(Inlexso Innovative Legal Services) / cdt

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO: A103/2019

DATE: 2019-11-18

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED

SIGNATURE

DATE: 18.11.19

In the matter between

J M KAUSI Appellant

and

THE STATE Respondent

J U D G M E N T (Leave to appeal)

SWANEPOEL, AJ: The appellant was charged with rape in the regional magistrate's court. He was legally represented and pleaded guilty. He was found guilty and sentenced to life imprisonment. The learned magistrate could not find any substantial and compelling circumstances that would justify the imposition of a lesser sentence.

The appellant appeals both his conviction and his

sentence. The basis of his appeal on the conviction is this: the evidence of the probation officer was led at the sentencing stage of the trial. The probation officer's report recorded the following:

> "He indicated that since 2010 he consumed alcohol during weekends and when under the influence of alcohol, he easily gets into fights. He added that on the day in question he was not in a sober sense as he had been drinking since morning."

In a further passage the following is stated by the probation officer:

> "He agreed to the prosecution's statement as outlined. He said that he did not consider his unlawful actions when committing the offence as his actions were driven by alcohol. The accused is taking full responsibility for his actions."

Counsel for the appellant contended that these passages in the probation officer's report showed that there was a contradiction between what was stated in that report and the guilty plea that had been recorded by the Court.

Citing *S v Nixon* 2002 SACR 79 (W), Counsel for the appellant contended that the learned magistrate, upon hearing the evidence of the probation officer, was required to further investigate these matters concerning the sobriety of the appellant and change the plea to not guilty.

The failure by the learned magistrate to do so it was submitted vitiates the soundness of the conviction in respect of the rape charge.

The passages in the probation officer's report to which I have referred must be understood in the light of what was said by the appellant in explanation of his plea of guilty.

What appears from this statement is that the appellant saw a child then four years old, playing on the street. He asked her to come along and walked with her to a local park in Moletsane. I then quote from what was recorded by way of his statement:

> "At the park, I gave her a Polony sandwich. Therefore I undressed her of her clothes and her panty. I admit that I undressed her. I inserted my penis into her vagina. I then had sexual intercourse with the victim until I ejaculated inside her vagina.
>
> I admit that immediately after I had finished having sexual intercourse with the victim, two ladies came up to us in the park and took the victim away. I admit to that of the said day the victim was the person under the age of 16 and as such could not consent to sexual intercourse.
>
> I admit that on the said date, I was aware that my conduct was unlawful, intentional and is

punishable by law. I admit that on the said date, the offence occurred within the jurisdiction of the above honourable court."

When one reads these passages, it is perfectly plain that the appellant executed a well-orchestrated plan to lure a four year old child into a park and there rape her. There is nothing from these passages which would indicated any inability to appreciate the nature of his conduct and its consequences.

Quite the contrary, his actions are planned, deliberate and carefully executed. For a magistrate to investigate the matters raised further, would have required some factual material that would cause some doubt to arise in respect of the veracity of what was said by the appellant in his statement in terms of section 112.

What is simply said concerning his state of sobriety simply adduced no relevant facts that would warrant a reconsideration of what was said by way of the plea of guilty and I can therefore find no reason to interfere with the conviction that was pronounced upon the appellant.

The obligation of the magistrate was simply not triggered by reason of the statements made through the probation officer in respect of the consumption of alcohol by the appellant.

As to the question of sentence, Counsel for the appellant they reminded the Court of the well-known authority of *S v Malgas* 2001 (1) SACR 499 (SCA) and said that it was necessary to consider all the factors relevant to an appropriate sentence in the round.

The two matters to which particular reference was made was a showing of remorse by the appellant and his plea of guilty. Those factors were taken into account, but it must be recalled that this was a planned rape of a four year old child in respect of which the appellant was caught red handed.

In these circumstances the gravity of his conduct is such that I can find no reason why the magistrate erred in holding that there were no substantial and compelling circumstances. For these reasons there is no warrant to interfere either with the findings of the magistrate as to conviction, nor as to sentence. In consequence the appeal is dismissed.

.....

UNTERHALTER , J

JUDGE OF THE HIGH COURT

DATE: 18.11.19.....