

SOUTH AFRICA / JUDGMENT

Dlamini v S (A04/2021) [2021]

ZAMPMHC 30 (15 November 2021)

[2021] ZAMPMHC 30

COURT

Middelburg High Court, Mpumalanga

BEFORE

Ratshibvumo, Mankge

CASE / FILE NUMBER

A04/2021

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MIDDELBURG LOCAL SEAT

- (1) REPORTABLE: YES
- (2) OF INTEREST TO OTHER JUDGES: NO
- (3) REVISED.

15 November 2021

CASE NO: A04 / 2021

In the matter between:

ZAKHELE JEFFREY DLAMINI

APPELLANT

and

THE STATE

RESPONDENT

J U D G M E N T

RATSHIBVUMO J:

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 10H00 on 15 NOVEMBER 2021.

Introduction.

- [1] This is an appeal against the conviction and the sentence imposed on the appellant by the Mkhondo Regional Court on 20 May 2019. The appellant stood trial in that court on a charge of kidnapping and two charges of contravening section 3 of Act 32 of 2007 (the Sexual Offences and Related Matters Act) – rape, to which he pleaded Not Guilty. He was however found Guilty as charged in respect of the charges of kidnapping and one count of rape (where the victim was raped more than once) after a trial. As for the other count of rape, the court a quo reasoned that it would be a duplication of charges to convict him on that count. He was as such convicted of rape in circumstances that the victim was raped more than once. He was sentenced in terms of section 51(1) of Act 105 of 1997 to life imprisonment after the two charges were taken together for purposes of sentence. The appeal is lodged subject to the provisions of section 309(1)(a) of Act 51 of 1977 (the Criminal Procedure Act) which provides for the automatic right to appeal when the sentence of life imprisonment is imposed by the Regional Court.

Background

- [2] It is common cause that on the night of 23 September 2018, the complainant, Ms. TM, was led by the appellant to his home where they had sexual intercourse three times. The complainant only walked out of that house the following day in the morning after he woke her up and told her to go. Once outside on the street, the complainant telephoned her lover, Mr. Mkhwanazi who came to where she was and helped in calling the police who came and arrested the appellant at his place of abode. The complainant alleged that the sexual intercourse took place without her consent and that she was taken to the appellant's place against her will. The appellant in turn alleged that the complainant went with him willingly and that they had consensual sexual intercourse.

Evidence presented by the State.

- [3] The complainant and her boyfriend were together on 23 September 2018 at the home of her uncle. Their parting was acrimonious as they clashed in their interaction. This led to the boyfriend leaving the complainant behind. Between 20h00 and 21h00, the complainant walked home alone in the dark. As she was walking, she encountered the appellant along the way who was unknown to her. The appellant approached her as though he wanted to ask something but she decided to run away from him. As she ran, he ran after her until he caught up with her. He grabbed her by the hand while holding a knife in his other hand. Out of fear, she offered to surrender her phone and cash to him but he had no interest in them. All he wanted was for her to go with him.
- [4] She submitted to him and they walked as he directed, but throughout the walk, she was crying out for help. As they walked, they came across a motor vehicle that came to stop. Against the orders given by the appellant that she should stand still, she ran to this motor vehicle and knocked for help, but it immediately drove off. She then ran to a place where

there are rooms being rented out. A tenant in one of the rooms opened the door but did not help. The appellant caught up with her and slapped her on her face with an open hand. She did not attempt to flee again. She then walked with the appellant who led her to his home and into his room.

Once inside, he placed the knife on the table.

- [5] As they were walking and even after their arrival at the appellant's place, her boyfriend kept on calling her on the cell phone and she would answer the calls. These calls irritated the appellant who finally decided to switch her phone off. Once in his room he instructed her to suck his penis and she complied. He then had sexual intercourse with her as she lied in bed on her back. When he finished he had a conversation in which he told her about his former girlfriend who was too forward. He told her that

she was taking ARV tablets without informing him about it (that she was HIV positive). According to him it is being forward that causes some men to kill their lovers. He equated this to her behaviour when she kept crying out for help while he was with her earlier saying she was being forward. He told her that no one was going to rescue her.

