

SOUTH AFRICA / JUDGMENT

D.S.M v S (A76/23) [2024] ZAGPPHC 630 (26 June 2024)

[2024] ZAGPPHC 630

COURT

North Gauteng High Court, Pretoria

BEFORE

Coetzee, Phahlane

CASE / FILE NUMBER

A76/23

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IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG DIVISION,

PRETORIA

Case Number: A76/23

(1)

REPORTABLE: YES/ NO

(2)

OF INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED

SIGNATURE:

DATE:

26/6/2024

In the matter between: D[...]
S[...] M[...]
Appellant
and
THE
STATE
Respondent
This judgment was
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parties' representatives by email. The date and
time for hand-down is
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JUDGMENT

COETZEE,AJ

INTRODUCTION:

- [1] This is an appeal against a conviction and sentence. On the 24th of November 2022 the appellant was found guilty by the Regional Court of Gauteng, held in Benoni for contravening the conditions of a domestic violence order, kidnapping, assault with the intent to cause grievous bodily harm, and rape. He was sentenced to five years imprisonment for counts 1 to 3, to be served concurrently with a life sentence for rape.
- [2] Section 51(1) of the Criminal Law Amendment Act 105 of 1997 (the Minimum Sentences Act) [1] and its accompanying schedule 2 was found to be applicable to the charge and conviction of rape, hence the sentence of life imprisonment. The appellant is before court by virtue of his right to an automatic appeal.
- [3] This case is a tragic example of gender-based violence, reflecting the harsh realities many women face in this country. The appellant is the ex-boyfriend of Z[...] M[...] ("the complainant"), and the father of her two children. A final protection order was issued against him on the 25th of July 2019, because of previous acts of violence against her. Despite this order, on the 7th of December 2019, he violated it by attacking and raping her.

ISSUES TO BE DETERMINED:

- [4] The identity of the appellant and the occurrence of sexual intercourse are undisputed. The primary issues for conviction are whether the sexual intercourse was consensual and whether the injuries on the complainant's body were unlawfully and intentionally inflicted by the Appellant. Regarding sentencing, the issues are whether the sentences for assault with intent to cause grievous bodily harm and rape should be combined to avoid double punishment, and whether the trial court erred in concluding that there were no substantial and compelling circumstances to justify deviating from the prescribed minimum sentence.

EVIDENCE:

- [5] In the trial court, the state led the evidence of four witnesses, the complainant, T[...] U[...], M[...] M[...], and Julia Sekgodi. The appellant testified in his own defence and called one witness, his brother, T[...] M[...].
- [6] The complainant testified that on the 7th of December her daughters had gone to visit their grandmother, the accused's mother, leaving her alone at her RDP house. Around 7:00 PM, while taking out the trash, she noticed the appellant standing behind her in her yard. He grabbed and dragged her into the street, brandishing a large knife with a fixed blade. The appellant assaulted her with his fists and headbutted her repeatedly. He then stabbed her on the back of her left hand, the middle finger of her right hand, and her forehead above her eye.
- [7] The appellant pulled her across the road into an open field while it was raining. Despite her screams, there were no people nearby. In the field, the appellant continued assaulting her as she fought for the knife, which caused cuts on both her hands. He ordered her to undress while still beating her. She complied, removing her jeans. Among other abuses, he strangled and threatened to kill her, causing her to cry. The appellant then lowered his pants, exposed his penis, and penetrated her. Afterward, he took mud and shoved it into her vagina. While on his knees, he attempted to insert the knife into her vagina, but she resisted and was only cut on the labia minora.
- [8] Despite her screams, no one responded. When the appellant noticed people in the distance, he told her to dress, continuing to assault her as she did. One of her shoes was lost in the process, and she walked with one shoe. The appellant initially said they were going to his brother's place but then changed his mind and decided to go to his own place. Along the way, he continued to assault her, causing her to lose her other shoe. He threatened to kill her and demanded she walk faster. When they reached his house, he searched for the key under the mat, providing her with an opportunity to escape to a nearby house, approximately 30 meters away, where a person named M[...] lived.
- [9] At M[...] 's house, she found two young men inside and begged them for help. The appellant followed, shouting that "this dog is supposed to be killed", but the men intervened. M[...] arrived, having heard her screams, and the appellant continued to assault her. She was bleeding heavily from her left eye and was losing strength. M[...] called an ambulance. Due to the rain, M[...] and the men helped her to the ambulance, which was parked about 100 meters away. On the way, the appellant threatened to kill her, fearing she would press charges. She was taken to the hospital, where Sergeant Malebe photographed her injuries, which were admitted as evidence. She was discharged the following day.
- [10] The second witness, T[...] U[...], testified that in 2019 he lived with his aunt, M[...]. On the 8th of December 2019, around 2 AM, he was with S[...] when the door was suddenly banged open, and a woman with a swollen face, covered in blood, entered, crying for help. She ran behind T[...] and S[...], who asked her what she needed. Before she could respond, the

appellant entered the room holding a knife and declared he wanted "to kill the dog." He claimed the complainant was the mother of his children and had been abusing him for a long time. T[...] managed to take the knife from the appellant.

