

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: A173/2020

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO
Date: 23 February 2023 E van der Schyff

In the matter between:

AMASELI PATRICK OKEKE

FIRST APPELLANT

ONJOKE THEOPHILUS NDUBISI

SECOND APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

Van der Schyff J (Nyathi J concurring)

Introduction

[1] This is an appeal against the appellants' conviction on 28 May 2018 and sentence on 27 August 2018 by the Regional Court for the Regional Division of Gauteng held

in Pretoria. It is common cause that the record is incomplete. The parties agreed, however, and in our view correctly so, that the appellants will not be prejudiced if the appeal is finalised on the record as it stands. The late prosecution of the appeal caused by the endeavours to finalise the record, stands to be condoned.

- [2] On 15 October 2015 the appellants, and a co-accused, were charged in the Regional Court for the Regional Division of Gauteng held at Pretoria with 11 counts. On 28 May 2018, the appellants were convicted on counts 1 and 3 for the human trafficking of one EM, and the keeping of a brothel, respectively. Human trafficking was criminalised through s 71(1) of the Sexual Offences and Related Matters (Criminal Law Amendment) Act 32 of 2007. Section 71 was repealed by the Prevention and Combating of Trafficking in Persons Act 7 of 2013 (the POCTP). Section 49 of the POCTP contains certain transitional arrangements and provides for the continuance and conclusion of criminal proceedings instituted in terms of any law which were instituted prior to the commencement of the POCTP. The appellants' first appearance in the regional court was on 10 March 2015. The POCTP commenced on 9 August 2015.

- [3] The appellants were sentenced to life imprisonment on count 1 and one-year imprisonment on count 3, the latter to run concurrently with the first. The appeal is lodged in terms of s 309(1)(a) of Act 51 of 1977.

- [4] It was evident that the counsel acting for the state was deeply invested in this matter, to the extent that her oral submissions tended to become over-emotive. Counsel for the appellants submitted that the judgment of the court *a quo* was influenced by the emotions aroused in matters of this kind, and the court's sympathy with the two alleged victims. We thus found it prudent to reserve our judgment and again scrutinise the appeal record to ensure that our findings are based on an objective analysis of the evidence led during the trial.

Ad conviction

- [5] The crux of the appeal lies against the credibility findings of the court *a quo* pertaining to the acceptance of the single witness, EF's, testimony.
- [6] It is trite that a court on appeal should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that the trial court was plainly wrong.¹ The factual and credibility findings of the trial court are presumed to be correct unless they are shown to be wrong with reference to the record.² The Supreme Court of Appeal held as follows in *S v Pistorius*:³

'It is a time-honoured principle that once a trial court has made credibility findings, an appeal court should be deferential and slow to interfere therewith unless it is convinced on a conspectus of the evidence that the trial court was clearly wrong. *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 706; *S v Kebana* 2010 (1) All SA 310 (SCA) para 12.... As the saying goes, he was steeped in the atmosphere of the trial. Absent any positive finding that he was wrong, this court is not at liberty to interfere with his findings.'

- [7] Counsel on behalf of the appellants submitted that the trial court failed to exercise the necessary caution when dealing with EF's evidence. Although a court must be alive to the danger of relying on the evidence of only one witness for the obvious reason that it cannot be checked against other evidence, section 208 of *The Criminal Procedure Act* 51 of 1977, permits the conviction of an accused on the evidence of a single witness. The trial court was well aware of, and alive to the cautionary rule and its application. Counsel for the appellants submitted that the regional court magistrate paid mere lip service to the rule. This submission is not supported by an objective reading of the judgment against the background of the totality of evidence led.

¹ *R v Dhlumayo & another* 1948 (2) SA 677 (A) at 705-706.

² *S v Francis* 1991 (1) SACR 198 (SCA) at 204E-D.

³ 2014 (2) SACR 315 (SCA) par [30].

