SOUTH AFRICA / JUDGMENT

Cawu v S (A29/2018) [2024] ZALMPPHC 134 (17 September 2024)

[2024] ZALMPPHC 134

COURT
Limpopo High Court, Polokwane

BEFORE
Naude-Odendaal, K. Pillay

CASE / FILE NUMBER
A29/2018

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REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)
CASE NO: A29/2018
(1)
REPORTABLE: YES/NO
(2)
OF INTEREST TO THE JUDGES: YES/NO
(3)
REVISED: YES/NO

SIGNATURE:	Naude-Odendaal J
DATE:	17/09/2024
In the matter between:	JABU CHRIS CAWU APPELLANT and THE STATE RESPONDENT

JUDGMENT

NAUDE-ODENDAAL J:

[1] The Appellant was charged with two counts of Attempted Murder and one count of Rape in contravention of the provisions of Section 3 of Act 32 of 2007, read with the provisions of Section 51(1) of Act 105 of 1997.

[2] The Appellant was legally represented throughout the proceedings. The Appellant pleaded not guilty to all three counts and did not give a plea explanation. The Appellant was found guilty as charged on Count 1 and Count 2. He was sentenced on 25 January 2018 to life imprisonment in respect of the count of rape and six years' imprisonment on the count for Attempted Murder. Both sentences

were ordered to run concurrently. The Appellant appeals against both the conviction and sentence in terms of his automatic right to appeal.

GROUNDS OF APPEAL:

[3] The grounds of appeal are in summary as follows:-

3.1 In convicting the Appellant, the court a quo erred in making the following findings:

3.1.1 that the Respondent proved its case beyond reasonable doubt;

3.1.2 that the Complainant was credible and honest, as the court a quo ruled that she exaggerated about her injuries on her head, finger and hands;

3.1.3 the court misdirected itself when it found that the Complainant was credible in that she informed the court a quo that she ended the relationship and during cross-examination, she conceded that she did not terminate the relationship, however she was in the company of other men in order for the Appellant to see that she was no longer interested in the relationship;

3.1.4 the court a quo erred in convicting the Appellant on a charge of rape as the court a quo conceded that there was no conclusive prove that there was vaginal penetration;

3.1.5 in accepting the evidence of the witnesses and that they corroborated one another. The Appellant submits that there were contradictions between the witnesses which are material;

3.1.6 In rejecting the version of the Appellant as false and that he did not make a good impression. The Appellant submits that his version was reasonably possibly true;

3.17 By finding the Appellant's version is improbable. The Appellant submits that his version is probable.

3.2 The Regional Magistrate erred in finding that the sentence of Life Imprisonment and Six years' imprisonment is a suitable sentence in that:-

3.2.1 the sentence is harsh and disproportionate under the circumstances of this case. It induces a sense of shock;

3.2.2 the Regional Magistrate over emphasized the interest of society and failed to strike a balance of the triad factors as per S v Rabie 1975 (4) SA 855 (A) at 862 G;

3.2.3 the Regional Magistrate over emphasized the crimes and the impact on the Complainant;

3.2.4 the Regional Magistrate erred in finding that there are no substantial and compelling circumstances. The Appellant submits that the following cumulatively, constitutes substantial and compelling circumstances, namely:-

3.2.4.1 The Appellant is still of tender age. He was only 23 during the sentencing proceedings and therefore youthfulness played a role.

3.2.4.2 The Appellant was still attending school during his arrest and detention;

3.2.4.3 Life Imprisonment and Six Years' Imprisonment is not proportionate to the offences committed;

3.2.4.4 The Appellant is still very young and has prospects of rehabilitation.

THE LAW AD APPEAL AGAINST CONVICTION:

[4] It is an established principle that where an appeal is lodged against a trial court's findings of fact the court of appeal must take into account that that court was in a more favourable position than itself to form a judgment. Even when inferences from proven facts are in issue the court a quo may also be in a more favourable position than the court of appeal, because it is better able to judge what is probable or improbable in the light of its observations of witnesses who have appeared before it. Therefore if there are no misdirections on the facts a court of appeal assumes that the court a quo's findings are correct and will accept these findings, unless it is convinced that these are wrong. See R v Dhlumayo and Another 1948 (2) SA 677 (AD) at 705-6.

[5] Therefore in order to interfere with the court a quo's judgment it has to be established that there were misdirections of fact, either where reasons on their face are unsatisfactory or where the record shows them to be such. See also S v Monyane and Others 2008 (1) SACR 543 (SCA) at para [15] where the SCA stated that it is only in exceptional cases that it would be entitled to interfere with the trial court's evaluation of oral evidence.

