



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)**

CASE NO. CA&R 116/2022

Heard on: 18 October 2023

Date delivered: 23 January 2024

In the matter between:

ZOLISA NCITHA

Appellant

And

THE STATE

Respondent

JUDGMENT

MAJIKI J:

[1] This is an appeal against a rape conviction by the Regional Court in Bizana, on the basis of the appellant's statement in terms of section 112(2). He was sentenced to life imprisonment. The appeal is opposed by the state.

[2] Summarily the grounds of appeal are that the plea statement did not admit all the elements of the offence. The court *a quo* therefore erred by not recording a plea of not guilty in terms of section 113 of Criminal Procedure Act 51 of 1977, (the CPA) because the appellant did not admit that he had the necessary intention to commit the offence. Further, there is no averment about penetration. The statement also does not aver that the appellant was in sound and sober senses when he made the statement and that he was informed of his right to remain silent. According to the appellant these vitiate the proceedings.

[3] The statement from the transcribed record slightly differs from the manuscript one that was admitted as exhibit “D” in the court *a quo*. The area of difference will be highlighted in order for this court to consider what was presented in totality. The appellant stated:

‘I the undersigned Zolisa Ncitha make the following statement. I am the accused person in this matter, also aware of the charges preferred against me. I plead guilty to the charge of rape. I plead guilty out of my own free will. I wish to state as follows: On or about February 2017 I was doing house chores. I sent my cousin sister to get me a cigarette from a(local) shop. Indeed, she came back with it. On her return I became tempted and lifted her (skirt and lowered her) panty (and) I inserted my finger on her vagina without her consent thereby raping her. I admit what I did was against the law. I am remorseful for what I did. (brackets omitted in exhibit D).

[4] The appellant was charged in terms of the provisions of section 3 read with sections 1, 56(1), 57, 58, 59, 60 and 61 of Criminal Law Sexual Offences and related matters amendment Act 32 of 2007 (sexual Offences Act) also read with sections 256 and 261 of the CPA. The state had alleged ‘from February

2017 and at near Msizazwe location, Bizana, The said accused did unlawfully and intentionally commit an act of sexual penetration with the complainant (a 9-year-old girl) by inserting his finger into her vagina, without the consent of the complainant.

[5] Section 3 of the Sexual Offences Act provides:

‘Any person who unlawfully and intentionally commits an act of sexual penetration with a complainant (“B”) without the consent of B, is guilty of the offence of rape’

[6] In this court on behalf of the appellant it was submitted that the appellant did not admit intention, it ought to have been proved. The counter argument on behalf of the state was that the factual averments made by the appellant suffice for the inference of intention on the part of the appellant to be made. The appellant averred that he became tempted, lifted her panty or skirt and inserted his finger on her vagina without her consent.

[7] In **S v Monyane and others** 2008 (1) SACR 543 at paragraph [15] Ponnan JA restated the principles applicable in consideration of factual findings on appeal. He stated: ‘The court’s power to interfere on appeal with the findings of fact of the trial court are limited. ... In the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct, and will only be disregarded if the recorded evidence shows them to be clearly wrong’.

[8] It is noteworthy that the appellant had stated that he pleaded guilty out of his free will. To that extent there would be no basis to find fault in the court *a quo*’s acceptance of the fact that the appellant was in his full senses at the time the plea was drafted. He also confirmed the plea in court.

[9] It is common cause that the express word, intention is missing in the statement. The appellant's statement does contain facts admitted by the appellant and with regard to penetration, he stated; 'I inserted my finger on her vagina without consent'.

[10] It is trite that intention comprises of a person's state of mind. **Jonathan Burchell and John Milton in Principles of Criminal Procedure second edition page 98** say direct intention refers to aim and object to perpetrate unlawful act. Firstly, the appellant was aware that he was acting without the consent of the complainant. Secondly, he stated, 'I became tempted and lifted her panty or skirt'. The appellant thereafter proceeded to penetrate the complainant with his finger. His state of mind of temptation made him to want to achieve the aim of or to pursue an unlawful act.

[11] In **Director of Public Prosecutions, Pretoria v Hamisi** 2018 (2) SACR 230 SCA paragraph 8 Dambuza JA states '... the written plea is aimed at ensuring that the court is provided with an adequate factual basis to make a determination on whether the admissions by an accused support the plea.' This in my view is a clear call to consider the facts. The word intention in the sense of this matter is a legal conclusion. Even if it was there, if the facts indicated to the contrary, the requirement for admission of elements of the offence would not have been met. For this assertion this court finds support in what Jafta JA (as he then was) stated in **S v Mshengu** 2009 (2) SACR 313 SACR 316 paragraph 7. The learned Judge said 'section 112 (2) requires that the statement must set out the facts which he admits and on which has pleaded guilty. Legal conclusions will not suffice.'

[12] In my view, there is no misdirection in anyway in the magistrate's reasoning and findings and therefore no reason for interference.

[13] In the result,

The appeal is hereby dismissed.

B MAJIKI
JUDGE OF THE HIGH COURT

I agree

S TILANA-MABECE AJ
ACTING JUDGE OF THE HIGH COURT

Appellant's Counsel : Mr X Babane

Instructed by : Legal Aid South Africa
Mthatha Local Office
No. 96 PRD Building

Sutherland Street

MTHATHA

Respondent's Counsel : Mr A Bikitsha

Instructed by : Office of the Director of
Public Prosecutions, Mthatha
94 Lower Sisson Street
Fortgale
MTHATHA