REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,

(GAUTENG DIVISION, PRETORIA)

CASE NO: A584/2016

DATE: 26/01/2018

In the matter between:

MUZI ZACHIOUS NTSHAKALA Appellant

and

THE STATE Respondent

JUDGMENT

TEFFO, J:

[1] The appellant was convicted in the Regional Court, Piet Retief, on one count of rape of an 11 year old girl, his [...], in contravention of s 3 of the Sexual Offences and Related Matters Act, 32 of 2007. He was sentenced to imprisonment for life. He now appeals against his conviction and sentence in terms of the provisions of s 10 of the Judicial Matters Amendment Act, No 42 of 2013. The section provides that an accused person who has been sentenced to imprisonment for life by the Regional Court under s 51(1) of the Criminal Law Amendment Act, No 105 of 1997 may note an appeal without having to apply for leave in terms of s 309 B of the Criminal Procedure Act,51 of 1977 ('the Act').

The point in limine

[2] An issue was raised that, while the record reflects that the appellant's mother asked the prosecutor that the mental state of the appellant be investigated and the trial court having been made aware of the situation, failed to direct that the matter be enquired into and be reported in accordance with the provisions of s 79 of the Act. It was argued that the trial

court's approach on the issue did not conform to the prescript of ss 77, 78 and 79 of the Act. It accordingly constituted an irregularity which infringed the appellant's right to a fair trial and that, on that basis, the conviction and sentence should be set aside.

The appeal against conviction

[3] The conviction of the appellant is challenged on the basis that the trial court did not approach the evidence of the complainant, a single witness to the rape, with the necessary caution.

[4] It was also pointed out that the trial court erroneously rejected the appellant's version.

The appeal against sentence

[5] The sentence of the appellant is criticised on the basis that it is harsh and shockingly inappropriate. It was further submitted that the trial court erred in concluding that there are no substantial and compelling circumstances present justifying it to deviate from imposing the prescribed minimum sentence of life imprisonment.

[6] The state disagreed with both submissions on both conviction and sentence. It was argued on behalf of the state that the appellant was correctly convicted and that the sentence is justified.

The evidence

[7] The state called two witnesses, namely, Ms N. Z. S.(the complainant) and Ms P. M. (P.) in support of its case while the appellant testified without calling witnesses.

[8] The complainant testified with the use of a CCTV and was assisted by an intermediary. Her evidence was briefly as follows : The incident happened on a Sunday. She did not recall the date and month. She was visiting her stepfather (the appellant)'s place of residence. While she was in the kitchen, she asked the appellant to borrow her his cell phone. The appellant said she could go and get it in his room. The room is outside the main house. She went to his room to get the cell phone. While she was in the room, the appellant followed her and closed the door. He undressed her of her pants and her panties

and threw her on the bed. He inserted his penis into her private part for a while. When she cried, he told her not to cry. He said he was going to buy her a big cake. She also screamed and kept on pushing him away from her. It was painful. After he finished raping her, she dressed up and went out. She proceeded to the main house where she found her grandmother (the appellant's mother) in the dining room. She was crying. She does not know if the appellant's mother saw that she was crying. She did not tell her anything. She took her shoes and left.

[9] The appellant accompanied her home where she was residing with her mother but only took him halfway. He was afraid to show his face at her residence. Her mother was not at home. She went to her aunt (P.) and reported to her that her stepfather touched her on her private parts. P. called her uncle and told him what she told her. They phoned the police. She was eventually taken to the hospital where she was examined. The incident happened during the day between 15:00 and 16:00. The appellant told her not to tell anyone about what happened.

[10] She testified under cross examination that her mother and the appellant were still in a relationship when the incident happened. On the day in question she was visiting the appellant and his mother. She was adamant that the appellant undressed her and raped her. She admitted that he bought her chips and that she ate it. She explained that while he was on top of her, he pushed his body forward. She also explained how the appellant touched her private parts. In fact she meant that he inserted his penis into her private parts. After the incident she tried to walk but could not walk properly. Her mother asked her to try and walk properly so that the people should not see that she was having a problem. A white-like substance came out of her private parts for the whole week when she urinated and it was painful. She did not bleed. It was the first time she had sexual intercourse.