- [8] EF had a long history of prostitution, drug abuse and being handed down from pimp to pimp that does not involve the appellants in this case. She testified that while she was staying with a person known as Orgadi/Ogady at Jaspit Court, she was taken by a man, Mr. Shimobe, to the Fairy Glen address where the police raid eventually occurred. At Fairy Glen she worked for Patrick Ametchi, the first appellant. She was working on the internet. She did not pay the person who took the photographs for the escort agency's online advertisements. Her answer was that the 'guy I was staying with gave them the money'. EF testified that 'Patrick' was her pimp. 'Patrick' slept in the house, and she slept in a room. She was sharing her room with a white girl with green eyes, she thought her name was Bianca. When EF was shown the photographs of the ladies taken by the police, she confirmed that it was a photograph of her and the girls who worked in the house. She also identified a man by the name of 'Happy', the second appellant, who stayed with a girl named Jodie, and she identified Patrick on some of the photographs. She explained that he was not staying in the room wherein he was when the photograph was taken, he stayed in the lounge.
- [9] EF then testified that Patrick was not the person who brought her to the Fairy Glen premises. She explained again that Mr. Shimobe transported her to the Fairy Glen premises, but that Patrick and Happy were also in the vehicle when she was transported. EF testified that Patrick was seldom at the Fairy Glen premises during the day. He told her how much she had to charge per client, and she had to give the money she received to him. He provided her with drugs to smoke. He would also give her drugs in the morning before he went out to 'wake her up'. Patrick never abused her physically he never touched her. She testified that she could not leave the property as she did not have a remote to open the access gate. She was confused and did not know the area. She also testified that she cannot actually say that she was not allowed to go out, because she never actually wanted to go out.
- [10] Under cross-examination, EF explained that before being transported to the Fairy Glen premises she was waiting in Sunnyside. Happy and Patrick arrived. Patrick picked her up and they were all picked up and transported by Mr. Shimobe who transported them to Fairy Glen. She confirmed again that she gave all the money

she received to Patrick. When he was not home, she kept the money until he returned home and then gave it to him.

- [11] EF also testified, when cross-examined, that she never gave accused 3, the second appellant, any money. When he had a client for her, and she was paid, she would still give the money to Patrick. It was Happy's 'girl' who made the arrangements to meet clients for which Happy was to be paid. EF confirmed again that when she was transported to Fairy Glen, Patrick and Happy were with her – 'I sat right in the middle of Patrick and Happy. We even had a conversation. So I do not know why is Happy saying that he was not in the car.' She denied that she met Patrick a month before she was taken to Fairy Glen, she stated that she only met him on that day. She denied that she was his girlfriend and when it was put to her that he will testify that he never took any money from her she said 'He never took money from me? So who took the money?'. When asked to comment on the statement that she was Patrick's girlfriend, EF answered – 'We did not stay in one room ... I do not know. I never think I was his girlfriend. I thought I was only a girl working there'.
- [12] When it was put to EF that Patrick would testify that he never sold her to other people, she confirmed that he never sold her to other people and said that she was being called on the phone [by potential clients]. He did provide her with drugs. In answer to the statement that 'accused 2 would deny that he gave you drugs or that you ever worked for him' EF answered 'Madam, can I, so what was I doing in Skukuza Street?' When the presiding magistrate told EF that she has to agree or disagree she said 'I don't know. I do not know what to answer to that.'
- [13] The first appellant testified that EF was his girlfriend, that he never provided her with drugs, and was not aware that she was prostituting herself while they were together. He also denied having any knowledge of the Fairy Glen property being used as a brothel and denied receiving money from EF. He testified that he met EF a few days before she came to stay with him. He met her in Sunnyside, they exchanged numbers. When she phoned him, he directed her to where he was and from there a friend transported them to Fairy Glen. The friend's name was Ogardi. He said EF only visited and had plans to go back after the weekend. The raid and subsequent

arrests happened on the Friday. He denied that accused 3, Happy, was in the vehicle when they were transported to Fairy Glen. It was never put to EF by the appellant's legal representative that she only visited accused 2 and would return to wherever she came from after the weekend. Although it was put to EF that accused 2 would testify that she was his girlfriend, it was never put to her that he denied that she shared a room with Bianca and that he slept in the lounge. It was never put to EF that the pedestrian gate to the property was never locked, or that the gate malfunctioned at times and stood open.

