IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: AR220/2020

In the matter between:

Z[…] P[…] K[…] **APPELLANT**

and

THE STATE **RESPONDENT**

ORDER

On appeal from: Umzimkhulu Magistrates' Court (sitting as court of first instance):

The appeal against both the convictions and sentence be upheld.

A copy of this judgment is to be forwarded to the Secretary of the Magistrate's Commission, Mr Dawood.

JUDGMENT

Delivered on 8 October 2021

Maharaj AJ (Jappie JP concurring):

Introduction

[1] The appellant, Z[…] P[…] K[…], was convicted of three counts of rape in contravention of section 3 of the Criminal Law (sexual offences and related matters) Amendment Act 32 of 2007, (Hereinafter referred to as Sexual Offences Act) of three female children below the age of 16, in the regional court sitting at UMzimkhulu on the 18 October 2013.

[2] On 21 October 2013 the appellant was handed down a life sentence, the learned regional magistrate taking all counts as one for the purposes of sentence.

[3] The matter serves before this court pursuant to the provisions of Section 309 (1)(a) of the Criminal Procedure Act 51 of 1977 (hereafter referred to as the Act) which provides as follows:

'If a person was sentenced to imprisonment for life by a regional court under section 51(1) of the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997), he or she may note such an appeal without having to apply for leave in terms of section 309 B'.

[4] The appeal lies against both convictions and sentence.

[5] The factual matrix in summary is that the appellant is the biological father to the complainant on counts 1 and 2 and a father figure to the complainant on count 3, who is the niece of the appellant's wife.

[6] The incidents of rape are alleged to have taken place during the following periods:

On count 1, in respect of T[…] K[…] between the years 2000 to 2012.
On count 2, in respect of A[…] K[…] between the years 2000 to 2012.
On count 3, in respect of Y[…] M[…] between the years 2009 to 2012.

[7] The appellant was employed at Harmony Gold in Johannesburg and would visit the home where the children lived during the periods averred in the charge sheet and would engage in sexual intercourse with the complainants. This was done in the absence of the complainants' mother.

[8] These incidents of sexual intercourse occurred on diverse occasions when the appellant visited his home during the course of the year.

[9] The incidents of rape finally came to light when the complainant on count 1, T[…] K[…], penned a letter to her mother before leaving the home. In this letter the complainant mentioned that the appellant had wanted to sleep with her.

[10] T[…] testified that the appellant had raped her from the time she was eleven years of age and stopped when she was fifteen years of age. She did not disclose the incidents of rape to any person during this time. She was not examined by a medical doctor in relation to these incidents of rape.

[11] The complainant on count 2, A[…] K[…] testified that the appellant had raped her from the age of six years and stopped when she was twelve years of age. Likewise she did not describe these incidents of rape to any person at that time, as she believed that the appellant would be angry and would assault her. She only reported the rape to her mother after T[…] had left home.

[12] The complainant on count 3, Y[…] M[…] testified that she was staying at

the home of the complainants on count 1 and 2, when the appellant had sexual intercourse with her many times. It was her aunt who said that she must report the incidents of rape. Y[…] did not make any report of rape until A[…] made her report.

[13] It is trite law that the onus to establish the guilt of an accused person rests with the State which has to be discharged beyond reasonable doubt.

[14] In this regard see[1], where Heher AJ (as he then was) held the following at page 139 paragraph [15]:

'The correct approach is to weigh up all the elements which point to the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt'.

[15] See also[2] where Nugent J held the following:

'The onus of proof in a criminal case is discharged by the state if the evidence established the guilt of the accused beyond a reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent.[3]

[16] The medical examination as contained in the pro-forma J88 in respect of the complainants on counts 1 and 3 indicates that there was no hymen, no bruise, no tear or scar and that the medical examination was normal.

[17] In my view, the medical examination on these complainants does not

[1] S v Chabalala 2003 (1) SACR 134 (SCA)
[2] S v Van Der Meyden 1999 (1) SACR 447 (WLD) AT 488 E-F
[3] See R v Difford 1937 AD 370 at 373 and 383.

accord the probabilities of the evidence of these complainants. The incidents of rape as testified to, took place over a period of time and on multiple occasions. Surely in these circumstances there would have been some medical evidence of penile penetration in terms of injuries to these complainants.

[18] The court would in these circumstances be fully justified in drawing an adverse inference against the State in failing to call the doctor to testify and to elucidate and expand on his clinical examination in respect of both the complainants.

[19] The appellant made no threats to any of the complainants about reporting this matter. A[…] thought and perceived on her own that the appellant would be angry and would assault her.

[20] At page 85 line 17 of the appeal record (thereinafter referred to as the record) she says the following:

‘Well, I did not see him at the time he was doing it, I only realised when he was now wet that he had urinated.’

[21] A[…] also posited multiple reasons for not reporting the incidents of rape. These included, not telling her sisters because she was afraid; not telling her teachers because she was afraid they would laugh at her and it did not come to her mind to tell her friends.

[22] As mentioned above, the appellant worked in the mines in Johannesburg. He would visit his home during the course of the year or when he took ill and would then return. Hence there would have been ample opportunity and time for the complainants to have reported what the appellant had done to each of them.

There can be no element of any fear or duress for not doing so. In my view, this conduct does not accord with the probabilities of their evidence.

[23] Y[…] M[…]'s replies or answers given in cross examination is telling against her. At page 98 line 17 the question was asked 'and how many times did it happen, for example one time, many times, ten times? The answer was once. Further at line 25 the question was asked 'Mam, how many times before'. The answer was two times.

