

SOUTH AFRICA / JUDGMENT

Chauke v S (A19/2022) [2024] ZALMPTHC 31 (19 April 2024)

[2024] ZALMPTHC 31

COURT

Limpopo High Court, Thohoyandou

BEFORE

T Tshidada, AML Phatudi

CASE / FILE NUMBER

A19/2022

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

LIMPOPO

DIVISION, THOHOYANDOU

CASE

NO: A19/2022

(1)

REPORTABLE: YES

(2)

OF INTEREST TO THE JUDGES: YES

(3)

REVISED.

DATE:

18/4/2024

SIGNATURE:

In

the matter between: RIPFUMELO
 CYRIL
 CHAUKE
 APPELLANT
 and
 THE
 STATE
 RESPONDENT

JUDGEMENT

TSHIDADA J

Introduction

1. Appellant approached this court exercising his automatic right to appeal in terms of Section 309 (10(a)(b) of the Criminal Procedure Act[1], disgruntled by both the conviction and life imprisonment sentence imposed on him by the Regional Court of Malamulele on 15 December 2012 on one count of rape contemplated in Section 3 read with Section 1, 50, 55, 56(1), 56A, 57 58, 60, 61 of the Criminal Law Amendment Act[2] 32 of 2007,(Sexual Offences and Related Matters), also read with Section 51() and Schedule 2 of the Criminal Law Amendment Act[3] as amended:
2. At the trial court, the respondent alleged, that upon or about 16 February 2017, and at or near Dinga Village in the Regional Division of Limpopo, the Appellant did unlawfully and intentionally commit an act of sexual intercourse/penetration with K[...] A[...] C[...], a 12 year old minor female person by inserting his penis into her vagina

and had sexual intercourse with he without her prior consent.

GROUND OF APPEAL

Ad Conviction:

3. The appellant presented the following points that which he argues the trial court erred upon when considering the evidence that was before it. These are the grounds which appellant contends should persuade this court to upset and overturn the finding of the court a quo.
4. It is averred that the trial court erred in its conclusion that the State succeeded in proving the guilt of the appellant beyond reasonable doubt on the following basis:
 - 4.1 that on 16 December 2017, the appellant kidnapped the complainant and took her to his home, against his evidence that the complainant in fact co-operated and was willing to go with him to his homestead.
 - 4.2 trial court erroneously concluded that the appellant sexually penetrated the complainant with his penis without her consent.

4.3 appellant also contended that the trial court erratically found that the evidence of the complainant and that of D[...] K[...] was consistent with no material contradictions or discrepancies and thereby failing to attach sufficient weight on the identified inconsistencies and/or contradictions over the State witness' evidence.

4.4 trial court erred in concluding that the evidence of the complainant and all the state witnesses were credible and reliable, and lastly misdirected itself by rejecting the appellant's version that he did not insert his penis into the complainant's vagina but only ejaculated on her navel.

Ad Sentence:

5. Appellant further contends the trial court misdirected itself by failing to consider or take into account the following factors as substantial and compelling to justify imposition of a lesser sentence than life imprisonment on the appellant, thus

5.1 appellant's relative age of 19 years at the time of the commission of the offence, presumably with a potential and good prospect of rehabilitation if imprisoned for a short period of time.

5.2 fact that he was a first offender, who also did not utilise a dangerous weapon, neither did he inflict excessive violence on the complainant when committing the offence under consideration.

5.3 offence was allegedly not pre-meditated. Astonishing is that he also contends that he decided to use a condom when sexually penetrating the complainant in order to minimise the risk of complainant contracting sexually transmitted diseases or even falling pregnant at her notably young age, indicative of him having pre-planned on how he intended the sexual intercourse unfold.

6. He argued that the seriousness of the offence, interest of society and harm suffered by the complainant was over emphasised, to the extent that the sentence which was imposed was disproportionate to the seriousness of the offence committed, as a result the sentence of life imprisonment was not justified. In light of the above, the court should either set aside the entire conviction and sentence, alternatively impose a lesser sentence it deems fit and reasonable other than a life imprisonment sentence imposed.

7. It is an established legal principle that the onus in every criminal trial to establish the guilt of an accused beyond reasonable doubt in order to secure his/her conviction by the trial court resides with

the State.

8. In *S v Chabalala*[4] at para 15 Heher AJA stated the following:

"The correct approach is to weigh up all the elements which points 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."