- [6] When he finished this talk, he asked her if her boyfriend ever had anal sexual intercourse with her and she told him he had not. He told her it was because he knew nothing. He then penetrated her anus with his penis and continued to have intercourse with her. When he finished he showed her a video recording on his cell phone in which his mother was in a conversation with his former girlfriend talking about the ARV tablets she was taking. As she watched the video, he lit the cigarette and started smoking. When he finished he again had sexual intercourse with her penetrating her vagina and her anus. When he finished, he showed her more videos on his cell phone. She watched and later fell asleep. He woke her up around 04h00 the next morning saying she must go. She rose and left him while still in bed. Once on the road, she telephoned her boyfriend and directed him to where she was and he came.

- [7] Mr. Mkhwanazi corroborated her version pertaining to their grudge and how he found her the next morning following her call. He helped her in calling the police who came and arrested the appellant at his home.

- [8] Mr. Thabiso Nkabinde is one of the tenants occupying the rooms that the complainant ran to. He was unknown to her. He also did not know the complainant or the appellant. In fact these two remained unknown to him even as he gave evidence during the trial. Mr. Nkabinde had heard the screams of a woman crying out for help from far until those cries where in the passage of where he rented out a room. He opened the door to see. As he opened, he saw a man holding a woman by the hand while he had a knife on the other hand. The woman's cell phone started to ring and the man holding her suspected that it was him (Mr. Nkabinde) calling her. The said man approached him while asking the woman if the call was from him. It was at this stage that the woman approached this man and pulled him away from Mr. Nkabinde, saying the call was not from him.

Evidence presented by the defence

- [9] The Appellant version was that he met the complainant for the first time a day before the date of the incident and proposed love to her. The complainant agreed to his proposal. She however gave him a false name as he only heard her true name in court. She declined giving him her phone number as she said she was always in the company of her boyfriend. She promised to send him a 'please call me' when she is available. That 'please call me' did not take long to arrive as it happened the following day. He knew it must be her because the message had a name of a person to be called which happened to be the name she had given him earlier. He immediately called her and proceeded to the place agreed and eventually met her.
- [10] After finding her, they walked to his place without encountering any of the people that the complainant testified about. He also denied having been to the rooms where Mr. Nkabinde resided, saying he did not see him that night. Once at his place of abode, he ushered the complainant into his room where he left her watching videos on his cell phone while he went to the kitchen to dish out food for them to eat. He came back with food and they ate together. After eating, they had sexual intercourse three times before they could sleep. He denied having had anal sexual intercourse with her.
- [11] He woke her up around 04h30 the next day as she had told him that she would want to wake up and prepare to go to work. He offered her water to bath but she declined saying she was already late. He offered to accompany her but she declined because he was not giving her money. She became angry and asked him to stay behind for that reason. She unlocked the security door and left. Some thirty minutes later when he checked the phone in order to call her, he realised that her phone numbers were deleted and he suspected that she could have done this the time he left her with the phone watching a video. Later that day, the police arrived and arrested him.
- [12] Michael Junior Nkosi is the appellant's neighbour who testified for the defence. He was home on the night of the incident when the barking dogs caught his attention. He went out to see and observed it was his neighbour, the appellant walking into his yard followed by a woman behind him.

Grounds of appeal.

- [13] The appellant avers that the court a quo erred in convicting him on a charge of kidnapping in that,
- a) it failed to consider whether in light of all the evidence, the appellant's guilt was proved beyond a reasonable doubt.
 - b) It held that Mr. Nkabinde corroborated the complainant's evidence saying she knocked on his door. To the contrary, Mr. Nkabinde testified that she did not knock on his door which contradicts her evidence.