- [14] When it was put to the first appellant during cross-examination that EF referred to Ogardi as her previous trafficker, and that he indicated that Ogardi was the person who transported them from Sunnyside to Fairy Glen, the first appellant said that what he means is that the person's name is Nyaza and some people referred to him as Okuchucku.
- [15] Accused 3, the second appellant denied any knowledge of prostitution, drug use or the Fairy Glen property being used as a brothel. He denied ever accompanying his co-appellant to collect EF.
- [16] The regional court magistrate's analysis and evaluation of the two appellant's evidence cannot be faulted. Their respective versions that they were totally oblivious as to the activities that were taking place at the Fairy Glen property in the context of the evidence presented is so inherently improbable that it cannot reasonably be possibly true.
- [17] An objective evaluation of EF's evidence indicates that she gave an honest and frank version of what happened to her. She did not attempt to lay any blame for her position before the appellants' feet. Although she said she could not leave because she did not know of the buzzer against the wall and was not provided with a remote to open the access gate, she also said that she did not attempt to leave, because she was confused and wanted to belong. EF did not paint a picture of the first appellant being a cruel and wicked man who kept her locked up and forced her with threats of violence to engage in prostitution. Her evidence indicates that it was her substance abuse disorder, for which neither the appellants are to blame, that initially

drove her to prostitution. Her evidence, however, also proves that appellants were instrumental, in the exploitation of her substance abuse disorder to engage in prostitution for their enrichment.

- [18] Appellants' counsel emphasised that EF, when she was cross-examined and after she expressed her amazement at the third accused's denial that he was present when she was transported from Sunnyside to Fairy Glen, remarked 'I do not know then who it was that was there'. The record reflects that it was difficult for EF to respond to the accuseds' respective versions when it was put to her. Not that she agreed with it. Her difficulty clearly arose in the manner in which she had to express her agreement or disagreement. When she was told by the court that she should not ask questions like 'so what was I doing in Skukuza street?' and just answer, she said 'I do not know. I do not know what to answer to that'. If these remarks are considered in context, it reflects not that she agreed with the statements but that she did not know how to express herself.
- [19] The regional court magistrate carefully evaluated EF's evidence before accepting it. She then considered the evidence in totality before she rejected the appellants' versions, and carefully considered the required elements of the charges and the evidence before she convicted the accused. Her approach cannot be faulted.
- [20] Human trafficking is endemic. Research has shown that traffickers use substance abuse as a means of coercion, to get victims to comply with their demands, increase productivity, inhibit self-protection, decrease escape attempts, and continue entrapment.⁴ Drug addicts are vulnerable individuals. EF's evidence before the trial court supports a finding that her substance abuse disorder was exploited to motivate her to remain entangled in prostitution, and docile at the Fairy Glen property. She regarded accused number two as her pimp because he gave her instructions, paid for the internet advertisements, received the money she was paid by clients, and provided her with the drugs she desperately craved. Accused number three was not

⁴ See, amongst others, <https://www.naadac.org/SUD-Human-Trafficking-webinar> accessed on 20 February 2023; https://2017-2021.state.gov/wp-content/uploads/2020/10/TIP_Factsheet-The-Intersection-of-Human-Trafficking-and-Addiction-1-508.pdf; <https://www.antitraffickingreview.org/index.php/atrjournal/article/view/615/480>.

only present when EF was transported to Fairy Glen, but also provided her with at least one client. Against the accepted facts it cannot be said that EF remained at the Fairy Glen property voluntarily. She knew she was brought to the house 'to work' and that she would receive the drugs she craved for if she worked. The promise of a continued supply of drugs was the bond that kept EF at the Fairy Glen property, engaging in prostitution. Against this factual background EF's evidence that the second accused did not sell her to other people and that she was being called on the phone, is not, as counsel for the appellants submits, an indication that she acted out of her own free will, without being coerced or exploited. As a result, the appellants' appeal against their respective convictions stands to be dismissed.

