IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Reportable: No
Of interest to other judges: No
Revised

CASE NUMBER: A574/15
DATE: 29 April 2016

ERIC MOSES NKOSI Appellant

v

THE STATE Respondent

JUDGMENT

MABUSE J:

[1] This is an appeal against both conviction and sentence.

[2] The appellant, Mr. Eric Moses Nkosi, appeared before a regional court magistrate in Benoni where he was charged with, and convicted of, rape in contravention of s 3 of Act 32 of 2007. Despite his plea of not guilty, he was convicted accordingly and upon conviction, sentenced to life imprisonment. He now appeals, in terms of s 309 of the Criminal Procedure Act 51 of 1977 ("the CPA"), against the aforementioned conviction and sentence.

[3] As the charge sheet indicated, the complainant was a 10 year old girl who testified through an intermediary. At the time of this incident, she was staying with her mother, her sibling, her cousin and the appellant at Barcelona in Benoni. The appellant had an affair with the complainant's mother, one J. M. He was the complainant's stepfather.

[4] The charge against the appellant arose from the following set of facts. D., the complainant, had some health problems in the stomach. Every evening she got sick in the stomach. So the appellant and her mother J.M. took her to a ZCC pastor for assistance. The pastor gave them a prescription for the ailment to use or to drink to solve her problem. It was a concoction of herbs called "ndayelo" which she was supposed to drink. She took the concoction for a time but the problem persisted. It did not go away because either the complainant did not drink the concoction or if she did it was not effective.

[5] The appellant then took vaseline, applied it to his finger and inserted the finger into her vagina. At first the appellant inserted only his vaseline smeared finger into her vagina but with the passage of time, in the place of his finger, the appellant inserted his penis after he had covered it with some layer of vaseline. This the appellant did four times during April 2013 and ending on 23 July 2013. She did not tell her mother because the pastor had told her not to.

[6] One day her mother came back from where she was selling some goods. She had been left behind with the appellant. The house was dark because there was no electricity. She called her name out but there was no response. She then got into the house and as she stood by the doorway the appellant emerged from the childrens' bedroom. This surprised J.M..

[7] Her mother sent the appellant to go and buy electricity units and while he was away she lit a candle and checked her private parts. After examining her, J.M. asked her what had happened. She told her mother what had happened and told her that the appellant had told her not to tell her. She further told her that it was in fact the pastor who had told her not to tell her about what the appellant did to her.

[8] Her mother then called C.'s daughter to examine and compare their private parts. While she did that she noticed a vast difference between C.'s daughter's private parts and the complainant's private parts. C. was the complainant's elder sister. C. advised them to go to the police station to lay charges.

[9] First they went to the police station to lay charges against the appellant and the following day they went to the Daveyton Clinic where the complainant was medically examined by a professional nurse, one Thandeka Njikelana.

[10] J.M.'s evidence supported the relevant portions of the complainant's evidence. At the police station the police told them that the complainant should not wash herself until she had been to the clinic. The panty that she was wearing before and after the incident of 23 July 2013 was taken by the police for investigation purposes. The appellant was arrested on the same evening they had laid the charges against him at the police station.

[11] Thandeka Njikelana was the State's third witness. As already indicated earlier she was a professional nurse who on 24 July 2013 medically examined the complainant's vagina and who, having done so, completed her report in a document called J88. This J88 was handed in as an exhibit during the trial. Her conclusions or gynaecological findings were that her genital findings were consistent with a history of vaginal penetration by a blunt object. During her examination of the complainant she had noted certain vaginal injuries at 3 o'clock; 4 o'clock, and 7 o'clock and a red and tender fossa naviscularis.

[12] Certain exhibits were handed in during the course of the trial. Exhibit 'A' was an affidavit in terms of s 212 of the CPA by Mothathe Esther Maswanganyi, an administration clerk in the South African Police Service and attached to the Biology Section of the Forensic Science Laboratory. In Exhibit 'A', the said Maswanganyi had declared, among others, that during the course of her official duties and in particular on 25 July 2013 she received one sealed evidence sealing with reference number 1OD7AB9904EB marked Etwatwa 398/07/2013 from constable Masondo MG. The said bag was in her safekeeping since she received it until she handed it to the administration component of the Biology Section of the Forensic Science Laboratory.

