THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 284/2010
No Precedential Significance

MBUTINI ISAAC VILAKAZI **Appellant**

and

THE STATE **Respondent**

Neutral citation: *Vilakazi v The State* (284/10) [2010] ZASCA 125 (30 September 2010)

Coram: NUGENT and HEHER JJA and K PILLAY AJA

Heard: **13 September 2010**
Delivered: **30 September 2010**

Summary: Rape ─ whether conviction justified by the evidence – whether sentence of ten years' imprisonment excessive.

ORDER

On appeal from: North Gauteng High Court (Pretoria) (Basson J and Makhafola AJ sitting as court of appeal):

The appeal against conviction and sentence is dismissed.

JUDGMENT

K PILLAY AJA (Nugent and Heher JJA concurring)

[1] The appellant was charged, in the Regional Court of Mpumalanga, with rape. The appellant, who was represented at the trial, pleaded not guilty and elected not to disclose the basis of his defence. He was convicted and sentenced to 10 years' imprisonment. On appeal to the North Gauteng High Court, the conviction and sentence were confirmed. This appeal, which is with leave of the court below, is directed at both conviction and sentence.

[2] The complainant is the appellant's maternal aunt. At the time of the incident she was 44 years old and he was 30. According to the complainant on 1 January 2004, at 3:30 am, she was at the appellant's parental home. A quarrel ensued between the complainant and the appellant's mother, Ms Tomnina Ester Pakati, which caused the complainant to leave. She met the appellant outside and asked him to accompany her to her friend Elizabeth's home. On the way, the appellant decided to show the complainant his home at Extension 22.

[3] Upon arrival at Extension 22, the appellant grabbed the complainant by her throat, led her to his room where he forcibly had sexual intercourse with her. He instructed her not to scream and placed a knife next to her on the pillow. The complainant eventually persuaded him to leave so that she could go to her other sister Gogo's home. This was about 5:30 in the morning. The appellant accompanied her. On the way there, they parted company and she proceeded to her friend Elizabeth Ngwenya's home.

[4] She reported the rape to Elizabeth, who observed that her neck was swollen. Elizabeth gave her money and advised her to report the incident to the appellant's parents, which she did. They advised her to report the incident to the police and took her to the police station, whereafter she was taken to a medical doctor at a hospital.

[5] As disclosed in cross-examination the appellant's version was an alibi defence to the effect that he left his parental home at 2:00 am with his girlfriend and spent the rest of the early hours of that morning with his girlfriend at Extension 22. However, the complainant insisted that the girlfriend was never present at the appellant's parental home.

[6] It was not disputed that later that day the complainant came across the appellant in hospital where, so he said, he had gone for treatment for a foot injury. The appellant was arrested there.

[7] Elizabeth Ngwenya testified on the complainant's behalf and confirmed that the latter had reported the rape to her on the morning of 1 January 2004. She said that she saw 'black marks' on the complainant's neck.

[8] The doctor who examined the complainant on 1 January 2004 tabulated his findings on a J88 form, the contents of which were formally admitted by consent. There were bruises on both sides of the complainant's upper chest. No other injuries were noted. The J88 form was admitted together with a document, bearing the reference 02DIAF3447XX. The document was titled 'Sexual Assault Kit' and recorded that swabs were taken from the complainant.

[9] Sergeant Makwena, a forensic analyst at the Forensic Science Laboratory, analysed genital swabs A and B of specimen 02DIAF3447XX 'L.A. Phalathi' and found that the genital swabs tested positive for semen.

[10] A DNA expert, Sergeant Mphepu, also testified. His evidence, was that he did a comparative analysis of a control blood sample, marked with reference number 02DIAE6202XX 'I.M.V.' with genital swabs A and B with reference '02DIAF3447XX LA Phalati', which revealed a 99.99 percent match.

[11] In the process of delivering judgment, the trial magistrate appears to have realised that formal evidence was lacking that the blood sample used for comparative analysis was that of the appellant. It seems that such an admission might have been made but had not been formally recorded. He accordingly posed the following question to counsel for the appellant:

'However the Court does not have any notes for the formal admission that was made that the blood sample that was used for comparison purposes was in fact the blood sample of the accused, is that in contention or can the Court record that as a formal admission?'

The record reflects the following exchange thereafter:

'DEFENCE: (Inaudible)
COURT: Can the court then record it as a formal admission?
DEFENCE: (Inaudible).'

And further:

'Sergeant Mogute testified that when he received the said samples at the laboratory together with a blood sample, which is referred as to a control blood sample and which was formally admitted to be that of the accused's, he tested the vaginal swabs that were taken from the complainant and found them to react positively, in other words that there was DNA present.'

[12] In his testimony, the appellant denied that he had any sexual intercourse with the complainant. He confirmed that he was at his parental home until 2:00 am on 1 January 2004, when he left with his girlfriend for his home at Extension 22.

[13] The appellant's mother testified on behalf of the appellant. She said that the appellant had left her house with his girlfriend at 2:00 am. The complainant remained with her until 4:00 am and then returned at 11:00 am to report that the appellant had raped her. The appellant's girlfriend confirmed his version so far as it related to her.