Ad sentence

- [21] Counsel for the appellants submitted that the sentence of life imprisonment imposed on count 1 was shockingly inappropriate, and harsh. The harshest sentence that can be imposed was imposed and it seems as if the sentence was influenced by personal emotion and subjectiveness.

- [22] Counsel for the State submitted that a conviction on count 1 carries a minimum prescribed sentence. She argued that the judgment on sentence demonstrates that the regional court magistrate considered the relevant factors and applicable case law.

- [23] It is trite that the Criminal Law Amendment Act 105 of 1997 (the CLA) provides for the imposition of minimum sentences for certain offences, including '[t]rafficking in persons as provided for in section 4 (1) and involvement in the offence as provided for in section 10 of the Prevention and Combating of Trafficking in Persons Act, 2013.' Before the commencement of the POTCP, schedule 2 of part II of the CLA included 'Trafficking in persons **for sexual purposes** by a person contemplated in section 71 (1) or (2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007.' If a court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the prescribed sentence, it must enter those circumstances on the record of the

proceedings and must thereupon impose such a lesser sentence.⁵ The regional court magistrate did not find any substantial and compelling circumstances which would justify the imposition of a lesser sentence than the prescribed sentence. The regional court magistrate handed down a well-reasoned judgment wherein she dealt with all the aspects that a sentencing court should consider. The regional court magistrate exercised her sentencing discretion judicially. The question is not whether this court would have imposed a similar sentence, but whether the regional court magistrate erred in finding that the prescribed minimum sentence is to apply.

- [24] The appellants' counsel is not correct in stating that the regional court magistrate sentenced the appellants to satisfy public opinion and over-emphasised the serious nature of the offence. The reality is that the legislature provided the benchmark. The legislature emphasized the objective gravity of this type of crime and the need for effective sanctions against it. The regional court did not ignore the other factors traditionally taken into account in the sentencing procedure.⁶ The legislature has deemed the crime of human trafficking for sexual purposes in such a serious light that it was singled out for harsh punishment. The prescribed sentence should ordinarily be imposed unless substantial and compelling circumstances are found to be present.⁷ In these circumstances, the appeal against the sentence imposed by the regional court stands to be dismissed.

ORDER

In the result, the following order is granted:

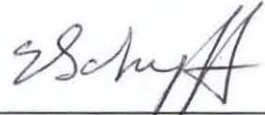
- 1. The late prosecution of the appeal is condoned;**

⁵ Section 51(3) of the CLA.

⁶ As determined is required to do in *Calvin v S* 2014 ZASCA 145 (26 September 2014).

⁷ See also P.G. Du Toit 'A Note on Sentencing Practices for the Offence of the Unlawful Possession of Semi-Automatic Firearms' PER/PELJ 2020 (23) 1 - 20.

2. The appeal against the conviction of and sentence imposed on the appellants by the presiding magistrate of the Regional Court for the Regional Division of Gauteng held at Pretoria in case number 14/255/2015 is dismissed.



E van der Schyff

Judge of the High Court

I agree



J.S. Nyathi

Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

For the appellants:

Adv. P F Pistorius SC

Instructed by:

Du Toit Attorneys

For the respondent:

Adv. A Van Deventer

Instructed by:

The Director of Public Prosecutions

Date of the hearing:

26 January 2023

Date of judgment:

23 February 2023