

SOUTH AFRICA / JUDGMENT

Dick and Another v S (CA 45/2020)

[2025] ZANWHC 18 (28 January 2025)

[2025] ZANWHC 18**COURT**

North West High Court, Mafikeng

BEFORE

Reid, Wessels

CASE / FILE NUMBER

CA 45/2020

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Policy**IN THE HIGH COURT OF****SOUTH AFRICA****NORTH WEST DIVISION,****MAHIKENG****CASE NUMBER:CA45/2020****CASE NUMBER OF COURT A****QUO:RC336/2016****Reportable:**

YES / NO

Circulate

to Judges: YES / NO

Circulate

to Magistrates: YES / NO

Circulate

to Regional Magistrates: YES / NO

In the matter between:

PETER
MOGALETWA DICK
FIRST
APPELLANT
O[...]
R[...] N[...]
SECOND
APPELLANT
and
THE
STATE
RESPONDENT

Coram:

REID J et WESSELS
AJ
Date: 28 January 2025
ORDER
i.
The late filing of the notice of appeal and prosecution of the appeal
is condoned.
ii.
The appeal against sentence and conviction is dismissed.

JUDGMENT

- [1] The appellants were convicted of two counts of rape in terms of Section 3 of the Sexual Offences and Related Matters Amendment Act 32 of 2007 read with Section 51(1) of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 and theft of a motor vehicle. In addition, the appellants were declared unfit to possess firearms.
- [2] Firstly, it is apt to deal with the condonation for the late filing of the notice of appeal. It should be stated that this appeal forms part of a special project for the eradication of a backlog of criminal appeal cases, a fact appreciated by both parties. It is this Court's view that it would be in the interests of justice that the appellant's late filing of the appeal be condoned and this appeal be dealt with on the merits. Condonation is subsequently granted.
- [3] The appeal lies against the sentence and conviction by the Potchefstroom Regional Court.
- [4] The grounds of appeal are all but focussed and constitute a scatter-shot approach. Apart from the appeal against the conviction on all the charges, the appellants appeal only against the life sentence imposed in terms of the finding of guilt on the rape charges. The grounds of appeal are the following:
- [5] Ad conviction:
- 5.1. In convicting the appellants, the court a quo erred in making the following findings:
- 5.1.1. That the state proved the guilt of the appellants beyond reasonable

doubt;

5.1.2. That there are no improbabilities in the state's version;

5.1.3. That the state witnesses gave evidence in a satisfactory manner;

5.1.4. That the evidence of the state witness can be criticised on matters of detail only, whereas the evidence was contradictory in material respects.

5.2. In convicting the appellants, the court a quo erred in failing to:

5.2.1. Properly analyse or evaluate the evidence of the state witnesses;

5.2.2. Properly consider the improbabilities inherent in the State's version.

5.3. In convicting the appellants, the court a quo further erred in the following respects:

5.3.1. Rejecting the evidence of the appellants as not being reasonably possibly true;

5.3.2. Accepting the evidence of the state witnesses;

5.3.3. Holding against the appellants contradictions between their own evidence and the facts put to witnesses in cross-examination;

5.3.4. Giving no importance to the discrepancies of the state witnesses;

5.3.5. Holding against the appellants' matters which were not put to the witnesses;

5.3.6. Giving no importance to the witnesses;

[6] Ad sentence:

6.1. A term of life imprisonment is strikingly inappropriate in that it:

6.1.1. Is out of proportion to the totality of the accepted facts in mitigation.

6.2. The court a quo erred by not imposing a shorter term of imprisonment, coupled with community service and/or further suspended sentence, more particularly in view of the following factors:

