

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: A470/2014

23/10/2014

(1) REPORTABLE: **NO**

(2) OF INTEREST TO OTHER JUDGES: **NO**

In the matter between:

SAMUEL RAMONYATHI

APPELLANT

and

THE STATE

RESPONDENT

J U D G M E N T

Date of Hearing: 16 OCTOBER 2014

Date of Judgment: 23 OCTOBER 2014

KUBUSHI, J

[1] The appellant, a 34 year old male person, presently serving a sentence of life imprisonment was convicted by the regional court Pretoria on a charge of the rape of a girl under the age of 16 years. It being alleged that the appellant raped the complainant on several occasions over a period of six years, from 2004 to October 2010. The trial court found him guilty of such rape, that is, having raped the complainant on numerous occasions between 2004 and October 2010 and sentenced him to life imprisonment. The trial court refused to grant him leave to appeal the conviction and sentence. However, on petition to this court, he was granted leave to appeal both conviction and sentence. He is thus before us appealing both his conviction and sentence.

[2] Certain irregularities emanating from the record, as to the conduct of the case by the appellant's legal representative during trial, created an impression of incompetence and/or lack of experience on the part of the legal representative. We were of the view that this issue required consideration in order to determine whether such incompetence or inexperience, if any, does not render the trial unfair. The issue was not raised as one of the grounds of appeal nor was it raised in the parties' heads of argument. When the parties appeared before us on 13 October 2014, the matter could not be proceeded with and was postponed to 16 October 2014. The parties were afforded an opportunity to file supplementary heads of argument addressing this issue. The respondent's counsel, *per* request, was granted leave to address the court on the issue without filing supplementary heads of argument.

[3] In his supplementary heads of argument, the appellant's counsel raises the following as examples of the inadequacy of the appellant's legal representative: the manner in which he presented the appellant's plea explanation; his inability to deal with a witness' written statement; his failure

to put appellant's version to the complainant during cross-examination. The submission by the appellant's counsel is that the cumulative effect of all these facts clearly demonstrates that the appellant's defence was improper, ineffective and incompetent which made his trial unfair. He consequently requested us to set aside the appellant's conviction and sentence.

[4] The respondent's counsel, on the other hand, contends that it cannot be said that the appellant had an unfair trial due to the inexperience of his legal representative. According to him, the plea explanation was properly put before the trial court and the discrepancies, which cropped up, might have been occasioned due to the interpretation; the witnesses were properly cross-examined. Even though the legal representative had a problem with the witness statement, however, at the end of the day the statement was eventually proven; he was also able to lead the appellant in chief. Of importance to the respondent's counsel is that the duty is on the appellant to prove that he was not properly represented but appellant did not take this issue up in his appeal which might mean that he was satisfied with the representation.

[5] It has been held that the right to legal representation cannot be a right to anything but effective legal representation. Whatever else, effective legal representation could connote; it denotes that the representative must act in the best interest of his or her client, while still ensuring that his or her inherent duty towards justice is maintained.¹

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See *S v Mofokeng* 2004 (1) SACR 349 (WLD) on 355

[6] It has also been stated that the constitutional right to counsel must be real and not illusory and an accused has, in principle, the right to a proper, effective or competent defence. Incompetent lawyering can wreck a trial, thus violating the accused's fair trial right. The right to legal representation therefore means a right to competent representation – representation of a quality and nature that ensures that the trial is indeed fair.²

[7] We were referred by the appellant's counsel to numerous reported cases, where the principle is set out that each and every accused is entitled to a fair trial. The principle is clear that ineffective and improper defence by a legal representative vitiates a trial as being unfair.

[8] Having heard counsel, I am of the view that the irregularities committed by the appellant's legal representative at the trial are not material as to render the trial unfair. With the guidance of the trial court the legal representative did represent the appellant properly and effectively. The plea explanation was properly done and the witness' statement complained of was handed in and forms part of the record. The reading of the state's evidence leads to the conclusion that the state's witnesses were extensively cross-examined. In cross-examination they were referred to their respective statements made to the police, which statements were eventually handed in as exhibits. On the whole no failure of justice was shown to exist.