[11] P. also testified. She is the complainant's aunt to whom she made the first report. The complainant came to her crying and reported that her private part was touched. She did

not mention who touched it. She corroborated the complainant's evidence that, after she had reported the rape to her, she asked her uncle (the witness's boyfriend) to assist by calling the police. The complainant was at S. B. before she came to her house to report the incident. The appellant also resides at S. B.. The complainant used to visit the appellant's mother at his residence. She came to her house around 10:00 to report what happened. At that time the complainant's mother was not at home.

[12] Under cross examination P. testified that the complainant did not explain how her private parts were touched. She testified that she asked the complainant who touched her but she did not mention the name of the person. She also did not tell her when the incident took place. She does not know who touched her.

[13] The appellant's evidence was as follows: On Sunday 18 January 2015 at approximately 10:00 the complainant came to his place of residence. She greeted him and proceeded to his mother. He took R10.00 and went to go buy food for her. He came back, made food for her and left her in the kitchen to eat. He went to his room outside the main house to clean it. After the complainant had finished eating, she followed him to his room. She asked to use his cell phone. He handed the cell phone to her and continued cleaning the room. He also gave her headphones to use while playing games on his phone. He finished cleaning the house and went to a place called Emmakateng to watch a soccer match. His mother was in the main house at the time and he left the complainant with her as she had gone to her for her hair to be done.

[14] He watched the soccer match until late in the afternoon and at approximately 16:00, he went back home where he found that the complainant was still there. It was getting late. He requested her to take her belongings and accompanied her home. He walked with her up to a point where he saw she was safe and very close to where she was residing and turned back home.

[15] When asked why the complainant would testify that he raped her, he testified that he

and her mother were already having problems in their relationship. He further testified that the complainant could be falsely implicating him for something he did not do. He was in good terms with the complainant. He was arrested on the night of the incident.

[16] He denied ever raping the complainant. He used to play with her. On the day of the incident, he did not play much with her as he left to go and watch the soccer match. When asked as to how he played with her, he testified that he tickled her. It is not clear on the record what he meant, but the record reflects that he demonstrated doing something under her armpits and saying: "hey you, hey you...". He played with her while the two were outside the room.

[17] Under cross examination he testified that, at the time of the incident, he no longer had a relationship with the complainant's mother. When confronted with the uncontested evidence of P. that he was 99still in a relationship with the complainant's mother, he denied it. He was adamant that the complainant was coming to his homestead on her own and not in her mother's company. He was asked what the complainant was then doing at his homestead because he no longer had a relationship with her mother. He testified that the complainant knew him as her father. He was further asked why the complainant would say he raped her if he only gave her food and a cell phone to play games with. He explained that he used to buy her a cake every December when she had performed well at school. At the time of the incident, she used to frequent his place of residence with the hope that she would get a cake as a present from him but he did not buy it. When asked whether that could be the reason for the rape allegations, he testified that he observed on the day of the incident that the complainant was angry and that is why she and her aunt decided to level false allegations against him.

[18] He further testified that when he left for the soccer match, his brother was also present. When asked whether he told this to his legal representative, he testified that he did not regard that evidence as important because his brother did not know anything about

it.

[19] When he accompanied the complainant home, there was no indication that she was upset. He further testified that on the day the complainant visited his homestead, she kept on reminding him about the present. He tried to explain to her that he did not yet have money to buy it. He however could not explain why what he was saying was never put to the complainant when she was testifying and why this fact was also not mentioned in his evidence in chief. He also could not explain why his evidence that he left the complainant at his homestead to go and watch the soccer game, was not put to the complainant when she was testifying.

[20] Section 77(1) of the Act provides that, if it appears to the Court at any stage of the criminal proceedings that the accused is by reason of mental illness or mental defect not capable of understanding the proceedings so as to present a proper defence, the Court shall direct that the matter be enquired into and be reported on in accordance with the provisions of section 79.

[21] The Act further provides that the Court must give at least the following directions:

(i) Whether the enquiry must be done under section 77 or 78 or both.