- c) It failed to consider the contradiction between the complainant's evidence and that of Mr. Nkabinde in that the complainant said the appellant dragged her by the hand while Mr. Nkabinde testified that she pulled the man away.
 - d) It failed to attach value to Mr. Nkabinde's evidence that the complainant kept on referring to the appellant as "my love" while she apologised saying, they must talk when they get home.
 - e) It failed to attach value to the evidence by Mr. Nkosi who saw the appellant walking with the complainant in a manner that suggested that they were lovers.
 - f) It also failed to draw the negative inference to the fact that the complainant who kept on communicating with her boyfriend on the phone, failed to inform him that she was being kidnapped.
- [14] As for the rape conviction, the court a quo's judgment is attacked for referring to common cause factors between the State and the defence as corroboration. The reference to injuries marked in the medical report as corroboration of the complainant's evidence is attacked for the reason that the medical report did not mention who inflicted the injuries. The complainant's failure to scream for help or resist the appellant's advances while inside his room, is also raised as a basis upon which the court a quo should have reject her evidence that the intercourse was not consensual. The appellant also casts doubt on whether there was anal penetration as the complainant did not testify about any pain or bleeding in her anus.
- [15] A lot of dust is raised in the grounds of appeal when the appellant suggests that the complainant contradicted herself in alleging that the appellant woke her up and yet she alleges she left him still asleep. Then same goes for the submission that the forensic specimen collected had the conclusions not readable leaving the identity of the person from whom the sample was obtained unknown.
- [16] The appeal is vehemently opposed by the respondent. Counsel for the respondent submitted that there were no contradictions between the complainant's version and that of Mr. Nkabinde and that even if we find that there were contradictions, they would be so minor and immaterial to the ultimate verdict in respect of all the charges. She therefore relies on *S v Mkohle*[1] where it was held that contradictions per se do not lead to the rejection of a witness' evidence; they may simply be indicative of an error. Not every error made by a witness affects his/her credibility; in each case the trier of fact has to make an evaluation, taking into account such matters as the nature of the contradictions, their number and importance, and their bearing on other parts of the witness' evidence.

Powers of the appeal court.

- [17] The approach to be adopted by a court of appeal when dealing with the factual findings of a trial court is guided by the collective principles laid down in *R v Dhlumayo*[2]. A court of appeal will not disturb the factual finding of a trial court unless the latter had committed misdirection. Where there has been no misdirection on fact by the trial court, the

presumption is that his conclusion is correct. The appeal court will only reverse it where it is convinced that it is wrong. In such a case, if the appeal court is merely left in doubt as to the correctness of the conclusion, then it will uphold it.[3]

[18] Maya DP (as she then was) summarises the position well in *S v Hewitt*[4], when she states,

“an appellate court may not interfere with [the discretion of the trial court] merely because it would have imposed a different sentence. In other words, it is not enough to conclude that its own choice of penalty would have been an appropriate penalty. Something more is required; it must conclude that its own choice of penalty is the appropriate penalty and that the penalty chosen by the trial court is not. Thus, the appellate court must be satisfied that the trial court committed a misdirection of such a nature, degree and seriousness that shows that it did not exercise its sentencing discretion at all or exercised it improperly or unreasonably when imposing it. So, interference is justified only where there exists a ‘striking’ or ‘startling’ or ‘disturbing’ disparity between the trial court’s sentence and that which the appellate court would have imposed. And in such instances the trial court’s discretion is regarded as having been unreasonably exercised.”

[19] Almost all the grounds of appeal levelled against the conviction of the appellant on a charge of kidnapping are premised from the alleged contradictions between the version of the complainant and that of Mr. Nkabinde. Much of the alleged contradictions are quoted of context as demonstrated herein after. The appellant focused on these and forgot to include his own version which is to the effect that there was no Mr. Nkabinde that was interacted with that night. It is as such not clear as to whether he argues that the complainant’s version be rejected in favour of Mr. Nkabinde’s or the other way round as his version is completely left out. The concern is that Mr. Nkabinde version of events was not challenged or disputed by the appellant during the trial. The risk in deciding the contradiction to the exclusion of the appellant’s version is exactly what he cries that the court a quo is guilty of, to wit, failure to evaluate the evidence holistically, not in peace meals[5].