6.2.1. The absence of planning;

6.2.2. The age and personal circumstances of the appellants;

6.2.3. The rehabilitation element;

6.2.4. The mitigating factors inherent in the facts found proven;

6.3. The court a quo further erred in over-emphasising the following factors:

6.3.1. The seriousness of the offence;

6.3.2. The interests of society;

6.3.3. The prevalence of the offence;

6.3.4. The deterrent effect of the sentence;

6.3.5. The retributive element of sentencing;

[7] The facts that led up to the conviction and sentence and ultimately this appeal are that in the early hours of 16 May 2016, the appellants stole a vehicle belonging to the first complainant, Mr Samuel Modise (“Mr Modise”). At the time of the theft, Mr Modise was a patron at an establishment known as Mr Chips (“the tavern”) in Potchefstroom. Late in the evening of 15 May 2016, Mr Modise left the tavern in an inebriated state and got into his vehicle (parked outside the tavern) to sleep. He left the right window of this vehicle slightly open and asked Mr Johannes Baxana (“Mr Baxana”), a car guard, to keep a lookout while he was asleep. When Mr Modise awoke after midnight, he noticed that his car keys had been removed from the ignition of his vehicle. The first appellant, who was on the scene when Mr Modise got out of his car, helped Mr Modise with Mr Baxana to look for the keys in Mr Modise’s vehicle. Mr Baxana informed Mr Modise that the second appellant had taken the keys. Mr Modise approached the second appellant and noticed the car keys on the person of the second appellant. Eager to retrieve his car’s keys, Mr Modise offered the second appellant R1,000.00 for the keys. Mr Modise went to a nearby ATM to withdraw this amount and upon his return, found that his vehicle was gone. The first appellant was then picked up by an individual in another vehicle and left the scene.

[8] While fleeing from the South African Police Service (“SAPS”)

in the early hours of the morning of 16 May 2016, the appellants, who were at that stage both in possession of Mr Modise’s vehicle caused the vehicle to overturn.

[9] Both accused were identified by Mr Modise in an identification parade on the national photo image system of the SAPS. Apart from Mr Modise’s evidence, the evidence of Mr Baxana, an independent witness, put both the appellants on the scene when Mr Modise’s vehicle was stolen.

[10] Sergeant Suzanne Venter (“Sergeant Venter”), employed as a fingerprint expert by the SAPS, testified that she found a fingerprint on the inside of the front side window of Mr Modise’s

vehicle and identified the print as that of the first appellant. The evidence of Sergeant Venter was that the location and direction of the fingerprints were indicative of a person trying to open the front door of the vehicle from the inside. The court a quo rejected the first appellant’s version that the fingerprints were left in Mr Modise’s vehicle when he assisted in the search for the vehicle’s keys.

- [11] The second complainant was Ms Z[...] K[...] (“the second complainant”), a sex worker. She was picked up by both the appellants on 16 May 2016 at around 02:00, both at that stage driving Mr Modise’s vehicle. Having driven to a location frequented by sex workers the second appellant had intercourse with her. The first appellant thereafter raped the second appellant.
- [12] Hearing police sirens in the distance the second complainant was forced into the back of the vehicle by the appellants where the first appellant continued to rape her while the second appellant drove to a farm in the vicinity. While the rape took place, the second complainant testified that the first appellant slapped her and pulled her hair. Importantly Perus Bekinyana Piet (“Mr Piet) to whom the second complainant reported the rape described the second complainant who was wearing a weave in her hair at the time as “She was wearing a weave and it seemed like that it was pulled on one side”. When the appellants arrived at the farm with the second complainant, they took turns to rape her again. Perceiving danger, the second complainant asked the appellants not to kill her.
- [13] Both the appellants left the second complainant in bushes on the farm and drove away with the vehicle. The second complainant memorised the registration number of this vehicle (Mr Modise’s vehicle). Abandoned in the dark of night, the second complainant walked a distance until she reached the residence of Mr Piet, who resides next to a nearby BP Garage in the area of the farm. The second complainant reported the rape to Mr Piet. Mr Piet described the second complainant as hurt and tearful.
- [14] Following the rape, the second complainant was examined by a nurse who found no physical or gynaecological injuries but concluded that the absence of such injuries did not exclude sexual penetration.
- [15] Both the appellants were pointed out by the second complainant in an identity parade.
- [16] The defence of the first appellant is in short that he was at the tavern on 15 May 2016, where he observed Mr Modise sleeping in his vehicle. Later on, during the evening, when he exited the tavern he found Mr Modise with Mr Baxana looking for the keys to Mr Modise’s vehicle. He accompanied Mr Modise to a nearby ATM where he requested R100.00 from Mr Modise. Upon their return, they found Mr Modise’s vehicle having been stolen.
- [17] The first appellant testified that he knew the second complainant “by sight” and denied having had sexual intercourse with her on 16 May 2016. He denied that he was in the company of the second appellant on 15 or 16 May 2016.
- [18] The second appellant testified that he was not in the vicinity of the

tavern on 15 May 2016 and was at home waiting for his niece to return from Pretoria. He denied meeting the second complainant or having sexual intercourse with her on 16 May 2016.