(ii) The place where the enquiry must take place, which has to be an institution for the mentally ill persons unless such a place is not available. The name of the institution ought to be mentioned; if that is not done, the nature of the place should be indicated.

(iii) The duration of the enquiry, which may not be more than 30 days at a time although extensions are permissible (s 79(2)).

(Hiemstra's Criminal Procedure 2007 ed, Commentary, issue 8, p13-18).

[22] Before a report under s 79 can be made, the accused must be send for observation as contemplated ins 79. However, before the court can refer the accused for observation under s 79 it must be satisfied that some factual or medical basis has been laid for the allegation. (S v Makoka 1979(2) SA 933 (A) at 937G)

The point in limine

[23] At page 46 of the record line 14, the trial court said the following in its judgement "Goedbeskuldigde se ma kom dan nadie staatsaanklaertoeen se hulle moet 'n bietjie kyk, beskuldigde is geestesversteurd. Ons stel toe die saak verskeie kere uit om die evalueering, ensovoorts te doen en op die ou end se die dokters vir die hof daar is niks fout met hom nie. In kort, voordat ek verder gaan, dit lyk of sy vir die hof lieg om die beskuldigde te beskerm."

[24] On page 78 of the record, a note has been made by the Magistrate, Piet Retief that on 19 January 2015, the matter was postponed to 2 February 2015 for possible mental observation.

[25] Between pages 84 and 85 of the record, vol 2, a so called Memorandum is included. The document is dated 9 July 2015 and reflects an official stamp of Piet Retief hospital. It is completed by hand and states the following: “A No mental disturbances. Apparently there is no mental condition evidence during the medical interview." The document emanated from Piet Retief hospital and is addressed to the Piet Retief Magistrate Court.

[26] It was argued on behalf of the appellant that there is no indication on the record that Piet Retief hospital is a psychiatric hospital as envisaged by s79 of the Act. It is also not clear from the document by whom the appellant was interviewed for purpose of this investigation.

[27] It was further submitted that the wording as it appears from the Memorandum can be construed as hearsay from the author of the Memorandum and that somebody else than the author interviewed the appellant.

[28] It was further pointed out, that when the issue of the appellant's mental condition was brought to the trial court's attention, the trial court should have called or directed that the appellant's mother testify on the appellant's alleged mental disturbance. It was submitted the trial court's approach constituted an irregularity which infringed his right to a fair trial.

Counsel for the appellant therefore submitted that the conviction and sentence should be set aside on this ground alone.

[29] On the other hand the following submissions were made on behalf of the State: Immediately after the issue was brought to the trial court's attention, the case was postponed and the appellant was referred for an investigation. Accused persons are normally referred to a District Surgeon. In this case the appellant was taken to a District Surgeon. As to the issue why the Memorandum and not a report was compiled, it was submitted that the appellant was legally represented throughout the proceedings. His legal representative never raised an issue about the report. No issue was also raised that the appellant's evidence was incoherent and it was submitted that this gave credence to the magistrate's findings that the appellant's mother wanted to protect him by requesting that his mental condition should be investigated.

[30] It appears from the trial court's judgement that the appellant's mother approached the prosecutor with the request that he/she investigate the appellant's mental situation as, according to the appellant's mother, the appellant is mentally disturbed. The record does not indicate when the request was made by the appellant's mother and the details or whether her request related to the investigation of the mental condition of the appellant at the time of the commission of the offence or whether it related to the time when the trial proceedings were conducted in the court a quo. The information about the request is only mentioned in passing as quoted above in the trial court's judgement.

[31] It is however accepted that the issue about the appellant's mental condition was raised and that it was brought to the trial court's attention during the trial before conviction. According to the record the case was postponed several times and that the appellant was referred for an investigation hence the Memorandum.

[32] The fact that the learned magistrate decided to refer the appellant for mental observation meant that he needed confirmation about his mental status.