²

See *S v Halgryn* 2000 (2) SACR 211 (SCA) para [14]

[9] As regards the merits, the appellant raised various grounds of appeal but I shall deal only with those traversed by his counsel at the hearing of the appeal.

[10] Firstly, I find the appellant's argument that the state's evidence does not support the evidence that the complainant was raped, in that the complainant sustained no vaginal injuries, her evidence was not corroborated, she failed to report the rape, and that her reaction after she eloped is not consistent with that of a person who has been raped, to be immaterial, based on the following:

10.1 It is common cause that the appellant admitted the correctness and contents of the medical report (the J88 form). In terms of the said J88 form, the doctor examined the complainant and found no abrasions, bruising or lacerations on any part of her vagina. However the vagina admitted two fingers, which led to the doctor concluding that the 'findings fit in with previous vaginal penetration'. The doctor's findings in my view support the complainant's version in not finding any visible injuries. It should be remembered that the complainant's evidence is that she was raped over a period of time (six years and on a continuous basis – almost every two weeks) and the last such rape happened in October 2010 and the examination took place on 18 November 2010. There could therefore be no vaginal injuries to speak of. Even at that age and having been penetrated over such a long time, possibilities of visible injuries would be non-existent. This evidence clearly corroborates the evidence of the complainant, and renders the evidence of the appellant less probable.

10.2 The complaint's failure to report the rape is, in my view, reasonable. According to the uncontroverted evidence of the complainant, when she was first raped she was in grade 3 and was only 8 years old. According to her, at that time she did not know what the appellant did to her implied. She only became aware that the appellant was raping her when she was in grade 8. The first person she could have reported the rape to was her mother but she did not even have to report the rape to her because twice her mother witnessed the rape and did nothing about it. The appellant's argue that she should have reported the rape to her biological father at the time when she eloped. However, the evidence shows that she was not staying with her father and did not even know where her father was. She had to enquire from one of her aunts who gave her the phone number. How then would it be expected that the first thing she would say to her father was that she was being raped. To me, the fact that she informed her father that she was being ill-treated was enough because as a child she expected that her father would remove her. She eventually left on her own and when she was asked to go back she had the courage to tell her other aunt, the first state witness, about the rape. Consequently, I would hold that the submission by the appellant's counsel that the complainant's reaction after eloping was not consistent with that of a person who has been raped to be fallacious.

[11] Secondly, the appellant's submission is that the trial court erred in making credibility findings in favour of the complainant. I find such assertion to be misplaced on the following basis:

11.1 It is established law that a court of appeal rarely interferes with the credibility and factual findings of a trial court. The powers of a court of appeal to interfere with the findings of fact of a trial court are limited. In the absence of any misdirection the trial court's conclusion, including the acceptance of a witness' evidence, is presumed to be correct on the basis that the trial court has the advantage of seeing, hearing and appraising a witness.³

11.2 Having studied the record I could not find evidence that indicates that the trial court misdirected itself in any way in its credibility and factual findings and my view is that such findings must stand. The record indicates that a proper approach to the two mutually destructive versions of the parties was followed by the trial court. It applied its mind not only to the merits and demerits of the state and the defence witnesses but also to the probabilities of the case. It was only after applying its mind as such that it found the version of the appellant to be not reasonably possibly true and as such concluded that the guilt of the appellant was proved beyond reasonable doubt. I would therefore suggest that the appeal on conviction be dismissed.

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See S v Francis 1991 (1) SACR 198 (A)

[12] The appellant is convicted of the rape of a minor girl under the age of 16 years. In terms of s 51 of the Criminal Law Amendment Act 105 of 1997, a person convicted of such an offence should be sentenced to imprisonment for life unless there are substantial and compelling circumstances which justify a lesser sentence. It appears from the record that the accused was informed, and it was thoroughly explained to him, on the first date of his appearance about the minimum sentence provisions. He was from the outset informed of the possibility of being jailed for life should he be found guilty.