Conviction

[19] The test to determine whether the versions of the appellants are reasonably possibly true, had been laid down by the Supreme Court of Appeal in *S v Trainor*[1] wherein it was stated:

"A conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable, the quality of that evidence must be of necessity, be evaluated, as must corroborative evidence, if any. Evidence of course, must be evaluated against the onus of any particular issue or in respect of the case in its entirety".

[20] The court a quo found Mr Modise to be a good and "impressive" witness. In addition, the evidence of Mr Modise was corroborated by that of Mr Baxana (the car guard).

[21] Furthermore, in *Minister of Safety and Security and Others v Craig and Others*[2] the Supreme Court of Appeal remarked that a court of appeal may be in a better position to draw inferences:

"Although courts of appeal are slow to disturb findings of credibility, they generally have greater liberty to do so where a finding of fact does not essentially depend on the personal impression made by a witness' demeanour, but predominantly upon inferences and other facts and upon probabilities. In such a case a court of appeal with the benefit of a full record may often be in a better position to draw inferences".

[22] The charge of rape that the appellants have been found guilty of is a serious crime which the Supreme Court of Appeal, in the matter of *S v Vilikazi*[3] described as a repulsive crime and an invasion of the most private and intimate zone of a woman that strikes at the core of her

personhood and dignity. This fact was also appreciated by the court a quo. The fact that the second complainant was a sex worker does not (and should not) in the slightest derogate from the seriousness of this kind of crime.

[23] The second complainant was a single witness, a factor that had been recognised and taken into account by the court a quo when it convicted the appellants. The court a quo found that the second complainant had no motive to implicate any of the appellants falsely. The identification of the appellants in the identification parade by the second complainant was correctly found by the court a quo to be above reproach.

In relation to the position of a single witness, Section 208 of the Criminal Procedure Act[4] provides that an accused may be convicted of any offence on the single evidence of any competent witness.

[24] The court a quo found that the second complainant "... was an impressive witness who did not contradict herself and she did not show any motive to falsely implicate any of the two accused."

[25] Mr Piet was the first person the second complainant found at the first opportunity, to whom she made the report after she had been raped. The fact that the second complainant reported the rape

to Mr Piet immediately after it occurred is of considerable value.

[26] The second complainant instructed Mr Piet to phone the SAPS to report the rape. The reporting of the rape to the SAPS is of importance. The second complainant, by reporting the incident,

would have been well aware of the fact that it was the criminal act of soliciting sex that caused her to accompany the appellants in the first place to the locations where she was raped.

Notwithstanding the risk of being implicated as aforesaid, the second

complainant reported the rape to the SAPS.

[27] There were no inherent contradictions or improbabilities in the evidence of Mr Modise, Mr Baxana or the first complainant. The evidence of the remainder of the state witnesses stands largely undisputed. On the conspectus of the evidence, as it appears from the record of the proceedings in the court a quo, this Court is of the view that the court a quo properly evaluated the facts before it and correctly followed the above principles. The court a quo considered the totality of the evidence in arriving at a correct and just decision and had not followed a piecemeal approach.

Sentence

[28] Both appellants had previous convictions. The first appellant was found guilty of theft in twenty fifteen for which he was sentenced to a fine of R6,000.00 or three years imprisonment (wholly suspended for three years). On 12 June 2015, the first appellant was found guilty of possession of a dependence-producing substance and was sentenced to R3,000.00 or 9 months imprisonment of which R2,000.00 or six months imprisonment that was suspended for five years. Subsequently, the first appellant was found unfit to possess a firearm.

[29] The second appellant was convicted of attempted housebreaking and theft on 10 July 2003 and sentenced to R2,700.00 or 18 months imprisonment of which R1,800.00 or 12 months were wholly suspended for a period of five years. On 7 October 2013, the second appellant was found guilty of possession of dependence-producing substances and was sentenced to R6,000.00 or 36 months imprisonment of which R3,000.00 or 18 months was suspended for 5 years.

[30] At the time of sentencing, the first appellant was 38 years of age.

He washed cars for which she earned R150.00 – R200.00 per day. He had 4 minor children. He testified that he uses chronic medication for a heart-related illness.

[31] The second appellant was 42 years of age and unemployed. He had 3 minor children whom he maintained through social grants. He is HIV-positive.

