

SOUTH AFRICA / JUDGMENT

D.H v S (Appeal) (A173/2024)

[2025] ZAWCHC 269 (25 June 2025)

[2025] ZAWCHC 269**COURT**

Western Cape High Court, Cape Town

BEFORE

Dolamo, Nziweni

CASE / FILE NUMBER

A173/2024

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Policy**IN THE HIGH COURT OF****SOUTH AFRICA****(WESTERN CAPE****DIVISION, CAPE TOWN)****CASE NO: A173/2024****In the matter between:**

D[...] H[...]

Appellant

v

THE

STATE

Respondent

Coram: Dolamo J et

Nziweni J

Matter heard on Friday 06

June 2025

Judgment delivered

electronically on Wednesday 25 June 2025

JUDGMENT

DOLAMO et NZIWENI JJ

INTRODUCTION

- [1] The appellant seeks to appeal against both the conviction and sentence handed down by the Regional Court Magistrate in Oudtshoorn, on 28 February 2022. The appellant was convicted on one count of a contravention of section 3, read with certain sections of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (rape) and one count of common assault. Since the Regional magistrate found that the complainant was raped more than once, the offence of rape fell within the purview of section 51(1) read with Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997. The Regional Magistrate took both counts together for sentence purposes and imposed a sentence of 20 years imprisonment. The appellant was granted leave to appeal on petition on both conviction and sentence.
- [2] The State alleged that the rape offence was committed on or about December 2020 till January 2021. In respect of the assault charge the state alleges that it was committed on 02 February 2021. It is common cause that the appellant and the complainant were previously involved in an intimate relationship from 27 July until November 2019, when their relationship ended. They have a three-year-old child together. It is also common cause that on 19 December 2020, there was an act of sexual penetration between the appellant and the complainant.
- [3] Appellant's Counsel sets out in her heads of argument that the trial court erred in finding the appellant to have raped the complainant more than twice. This, according to Counsel, was a duplication of charges. However, in oral submissions Counsel expressly abandoned the argument that the trial court erred in finding the appellant to have raped the complainant more than once. This concession was correctly made as the argument was entirely meritless.
- [4] The appellant raises several issues on appeal. The appellant's version is a denial that he raped the complainant and asserts that he had consensual sexual intercourse with her. He also argues that there was insufficient evidence to sustain his convictions for the two offences he was charged with.
- [5] During the trial the complainant, her mother, brother, sister and a social auxiliary worker testified. Amongst others, the complainant testified that after they had terminated their relationship, they had contact again in December 2020 as the appellant wanted to see his child. She allowed him to have contact with his child. It was also her testimony that she has always been afraid of the appellant and the appellant knew this.

[6] The complainant testified that on 19 December 2020, the date on which the appellant admitted to having had consensual sexual intercourse with her that the appellant had put his penis and ejaculated in her mouth. She did not want nor did she consent to have sex with him at that time and she told the appellant that she did not want to have

intercourse with him. The complainant further stated that, as the appellant was armed with a knife, she did not fight him as she

thought that that would be the safest thing to do, in order to avoid being harmed. She also did not summon any help nor tell anyone

immediately as she feared for her life.

[7] The second incident happened on 14 January 2021, at her mother's place, where the appellant again had oral sex with her. After the appellant had left, she phoned Ricardo Swarts, a social worker and informed him about what had just happened. She testified that the appellant came to her mother's place again on 02 February 2021. Inter alia, she testified that the appellant placed a knife on the bed where she sleeps. When she refused to give the appellant the Pin to her phone the appellant took the knife and pricked her on her thigh, to scare or threaten her.

[8] The complainant's testimony was detailed, consistent throughout, candid, forthright, and honest. She did not embellish her evidence. For instance, she testified that from December 2020, to February, the appellant never 'hurt' her. This is born by the fact that she testified that the appellant was disturbed in his quest for oral sex when her brother entered the room. Surely, if she was bent on casting the appellant in a bad light, she could have easily embellished her evidence and stated that also on 02 February 2020, the appellant had placed his penis in her mouth. She also withstood searching cross examinations.

[9] The evidence in this matter further shows that the State witnesses did not collude. For instance, the complainant's brother did not shy away from testifying that when he entered the room where the appellant and the complainant were, it did not look as if the appellant was causing any trouble nor did he see any weapons. His evidence was that he saw the brassiere that the complaint told him the appellant had cut with a knife.