[20] Moreover, upon close reading of the alleged contradictions between the evidence tendered by the complainant and Mr. Nkabinde, it appears to be a quotation of evidence out of context. The complainant’s evidence was that she knocked on the door which was obviously closed. She did not give evidence on the room owner seeing or hearing the knock. The room owner was obviously inside. The room owner can only testify on whether he heard the knock, not whether there was a knock. Mr. Nkabinde did not open the door because of the knock, but because of the noise he had heard from far off which was now in the passages of the rooms where he rented a room. There was not clarity on whether the room she knocked at was the exact room where Mr. Nkabinde opened. But presuming that it was, failure to hear the sound of a knock by those inside does not mean there was no knock from the outside. It may mean those inside did not hear it.

[21] Again, it is common cause evidence that Mr. Mkhwanazi, the complainant’s boyfriend, kept on making calls to the complainant while she was with the appellant and even when she had arrived at his place. She kept on responding to his calls until the appellant decided to switch off her phone as it was irritating him. Mr. Nkabinde testified that when he opened his door,

the complainant's phone rang. Moments later, he heard her saying, "my love, I am sorry let us talk about this when we arrive at home." Although Mr. Nkabinde did not know that the person calling the complainant was her lover with whom she parted ways rancorously, it should make sense when one looks at the evidence as a whole that she could not have been talking to the appellant but to the person on the phone. Otherwise it would be strange for a woman to address a man who drew a knife for her as "my love."

This would fit in well with the complainant's version that she did not know the appellant and at that stage, she did not even know where he was leading her to. There was as such no home arrival to talk about with the appellant.

- [22] Any possible mistake to the effect that the words may have been directed to the appellant, given the frustrating situation and the fact that Mr. Nkabinde himself faced a threat to be attacked by a man who was approaching him armed with a three-star knife, should be understandable. After all, Mr. Nkabinde testified that it was too dark for him to see the faces of these people. I suppose the darkness must have hindered him from observing when the complainant responded to the phone call or at least, when she took it to her ear.
- [23] The same approach should apply on the perceived contradiction on who pulled who between the complainant and the appellant. Mr. Nkabinde testified that the man was pursuing the woman and he caught up with her in the yard as there was no exit out of the yard. When he opened the door, the man was holding the woman and in his other hand, he held a knife.
- [24] It was only when the appellant approached him when he suspected that the call to the complainant was from him that he let go of her hand and approached him (Mr. Nkabinde) asking if he was the one calling. The woman (the complainant), knowing that Mr. Nkabinde (albeit unknown to her) was innocent of the accusation that he was the one calling her, rushed to his rescue and pulled the man away saying, he was not the one calling. She knew that as she ran there, the appellant was accusing her of dating person(s) in those rental rooms. She obviously acted to protect the man whom she thought opened the door in order to help her as he was seen by the appellant as her possible lover. The question on who grabbed who would as such depend on the various stages of the events.
- [25] I fail to see why the trial court should draw a negative inference at the fact that the complainant failed to inform her boyfriend over the phone that she was being kidnapped. Is it suggested that informing the boyfriend would have caused the kidnapping to stop? If so, I do not see how that was going to happen as she did not even know where she was being taken to. In my view, doing so would have informed the appellant that a case would be opened with the police and could make him treat the complainant to avoid being arrested which could easily have led him to kill her. It was therefore wise in my view to avoid saying anything that would tempt the appellant along those lines.

[26] As I indicated above, some of the submissions the appellant made simply cause dust that can obscure one's view and can easily divert from the real issues. For example, the appellant wants us to see a contradiction when the complainant testified that she was woken up at 04h00 by him and that when she left, he was still sleeping. I understand her evidence to mean that he was lying in bed as he could not have woken her up and still be fast asleep. I do not see any contradiction in this regard especially as the appellant also testified that he is the one who woke her up.

