

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU- NATAL DIVISION, PIETERMARITZBURG**

Case No: AR410/2018

In the matter between:

MAKHOSINI MATHEWS FAKUDZE

APPELLANT

and

THE STATE

RESPONDENT

Coram : Poyo Dlwati et Masipa JJ

Heard : 31 May 2019

Delivered : 7 June 2019

ORDER

On appeal from: Regional Court, Durban (sitting as court of first instance):

- (1) The conviction and sentence on count 1 is set aside;
- (2) The conviction on count 2 is confirmed;
- (3) The appeal against sentence on count 2 is dismissed.

JUDGMENT

Poyo Dlwati J:

[1] On 15 March 2017 the appellant was convicted by the regional court sitting in Durban of one count of trafficking in persons in contravention of s4(1) of the Prevention and Combating of Trafficking in Persons Act 7 of 2013 ('the Trafficking Act') (count 1), one count of rape on diverse occasions (in contravention of section 3 of Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007) (count 2), and one count of entering or remaining in the Republic without a valid permit, being an immigration offence (in contravention of section 49(1)(a) of the Immigration Act 13 of 2002). On 22 March 2017 the appellant was sentenced to life imprisonment in respect of counts 1 and 2, and twelve years' imprisonment in respect of count 3. The appellant exercised his automatic right of appeal (as provided for in s309 (1) (a) of the Criminal Procedure Act 51 of 1977 ('the Act'), and appealed against the sentences imposed in count 1 and 2. However, for reasons which will be apparent below and exercising the inherent jurisdiction that this court has, we also considered the correctness of the conviction on count 1.

[2] The brief background to the charges was that the appellant was married to the complainant's mother. The complainant was therefore his stepdaughter. They all resided in Swaziland at a home rented by the appellant. The appellant and the complainant's mother had two children. When the complainant was about 12 years old, the appellant started having sexual intercourse with the complainant without her consent. When she reported the incident to her mother, she did not believe her. When the complainant showed her mother her blood-stained clothes after the appellant had sexual intercourse with her, the complainant's mother said that her clothes should be burnt. Even though the complainant reported the incident to her teachers, who in turn reported the

matter to the police, the complainant, however, did not know what became of the case.

[3] During 2014, the appellant and the complainant's mother had some disagreements. The appellant found the complainant's mother with another man. He then chased her away from their home. The complainant's mother left their home the following morning, leaving the complainant behind with the appellant and two other children. When the complainant requested to go with her, she ignored her. The appellant took his two children, locked the house and went to the station. The complainant remained outside their home. She did not know where her mother went, but knew that the appellant was going to South Africa. After a few minutes, and after having considered how she would survive if she remained there, she decided to follow the appellant as she feared becoming a street child. She also thought that perhaps the appellant would not abuse her again.

[4] The complainant went to the station and found the appellant. She begged the appellant let her go with them. Even though he initially refused, he later agreed. They left Swaziland and came to South Africa during October 2014. She did not have any travelling documents or a birth certificate to enable her to come to South Africa. When they arrived in South Africa, they stayed in a certain home in Jozini in northern KwaZulu-Natal. Everything seemed fine and there was no abuse until the end of 2014.

[5] Sometime in 2015 the appellant started touching the complainant's breasts and private parts. He also had sexual intercourse with her many times on diverse occasions without her consent. He also never allowed her to go out of the house and play with other children. He told her to keep quiet, and would

threaten to kill her if she told anyone. He would remind her that he supported her every day and was doing everything for her.

[6] The appellant would not always use protection when he had sexual intercourse with the complainant. She felt like he was treating her as his wife as he also made her cook for the other children and wash their clothes. The complainant could not say whether the other children knew what the appellant was doing to her, as sometimes the appellant would send them to the shop or other times they would be playing outside the house when the sexual abuse occurred. At times the children would see the complainant crying, and when they asked her what was wrong she would tell them that everything was fine and she would be okay. She used to feel pain when the appellant was having sexual intercourse with her and she thought that her bladder was injured.

[7] According to the complainant, the appellant stopped having sexual intercourse with her when he realised that she was pregnant. She initially did not know that she was pregnant and thought that she had just gained a lot of weight. A neighbour told her that she was pregnant as her tummy was getting bigger. She also slept a lot during the day and was getting tired. She also felt some kicking in her abdomen. The appellant took her to the hospital for a check-up. At the hospital, it was confirmed that she was pregnant. The complainant believed that the appellant was the father of her child as he was the one who had sexual intercourse with her without protection.