[14] The trial court found that the cumulative weight of the DNA evidence, which positively linked the appellant to the commission of the crime, together with the credible evidence of the state witnesses established the appellant's guilt beyond reasonable doubt.

[15] I have pointed out that in the course of his judgment the magistrate asked whether it was formally admitted that the blood sample that was tested against the specimen of semen had emanated from the appellant. Notwithstanding the inaudible replies from counsel it is clear from the

fact that the magistrate proceeded with this questioning, that such an admission was formally made, and that was not disputed by counsel before us. It was submitted on the appellant's behalf that the extraction of that admission was irregular and that it had not been made on the instruction of the appellant. In those circumstances, so it was submitted, the admission falls to be ignored, with the result that the prosecution had not proved that the blood sample emanated from the appellant.

[16] I do not think the magistrate can be said to have acted irregularly in asking whether a formal admission was being made. He was entitled to admit evidence at any stage in the proceedings, which concluded only when the verdict was delivered (provided, of course, that it did not cause prejudice the appellant). In view of the fact that the admission was indeed made it is clear that no prejudice was caused merely on account of the fact that the admission was admitted only while he was delivering his judgment. Moreover, it seems that, that was not the first time that the admission was made. As I said earlier, it seems that the admission had indeed been made before that, but had not been recorded by the magistrate at the time.

[17] It is well established that an accused is bound by the admissions made on his behalf by a legal representative unless such legal representative has not been properly instructed or the admission was made as a result of a bona fide mistake.[1] Section 220 of the Criminal Procedure Act 51 of 1977 permits a legal adviser to make any admission on his or her client's behalf. The aforesaid section provides:

'An accused or his or her legal adviser or the prosecutor may in criminal proceedings

[1] *Dlamini v Minister of Law and Order & another* 1986 (4) SA 342 (D); *S v Mbelo* 2003 (1) SACR 84 (NCD).

admit any fact placed in issue at such proceedings and any such admission shall be sufficient proof of such fact.'

The contention that the admission was not made on the instructions of the appellant was no more than an allegation made from the bar without any evidence before us that that was so.

[18] But even without the admission the evidence was sufficient to establish, by inference, that the blood sample that was tested had indeed emanated from the appellant. It was not disputed that a blood sample had indeed been taken from the appellant and sent to the laboratory for analysis. The possibility that the laboratory then inadvertently tested the semen sample against some other blood sample that happened to be there, and that it coincidentally correlated with the semen sample, which is the logical conclusion that follows from the submission, is so remote that it can safely be rejected.

[19] It was also submitted that the evidence fell short of establishing that the equipment used to perform the DNA analysis functioned correctly for the performance of the task. In my view the submission has no merit. The evidence established that the relevant technician calibrated the equipment against standard samples, in accordance with ordinary practices. In the absence of any evidentiary basis for suggesting the equipment might have been defective for the task that it was to perform there was no basis for finding that that might possibly have been so.

[20] The evidence of the complainant that she was raped was not placed in issue in the course of the trial (nor in argument before us). The only matter in dispute was whether the appellant was the perpetrator. The complainant implicated the appellant shortly after the rape, both to her

friend and to the police. The trial court found her to be a credible witness. This finding, on perusal of the record cannot be assailed. Her evidence, which in itself might have justified a conviction, was corroborated by the DNA evidence. I have no doubt that the appellant was properly convicted and his appeal in that respect must be dismissed.

[21] The offence fell within the ambit of Part III of Schedule 2 of the Criminal Law Amendment Act 105 of 1997, which carries a minimum sentence of ten years' imprisonment. Both the trial court and the court below were unable to find that there were any substantial factors proved that would compel a reduction in sentence.

[22] The appellant's transgression must be viewed against the fact that the complainant is his aunt who is much older than he is. In asking him to accompany her in the early part of the morning to her friend's residence, she actually sought his protection. Instead he opportunistically subjected her to the degradation of rape. She was also assaulted during the rape and sustained bruises to her upper chest. There were no gynaecological injuries noted which is not unusual in women of her age who have borne children, as she had. Apart from the violence that is inherent in the act of rape, this case was aggravated by the deliberate positioning of the knife alongside the complaint before the assault was committed, which was clearly intended to intimidate her.

[23] The only factors placed before the trial court in mitigation by the appellant, at the time of sentencing, were that he was 32 years old, he had two minor children, and had been employed as a truck attendant. He had a previous conviction for theft and was serving a 30 month sentence for assault. Both the trial court and the court below were unable to find that

these factors were sufficiently weighty to constitute substantial and compelling factors, and I agree. I might add that in my view the sentence that was imposed was in any event an appropriate sentence, even had there been no minimum sentence.

[24] In the circumstances the appeal against conviction and sentence is dismissed.

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K Pillay
Acting Judge of Appeal

APPEARANCES:

APPELLANT:	(Ms) L Augustyn Instructed by Legal Aid Board, Pretoria Legal Aid Board, Bloemfontein
RESPONDENT:	JJ Kotze Instructed by The Director of Public Prosecutions, Pretoria The Director of Public Prosecutions, Bloemfontein