THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case No: 229/2015

In the matter between:

DECEMBER MDLULI **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Mdluli v S* (229/2015) [2015] ZASCA 178 (27 November 2015).

Coram: Maya DP, Mhlantla and Theron JJA and Van der Merwe and Baartman AJJA

Heard: 11 November 2015

Delivered: 27 November 2015

Summary: Criminal Procedure – appeal against the refusal of a petition by the court a quo – no reasonable prospect of success on appeal – appeal dismissed.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Mothle J and Modiba AJ sitting as court of appeal):

The appeal is dismissed.

JUDGMENT

Van der Merwe AJA (Maya DP, Mhlantla and Theron JJA and Baartman AJA concurring):

[1] The appellant stood trial in the regional court together with another person (accused 2) on two counts of rape of a minor girl (the complainant) in contravention of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. The case for the prosecution was that both the appellant and accused 2 raped the complainant on the same occasion and that the one was an accomplice in respect of the crime committed by the other. The appellant was convicted on one count of rape and accused 2 on both counts, on the aforesaid basis. The appellant was sentenced to 18 years' imprisonment.

[2] The regional court refused the appellant's application for leave to appeal against the conviction and sentence. His petition to the Gauteng Division of the High Court, Pretoria (Mothle J and Modiba AJ) suffered the same fate. This court, however, granted special leave to the appellant to appeal to it in terms of s 16(1)*(b)* of the Superior Courts Act 10 of 2013.

[3] Before us the attorney for the appellant correctly conceded that the appeal lies only against the refusal of the petition by the court a quo. (See *S v*

Tonkin (938/12) [2013] ZASCA 179; 2014 (1) SACR 583 (SCA); *Van Wyk v S*, *Galela v S* (20273/2014, 20448/2014) [2014] ZASCA 152; 2015 (1) SACR 584 (SCA); *Dipholo v S* (094/2015) [2015] ZASCA 120 (16 September 2015)). Therefore, the issue on appeal is whether the court a quo should have granted leave to the appellant to appeal to it. That is determined by whether the appellant had shown a reasonable prospect of success in the proposed appeal. A mere possibility of success or that the case is arguable or cannot be described as hopeless, does not constitute reasonable prospects of success. The appellant must convince this court on a sound basis that there is a realistic chance that his appeal might succeed. (See *S v Sikosana* 1980 (4) SA 559 (A) and *S v Smith* (475/10) [2011] ZASCA 15; 2012 (1) SACR 567 (SCA)).

[4] The complainant was born on 30 September 1996. The events in question took place on 10 September 2011, some 20 days shy of her 15th birthday. At approximately 18h30 on that day, the complainant's mother sent her to buy six Savannah ciders at a bar. As she was not allowed to enter the bar, Mr Njabulo Nkambule, whom she met near the bar, agreed to purchase the liquor and to bring it to her. Whilst she was waiting outside the bar, the complainant was approached by the appellant and accused 2. She knew both of them as they all lived in the same area. The appellant and accused 2 started pulling her by the hand. When Mr Nkambule returned, he witnessed this. As a result he did not hand the liquor over to the complainant but proceeded to report the matter to the complainant's mother.

[5] The complainant testified that the two men dragged her to a mountain. There accused 2 undressed her. In the process the complainant's skirt was torn. Accused 2 caused the complainant to lie down facing upwards on a flat piece of rock. The complainant was then raped by the appellant, whilst accused 2 held both her legs. For this purpose he knelt behind the appellant. Thereafter the appellant departed, saying that he was going to buy liquor. Accused 2 then also raped the complainant. The complainant said that she did not scream whilst in the presence of her assailants because both had threatened to kill her should she do so. After the rape the complainant

dressed herself and went home. Her mother was not at home, because she went looking for her daughter after the report by Mr Nkambule. The complainant reported what had happened to a neighbour, Ms Dudu Lekhuleni. The latter telephoned the complainant's mother who arrived shortly afterwards.

[6] Mr Nkambule confirmed the testimony of the complainant as far as it fell within his knowledge. On a proper reading of his evidence, he said that both the appellant and accused 2 held and pulled the complainant. She resisted by telling them to leave her alone and by pulling back, but to no avail. It is clear that Mr Nkambule was compelled by what he witnessed to make a report to the complainant's mother. He urged her to go and look for the complainant, which she promptly did.

[7] Ms Lekhuleni testified that when the complainant arrived at her home at approximately 19h00, she was crying and bending down whilst holding her stomach. She confirmed that the complainant reported to her that she had been raped by the appellant and accused 2. Ms Lekhuleni told the complainant that she had heard screams and enquired as to whether they emanated from the complainant, which the complainant confirmed. There is no evidence, however, that this screaming took place in the presence of her assailants. On the contrary, it appears probable that this happened after the complainant managed to flee from the mountain. The mother of the complainant confirmed the evidence of Mr Nkambule and Ms Lekhuleni. She said that when she saw the complainant, the complainant was bleeding from her vagina, was full of dust and that her skirt was torn.