9. However, if the accused's version is found by the court to be reasonably possibly true, the corollary shall be for the court to acquit the accused.
10. The Appellant was legally represented throughout the course of trial. At the commencement of trial, the court duly appraised the appellant of the applicability and possibility of imprisonment for life in terms of Section 51(1) and Schedule 2 of the Criminal Law Amendment Act, in the event the State was successful to secure his conviction, unless the court was to find substantial and compelling circumstances to exist during mitigation of his inherent sentence.

Evidence

10. The complainant's evidence was tendered through an intermediary via closed circuit television due to her young age where she testified as follows after she was duly admonished by the court.
11. She confirmed she was 15 years old at the time of the trial and doing Grade 10 at school, however, she was only 12 years old when the offence was allegedly perpetrated on her. She resided with her mother and grandmother at that stage.
12. On the afternoon in question, she, in the company of her friends, S[...], L[...], D[...], P[...], and R[...] came across the appellant whilst on their way back from her aunt's place where there was a stokvel on that particular day. She shared no relationship with the appellant save to say he was merely known to her as one of her friend's uncle.
13. It was at that point that she stated the appellant approached her group and firstly grabbed D[...] by her hand before she pushed him away and then he turned on S[...] who let loose from him also before he decided to grab her with hand, separated her from the group and caused both of them to walk across the main road pulling her to his homestead whilst she continued to plead with him to let her go.
14. Along the way she stated the appellant kept on threatening to assault her if she was to dare scream and cause him unwanted public attention, regardless of the complainant desperately informing him she did not want to go with him to his homestead because her mother would not take kind to her coming back home late or of her sleeping out.
15. He then dragged and pushed her into a rondavel within his homestead causing her to fall to the floor next to a basket before removing her clothes and tying her legs and hands with a rope. He then started stuffing a t-shirt into her mouth to stop her from screaming.
16. She was then thrown on top of the bed and her legs untied. Appellant then opened her legs and forcefully inserted his penis which had a condom on into her vagina whilst she laid on her back and started thrusting on her as she painfully screamed for help.

17. Complainant testified, Appellant got off her only when his mother came knocking at the door indicating that she wanted to put cooldrink inside the fridge, which was in that room. At that moment appellant apparently continued with his threats to kill her if she were to scream and alert his mother of her presence in the room as he proceeded to go receive the cooldrink through a slightly opened door from his mother whom he had refused entry into the room.
18. Despite her pleas to let her go, the Appellant is alleged to have said he would only release her provided she agrees returning to his place the following day, a condition the complainant testified she acceded to in order to be freed from his capture. Soon thereafter, he untied her hands after which she was able to dress up, and he then opened the door, walked her to the gate where she managed to get out and run straight home where upon arrival she immediately reported and

explained what had happened to her to her mother.

19. In turn her mother decided that they should go back straight to the appellant's home, however, he was no longer present as her mother explained her ordeal to the mother. Back at her home her father called the police to report the matter who later took down he statement before she was taken to Malamulele hospital for medical assessment.
20. Complainant concluded her evidence by stating that at no stage before did she engage in a consensual sexual intercourse with the appellant neither did he ever propose a love relationship with her. She further disputed ever being in appellant's niece (M[...])'s company on the day in question when she and her girl-friends were confronted by

the appellant, instead M[...] was seen standing a bit of a distance away from the complainant and her group friends.

21. She refuted voluntarily touching and brushing the appellant's penis whilst he sat on the bed and/or removing her clothes and panties, neither giving him a blowjob until he ejaculated on her stomach before allegedly wiping off his semen using her panties which was found to have been the reason why his DNA tested positive from the test conducted on the complainant's underwear.
22. D[...] K[...] was the second state witness to be called. She testified that on the day under consideration she was in the company of a group of girls already listed by the complainant herein. Whilst on their way from an unveiling party at one of the homesteads in the village somewhere next to a spaza shop, the group came across the appellant who had just alighted from a taxi.
23. The appellant was known to her since their early days as classmates at one of the local schools at their place of abode. The appellant is said to have called the witness' name out as he was approaching the group. She testified he grabbed her by the hand, but she broke loose from the grip because she noticed that the appellant looked drunk and

smelt of liquor. After that, he grabbed S[...] who also broke loose.