[6] It is acceptable in evaluating the evidence in totality to consider the inherent probabilities and the following dictum by Heher AJA, as he then was, in S v Chabalala 2003 (1) SACR 134 (SCA) at para [15] is apposite: "The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt."

[7] An accused's version cannot be rejected merely because it is improbable. It can only be rejected on the basis of the inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true. See S v Shackell 2001 (2) SACR 185 (SCA) at para [30] which I quote:

"It is a trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true."

See also Olawale v The State [201O] 1 All SA 451 (SCA) at para [13].

THE EVIDENCE:

[8] The State's first witness, was the Complainant. She testified that on the 11th of December 2016 she was in the company of her new boyfriend, namely Timothy. The Appellant came to the house which they were occupying, and he knocked aggressively and called for her to come outside. The grandmother of Timothy told the Complainant to go outside. She eventually opened the burglar door. The Appellant dragged the Complainant to the street. She tried to run away from him by climbing a fence, but she failed and he caught her. The Appellant proceeded to hit her with a panga which he produced from the bag he had on his back. She managed to disarm him from the panga, whereafter he took out another panga from his backpack and hit her further with it. She sustained injuries on her head, as well as her hands when she tried to block the panga from hitting her head.

[9] After the Complainant had been injured, the Appellant dragged her to his homestead and he assaulted her further with fists and he kicked her with booted feet. The mother of the Appellant saw that the Complainant was injured and bleeding. She enquired what transpired and then blamed the Complainant for what the Appellant has done to her. She gave the Complainant water to bath and clean clothes belonging to the Appellant's sibling to wear as her clothes were covered in blood.

[10] The Complainant slept at the homestead of the Appellant and the following day he accompanied her home. Her family took her to hospital after they realized that she was badly injured.

[11] The Complainant further testified that on the 12th of September 2015, she was with her boyfriend, Thabo. They were walking in the street when the Appellant appeared. He threatened Thabo. Thabo ran away and left her in the company of the Appellant. The Appellant dragged her to his home. She left her shoes in the street. Upon arrival at his home,

he dragged her into his room and locked her inside. He went outside to fetch a stick which he used to assault her. According to the Complainant, the Appellant assaulted her on her hand, but the J88 shows that it was also her forearm. She was in pain from the assault. The Appellant then demanded to have sexual intercourse with her. He took off his

pants and her panty and proceeded to penetrate her without her consent. She testified that she couldn't refuse because she was in a lot of pain from the assault and was scared. After the Appellant raped her, she fell asleep at his home. The following day the Appellant accompanied her to her home. Her family noticed that she was injured, and she was taken to hospital where she was admitted and treated for a considerable time.

[12] The second state witness was Thabang Alpheus Morumudu (Thabo). He testified that he was in a love relationship with the Complainant. He testified that on the 12th of September 2015 he was with the Complainant walking. He heard footsteps. When he looked back he saw the Appellant who by then had produced a knife. He testified that he ran away and he saw the Appellant dragging the Complainant.

[13] Under cross-examination, Thabo denied that he was in a relationship with the Complainant at that time. He was adamant that he saw the knife even though the Complainant did not testify about the Appellant being in possession of the said knife.

[14] The third state witness was Elias Moleko. He is the Complainant's uncle. He testified that on the 13th of September 2015 he saw that the Complainant was injured and he took her to hospital where she was admitted. He testified that the Complainant made a report to him about the incident and that the Appellant had assaulted her with a stick. She did not tell him that she was raped by the Appellant, but at the hospital he heard her tell the police that the Appellant had raped her.

[15] The fourth state witness was Naniki Duba. She testified that the Complainant was injured and she hired a motor vehicle for her to be taken to hospital. The State closed its case and the Appellant was discharged on Count 3 in terms of Section 174 of the Criminal Procedure Act, 51 of 1977.

AD DEFENCE CASE:

[16] The Appellant testified that he knows the Complainant and that they were in a love relationship to date of the trial. He testified that the Complainant had been with him after he was released on bail. He denied that on the 12th of September 2015 he had sexual intercourse with the complainant without her consent. He however conceded that he assaulted her with a stick which was in his room because he wanted to know what she was doing with Thabo.