[10] We start the analysis of the appellant's version with his plea explanation. In his plea explanation, the appellant stated the following:

"... Beskuldigde erken slegs dat hy op 19 Desember 2020 met die klaagster se toesteming haar vaginaal gepenetreer het, Beskuldigde onteken egter dat hy op enige ander stadium gemeenskap met haar gehad het sonder haar toestemeng..."[1]

[11] In his evidence in chief, the appellant testified that the consensual intercourse between him and the complainant took place under a peperboom. Later he contradicted himself. In cross examination of the appellant, the following took place:

“Q: Baie keer was u en die klaagster seker alleen gewees daar by die pa se ghetto, is dit reg so?”

A. Ons was altyd alleen ...

Q. Altyd alleen?

A. Ja ...

Q. Nou het hulle (sic) weer seks gehad daarso by die ghetto?

A. Ja, ek het een aand geslaap ook daar. Soos ek se.

Q. Want die ding is. So. Elke keer as julle mekaar daar ontmoet het julle gevry en geseks?

A. Yes

Q. Is dit reg?

A. Yes...”[2]

[12] It is clear that there is a major difference between the appellant’s plea explanation and his evidence under cross examination. Counsel’s for the appellant, however, persisted with the argument that there was no contradiction or inconsistency within the appellant’s testimony.

[13] The appellant attacked the Magistrate’s overall findings in the assessment of credibility. Counsel for the appellant attempted to persuade this Court and remained adamant that there was no contradiction in the appellant’s version without specifying which aspects of his evidence was not contradictory. This argument flies in the face of common sense and the evidence on record, which clearly shows that the appellant without any reason was adjusting and embellishing his testimony.

[14] The Magistrate also noted contradictions, and incongruities in the appellant’s testimony as regards, not only the number of times he had had consensual intercourse with the complainant, but also the places where the intercourse took place. The appellant did not only contradict himself in relation to just one such occasion, but on two separate occasions. He did not explain these contradictions. It is clear that the appellant was adjusting his testimony as the trial continued.

[15] The contradictions in appellant’s evidence is on material and central aspects relating to the charges he was facing. Given the importance of these aspects in his account and regarding the alleged consensual nature of the encounters with the complainant, it is plain that they undermined the appellant’s overall credibility.

[16] The complainant was a single witness it is well established that an accused person may be convicted on the evidence of a single witness. Such evidence, however, must be approached with caution. In *Rugnanan*[3] the Supreme Court of Appeal held that ‘[t]he cautionary rule does not require that the evidence of a single witness must be free of all conceivable criticism’: the

‘requirement is merely that it should be substantially satisfactory in relation to material aspects or be corroborated’. For that matter, it is not tenable that an accused person can only be convicted based only on evidence that is corroborated. For instance, crimes involving rape and other sexual offences always happen in secret. In most instances only the complainant is available to give evidence regarding the commission of the offence.

- [17] Moreover, during the hearing Counsel for the appellant was required to direct us to those aspects of the complainant’s evidence that were not clear and substantially satisfactory, but was unable to do so. The record does not bear any significant indicia of the complainant’s unreliability. The trial court thoroughly and adequately dealt with the evidence presented before it. The Court also considered and applied relevant law to the evidence. The trial court gave reasons why it accepted the testimony of the complainant. Furthermore, the Magistrate meticulously articulate the facts that led to the finding of guilt.
- [18] The Magistrate rejected, correctly so, the appellant’s version of events. The Magistrate also made correct credibility findings. As such, he gave full and adequate reasons as to why he accepted the evidence of the State and rejected that of the appellant. In the circumstances of the case, the court a quo cannot be faulted for accepting the version of the of the State and rejecting that of the appellant. It is obvious that the appellant lied during the trial on the other hand. The State evidence of a single reliable witness who was beyond reproach and met the required standard necessary to overcome the hurdle of the cautionary rule.
- [19] Turning now to sentence. The facts of this matter reveal that life imprisonment was applicable to count 1. Count 1 is also read with the provisions of section 94 of the Criminal Procedure Act, Act 51 of
1977. Section 94 speaks of commission of offence on diverse occasions. The court a quo found that the accused raped the complaint on different occasions. This then squarely places count one within the purview of section 51 (1) of the CLAA. Despite life being applicable the court a quo deviated from imposing life. There is no basis for this Court to interfere. It follows that the appeal against sentence must also fail.
- [20] There is one last aspect which requires attention. This is the issue of the record of the proceedings in the court a quo being in the Afrikaans language, which Counsel for the appellant raised as a point in limine. All the participants in the trial in the lower court were Afrikaans speaking and the proceedings were conducted in the Afrikaans language. No provision was made to translate them into the English language. Counsel submitted that the question is, despite the language policy dictating that all court records shall be in English, whether this court will be able to consider the merits of the appeal.
- [21] Counsel for the appellant submitted that in terms of section 35(3)(k) every accused person has the right to a fair trial, which includes the right to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language. Counsel referred to several decided cases as authority for the proposition that an accused person must be tried in a language he understands. Notable in these authorities is

