complainant was raped

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

1. The appeal against conviction is dismissed.

2. The appeal against sentence is dismissed.

NP MNGQIBISA-THUSI
JUDGE OF THE HIGH COURT

I agree:

P PHAHLANE
Acting Judge of the High Court

Appearances

For the Appellant: Adv LA Van Wyk
Instructed by: Pretoria Justice Centre
For the Respondent: Adv DWM Broughton
Instructed by: DPP