[17] He further denied that he assaulted the Complainant on 11 December 2016. He testified that he was with the Complainant at a drinking place. He denied that he went on to drag the Complainant from the house while she was in the company of Timothy. He denies further that the chopped her with a panga and testified that the Complainant injured herself when

she tried to leave through a window while he was outside. According to him, the injuries were caused by the windowpane. He confirmed that she was given water to bath, and that she was given clothes to change since she was injured and her clothes were blood stained. He confirmed that he accompanied her home the following day.

FINDINGS BY THE COURT A QUO AND APPLICATION OF THE LAW TO THE FACTS:

[18] The court a quo found that the contradictions as appeared in the State Witnesses' had no bearing on the witnesses' evidence and are immaterial to the facts in issue. It was found that when one looks at the evidence as presented, the Complainant's version is not that remote from the Appellant's version with regard to the places, dates of incidents, the injuries sustained by the Complainant, that the Complainant was with Thabo Muremudi and that the Complainant had a love relationship with Timothy. Further, that the Appellant's parents had to get involved and find out as to what happened to the Complainant after having realised that she was injured. The Appellant ordered the Complainant to bath as she was bleeding from the head injury. There are only a few differences, which mainly relates as to how the two incidents had occurred. It is not in dispute that the Complainant was with the Appellant on the dates of the respective incidents.

[19] The court a quo found that it is improbable in respect of the first incident, that the Complainant would risk her life by getting out of the room through the window in the manner as described by the Appellant. The court a quo, when looking at the probabilities and improbabilities, found that the version of the Complainant is more probable than that of the Appellant. Although the court a quo found that the Complainant might have exaggerated a little bit as to how she was hit with a panga, the fact remains that she was hit with a panga which caused the injuries on her head, fingers and hands as she tried to protect herself.

[20] In respect of Count 2, the court a quo found that the Complainant's version was consistent with the injuries as reflected on the J88 in that she sustained a fracture of the radial bone of her arm. In this regard, the Appellant admitted having assaulted the Complainant with a stick. However, when it comes to the rape charge, the findings were that the Complainant had already bathed, urinated, and changed clothing at the time when she was examined and the conclusions were that no injuries seen seems to exclude vaginal penetration.

[21] The court a quo went on to find that there was inconclusive medical evidence on whether there was any vaginal penetration. The court then went on to assess and evaluate the evidence in its totality. From the evidence it was quite clear that the Complainant did not report to her family members that she was raped by the Appellant or that he engaged in an act of sexual penetration with her. The second state witness testified that on the second day upon arrival at the hospital he found the Complainant making a statement to the police to the effect that the Appellant raped her. The defence questioned the issue of the delay in reporting the said rape to her family members and to the police and submitted that the rape did not take place and that the Complainant was falsely implicating the Appellant for having raped her.

[22] After evaluating the evidence in its totality, the court a quo found that the Appellant's version is not only improbable but false beyond reasonable doubt and rejected his defence. However, in

this court's view, the Complainant's version was also riddled with more questions than answers and if one considers the manner in which the alleged rape was reported, the fact that there was inconclusive evidence and the fact that the court a quo already found that the Complainant exaggerated a bit in her evidence, it is clear that there is doubt as to whether there was indeed an act of sexual penetration and the court a quo could not have come to the conclusion that the State managed to prove Count 2 beyond reasonable doubt.

[23] In this court's view, the court a quo erred in finding after having considered all the evidence in its totality and having considered the probabilities and improbabilities that the Appellant is guilty of rape beyond reasonable doubt. In this court's view, the State failed to prove beyond reasonable doubt that the Appellant committed the offence of rape. The appeal on conviction in respect of Count 2 only, therefore stands to succeed and the conviction to be set aside.

AD APPEAL AGAINST SENTENCE:

[24] The settled approach to be adopted by this court is that the sentencing task resorts primarily within the scope of the trial court's discretion, and the court on appeal shall not interfere with a sentence so imposed, save for if it is found that the sentence is ominously inappropriate and or disproportionate to the severity of the offence or that the trial court did not exercise its discretion judiciously.

[25] In S v RO and Another 2000 (2) SACR 248 (SCA) at paragraph 30 that Hener JA stated as follows:-

"sentencing is about achieving the right balance or in more high-flown terms, proportionality. The elements at play are, the crime, the offender, the interest of society with different nuance, prevention, retribution, rehabilitation, reformation and deterrence. Invariably there are overlaps that render the process more unscientific, even a proper exercise of the judicial function allows reasonable people to arrive in different conclusions. "

[26] It was submitted on behalf of the Appellant that an effective sentence of Life Imprisonment is harsh and disproportionate under the circumstances of this case in that they induce a sense of shock. The Appellant mainly appealed against the sentence of Life Imprisonment in respect of the rape charge, but not really against the sentence of six years' imposed on Count 1- Attempted Murder.