[27] Another aspect is the submission regarding the specimen collected, the conclusions of which were unreadable. This submission does not advance the appellant's course, but merely clouds the issues to be decided, and can be seen as him clutching at straws. The reason for this is that the appellant himself admitted to having sexual intercourse with the complainant. The forensic evidence becomes irrelevant and the focus should now be on whether there was consent. The same goes for the argument that if the complainant was penetrated anally, she should have testified that she had blood or pains in her anus. This argument borders on insulting the complainant and deserves no further comment.

[28] In arguing that the complainant should have called for help or try to flee as there were other people in the appellant's house, the appellant relies on *S v GS*[6] where the SCA said,

"13. The allegation that the appellant and the complainant did not avail themselves of the opportunity to have sex in the Wendy house and only did so later in the bedroom is not so improbable that it can be rejected as false beyond a reasonable doubt. The fact that the sex act took place in the bedroom without the complainant crying out for assistance is far more likely to have

occurred if the act was with her consent, than without it. And the appellant was hardly likely to have run the risk of attempting to rape the complainant in the same room as his sister and younger brother, after she had successfully fought off his initial attempt to do so in the Wendy house, as to do so would have invited discovery in a compromising position, should the complainant have again resisted his advances. Plainly, if the appellant intended to have forcible intercourse with the complainant in a house with four other occupants, without knowing how she would react, he ran the risk of her raising the alarm and him being found out. It would have been far less risky, if he was intent on such conduct to have done so in the Wendy house, where the opportunity clearly presented itself. If anything, the fact that the sexual act took place where it did is more consistent with the appellant's version than that of the complainant, and the appellant's version is not so inherently improbable in that regard to warrant rejection. Or rather, at best for the State, it is a neutral factor that does not tip the scales in its favour.

21. Had the complainant been raped, one would have expected her to have immediately cried out for assistance, particularly knowing that J was present in the room. She did not do so. Nor after the act did she wake J. When pressed on this, the complainant alleged that she had attempted to awaken her, but that J had been so drunk that she continued sleeping. J denied having been drunk and said that she had merely had a single brandy and Coke during the course of the whole evening, and her evidence in this regard was not challenged. The

complainant's evidence in regard to what she told J the next morning was also unsatisfactory. Initially she said she did tell J of the rape, but went on to say that she could not remember if she had done so. As I have said, J's evidence has not been shown to be unreliable and is wholly inconsistent with the complainant doing anything else, but expressing her pleasure at the events of the preceding evening.” [My emphasis].

[29] The judgment above was clearly quoted out of context as it by no means suggest that kidnapping should always be accompanied by resistance and screams for help. The facts can be distinguished by just reading the paragraphs above in full. In GS, evidence clearly establishes that the complainant had successfully resisted the appellant's attempts while they were in the Wendy house before getting into the house. The complainant in that case therefore knew she could resist without any fear of being harmed. Again, the complainant went into a room in which she knew there were four other occupants amongst whom were her relatives.

[30] In casu, the complainant did not know the house, the occupants thereof or whether there were any. All that is stated is that the appellant's

room had a security gate. No clarity was made as to whether it was an outside room or a room in the main house. Calling out for help while inside such a structure carries the same risks described above where it was suggested she should have told her boyfriend over the phone that she was being kidnapped.[7] My views are amplified by the fact that once in this room, and after putting a knife on the table, the appellant started lecturing her against being forward saying, what she did when she cried out for help and ran to the rented rooms was being forward as no person was going to rescue her. At that stage she was aware that indeed nobody rescued her. She was also warned that it is women who become this forward that get killed by the men. I think remaining quiet was the wise move on her part so she could live to tell her tale.

[31] The evidence of Mr. Nkosi, the appellant's neighbour is neutral in that it does not tilt the scales of justice to either side of the case. Even if we accept that each time his dogs bark, he goes out to investigate, this time he observed a woman who was already subdued in that she was already slapped with an open hand and knew that the appellant had a knife in his hand. It was the same knife that Mr. Nkabinde testified about saying the man (whom we now know was the appellant) held it in his other hand.

[32] I cannot find any misdirection on the part of the trial court in rejecting the appellant's version and finding that the complainant's version together with that of Mr. Nkabinde, an independent witness and the medical report prove that the appellant kidnapped and raped her.[8] Medical evidence does not have to tell who the culprit is, but it can tell if the injuries are in line with the evidence given by the victim, and in this case, the court a quo found that it did.