[33] Section 79(1) reads as follows:

"Where a court issues a direction under section 77(1) or 78(2), the relevant enquiry shall be conducted and be reported on

a) Where the accused is charged with an offence other than the one referred to in paragraph (b), by the medical superintendent of a psychiatric hospital appointed by the medical superintendent at the request of the court; or

b) Where the accused is charged with murder or culpable homicide or rape or compelled rape as provided for in sections 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, or another charge involving serious violence, or if the Court considers it to be necessary in the public interest, or where the Court in any particular case so directs-

i) By the medical superintendent of the psychiatrist hospital designated by the Court, or by a psychiatrist appointed by the medical superintendent at the request of the court;

ii) By a psychiatrist appointed by the Court and who is not in the full time service of the state unless the Court directs otherwise, upon application of the prosecutor, in accordance with directives issued under subsection(13) by the National Director of Public Prosecutions;

iii) By a psychiatrist appointed for the accused by the Court and

iv) By a clinical psychologist where the Court so directs."

[34] The provisions of s 77(1) are peremptory. It is clear that when the Court forms an impression or its attention is directed to the fact that the accused has a mental disturbance, the Court should grant order in terms of this section that his mental capacity be investigated as prescribed by s 79. Section 79 states that, where a Court issues a direction in terms of s77(1), the relevant enquiry shall be conducted and reported on, where the accused is charged of rape among others, by the medical superintendent of a

psychiatrist hospital designated by the Court, or by a psychiatrist appointed by the medical superintendent at the request of the Court, by a psychiatrist appointed by the Court and who is not in full time service of the state or by a psychiatrist appointed for the accused by the Court.

[35] Nothing on record shows that the appellant's enquiry was conducted at a psychiatrist hospital by a psychiatrist as envisaged by the provisions of s 79 of the Act.

[36] Section 77(1) further provides that the Court shall direct that the matter be enquired into and be reported on in accordance with the provisions of s79.

[37] Even if the legal representative of the appellant did not raise the issue in the trial as alluded to on behalf of the State, the issue is important and material to the proceedings before Court. As I indicated above, the provisions of s77 (1) of the Act are peremptory. Nowhere do they mention that a memorandum should be send to the court stating the outcome of the enquiry. The provisions of s77(1) refer to a report and s79 states that the enquiry shall be conducted by a psychiatrist at a psychiatric hospital and or by one who is not full-time in the employ of the state.

[38] The record does not state whether Piet Retief hospital is a psychiatric hospital. Counsel for the State submitted that the appellant was taken to a district surgeon for an investigation hence the Memorandum. In my view, if that is the case, the learned Magistrate took the wrong route that resulted in the appellant being taken to a district surgeon: A general practitioner cannot comment on the mental capacity of an accused.

[39] The Memorandum is furthermore very cryptic. It does not record any details of the enquiry, who interviewed the appellant, where the interview was held and the duration thereof. The duration of the enquiry should at least be 30 days. The Memorandum is therefore inadequate. It could not have assisted the court to arrive at a proper and just decision regarding the mental condition of the appellant at the time.

[40] I agree with the submission on behalf of the appellant that, after the issue of the

appellant's mental disturbance was brought to the trial court's attention, it should have taken it further by calling the appellant's mother to adduce evidence as to why she made such a request. That was not done. Before he was sent for mental observation, the trial court should have satisfied itself that the factual or medical basis was laid for the allegations. (S v Makoka supra)

[41] In my view the submissions made on behalf of the appellant have merit. The approach adopted by the trial court on the issue regarding the mental capacity of the appellant does not conform to the prescripts of ss 77,78 and 79 of the Act. It constituted an irregularity which vitiated the proceedings. The learned Magistrate has therefore misdirected himself in this regard. Under the circumstances the conviction and sentence cannot stand.

[42] In the result the following order is made:

1. The appeal against the conviction and sentence of the appellant is upheld.
2. The conviction and sentence of the appellant are set aside.

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M J TEFFO

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

I agree:

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A BASSON

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

APPEARANCES

FOR THE APPELLANT	F VAN AS
INSTRUCTED BY	LEGAL AID SOUTH AFRICA

FOR THE RESPONDENT	CORNE PRUIS
INSTRUCTED BY	THE DIRECTOR OF PUBLIC PROSECUTIONS
DATE OF JUDGMENT	26 JANUARY 2018