24. Appellant followed the group as the girls walked away from him, before grabbing the complainant who also told him to let go of her. Witness stated that she then parted ways with others and went home because she never thought appellant's behaviour on the day was to become an issue since none of the girls were in a love relationship with him and that she thought it was pure drunkenness on his part.
25. P[...] C[...] by enlarge corroborated the previous witness' evidence, save to state that she observed the complainant and the appellant standing nicely when their group first encountered the appellant.
26. The complainant's mother confirmed the report about the rape made to her by her daughter and the visit they immediately paid the appellant's mother, who apparently advised that it would be better for the complainant to be taken to the clinic the following day for some medical assessment because the appellant was at that stage nowhere to be found to discuss and clarify the rape allegations made against him.
27. Dr Khensani Mukansi confirmed that. she conducted the medical examination on the complainant and soon thereafter completed the J88 medical assessment form with data arising from her examination, the subsequent findings and partly with information or details that she collated from the complainant and her mother respectively.
28. Of importance and for the purpose of this matter though was her findings pertaining to the complainant's gynaecological examination. The complainant's clitoris, frenulum of clitoris, the urethral orifice, paraurethral folds and the labia majora were noted by the Doctor to be normal.
29. However, there were abrasions and bruising on the side of labia minora and the posterior fourchette that were noted inside the complainant's vagina. There was also a whitish discharge on her perinium. The expert's conclusion was that the abrasions and bruising on the labia minora and the posterior fourchette were suggestive of blunt forceful penetration of the complainant's vagina beyond the labia majora. The expert findings and conclusion in my view, both are in sync and confirmed sexual penetration of the complainant's private part.
30. Appellant ultimately took the witness stand to testify in his defence and confirmed that indeed the complainant together with a group of girls who were in her company on the day in question were well known to him as they all resided and schooled together in the same area. Therefore, the issue of regarding their identity would not arise or become questionable even for this court.

31. He testified that he met the complainant and her friends along the street near Wendy's tavern. He alleged that he was already on a approximately five days old love relationship or affair with the complainant until that day and that their relationship was only known by his niece, one M[...] M[...] who according to him used to see the complainant coming to his home.
32. This court has noted and takes judicial cognisance that the appellant undeniable formulated this version after hearing and knowing the complainant to have frequented his home wherein she would be coming to play with his niece. He also conceded in his evidence that two young friends often and used to play in his full view before his alleged love affair with the complainant. It was undenied that the appellant has always been aware of the two friends' young age.
33. Appellant also conceded under cross examination that he had only been with the complainant once when she came to play with her friend at his home, therefore at no stage does it appear that the complainant ever visited the appellant as her boyfriend at his home nor ever meeting him elsewhere as partners. Without any fear of contradiction, I conclude that the complainant's alleged love affair with the complainant was just an after thought to justify the disputed sexual intercourse he held with the complainant.
34. Appellant admitted that there was no prior arrangement he made to meet the complainant on that particular day. Essentially, he testified that everything he did with the complainant was consensual up until their sexual engagement at his room, of which according to his version unfortunately did not proceed as planned because he ended up unable to sexually penetrating the complainant because of the discharge he noticed coming out of her private part. He thereafter allegedly resorted to satisfying his sexual desire by masturbating and ejaculating on top of her stomach and then wiping his semen off her stomach using her panties as alluded to above.
35. He also confirmed that she agreed to his request to come back again the following day before he could usher her out of his homestead. During his examination in chief, he conceded that the complainant looked young to him and of approximately 13 years of age at the time and that he was also aware that having sexual intercourse with a girl below the age of 16 was an offence.
36. Appellant vehemently denied raping the complainant despite overwhelming and undisputed evidence that confirmed recent forceful vaginal penetration of the complainant. He sadly could not gainsay the medical finding or proffer a plausible explanation contrary to the expert medical examination and consequent findings.
37. The appellant's mother testified in his defence and confirmed that the complainant and her mother visited her house on the same night the rape incident allegedly occurred. She further stated that she heard the appellant arrive back home earlier around 20:00 that night in company of someone whom she did not establish who it could have been.

38. Strangely, she stated that when she entered the appellant's room there was no one inside, yet she had already said the appellant went inside with someone. It is astonishing when one has regards to the fact that the complainant testified that she through out remained inside the room together with the appellant until his mother came and stood by the slightly opened door to give the appellant cooldrink to put inside the fridge.
39. Despite, appellant's mother in her evidence indicated that she later noticed the appellant walking out the gate with a young girl as she peeped through a window.
40. Again, the complainant's presence at the appellant's homestead on the day is clearly a nonstarter. Witness also re-iterated that complainant visited her place to come and play with M[...]. She has never seen or heard complainant coming to visit the appellant.
41. Witness contradicted the appellant's version that he was drunk on the day and that she had a conversation with him about items which were to be placed inside the fridge. Her testimony was indicative of a concocted story meant to align with appellant's possible improbable version of events.
42. What was found startling which appeared to be a clear indictment of the appellant, was his mother's admission that the reason why she went to the complainant's home the following day was to go arrange that the appellant be allowed to apologise for what he is alleged to have done on the complainant.
43. M[...] M[...] was also called as one of the appellant's witnesses. She confirmed appellant to be her uncle and complainant to be her friend that she used to play with. She further stated that she had never seen the complainant with the appellant before, neither was she aware of any love relationship between them before the date of the incident.