that these were matters in which proceedings in the lower courts were either conducted in languages other than the one understood by one of the parties, in particular the accused criminal proceeding, or were held in indigenous languages. However, it is clear from all these

authorities that the court is at liberty to use any of the official languages provided it is an official language understood by the parties.

[22] The issue is different in this matter. This is an appeal and not a trial. In this respect it is to be noted that on 29 September 2017 the then Chief Justice of the Republic of South Africa, Mogoeng Mogoeng CJ issued the directive that English will be the only language of record in South African courts. The rationale behind the directive was to facilitate efficiency and the smooth running of the court system as English is a language understood by all Judges. The then Chief Justice went further and stated that many people have limited resources and that they would not be able to expand them on translating records from the language in which they were kept in the court a quo to English, when a matter is taken on appeal.

[23] This directive was followed by one in this division in 2021 which provides as follows:

“The transcription of court proceedings and reconstruction of court records for matters on appeal or review is an unnecessary and

wasteful expense to the Office of the Chief Justice and Department of Justice & Constitutional Development.

In order to limit these costs and undue delays in finalising these matters, Judicial Officers and Legal Practitioners are therefore required to take comprehensive notes, in English, during court proceedings and make such notes available as part of the court record.”

[24] The above directives have not been repealed, substituted, or superseded by any subsequent development. They are therefore still of force and effect. The trial court in this matter was obliged to have the proceedings translated into the English language, alternatively, to keep meticulous record in the English language which will accompany the transcript of the record when it is sent on appeal. This was not complied with. The consequence is that the appeal court was at a disadvantage in dealing with the record. That this was a disadvantage is underscored by Counsel who appeared for the respondent stating that, although she is Afrikaans speaking, she has become accustomed to reading records which are in the English language. According to her, this record took longer to read than it normally would have been the case, if it was in the English language. It would have been worse if Counsel was not Afrikaans speaking. This surely impact negatively on the administration of justice. It has nothing to do with the language of choice of the accused or the language preferences of the presiding officer.

- [25] We were able to deal with the appeal on its merits because both of us are reasonably proficient in the Afrikaans language. It would have been different had one of us, or both, been unable to deal with the matter on the merits because of the language barrier. Presiding officers in the lower court are reminded to comply with court directives which are aimed at facilitating the smooth running of the administration of justice.
- [26] Paragraphs [20] – [25] of this judgment, must be brought to the attention of the Regional Court President, Chief Magistrate: Cape Town, Chief Magistrate: Wynberg, and the Director-General of the Department of Justice and Constitutional Development.
- [27] In the circumstances, the appeal against both conviction and sentence is dismissed.

M J DOLAMO

JUDGE OF THE HIGH COURT

I agree.

N NZIWENI

Appearances:

Counsel for Appellant:

Adv. S Kuun

Legal-Aid South Africa – Cape Town

Counsel for Respondent: Adv. E Cecil

The Director of Public Prosecutions – Cape Town

- [1] Loosely translated into English he said: “The accused admitted that on 19 December 2020 he had penetrated her vagina with her consent: Accused deny that he had at any other stage had sexual intercourse with her without her consent”.
- [2] “Translation.: Q: On may occasions you and the complainant were alone there at the father’s ghetto, is that correct? A. We were always alone. Q. Always alone? A. Yes Q. Now they (sic) again had sex there at the ghetto? A. Yes, I also slept one night there, as I say. Q. Because the thing is, each time you met each other there you kissed and had sex? A. Yes Q. Is that correct? A. Yes...”
- [2] “Translation.:
- Q: On may occasions you and the complainant were alone there at the father’s ghetto, is that correct?
- A. We were always alone.
- Q. Always alone?

A. Yes

Q. Now they (sic) again had sex there at the ghetto?

A. Yes, I also slept one night there, as I say.

Q. Because the thing is, each time you met each other there you kissed and had sex?

Q. Is that correct?

A. Yes...”

[3] Per Dlodlo JA in S v Rugnanan

[2020] ZASCA 166 at par [23].

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