[32] The test laid down in *S v Malgas*[5] and later endorsed in *S v Dodo*[6] holds that a court, before imposing a prescribed sentence, has to assess, upon consideration of all the circumstances of the particular

case, whether the prescribed sentence is indeed proportionate to the particular offence.

[33] In *S v Dodo*[7] the Constitutional Court cautions that:

“To attempt to justify any period of penal incarceration, let alone imprisonment for life as in the present case, without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the

very heart of human dignity. Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end. Where the length of a sentence, which has been imposed because of its general deterrent effect on others, bears no relation to the gravity of the offence (in the sense defined in para [37] above), the offender is being used essentially as a means to another end and the offender's dignity assailed. So too where the reformatory effect of the punishment is predominant and the offender sentenced to lengthy imprisonment, principally because he cannot be reformed in a shorter period, but the length of imprisonment bears no relationship to what the committed offence merits. Even in the absence of such features, mere disproportionality between the offence and the period of imprisonment would also tend to treat the offender as a means to an end, thereby denying the offender's humanity.”

[34] Section 51(1) of the Criminal Law Amendment Act[8] applies to the sentence in the present case which holds the following empowering provision upon which the court a quo sentenced the appellant. It reads as follows:

“Notwithstanding any other law, but subject to subsections

(3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life.”

[35] The peremptory effect of Section 51(1) the Criminal Law Amendment Act[9] is tempered by the provisions of Section 51(3)(a) thereof that provides for the imposition of a lesser sentence than life only if a court is satisfied that substantial and compelling circumstances exist.

[36] The personal circumstances of the appellant as advanced as mitigating factors do not constitute substantial and compelling reasons to deviate from the minimum sentence as provided for in Section 51(1) of the Criminal Law Amendment Act[10].

[37] The report from the social worker in the court a quo opined that the accused should receive life sentences. Further aggravating factors to be inter alia considered that constitute aggravating circumstances are that the first appellant had unprotected intercourse with the second complainant and that she was raped more than once.

[38] In considering this Court's power to interfere with the sentences imposed by the court a quo, the Constitutional Court in *Bogaards v S*[11] remarked as follows:

"An appellate court's power to interfere with sentences imposed by courts below is circumscribed. It can only do so where there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it."

[39] This Court is of the view that there are no substantial and compelling circumstances present in this case, that warrant a deviation from imposing the prescribed sentence of life imprisonment.

[40] Having given proper and due consideration to all the circumstances of this case as is evident from the record, this Court is unable to criticise the assessment of the evidence of the witnesses by the court a quo. The court a quo had the advantage of observing their testimony and observing their reactions to questions during cross-examination, an advantage that this court does not have sitting as a court of appeal.

[41] In the absence of any clear misdirection by the trial court, this Court will not interfere with its finding.

[42] Taking into account the nature of the offence, there is nothing in the personal circumstances of the appellant that could be regarded as substantial and compelling circumstances. No basis therefore

exists to interfere with the sentence imposed by the court a quo.

Order

[43] Resultantly the following order is made:

- i. The late filing of the notice of appeal and prosecution of the appeal is condoned.
- ii. The appeal against sentence and conviction is dismissed.

M WESSELS

ACTING JUDGE OF THE HIGH COURT

I concur

FMM REID

JUDGE OF THE HIGH COURT

APPEARANCES

Date of hearing : 18 June 2024

Date of judgment : 28 January 2024

Counsel for appellants : Mr TG Gonyane

Instructed by

: Legal Aid

: Mahikeng

Counsel for Respondent : Director of Public Prosecutions

: Mmabatho

[1] S v Trainor 2003

(1) SACR 35 (SCA) at paragraph 9

[2] Minister of Safety and Security and others v Craig and Others [2009] ZASCA 97 at paragraph 58

[3] S v Vilikazi 2012

(6) SA 353 SCA at paragraph 1

[4] Criminal Procedure Act 51 of 1977

[5] S v Malgas 2001 (1) SACR 469 (SCA)

[6] S v Dodo [2001] ZACC 16; 2001

(3) SA 382 CC

[7] S v Dodo [2001] ZACC 16; 2001

(3) SA 382 CC at paragraph 38

[8] Criminal Law Amendment Act 105 of 1997

[9] Ibid, fn 8

[10] Ibid, fn8

[11] Bogaards v S (CCT 120/11) [2012] ZACC 23 at paragraph 41

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