Issues

in dispute

44. In the main two issues arises that requires to be answered in this matter. Firstly, whether the appellant succeeded in adducing evidence proving that he was prior to the incident in a love relationship with the complainant.
45. Initially the appellant stated that he had been in a relationship with the complainant for about 6 or 7 days prior the day of the incident, however under cross examination he changed his version and stated that he had only been with the complainant for the very first time or once on the day of the incident, which meant that he could not have been in a relationship 6 days prior or before meeting and starting to date the complainant. His version was and remain palpable improbable.

46. The complainant's version was corroborated by the appellant's mother and appellant's niece M[...] in as far as her reason to visit appellant's home was concerned. Both the appellant's mother and M[...] were unaware and did not know of the alleged love affair between the two, because in my view it was none existent except to be a simple made up story by the appellant which was correctly rejected and dismissed by the court a quo.
47. Second was for determining whether the appellant and complainant's entire encounter up to the sexual intercourse was consensual as alleged by the appellant or not.
48. State adduced evidence that confirmed that the appellant's friend managed to free themselves from the appellant until he got his grip tight on the complainant, surely without her consent whereafter he forcefully instructed her to come with him to his homestead.
49. The complainant and her two friends who witnessed the grabbing and the complainant being taken away by the appellant were all reliable and credible witness whose evidence was properly accepted by the court.
50. Appellant's evidence on how he met the group of girls and what transpired at the scene was riddled with material contradictions, improbable and unreliable hence the court rejected same.
51. P[...]s testimony also could not be relied upon because it was limited to her observing the appellant whilst standing with the complainant. She seems not to have observed the appellant first grab the other two girls, neither did she witness the appellant forcefully drag the complainant across the main road and walk her straight to his homestead. Her averment could not assist or advance the appellant's contention that the complainant cooperated with him from the moment they met.
52. The complainant is however considered a single witness regarding her alleged unconsented sexual intercourse with the appellant inside his locked-up room.
53. Courts have consistently warned through a plethora of case law that evidence such as the complainants' should be approached and treated with caution and circumspection by the trial courts, for it is usually evidence that is uncorroborated, not unless other corroborating material evidence in other form is presented before court. Ordinarily no one would have personally witnessed the evidence the complainant would be testifying to. Hence evidence of such witnesses is more often than not inherently potentially unreliable.
54. Section 208 of the Criminal Procedure Act clearly provides that an accused person may be convicted of any offence on the single evidence of any competent witness.
55. In *S v Webber*[5], the court held that:

"A conviction is possible on the evidence of a single witness. Such witness must be credible, and the evidence should be approached with caution. Due consideration should be given to factors which affirm, and factors which detract from the credibility of the witness. The probative value of the evidence of a single witness should also not be equated with that of several witnesses".

See also *S v Saul and Others*[6], where the court had the following to say:

"There is no rule of thumb when it comes to a consideration of the credibility of a single witness. The trial Judge will weigh his evidence, will consider its merits and demerits and having done so, will decide whether it is trustworthy and whether despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told".

56. On the conspectus of evidence presented by the state witnesses in particular the complainant from the time she was grabbed from the street and dragged to the appellant's room, least the threats to harm the forceful sexual intercourse, there is no doubt that violence was inflicted in order to subdue her, circumstances which clearly negate any possible consensual sexual intercourse authorised by the complainant.
57. Complainant's reports of the incident to her mother as soon as she was freed and her subsequent report of the rape to the police are a clear indication and confirmation that she had not consented to be sexually penetrated and violated by the appellant.
58. Complainant's version that the appellant forcefully sexually penetrated her vagina with his penis was confirmed by the findings of a medical expert as per the conclusions recorded on the J88 medical assessment report reflecting the abrasions and bruising of the inner part of the complainant's vagina.
59. It is my considered finding that the only inference to be drawn from the proven facts before court is that, it can only be appellant who had forcefully sexually penetrated the minor complainant whom in terms of the law was incapable of giving formal consent to sexual intercourse due to her under age on that fateful day. Simple because it is common cause that he was the one who held the complainant hostage inside his room on that evening wherein he on his own admitted to having engaged in some sexual activity with the complainant.
60. The sexual report and medical assessment of the complainant within a reasonable space of the time and at no stage was it ever suggested by the defence at the trial a quo that there exist a possibility that the complainant could have further engaged on a sexual intercourse with someone else between the time the appellant freed her, the reporting and when she was medically assessed and confirmed to have been sexually violated. See in this regard *R v Blom*[7].