[27] In S v Pillay 1977

(4) SA 531 (A) at 535E-F Trollip JA remarked:-

"Now the word "misdirection" in the present context simply means an error committed by the Court in determining or applying the facts for assessing the appropriate sentence. As the essential inquiry in an appeal against sentence, however, is not whether the sentence was right or wrong, but whether the Court in imposing it exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence; it must be of such a nature, degree, or seriousness that is shows, directly or inferentially, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably. Such a misdirection is usually and conveniently termed one that vitiates the Court's decision on sentence. "

[28] The Supreme Court of Appeal in Nkabinde and Others v S (2017] ZASCA 75; 2017 SACR 431 (SCA)at para 51 held that 'sentencing lies in the discretion of the trial court.'

[29] It is trite law that a court of appeal will not interfere with an imposed sentence of a lower court unless the discretion of the lower court was not judicially exercised, or if there was a severe irregularity or misdirection by the trial court, or if the sentence was so severe that no reasonable court would impose it, or if the sentence is shockingly inappropriate, or when there is a striking disparity between the sentence passed by the lower court and that which the Court of Appeal would have imposed. See S v De Jager 1965 (2) SA 616 (A) and S v Pieters 1987 (5) SA 717.

[30] In S v Obisi 2005 (2) SACR 350 WLD, S v Rabie 1975 (4) SA 855 (A) at 857 D-E and S v De Oliveira 1993 (2) SACR 59 A at 667, it was held that the test on appeal is not whether or not the court sitting on appeal would have imposed another form of punishment, but rather whether the trial court exercised its discretion properly and reasonably when imposing sentence. This court is mindful of the decision in S v De Jager 1965 (2) SA 616 (A) at 628 where the discretion of the appeal court was described as not having a general discretion to ameliorate the sentences of trial courts but that it is the trial court that has such discretion.

[31] In the absence of a material misdirection by the trial court, an appellate court cannot approach the question of sentence as if it were the trial court and then substitute the trial court's sentence simply because it prefers to. The same would apply to an accused that cannot choose the sentencing regime that he prefers.

[32] In the present matter, when imposing the sentence of six years' imprisonment for attempted murder, the trial court had regard to all the mitigating factors placed on record on behalf of the Appellant, as well as the aggravating factors. There is no evidence to show that the Appellant demonstrated remorse at any given time.

[33] In determination of an appropriate sentence in the present matter, the court a quo weighed and balanced the mitigating and aggravating factors cumulatively. The court a quo further had due regard to the triad of factors as stated in S v Zinn 1969 (2) SA 537 (A).

[34] After considering the factors required to be taken into account in the imposition of sentence, including the Appellant's personal circumstances and the fact that the Appellant was under the influence of alcohol, the court a quo came to the conclusion, and correctly so, that a sentence of six years' imprisonment will be a suitable sentence on Count 1.

[35] In this court's view, the court a quo did not misdirected itself and did not exercise its discretion improperly in sentencing the Appellant to six years' imprisonment on Count 1. The appeal against sentence in respect of Count 1 therefore also stands to fail.

[36] Accordingly, this court therefore makes the following order:-

1. The appeal against both conviction and sentence in respect of Count 1 - Attempted Murder, is dismissed.

2. The appeal against both conviction and sentence in respect of Count 2 - Rape, is upheld and the conviction and sentence in Count 2 is set aside.

M. NAUDÈ-ODENDAAL

JUDGE OF THE HIGH COURT,

LIMPOPO DIVISION,

POLOKWANE

I AGREE:

K. PILLAY

ACTING JUDGE

OF THE HIGH COURT,

APPEARANCES: HEARD ON: 7 JUNE 2024

JUDGMENT

DELIVERED ON: 17 SEPTEMBER 2024 For the Appellant: Mr. DJ. Nonyane (Mrs. P.R. Scott standing in for Mr. DJ Nonyane at the hearing of the matter) Instructed by: Legal Aid South Africa, Polokwane Local Office, Polokwane For the Respondent: Adv. Mufamadi Instructed by: The Director of Public Prosecutions Polokwane

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Prepared on 9 October 2026 · Esheria