[8] The complainant was quite anxious about having a baby at her age. Eventually the baby was born on 29 January 2016. Whilst at the hospital, she reported the abuse she endured under the appellant's watch to the nurses. After giving birth to the child, she did not return to stay with the appellant. Instead, the appellant was arrested and she was taken to a place of safety in Ngwelezane.

The complainant further confirmed that a buccal swab was taken from her and her baby, by the doctor for the purpose of conducting a paternity test, which test result confirmed that the appellant was the father of her child. This factor was common cause as the appellant admitted the results of the paternity test in terms of s220 of the Act.

[9] Prior to the cross-examination of the complainant, the appellant's counsel, after consultation with the appellant, indicated that he would cross-examine the complainant on count 1 only, as the appellant would make admissions in terms of s220 of the Act in respect of counts 2 and 3. Under cross-examination it emerged that the complainant's biological father had died. She, however, had a paternal uncle whose family stayed on a farm in Swaziland. It was suggested to her that she could have gone to stay with her paternal uncle and family instead of coming to South Africa with the appellant. Her response was that she did not like their way of living, as they at times stole and were also drinking a lot.

[10] The complainant conceded that she chose to come to South Africa with the appellant, as she thought her life and future would be better. She thought that she could finish school and thereafter get a job to support herself and her siblings. But, that did not happen. She felt, at the time, that she had no option but to come to South Africa with the appellant, as she felt that her mother had abandoned her. Whilst she also had an aunt who was her mother's friend, she chose not to go to her as the aunt's husband did not like the complainant staying with her, and he had made this known to her mother.

[11] After the complainant's evidence, the appellant made admissions in terms of s220 of the Act. He admitted having unlawfully and intentionally committed an act of sexual penetration with the complainant by inserting his penis into her

vagina on diverse occasions, without her consent. He further pleaded guilty on count 3, thereby admitting that he had entered the Republic without a valid permit. In his plea explanation in terms of s112 of the Act, he stated that he had entered South Africa through Jozini and he knew that what he did was unlawful, illegal and had no defence in law for his actions. He, however, disputed that he trafficked the complainant to South Africa for any reason. He, however, never testified in his defence.

[12] The learned magistrate returned a guilty verdict on all counts, hence the appeals. Prior to the hearing of the appeal, we requested both counsels to submit supplementary heads of argument in relation to the conviction on count 1 only. They both duly complied, and we are indebted to them for their co-operation at such a short notice.

[13] Ms Anastasiou, on behalf of the appellant, both in her heads of argument and during the hearing, submitted that the State had failed to prove the appellant's guilt beyond a reasonable doubt on count 1. She submitted that the learned magistrate erred in finding that the only reasonable inference that the court could draw, was that the purpose for which the accused harboured the complainant, was for the purpose of exploitation in the form of rape. Mr Naidoo, on behalf of the State, correctly in our view, conceded this factor. We agree. The learned magistrate's finding on this issue was not supported by the complainant's evidence nor was it supported by the law.

[14] The appellant was charged with contravening s4(1) read with sections 1, 3, 10, 11, 12, 13 and 14 of the Trafficking Act, and the relevant provisions of section 51 and Part I 4 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997. Section 4(1) of the Trafficking Act provides that:

‘Trafficking in persons:-

- (1) Any person who delivers, recruits, transports, transfers, harbours, sells, exchanges, leases or receives another person within or across the borders of the Republic by means of –
- (a) a threat of harm;
 - (b) the threat or use of force or other forms of coercion;
 - (c) the abuse of vulnerability;
 - (d) fraud;
 - (e) deception;
 - (f) abduction;
 - (g) kidnapping;
 - (h) the abuse of power;
 - (i) the direct or indirect giving or receiving of payments or benefits to obtain the consent of a person having control or authority over another person; or
 - (j) the direct or indirect giving or receiving of payments, compensation, rewards, benefits or any other advantage, aimed at either the person or an immediate family member of that person or any other person in close relationship to that person, for the purpose of any form or manner of exploitation, is guilty of the offence of trafficking in persons.’