Evaluation of evidence

61. When evaluating the evidence of the complainant in its entirety, particularly on how she was sexually violated by the appellant, it is my considered view that she satisfied the test or requirements on admissibility of single witness evidence in all material respect for she was honest, credible and reliable and her evidence was correctly accepted as reasonably possible true by the trial court.
62. Any possible contradictions between some of the state witnesses, in my view, were not material per se and could not lead to rejection of those witness evidence and the errors thereto were not fatal to affect their credibility.
63. The appellant's version and that of his defence witnesses referred to herein was inherently improbable and on certain aspects contradicted the appellant's version. Worse off was M[...]s evidence which to a large extent corroborated the complainant's version instead of that of the appellant. The defence or appellant's evidence was shamedly unreliable and was in my view correctly rejected by the lower court. See in this regard S v V[8].
64. In S v Sithole[9], the court stated that,
- "There is only one test in criminal case, and that is whether the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that the accused is entitled to be acquitted if there is a reasonable possibility that an innocent explanation which he has proffered might be true".
65. I therefore find that based on the evidence presented before court, the state proved beyond reasonable doubt that the appellant had unlawful and intentionally sexually penetrated complainant's vagina with his penis without her consent and thus the trial court correctly found the appellant guilty on the count of rape as charged, as such this court finds no errors or misdirection committed by the trial court on its judgement on merits.

See S v Francis[10].

Ad Sentence

66. Appellant was sentenced to life imprisonment on a charge of rape read with provisions of Section 51(1) of Schedule 2 of the Criminal Law Amendment Act supra. One of the considerations was that the complainant was under the age of 16 years at the time of the incident. Notwithstanding, it was the trial court's finding that there existed no substantial and compelling circumstances from those factors presented by the appellant in mitigation of his sentence, that justified deviation by the trial court from imposing a statutory prescribed sentence on the appellant.
67. It is trite law or established principle on all appeals on sentence, that the appeal court can only interfere with the sentence of the trial court if it finds the imposed sentence to be shockingly disproportionate to the seriousness of the crime and thus induces a sense of shock and does not strive to strike a balance of the seriousness of the crime, the circumstances of the offender and the interest of justice. See S v Zinn[11].

68. I concur with the trial court that the aggravating circumstances against the appellant were far out weighed by the mitigating factors presented in favour of the complainant and that it was in the interest of justice that the trial court found no basis to deviate and depart from imposing the prescribed minimum sentence of life imprisonment on the appellant under those prevailing circumstances.
69. As a result, the trial court imposed an appropriate statutory sentence on the appellant of which it would be remiss and unjustified for this court to interfere with. The trial court is found to have exercised its sentencing discretion judiciously so.
70. In the result the following order is made:

(1)The appeal on both conviction and sentence is dismissed.

T.C TSHIDADA

JUDGE OF THE HIGH COURT

I agree and it is so ordered.

AML PHATUDI

APPEARANCES

FOR THE APELLANT : Adv D Simango

INSTRUCTED BY

: Hakamela & AssociatesbAttorneys INC

FOR THE STATE

: Adv A Madzhuta

Director of Public Prosecution:

Thohoyandou

DATE OF HEARING : 06 October 2023

JUDGMENT

DELIVERED ON : 19 April 2024

[1] 51 of 1977

[2] 32 of 2007 [SORMA]

[3] 105 OF 1997

[4] 2003(1) SACR 134 (SCA)

[5] 1971 (3) SA 574 (A)

- [6] 1991 (3) SA 172
- [7] 1939 AD 188
- [8] 2000 (1) SACR 453 SCA at 455 a-b, para 3
- [9] 1999 (1) SACR 585 (W)
- [10] 1991
- (1) SACR 198j-199a
- [11] 1969 (2) SA 537 (A) at 540 G-H
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