[13] Even on this point, the appellant raised various grounds of appeal. I find it not necessary, for purposes of this appeal, to traverse the various grounds save merely to record that the common thread running through all of them is that the trial court under-emphasised the personal circumstances of the appellant.

[14] On perusal of the record it is clear that the trial court considered the seriousness and nature of the offence, the interest of society and of the complainant. It also considered the personal circumstances of the appellant in detail. It however, found no substantial and compelling circumstances warranting a lesser sentence, it as a result sentenced him to life imprisonment.

[15] The appellant's counsel in argument before us emphasised the fact that the rape in this instance is not what is commonly referred to as the worst kind of rape because the complainant suffered no injuries and there was no evidence of any psychological damage resulting from the rape. The argument is in my opinion misplaced.

[16] While regretting that there were no victim impact statements, the court *S v Matyityi*⁴ did not regard the lack of specific evidence addressing the emotional consequences of the ordeal for the complainant, as constituting a substantial and compelling factor justifying a sentence other than life imprisonment for the rape. The court was willing to infer the likely impact on the rape complainant from the other evidence.

[17] Similarly in this instance, although there is no evidence of any physical injury or trauma suffered by the complainant, it cannot be said that this was not the worst kind of rape. To me, this rape should be placed amongst the very worst rapes – if there is indeed something like that. Evidence of psychological damage can easily be inferred from other evidence. Her life was what the trial court referred to as ‘a life of terror and hell’. She was exposed to this rape from the early age of eight years. For six years she was continuously raped. According to the evidence she was raped almost every two weeks. She was continuously exposed to an adult person’s nakedness: in her evidence the complainant said the appellant undressed in her presence and the mother also found him naked on top of her. She was being continuously threatened with being assaulted and leaving in fear of this man. The complainant testified that he slapped her more than once for refusing to have sex with him. What other evidence is required to show that she was traumatised? It is true that at the time when she was examined by the doctor no vaginal injuries were found. But that does not exclude the probability that she was never injured. The first time, and most probably a few occasions thereafter, she must have suffered, at the very least, injuries inherent in the rape of a child of that age. It is thus apparent that the moral blameworthiness of the appellant, in this instance, overshadows his personal circumstances. The trial court was correct therefore to find no substantial and compelling circumstances which warranted deviation from the prescribed minimum sentence.

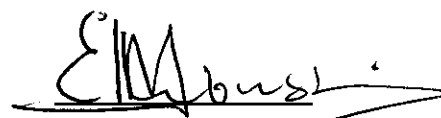
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2011 1 SACR 40 (SCA) para [20]

[18] The finding of the trial court, which I confirm, is that the appellant raped the complainant continuously for a period of six years. From the evidence it could not be ascertained how many times she was raped. When asked she stated that she does not know because it happened many times – at least twice a week all through that time. The cumulative effect of the rape warrants a sentence of life imprisonment as meted out by the trial court. The sentence imposed is, in the circumstances, appropriate and justified and I would recommend that the appeal on sentence be dismissed as well.

[19] In the premises I would propose the following order:

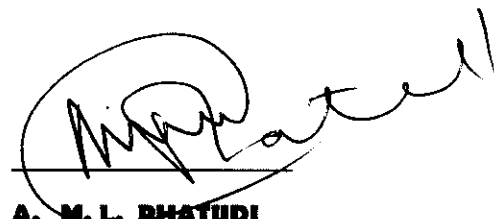
- 19.1 The appeal on both conviction and sentence is dismissed.
- 19.2 The conviction by the trial court is confirmed.
- 19.3 The sentence imposed by the trial court is confirmed.



E. M. KUBUSHI,

JUDGE OF THE HIGH COURT

I concur and it is so ordered



A. M. L. DHATUDI

JUDGE OF THE HIGH COURT

Appearance:

On behalf of the appellant:

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On behalf of the respondent:

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