THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 137/2012

In the matter between

AVHAPFANI VICTOR TSHIMBUDZI **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Tshimbudzi v The State* (137/12) [2012] ZASCA 200 (30 November 2012)

Coram: Heher, Mhlantla and Bosielo JJA, Swain and Mbha AJJA

Heard: 16 November 2012

Delivered: 30 November2012

Summary: Criminal – appeal against both conviction and sentence – appellant convicted of rape of a 13 year old female by regional magistrate – matter referred to high court for sentencing in terms of s 52 of the Criminal Law Amendment Act 105 of 1997 – charge sheet silent on whether the rape is covered by the provisions of the Criminal Law Amendment Act – appellant sentenced to imprisonment for life – high court not having confirmed the conviction of the appellant by the regional magistrate as being in accordance with justice – effect of failure by the magistrate to enquire into the complainant's ability to distinguish between the truth and lies and the ability to understand the import of the oath – cumulative effect of irregularities – the difference between truth and untruth and the consequences of telling a lie – the record marred by a series of inaudibles.

ORDER

On appeal from: Limpopo High Court, Thohoyandou (Hetisani J, sitting as a court of first instance):

The appeal against both the conviction and sentence is upheld and both are set aside.

JUDGMENT

BOSIELO JA (HEHER AND MHLANTLA JJA, SWAIN AND MBHA AJJA CONCURRING):

[1] This matter is a regrettable comedy of errors. The record reveals clearly that commencing from the plea stage in the regional court culminating in sentencing in the High Court, Limpopo, nothing was done according to the book. The record is riddled with irregularities. What must be considered is the nature of the irregularities and their cumulative effect.

[2] Aggrieved by the conviction and sentence imposed by the court below (Hetisani J) the appellant is appealing with the leave of this court.

[3] This appeal came before us 12 years after the appellant was sentenced to imprisonment for life. However, this delay is substantially

due to the appellant's own inaction as he only submitted his application for leave to appeal to this court in April 2011.

[4] It is clear from the record that substantially large parts of it that was put before us were inaudible when it was transcribed. These 'inaudibles' are so frequent and of so indefinite a duration that we are unable to determine what the proper outcome of the proceedings in the trial should have been. Furthermore, we are of the view that, given the poor state of the record, the learned judge in the court below was in the same situation and that he could not have been able to satisfy himself that the proceedings were in accordance with justice. Perhaps this is the reason why he failed to record that he had considered the convictions of the appellant by the regional magistrate and, found it to have been in accordance with justice. The failure by the court below to confirm that the proceedings were in accordance with justice means that the conviction cannot stand subject to the possibility of a remittal to the high court which will be considered below. Because the trial judge could not in the circumstances properly proceed to the sentencing phase the sentence also falls to be set aside.

[5] In addition there are a number of irregularities which were committed during the trial which in our view are of a serious nature. First, the appellant was charged with the rape of a 13 year old female. This offence falls under s 51(1) read with Part 1 of Schedule 2 of the Act. The alleged rape took place between 30 April 1999 and 2 May 1999. Upon conviction the appellant was referred to the high court for sentencing in terms of s 52 of the Act. In the absence of any facts that qualify as

substantial and compelling to justify a lesser sentence, as contemplated in s 51(3)*(a)*, of the Act, the appellant stood to be sentenced to imprisonment for life. However, this could only be done if the appellant had been advised either through the charge sheet or in whatever manner during the trial but before sentence that he faced an offence which fell within the ambit of the Act and that the possible sentence was life imprisonment. A failure so to advise the appellant means that it was incompetent for the court below to sentence him to imprisonment for life in terms of s 51(1) of the Act. See *S v Legoa* 2003 (1) SACR 13 (SCA); *S v Ndlovu* 2003 (1) SACR 331 (SCA) and *S v Makatu* 2006 (2) SACR 582 (SCA).

[6] Furthermore, it is an essential requirement of the Act that for the appellant to be convicted of rape under s 51(1) read with Part I of Schedule 2 of the Act, there had to be admissible evidence that the complainant was below the age of 16 years. There was none. The doctor also recorded in the medical report that she was 13 years old. The opinion by the medical doctor which is contained in the medical report, the J88, is inadequate as it is not supported by any facts. The doctor did not testify. Ordinarily, one would have expected the medical doctor to lay down a basis for his opinion perhaps by reference to the medical examination which he conducted. Absent such evidence, we find that notwithstanding the fact that the medical report was admitted as evidence by consent, it is not adequate to prove the complainant's age satisfactorily. The age of the complainant is crucial in determining the precise nature of the offence for which the appellant is charged and the possible sentence to be imposed upon his conviction.

[7] A further irregularity relates to whether the complainant was validly sworn in in terms of s 162 of the Criminal Procedure Act 51 of 1977 (CPA) before she testified. The record shows that she was sworn in. ('d.s.s'). However this is not enough as the complainant was a minor. Given the age of the complainant it was essential that the regional magistrate make some enquiry to satisfy himself that the complainant understood and appreciated the distinction of telling the truth and a lie. Only in the event that the magistrate was satisfied that the minor possessed this ability should the magistrate then have proceeded to determine whether the said minor fully understood the nature and import of giving evidence under oath. The magistrate conducted none of these enquiries and as a consequence the complainant's evidence was rendered inadmissible.

[8] It should be clear from the above exposition that the trial was characterised by serious irregularities which strike at the heart of the conviction and the fairness of the trial. The cumulative effect is such as cannot be corrected by any remittal.

[9] In the result, the appeal against both the conviction and sentence is upheld and both are set aside.

_____

L.O. BOSIELO
JUDGE OF APPEAL

Appearances:

For Appellant	:	M Madima Instructed by: Justice Centre, Thohoyandou Justice Centre, Bloemfontein
For Respondent	:	A Madzhuta Instructed by: Director Public Prosecutions, Thohoyandou Director Public Prosecutions, Bloemfontein