Ad sentence.

- [33] As for the sentence, the appellant argued that there were substantial and compelling circumstances that justified the imposition of a lesser sentence to life imprisonment as there was no extraneous violence and no physical injury caused other than physical injury inherent in the offence. The defence further challenged the ancillary orders made by the court in terms of sections 50 of the Sexual Offences and Related Matters Act, 120 of Act 38 of 2005 (Children's Act) and 103 of Act 60 of 2000 (the Firearms Control Act).
- [34] Counsel for the respondent submitted that there were no substantial and compelling circumstances advanced by the appellant and as such, the court a quo did not misdirect itself in the sentence it imposed. She relies on *S v Lungisa*[9] where the SCA held that the determination of sentence is principally a matter for the trial court's discretion. Grounds upon which a court of appeal may interfere with a sentence imposed by a trial court are confined. She made no submissions regarding the ancillary orders.
- [35] What remains to be determined is whether the court a quo misdirected itself when it imposed the sentence of life imprisonment. The sentencing imposed on the appellant was in accordance with the provisions of section 51 (1) of Act 105 of 1997, read with Schedule 2, Part I which provides for life imprisonment as a sentence for rape,
- “(a) when committed:-*
- (i) in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice;
 - (ii) by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy;
 - (iii) by a person who has been convicted of two or more offences of rape or compelled rape, but has not yet been sentenced in respect of such convictions; or
 - (iv) by a person, knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus;
- (b) where the victim:-*
- (i) is a person under the age of 16 years;
 - (iA) is an older person as defined in section 1 of the Older Persons Act, 2006 (Act No. 13 of 2006);
 - (ii) is a physically disabled person who, due to his or her physical disability, is rendered particularly vulnerable; or
 - (iii) is a person who is mentally disabled as contemplated in Section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; or
- (c) involving the infliction of grievous bodily harm.

[36] Courts can only deviate from the prescribed sentence if there are substantial and compelling circumstances that justify the imposition of a lesser sentence. Courts are to approach the question on whether such circumstances exist conscious of the fact that the Legislature has ordained prescribed sentences as the proper sentences to be imposed and that the specified sentences are not to be departed from lightly and for flimsy reasons.[10]

[37] I again cannot find any misdirection on the part of the trial court in finding no substantial and compelling circumstances that justify a lesser sentence in casu. Section 51(3)(aA)(iii) provides,

“When imposing a sentence in respect of the offence of rape the following shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence:

...

(ii) an apparent lack of physical injury to the complainant;

...” [My emphasis].

[38] The sentence imposed should be seen in light of what the courts of appeal often say in respect of crimes of rape. In *S v Chapman*[11], Mohammed CJ said,

“The rights to dignity, to privacy, and the integrity of every person are basic to the ethos of the Constitution and to any defensible

civilization. Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquility of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives.”

[39] What I also find aggravating in this case is the careless conversation that the appellant had with the complainant immediately after he had unprotected sexual intercourse with her informing her that his former girlfriend was taking ARV tablets which are known to treat those who are HIV positive. He did not assure her of his own status if he was HIV negative even after she complained to him that it means he wanted her to be HIV positive since he did not make use of any protection. Instead, he went on to show her a video in which the former girlfriend was talking to the appellant’s mother about her taking the ARV tablets. This was more like confirming that he was not lying about what he had said to her.

[40] I find the appellant to have been heartless, selfish and very unwise in this regard. No evidence was led about the complainant’s status or that of the appellant, except that the appellant merely testified that he was not HIV positive. No evidence was led on whether he was tested or the results thereof being handed in. As highlighted above,[12] Act 105 of 1997 provides for a sentence of life imprisonment when a victim is raped by a person who knows that he has HIV. Evidence led falls short of this requirement as it would appear the State did not have the appellant tested or lead evidence on his knowledge of his HIV status. This

however does not take away the pain and the trauma the complainant was subjected to that night; the trauma she could still be going through especially if she had not yet tested or if she has since tested positive of HIV. The prescribed sentence of life imprisonment is still mandatory for a different reason, being the raping of a victim more than once by the appellant.