[13] Exhibit 'B' was a s 212 of the CPA affidavit by Tshepo Joseph Mmushi, a warrant officer in the South African Police Service and also attached to the Biology Section of the Forensic Science Laboratory ("FSL"), as a Forensic Analyst. He possesses a Master of Science Degree in which he specialised in micro-biology, which included molecular and cellular biology relevant to DNA. On 29 July 2013, during the course of his official duties, he received from the administration component of the Biology Section of the FSL one sealed evidence sealing bag with reference number 1007AB9904EB marked Etwatwa 398/07/2013. This bag contained one sealed paediatric sexual assault evidence collection kit with reference number 1007AB9904EB marked Etwatwa 398/07/2013 containing one sealed internal Vaginal swab guard box; one sealed Vestibule swab guard box and one Vulva swab guard box. It was given to Cicilia Janse van Rensburg, a lieutenant in the SAPS attached to the Biology Section of FSL as a Senior Forensic Analyst who, after examining the complainant's panty and the blood sample taken from the appellant, made a finding of the presence of the appellant's DNA in both the panty and the blood sample. This was Exhibit 'C'. These Exhibits were handed in to court by consent and without the need to lead the evidence of the people who made such affidavits.

[14] The accused testified in his defence and called no witnesses in support of his case. In his evidence he denied that he had inserted his penis into the complainant's vagina in order for her to get better or for any other purpose. He denied furthermore that he applied vaseline to the complainant's vagina and thereafter his finger. He denied that the semen that was found on the complainant's panty was his.

[15] At the close of the appellant's case the court *a quo* was satisfied that the respondent had proved its case beyond reasonable doubt, and that the appellant was guilty of the offence he had been charged with. In fact it remarked that the evidence against the appellant was overwhelming. It found that the appellant's version was not reasonably possibly true. It rejected it on that basis and convicted him as charged. Upon conviction and after the mitigating factors had been placed before it, it found no substantial and compelling circumstances in favour of the appellant which justified a departure from the imposition of the prescribed sentence. For that reason it sentenced the appellant to life imprisonment. It is accordingly the above conviction and sentence

that the appellant complains about and wishes to challenge. He has set forth the grounds of his dissatisfaction against the conviction and the sentence in his notice of appeal. In the application for leave to appeal, which is part of the appeal papers before us, the appellant had given an indication that his appeal was only against the sentence. We will ignore the application for leave to appeal by reason of the fact that this appeal was brought under the provisions of s 309 of the CPA in terms of which the appellant had an automatic right of appeal.

[16] The application for leave to appeal does not constitute a requirement of the said section. Accordingly the application for leave to appeal may be safely ignored. It is accordingly the grounds as set out in the notice of appeal which are of supreme importance and this Appeal Tribunal will, in dealing with this appeal, both in respect of conviction and sentence, confine itself to such grounds.

[17] In respect of the applicant's appeal against conviction there are only three grounds on the basis of which he challenges his conviction. These grounds are that:

17.1 *"Thereis no medical evidence linking the accused to the crime.* "

17.2 *"The court did not take the possibility into account that the children might have been rape by the ZCCpastor';·*

17.3 *"There was no DNA evidence linking the accused to the crime.* "

[18] This notice of appeal was prepared by the appellant himself on 3 October 2014. It was signed by him in Benoni. There has not been an attempt to file a better notice of appeal. It is clear that when the appellant, or someone who assisted him, drafted the notice of appeal, he had not read the record of the proceedings in the court *a quo.* If he had the benefit of reading such a record, he would have noticed that the grounds of appeal set forth in the notice of appeal lacked merits. They lacked merits because there is an overwhelming evidence or scientific evidence that linked him to the crime. Secondly, there is no iota of evidence that the ZCC pastor was involved in the penetration of the complainant by any means whatsoever, and thirdly and lastly, there is DNA evidence of the appellant linking him to the offences.

[19] In his heads of argument Mr. Matlapeng, correctly referred the Court to R v Dhlumayu 1948(2) SA 4 677A. The approach that the said authority established was,

and still is, that a Court of Appeal will not disturb the factual findings of a trial court unless the trial court committed a misdirection or, where there has been no misdirection on the facts by the trial judge, the presumption is that the conclusion is correct. The Appeal Court will only reverse the factual findings of the trial court if it is convinced that it is wrong. Mr. Matlapeng is satisfied that there is no evidence that suggests that the ZCC pastor might have raped the complainant; the DNA evidence was presented at court and that it pointed to the appellant as the donor of the semen that was found on the complainant's panty. Finally he is satisfied, as the trial court did, that there was sufficient evidence that showed that the complainant had been sexually molested. For these reasons he found himself unable to argue the appellant's grounds of appeal against conviction confidently. The respondent also is of the view that the appeal against conviction lacks merit and should be dismissed.