[24] At page 100 of the record lines 6 – 14 the witness says that A[…] was writing in the same room, being on the same bed while she was being raped but A[…] did not witness the rape. Clearly this cannot be so.

[25] At page 105 of the record lines 14 -15 the question was asked 'Are you blaming my client because you're maybe too afraid of the real perpetrator? The answer was yes.

[26] The witness had also mentioned in cross-examination that she had told the doctor what the appellant had done to her yet no such recordal is contained in the pro-forma J88 in respect of Y[…]. This omission highlights yet again the importance of having the doctor testify.

[27] The evidence of T[…] is also a cause of concern in terms of the letter that she had penned for the attention of her mother. The recorded evidence is that she had written that the appellant had wanted to sleep with her.

[28] She did not describe details of the incidents of rape by the appellant in the letter. The reason posited for such an omission is that she did not have the time to do so and she felt upset and disappointed.

[29] These reasons in my view, are clearly at odds with the purpose of penning the letter to her mother when she left home. This omission also does not accord with the probabilities of her evidence in this regard.

[30] The learned regional magistrate erred in his interpretation of the contents of the letter and was clearly wrong in finding that the letter made mention of sexual intercourse. At page 200 line 24 he says the following:
'In that letter T[…], that is the complainant in count 1, said that the accused used to have sexual intercourse with her.'

[31] The above view is contradicted at page 55 of the record line 22, where the prosecutor poses the question:
'Now in the letter did you tell your mother what you have told the court as to when this started and how it was happening? That is now when he was inserting his penis into your vagina.' The answer was 'I did not explain that.'

[32] Turning now to the conduct of the learned regional magistrate. It would be remiss of the court not to comment on the conduct of the learned regional magistrate.

[33] Section 34 of the Constitution of The Republic of South Africa provides as follows:

'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or where appropriate another independent and impartial tribunal or forum.'

[34] The conduct and behaviour of the regional magistrate in my view is deserving of censure. He was clearly not fair in his treatment of the appellant

during the trial.

[35] His utterances to the appellant was suggestive of a judicial officer who was impatient and curt which compromised his impartiality.

[36] The record of the proceedings in the following aspects fortify my view expressed aforesaid.

[37] At page 65 line 3, he says the following:

'Why are you having your finger once more? You ask through your attorney. You must be careful because you might end up incriminating yourself.'

[38] At page 153 line 22:

'Do you agree that you agree because you know this Lindos thing is non-existent?' The answer 'Yes, your worship, it is non-existent but the person did come to me. Your worship and it is non-existent because I have no one to come and verify what I am saying to the Court.'

[39] At page 154 line 8:

'Do you agree what is said, that you know Linsdos never said that? The answer was 'I agree'.

[40] At page 155 Lines 4 to 6:

'Do not make longer than necessary explanations please, man. You are wasting our time.'

[41] At page 155 line 25 when the prosecutor says:

'So, therefore it means when a person makes an admission about a specific allegation it means that person has done it, is it not?

[42] The regional magistrate intervenes and asks:
'Is it so?'
The appellant qualifies his answer at page 156 line 10 where he says:
'Because I explained your worship that I am not saying I did this.'

[43] The record contains other instances where the regional magistrate intervenes by asking 'Is it so' or 'Did you have sexual intercourse with them?'

[44] The following comments of the regional magistrate clearly reflects his impatience and bias against the appellant at page 159 lines 21 to 25:
'Do you want the doctor to check your hymen, hey? The question is about the hymen, man. Do you have a hymen?

[45] At page 161 line 17 the regional magistrate says the following:
'Do not waste our time, Mr K[…], please.'

[46] The appellant says at 165, line 5 that he was not going to disagree with the court when the regional magistrate asked him if he agrees with the prosecutor's suggestion that he raped the children on diverse occasions.

[47] At page 142 line 10 the regional magistrate *mero motu* invited both the State and defence to address him on the possibility of section 174 on the rape charge on count 1. Unfortunately, for the appellant, his defence counsel did not rise to the challenge of addressing the court and in my view committed a dereliction of duty in not doing so. The regional magistrate did not give a ruling on the section 174 application and the appellant testified on all the counts.

[48] Nothing prevented the regional magistrate from *mero moto* exercising his discretion to discharge the appellant at that stage if he entertained a doubt on

count one. This is yet another example of the unfair trial the appellant was subjected to by the regional magistrate.[4]

[49] As a result of the aforegoing reasons, it would be superfluous to consider the appellant's version.

[50] In my view the evidence adduced by the State does not reach the threshold required for its acceptability to constitute proof beyond reasonable doubt.

[51] In addition the conduct of the regional magistrate not only violates his oath of office but also the appellant's right to a fair trial and to be treated with dignity in our courts. The appellant was also subjected to being badgered in the most egregious manner.

[52] A caveat should be sounded to all judicial officers that restraint and patience on the bench are the hallmarks of keeping an open mind when adjudicating in our courts.

[53] In passing, I might add that as part of the ancillary orders in these types of matters the provisions of section 299A of the Act, peremptory as it is, enjoins the court to bring to the attention of the complainant their right to make representations and to be present at parole board meetings.

[54] Accordingly, I propose the following order:
The appeal against both the convictions and sentence be upheld.

A copy of this judgment is to be forwarded to the Secretary of the Magistrate's

[4] See R v Mkhize and another 1960 (1) SA 276 (N).

Commission, Mr Dawood.

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MAHARAJ AJ

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JAPPIE JP

DATE OF HEARING: 8 October 2021
DATE OF JUDGMENT: 8 October 2021
FOR THE APPELLANT: Mrs Marais
FOR THE RESPONDENT: Mr E X Sindane