IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION. PRETORIA

CASE NO: A12/2014

DATE: 2014-06-02

REPORTABLE

OF INTEREST TO OTHER JUDGES

THE MAGISTRATE

Private Bag X013

BENONI 1500

Lower Court Case nr: SH137/12 (98/13)

In the appeal of

VUSI MAXWELL MNGUNI Appellant

and

THE STATE Respondent

JUDGMENT

J.W. LOUW J:

The appellant was charged in the Regional Court, Benoni on a count of rape in contravention of Section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007 (the Act) allegedly committed on 18 March 2012 (count 1). It was alleged that the victim was a 20 year old mentally retarded girl and that the provisions of Section 51 of the Criminal Law Amendment Act, 105 of 1997, applied. The appellant was convicted on the charge and sentenced to life imprisonment which is the minimum sentence

prescribed in terms of Section 51 of Act 105 of 1997 for the rape of a person who is mentally disabled as defined in Section 1 of the Act.

The appellant appeals against his convictions and sentence, leave having been granted on petition to this court. He was also charged and convicted on three further counts of housebreaking with intent to steal, theft of a motor vehicle and escaping from custody. The sentences on those convictions were ordered to run concurrently with the sentence of life imprisonment imposed in respect of count 1. All the sentences were ante-dated to the date of the appellant's arrest, being 14 February 2012. The appeal is directed only at the conviction and sentence in respect of count 1.

The definition of a person who is mentally disabled in Section 1 of the Act reads as follows:

> "*A person who is mentally disabled means a person affected by any mental disability including any disorder or disability of the mind to the extent that he or she at the time of the alleged commission of the offence in question was -*
>
> *(a) unable to appreciate the nature and reasonably foreseeable consequences of a sexual act;*
>
> *(b) able to appreciate the nature and reasonably foreseeable consequences of such an act, but unable to act in accordance with that appreciation;*
>
> *(c) unable to resist the commission of any such act; or*
>
> *(d) unable to communicate his or her 10 unwillingness to participate in any such act.* "

The onus was therefore on the state to prove that the victim was mentally disabled as contemplated in one of the four categories mentioned in the definition. The nature of the mental disability required to be proved is therefore specific. It is not sufficient for the state to merely prove that the victim is mentally disabled or retarded or challenged. The evidence presented by the state in this regard in my view fell short of what was required.

Mr BA Phangela, a clinical psychologist who examined the victim, prepared a report which he read out in court. His assessment of the victim reads as follows:

> *"Due to* (the victim's) *poor ability to understand instructions, her slow working pace and difficulty understanding relationship between figures and patterns, a formal psychological assessment could not be undertaken. A clinical assessment indicates that* (the victim) *is mentally retarded and appears to be functioning below the age of 13 years. This indicates that* (the victim's) *ability to distinguish between right and wrong is compromised to the age below 13 years."*

Mr Phangela's evidence did not address the requirements of the definition of a mentally disabled person as defined in the Act. The magistrate was not impressed by the evidence of Mr Phangela. She put critical questions to him during his evidence in court and said the following about his evidence in her judgment.

> "*The court can be led by this expert opinion, but it must be motivated and what was particularly quizzical to this court was where he got this age of 13 years from. The court enquired from him that a child of twelve can count at infinitum, he said yes and that a child even much younger than that will distinguish between all the colours of the rainbow, which* (the victim) *could not and a child of twelve will know what is the difference between a lie and the truth and all of this is inconsistent with his assessment results.*
>
> *A child of thirteen is a child that is basically a child adult with all the abilities of an adult. Mr Phangela, was under the impression that if a child is under the age of thirteen, that a child could not give consent to sexual intercourse. Off course he is wrong. "*

The next witness who testified for the state in this regard was Ms Anadel Mountford, a registered nurse who specialises in sexual assault and physical assault examinations. She testified that she was told by the victim's sister that the victim was severely mentally challenged, which she observed herself. The victim could not speak to her properly and she had a small head. The day she examined the victim for the alleged rape, she did not want to speak to them and it was a "*hell of a story to get her just to communicate with us."*

When asked in cross-examination whether an ordinary person who just meets the victim would gather that she was mentally challenged, she said they might or might not. Ms Mountford is not an expert in this field and her evidence in any event also did not address the requirements of the definition of a mentally disabled person in the Act.

In my view the trial court erred in convicting the appellant on count 1, but that does not mean that the appellant should go scot-free. I have no doubt that the appellant raped the victim and that his evidence that she consented was correctly rejected by the trial court. The evidence of Ms Mountford in this regard was overwhelming. She described in detail the injuries of the victim's gynaecological injuries when she examined her. The most serious injury was a tear which she found that ran through from the posterior fourchette to the fossa navicularis. Such an injury, she said, does not occur even during rough sexual intercourse and usually only happens during childbirth. The victim was bleeding from her vagina. There were even suggestions that the victim had been raped anally, although this was not part of the charge against the appellant. In my view the trial court should have convicted the appellant of rape, which is a competent conviction on the charge on which the appellant was arraigned.