[8] Dr N T Mbowane testified that she examined the complainant at 1h30 on 11 September 2011. She found that the hymen of the complainant was not intact. She also found increased friability of the posterior fourchette as well as mild swelling. She concluded that vaginal penetration had definitely taken place. She also noted cervical excitation tenderness, which is consistent either with deep penetration or infection. As there was no indication of infection, this constituted evidence of deep penetration. Dr Mbowane said that

on the history of the incident given by the complainant, one would normally expect more injuries than those suffered by the complainant. However, she said that the absence of severe injuries could be explained by the factors that the first date of the last menstruation of the complainant was on 9 September 2011 and that she was an adolescent, with resultant hormonal changes. According to the doctor's evidence, the hymen would in these circumstances be elastic, soft and moist and therefore even very violent penetration could cause only minimal injuries.

[9] The appellant denied any involvement in the rape of the complainant. He testified that the complainant arrived at the bar with Mr Nkambule, that Mr Nkambule entered the bar and that whilst the complainant was waiting outside the bar, she was approached by accused 2. According to the appellant, the complainant was accused 2's girlfriend. The appellant went to the two of them in order to borrow R50 from accused 2. Accused 2 said that he would give the money to the appellant along the way. The three of them then walked together for approximately 800 metres, whereafter accused 2 gave him the money. The appellant said that he left the complainant and accused 2 and went home. The evidence of accused 2 was to similar effect. He said that the complainant was his girlfriend, but that they never had sexual intercourse. According to him the complainant asked him to accompany her home. When they were approximately 250 to 300 paces from her home, they stood and chatted for about 30 minutes. The complainant then asked him to turn back. He did so and went home.

[10] The regional court considered the evidence carefully and accepted the evidence of the complainant and the other witnesses for the State. It rejected the evidence of the appellant and his co-accused as false beyond reasonable doubt. It is trite that a court of appeal would be bound by these findings, unless they were affected by a material misdirection or the court of appeal is convinced that they are wrong. It is not sufficient that the court of appeal is merely left in doubt as to the correctness of these findings. No misdirection of fact was relied upon before us. Thus, the question is whether the appellant

has shown a reasonable prospect that the court a quo might be convinced that the findings of the regional court were wrong.

[11] The evidence of the complainant reads well and contains no inherent improbabilities. The alleged differences between her evidence and her police statement, if they exist at all, are immaterial. She was corroborated by the evidence of Ms Lekhuleni and of her mother in respect of her evidence that she had been raped. The medical evidence placed it beyond doubt that the complainant had been raped. There is no reason to doubt the evidence of the complainant that she was a virgin before the incident. The only reasonable inference from the evidence is that the hymen of the complainant was not intact as a result of deep penetration that took place on the day in question. In the light hereof, it is of no consequence whether the complainant had showered between the incident and the examination and whether the doctor should have noticed signs of bleeding. Significantly, the evidence of the complainant that implicated the appellant, was materially corroborated by that of Mr Nkambule.

[12] In cross-examination on behalf of the appellant, it was put to the complainant that whilst she was in the company of the appellant and accused 2 outside the bar, Mr Nkambule handed the ciders to her. This was contradicted by the appellant in his evidence. He said that Mr Nkambule never came to where they were and did not hand over the ciders to the complainant. This is not immaterial and indicative of adjustment of his version. On the version put to the complainant, there was no reason for Mr Nkambule to go to the complainant's mother. It is of course important to consider why the complainant would deliberately incriminate the appellant falsely. In this regard the appellant referred in his evidence for the first time to previous events involving him and the complainant's uncle. The appellant suggested that that was the cause of bad blood which was demonstrated when on the same evening of the incident, the complainant's mother told him and his mother that: 'they do not have a problem with Manqoba they are only concentrating on me she told me that they have got me now and that they did not mind about Manqoba'. Manqoba is accused 2. But the appellant admitted that this

was not put to the complainant or her mother because he did not convey it to his attorney and he was unable to provide an acceptable explanation for the failure to do so. In any event, in the light of the prosecution of accused 2 the proposition carries little or no force.

[13] For these reasons I find that there is no reasonable prospect of a finding on appeal that the factual findings of the regional court were wrong and therefore no reasonable prospect of success on appeal in respect of the conviction.

[14] In terms of the Criminal Law Amendment Act 105 of 1997, the minimum sentence prescribed for the crime committed by the appellant was life imprisonment. The regional court found that substantial and compelling circumstances justified a departure from the prescribed sentence and imposed a sentence of 18 years' imprisonment. It is trite that the imposition of sentence was within the discretion of the regional court. Taking into account that the appellant participated in the multiple rape of a child who was a virgin at the time and for which he takes no responsibility, I am of the view that there is no reasonable prospect that a court of appeal would impose a lighter sentence.

[15] The appeal is dismissed.

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C H G VAN DER MERWE
ACTING JUDGE OF APPEAL

APPEARANCES:

For Appellant:	P J de Necker
	Instructed by:
	Coert Jordaan Attorneys Inc, Nelspruit
	Giorgi & Gerber Attorneys, Bloemfontein
For Respondent:	S Scheepers
	Instructed by:
	Director of Public Prosecutions, Pretoria
	Director of Public Prosecutions, Bloemfontein