[20] With regard to the appeal against sentence, the appellant has raised 5 grounds, namely that:

20.1. *"the accused is a first offender';*

20.2. *"the accused age is 48years old';·*

20.3. *"the accused has more than ayear awaiting trial';·*

20.4. *"the accused contributed to society before his arrest;·*

20.5. *"the accused have aprospect of rehabilitation."*

[21] In his heads of argument Mr. Matlapeng submitted that the sentence of life imprisonment imposed on the accussed by the trial court induces a sense of shock and that this Court should interfere. It must be recalled firstly, that imposition of sentence is pre-eminently a matter for the discretion of the trial court. See in this regard **R v Mapumulo and Others 1920 AD p. 56 at p. 57** where the Court had the following to say:

> *'The infliction of punishment is pre-eminently a matter for the discretion of the trial court. It can better appreciate the atmosphere of the case and can better estimate the circumstances of the locality and the need for a heavy or light sentence than appellate tribunal. And we should be slow to interfere with its discretion.* "
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> *"A Court of Appeal's powers to interfere with the sentence imposed by the trial court are limited. The Court's powers to interfere with the sentence on appeal are circumscribed. It may only do so if the sentence is vitiated by: (1) irregularity; (2)*

misdirection; or (3) is one which no reasonable court could have come to, in other words one where there is a striking disparity between the sentence and that which this court considers appropriate. " See in this regard **S v Petkar 1998(3) SA 571(A).**

[22] Mr. Matlapeng conceded that the appellant has been convicted of an offence that attracted the prescribed sentence of life imprisonment. The Court may not, for flimsy reasons, deviate from imposing the ordained sentence. It can only deviate from imposing the sentence of life imprisonment on the convicted person if it finds substantial and compelling circumstances.

[23] Ms. Makgwatha submits that, for the following reasons, the sentence imposed by the trial court on the appellant cannot be seen to be shockingly inappropriate:

23.1. the appellant raped a defenceless 10 year old child who had accepted him as her father;

23.2. the complainant was of ill health and thus vulnerable and the appellant used this vulnerability to rape her under the false pretences of healing her. That was cruel and inhuman.

23.3. the appellant was in a position of trust this vis-a-vis the complainant and he abused this trust in the worst possible way;

23.4. the appellant showed no remorse for his action. He still persisted with his motion of innocence even in the light of overwhelming evidence against him and sought to make the complainant a liar.

23.5. the complainant was raped in the sanctity of her own home where she ought to feel safe and secure and by a person whom she trusted with her life.

On the above factors Ms. Makgwatha submitted that the trial court correctly found that there were no substantial and compelling circumstances justifying the imposition of a lesser sentence than the prescribed minimum sentence of life imprisonment.

[24] According to a victim impact report by Ms. Bulawana-Kama prepared for the trial court, the rape incident traumatised the complainant. She had trusted and accepted the appellant as her father. The complainant developed sleepless nights and was scared as if the appellant would return to the house. She no longer felt safe in her own home. The Court should therefore find that the conduct of the appellant was, within the context that

this rape occurred within the context of family circumstances, reprehensible.

[25] *"Rape is a very serious offence constituting as it does a humiliating, degrading and brutal invasion of the privacy, dignity and the person of victim."* See in this regard S v Chapman 1997(2) SACR 3 SCA at 58 and see also S v Swartz and Another 1999(2) SACR 380 (C) at 385 where the court described the rape as a cancer within the society. Rape is a crime that threatens every woman and particularly the poor and vulnerable. In this country it occurs far too frequently and is currently aggravating by the grave risk of the spread of AIDS. A woman's body is sacrosanct and anyone who violates it does so at his own risk. Our legislature and community at large correctly expects our Courts to punish rapist very severely. See in this regard S v Nchenche 2005(2) SACR 386W.

[26] The court *a quo,* in our view, considered the triad, weighed all the relevant factors, including the personal circumstances of the appellant and concluded that the gravity of the offence and the interests of the society far outweighed the personal circumstances of the appellant. The court found no space for substantial and compelling circumstances. In the circumstances we are unanimous in our view that the court *a quo* committed no misdirection whatsoever and that no valid reason exists for this Court to interfere with the sentence imposed on the appellant by the court *a quo.*

[27] Accordingly the appeal against both conviction and sentence is hereby dismissed.

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P.M. MABUSE

JUDGE OF THE HIGH COURT

I agree

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E.M. KUBUSHI

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Appellant: *Adv. Matlapeng*

Instructed by:	*Pretoria Justice Centre (Legal Aid Board)*
Counsel for the Respondent:	*Adv. MJ Makgwatha*
Instructed by:	*Director of Public Prosecutions*
Date Heard:	*25 April 2016*
Date of Judgment:	*29 April 2016*