There clearly were no substantial or compelling circumstances which could have justified a lesser sentence than the prescribed minimum sentence of 10 years imprisonment on a conviction of rape. That is therefore the sentence which the trial court should in my view have imposed.

KEIGHTLEY AJ:

I agree. I would like to add something to the judgment. It has to do with the issue of the correct approach that should be followed at trial in circumstances where an accused person is charged with the crime of rape of a mentally disabled person.

This is an issue that is raised particularly in this case because, as the record reflects in this matter, the Magistrate in fact suggested that the victim be called into court for everyone to see, so that, apparently, some sort of lay person's assessment could be made of her mental abilities or disabilities.

What this case then raises is the particular question of what the prosecutor and presiding officer need to do to ensure that the issue of the mental disability of the complainant is dealt with properly. In this regard it is important to bear in mind that the Criminal Law (Sexual Offences and Related Matters) Amendment Act, Act 32 of 2007, which I shall refer to as the Act, was enacted to, *inter alia:*

> "Address the particular vulnerability of persons who are mentally disabled in respect of sexual abuse."

In addition, the Act recognises the need to minimise secondary victimisation and traumatisation for the victims of sexual offences. There is reference to this in the long title, as well as in many of the objectives of the Act.

These objectives must be seen in the context of a constitutional guarantee of the rights to, among others, privacy, dignity and the right to freedom and security of the person. These rights carry with them a constitutional obligation on all organs of state to respect, protect, promote and fulfill them. Public prosecutors fall under the rubric of organs of state and accordingly they are required to satisfy these obligations in respect of the complainant in a case such as the present. Courts, in turn, are bound by the Bill of Rights, and must conduct themselves in a manner consistent with it.

The National Director has in terms of Section 66 of the Act published directives on the prosecution of sexual offences. These directives require public prosecutors amongst other things to do the following: To adopt a victim-centred approach, to give priority to the emotional and psychological wellbeing of the complainant, to make every effort to reduce secondary traumatisation, and to make additional efforts in this regard in respect of mentally disabled complainants.

The directives also oblige prosecutors to determine whether any expert evidence will be required, including expert evidence of a psychological nature. Critically for this case, they must ensure that all statements in the docket, and this would obviously also include expert statements and reports, are "accurate and complete."

The present case demonstrates a clear shortfall in achieving these objectives. In the first place, the public prosecutor ought to have checked the expert report of the psychologist before trial to ensure that it correctly addressed what needed to be addressed, namely, whether the complainant was mentally disabled as defined in the Act and, hence, whether she was able or not to consent to sexual intercourse in terms of Section 57.

The expert report failed to do this. Instead, it concluded quite unhelpfully and inappropriately that the complainant's "*ability to distinguish between right and wrong was compromised."* This conclusion does not address the question of mental disability under section 1 of the Act. It refers instead to the competence of an accused person to stand trial.

The failure of the state to secure appropriate psychological expert evidence led to a further violation of the complainant's rights. The presiding magistrate called the complainant into court, so that she, that is the presiding magistrate, as well as the prosecutor, the appellant, who was sitting in court, and his legal representative could see for themselves whether the complainant was mentally disabled.

Not only is it quite irregular for the court to try to formulate an opinion in this manner, but it is also fundamentally contrary to the complainant's rights to privacy and dignity. She was effectively put on display and discussed as an object by the magistrate and others involved in the trial.

This was all captured for posterity in the court transcript. The presiding magistrate and the public prosecutor ought not to have allowed this to happen. Their conduct amounted to a violation of their *10* constitutional obligations to ensure that the complainant's rights to privacy, bodily integrity and dignity were respected and protected.

This situation could have been avoided had they instead proceeded as follows: In the first instance, the public prosecutor should have ensured the accuracy of the psychological report and ensured that it was fit for purpose well in advance of the trial.

Secondly, having failed in this regard, the public prosecutor should at least have sought to lead the evidence of the psychologist on the real issue at hand, namely, was the complainant's mental disability such that it could be found to fall within one of the four categories of the *20* definition of a person who is mentally disabled as defined in section 1 of the Act, as outlined above.

And thirdly, even failing this, it fell to the presiding magistrate to question the psychologist in order to elicit

his expert opinion on these issues, rather than what the magistrate did in this case, which was to castigate the psychologist and his report and to dismiss the report as being useless.

Had any of this been done, the complainant's rights would have been properly protected and it would have been unnecessary to subject both her and her family to secondary victimisation and traumatisation by parading her in front of the court.

It is to be hoped that the National Prosecuting Authority, public prosecutors and the magistracy will take heed of the shortcomings in the manner in which the expert evidence was dealt with in this case in order to avoid similar replications in the future.

J.W. LOUW J: I therefore propose that the conviction and sentence of the trial court on count 1 be set aside and substituted with the following:

ORDER

1. On count 1, the accused is convicted of rape and sentenced to 10 years' imprisonment.

2. All four sentences shall run concurrently and are ante-dated to 14 February 2012.

KEIGHTLEY AJ: I agree.

J.W. LOUW J: It is so ordered.