[15] ‘Abuse of vulnerability’ is defined in s1 as:

‘. . . any abuse that leads a person to believe that he or she has no reasonable alternative but to submit to exploitation, and includes but is not limited to, taking advantage of the vulnerabilities of that person resulting from -

- (a) the person having entered or remained in the Republic illegally or without proper documentation;
- (b) pregnancy;
- (c) any disability of the person;
- (d) addiction to the use of any dependence-producing substance;
- (e) being a child;
- (f) social circumstances; or
- (g) economic circumstances;’

[16] The evidence of the complainant was that the appellant left their home with his two children. She followed them thereafter as she believed it was of benefit to her since her mother had abandoned her. It cannot be said that the

appellant would have known or knew that the complainant would follow him and ask to go with him. I say so for the following reasons: -

- (a) the complainant could have tried to trace her own mother;
- (b) she could have gone to stay with her mother's friend until her mother was traced;
- (c) she could have gone and stayed with her father's family but she did not like their way of living;
- (d) she could have gone to the police who, maybe would have taken her to social workers so that she could be placed in a children's home.

[17] As the complainant testified, the appellant did not immediately agree that she could go with him. It therefore cannot be said that the appellant used or abused the vulnerability of the complainant. He did not seem to have had any intentions of leaving with the complainant. It cannot be said that the complainant did not have another reasonable alternative but to go with the appellant. Furthermore, the appellant did not abuse the complainant for the remainder of 2014, another justification why it could not be said that he had brought the complainant to South Africa for the purpose of sexually exploiting her. In my view, therefore, the evidence fell short of proving the appellant's guilt beyond reasonable doubt on this count. It follows that the conviction and sentence on count 1 ought to be set aside.

[18] With regard to the sentence on count 2, Ms Anastasiou was unable to point out any misdirection by the learned magistrate. She was equally constrained to point out any mitigating factors in favour of the appellant. The learned magistrate, in her judgment, applied her mind to the triad enunciated in *S vs Zinn*.¹ She did not find any substantial and compelling circumstances that

¹ *S v Zinn* 1969 (2) SA 537 (A).

justified deviating from the prescribed sentences. We could likewise not find any.

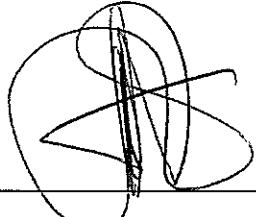
[19] The only factor that could be considered as mitigating, was the fact that the appellant was the primary care giver to his two other children, and that the court ought to have shown some measure of mercy in such circumstances. This issue was dealt with by the learned magistrate as the evidence presented to her was that the appellant's children were taken to the same place of safety as the complainant and they were well looked after. This was not disputed. As held in *S v M (Centre for Child Law as Amicus Curiae)*², a primary caregiver does not necessarily escape imprisonment because of the children. The aggravating factors will still be considered, which in circumstances of this case far outweigh any mitigating factors.

[19] The appellant abused his stepdaughter. He made her his wife, although it was the complainant's mother who was his wife. He was in a position of trust, and the complainant looked up to him as her father. The complainant continued, even at court during the trial, to refer to the appellant as 'father'. The appellant betrayed that trust. He took away her childhood as she could no longer go and play with other children. He took away her right to be a child as enshrined in s28 of the Constitution. What he did to this child was heinous and cannot warrant that any form of mercy be shown to him. As contained in the complainant's victim impact statement, which was admitted into evidence in the court *a quo*, she will always have a reminder of her abuse by the appellant in the form of her baby. He could even be a danger to his own children and deserve to be removed from society for a lengthy period. I, therefore agree that any mitigating factor is neutralised when having regard to the circumstances of this matter.

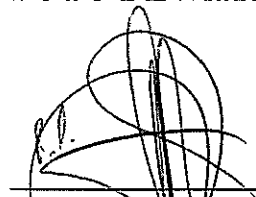
² 2008 (3) SA 232 CC para 107

[20] Accordingly, I make the following order:

- (1) The conviction and sentence on count 1 is set aside;
- (2) The conviction on count 2 is confirmed;
- (3) The appeal against sentence on count 2 is dismissed.



POYO-DLWATI J



MASIPA J, I agree

APPEARANCES

Date of Hearing	: 31 May 2019
Date of Judgment	: 07 June 2019
Counsel for Applicant	: Ms Anastasiou
Instructed by	: Justice Centre, Pietermaritzburg
Respondent	: Mr Naidoo
Instructed by	: Director of Public Prosecutions Pietermaritzburg