- [41] A word should go out to the communities out there that while the nation declares war on gender based violence, the courts shall not stand by, fold the arms and watch. The law shall be enforced with little room for mercy to them that violate the rights, privacy and the dignity of women in in our country. There is therefore no reason to interfere with the sentence imposed on the appellant after it was found that the complainant was raped more than once. The finding that there were no substantial and compelling reasons to impose a different sentence should as such be confirmed.

Ancillary orders.

- [42] Upon passing the sentence, the court a quo went on to order that the accused's name should be included in the sexual offenders' Register in terms of section 50 of the Sexual Offences and Related Matters Act. That section provides as follows,

"50. Persons whose names must be included in Register and related matters

- (1) The particulars of the following persons must be included in the Register:

(a) A person who in terms of this Act or any other law-

(i) has been convicted of a sexual offence against a child or a person who is mentally disabled;

(ii) is alleged to have committed a sexual offence against a child or a person who is mentally disabled in respect of whom a court, has made a finding and given a direction in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977;

(iii) is serving a sentence of imprisonment or who has served a sentence of imprisonment as the result of a conviction for a sexual offence against a child or a person who is mentally disabled; or

(iv) has a previous conviction for a sexual offence against a child or a person who is mentally disabled or who has

not served a sentence of imprisonment for such offence; and

(b) any person-

(i) who, in any foreign jurisdiction, has been convicted of any offence equivalent to the commission of a sexual offence against a child or a person who is mentally disabled;

(ii) who, in any foreign jurisdiction, has been dealt with in a manner equivalent to that contemplated in paragraph (a)(ii); or

(iii) whose particulars appear on an official register in any foreign jurisdiction, pursuant to a conviction of a sexual offence against a child or a person who is mentally disabled or as a result of an order equivalent to that contemplated in paragraph (a)(ii),

whether committed before or after the commencement of this Chapter.”

[43] The complainant was 23 when she gave evidence and 22 on the date of the incident. The Sexual Offences and Related Matters Act defines a child as anyone under the age of 18 which excludes the complainant in this case. Furthermore, no evidence was led to suggest that the complainant could have been mentally disabled. To order that the names of the appellant should be included in the sexual offenders’ register was therefore a misdirection on the part of the court a quo and should be set aside.

[44] The court also made an order to the effect that the appellant was not suitable to work with the children in terms of section 120(4) of the Children’s Act. The said section provides,

(4) In criminal proceedings, subject to the provisions of subsection (4A), a person must be deemed unsuitable to work with children-

(a) on conviction of murder, rape, indecent assault or any sexual offence contemplated in the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007), assault with the intent to do grievous bodily harm [with regard to a child], where a child is the victim of any such offence, or any attempt to commit any such offence, or possession of child pornography as contemplated in section 24B of the Films and Publications Act, 1996 (Act No. 65 of 1996), or offences in terms of section 8, 9, 10 or 24A(5) of the Prevention and Combating of Trafficking in Persons Act, 2013 (Act No. 7 of 2013); or

(b) if a court makes a finding and gives a direction in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), that the person is by reason of mental illness or mental defect not capable of understanding the proceedings so as to make a proper defence or was by reason of mental illness or mental defect not criminally responsible for the act which constituted an offence contemplated in paragraph (a).

[45] Since the appellant was not convicted of a crime against a child an order made under this provision is another misdirection that forces our hand to interfere. I am mindful of the provision under section 120(1)(b) of the Children’s Act that gives a court in any criminal proceedings a wider discretion to make an order regarding the suitability of the accused to work with children. The Legislature was obviously conscious of the possibility that evidence could be led that justifies such a finding even if the

victim in the matter may not be a child.

[46] Clearly, the court a quo did not rely on this section in making its order. First, the court a quo made an express finding that the order was in terms of section 120(4) of the Children’s Act which does not have a similar provision as those in a section 120(1). Secondly, there is no evidence that was led that suggests that children would be vulnerable at the hands of the

appellant. Lastly, when It is not mandatory for the court to make any order, natural principles of justice (*audi alteram partem*) demand that the accused should be afforded an opportunity to be heard before a decision is taken. In *casu*, the appellant was not afforded an opportunity to give reasons why his name should not be included in the register of persons not suitable to work with the children. The order made in this regard falls to be set aside.

[47] I however cannot hold the same in respect of the order made by the court in terms of section 103 of the Firearms Control Act. Section 103 provides that anyone convicted of any offence involving violence, sexual abuse or dishonesty, for which the accused is sentenced to a period of imprisonment without the option of a fine is unfit to possess a firearm unless the court determines otherwise. During the trial, the appellant's legal representative was aware of this provision and that the appellant was facing life imprisonment as he was convicted of rape in terms of section 51(1) of Act 105 of 1997. He addressed the court in terms of section 103 of the Firearms Control Act saying that the appellant did not have a firearm and did not want one.

[48] In essence, when the appellant was given an opportunity to present evidence for the court to interfere with the automatic declaration of being unfit to possess a firearm, he informed the court that he had no firearm and did not want one. The court understood it to mean that there was no need for it to determine otherwise. The mere conviction and the sentence makes the appellant unfit to possess a firearm. The only order that the trial court can make is to determine otherwise (that the accused is still fit to possess a firearm). Without such determination, the accused becomes unfit to possess a firearm automatically. There is therefore no need to interfere with the court determination in this regard except to properly indicate that the appellant is automatically unfit to possess a firearm as no order determining otherwise was made.

[49] Consequently, the following order is made:

[49.1] Appeal against the convictions and the sentences is dismissed.

[49.2] The convictions and the sentences imposed on the appellant are hereby confirmed.

[49.3] The order to the effect that the names of the appellant should be included in the sexual offenders' register as provided in section 50 of Act 32 of 2007 is hereby set aside.

[49.4] The order to the effect that the appellant is not suitable to work with children in terms of section 120 of Act 38 of 2005 is hereby set aside.

[49.5] No order is made in terms of section 103 of Act 60 of 2000 (The accused is automatically declared unfit to possess a firearm).

TV RATSHIBVUMO

JUDGE OF THE HIGH COURT

I agree.

TM MANKGE

JUDGE OF THE HIGH COURT

FOR THE APPELLANT:

CG JORDAAN

COERT JORDAAN ATTORNEYS INC – NELSPRUIT

C/O LEON VAN DEN BERG ATTORNEYS - MIDDELBURG

FOR THE RESPONDENT: ADV MAOKE

INSTRUCTED BY:

OFFICE OF THE DPP - MIDDELBURG

DATE HEARD:

12 NOVEMBER 2021

JUDGMENT DELIVERED: 15 NOVEMBER 2021

[1] 1990 (1) SACR 95 (A) at 98F-G.

[2] 1948 (2) SA 677 (A)

[3] See also DPP v S 2000 (2) SA 711 (T); S v Leve 2011 (1) SACR 87 (ECG); and Minister of Safety and Security and Others v Graig and Another NNO 2011

(1) SACR 469 (SCA)

[4] 2017 (1) SACR 309 (SCA) para 8.

[5] S v Van der Meyden 1999

(1) SACR 447 (W) at 448F-G.

[6] 2010 (2) SACR 467 (SCA) para 13 & 21.

[7] See paragraph 25 above.

[8] S v Vilakazi 2016

(2) SACR 365 (SCA) para 24.

[9] 2021 (1) SACR 1 (SCA) at para 8.

[10] S v Malgas 2001

(1) SACR 469 (SCA) at 482A.

[11] 1997 (3) SA 341 (SCA).

[12] See paragraph 35 above.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAMPMHC/2021/30.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/dlamini-v-s-unknown-topic-ampmhc-2021--6a3ea5133b1caa912980a6d2>

Prepared on 11 October 2026 · Esheria