- [11] The appellant then went outside, broke a bottle, and returned, threatening T[...] with the broken bottle. M[...] entered the room, and the complainant asked her to call for an ambulance. As they escorted the complainant to the ambulance, the appellant followed, attempting to hold the ambulance door open and insisting he wanted to "finish the dog as it is going to lay charges" against him. The paramedics warned the appellant that they would press charges against him for obstructing their efforts to take the complainant to the hospital. The ambulance eventually took the complainant away. T[...] noted that the complainant had a swollen

face, an injury to her left eye, and was covered in blood with bloodstained clothes.

- [12] The third witness, M[...] M[...], testified that T[...], her nephew, lived with her. On the 8th of December 2019, she was awakened by the sound of a woman screaming from T[...]’s back room. When she went to investigate, she found the appellant holding a knife. The complainant was standing behind T[...] and asked for help. M[...] took T[...]’s phone to call an ambulance, but the appellant stopped her, insisting that the complainant would get him arrested and saying he should be allowed "to kill the dog." She pleaded with the appellant, who eventually relented and allowed her to call an ambulance.
- [13] The complainant was covered in blood and had an injury to her left eye. Despite walking with difficulty and limping, she told M[...] that the appellant had raped her and stabbed her in her private parts. T[...] helped the complainant to the ambulance while the appellant menacingly waved a broken bottle. When the ambulance doors opened, the appellant tried to prevent them from loading her, insisting she would press charges against him and demanding that they allow him to kill her first.
- [14] The fourth witness, Julia Sekgodi, testified that she is a professional nurse at Far East Rand Hospital. She was on duty on the 8th of December 2019, when she examined the complainant during the early hours of the morning and completed the J88 form. Mrs. Sekgodi stated that the complainant had been referred to the crisis center from the hospital. The complainant presented with a swollen left eye and ear, and her forehead had seven stitches. She had abrasions and bruises on her left arm, and multiple stitches on the fingers of both hands, indicating recent physical assault. Additionally, a gynecological examination revealed that the complainant had a fresh one-centimeter tear or cut on her labia minora, indicating recent penetration.
- [15] The appellant testified that he and the complainant were previously in a relationship, lived together, and had two children. He stated that on the 7th of December they were still in a relationship without any issues, even though he had moved out of their shared home some time ago. He acknowledged the existence of a protection order prohibiting him from approaching her residence. On the 7th of December 2019, the complainant allegedly called

him, and they agreed to meet at his house at around 9:00 or 10:00 PM. However, he found her at his home at approximately midnight. He claimed they had consensual intercourse.

[16] During the night, he overheard the complainant talking on the phone with another man and discussing plans to meet him in the morning, which made him angry. He admitted that the complainant sustained injuries, explaining that he pushed her, causing her to hit a partially closed door. When she approached him again, he pushed her once more, causing her to fall onto broken tiles outside his tool room. He stated that these tiles were meant for use outside the house and that her injuries resulted from the push, not from assault.

[17] After their argument, she left the house. He could not see her initially but found her at his neighbor M[...]’s house, in the company of T[...] and his little brother. They were all sitting on the bed, and he noticed that the complainant was bleeding. He asked T[...] to borrow his phone to call an ambulance. Due to poor reception inside the house, they went outside to make the call. The

ambulance arrived about 20 to 25 minutes later but seemed to get stuck in the mud at the corner. He decided to go home and sleep,

leaving the scene. He denied going to the complainant's house, kidnapping her, or having a knife. He asserted that the complainant

lied about being assaulted and raped. Additionally, he claimed he never saw M[...] and that everyone was lying about the incident.

[18] T[...] M[...], the brother of the accused, testified that the appellant and the complainant had a healthy relationship in December

2019. Although they lived separately, the complainant frequently visited the appellant with their children. M[...] recounted an incident on the 8th of December 2019 when the appellant and the complainant had a physical altercation. According to him the appellant and the complainant arrived at their parental home arguing and continued to fight. He heard tiles breaking and noticed that the complainant was injured and bleeding. M[...] witnessed the fight, seeing the complainant on the floor with the Appellant on top of her, but he did not see what caused her injuries as they were holding each other. Despite his account differing substantially from that of the appellant, M[...] insisted that he was telling the truth.

PRINCIPLES APPLICABLE ON APPEAL:

[19] In *Director of Public Prosecutions, Eastern Cape, Makhanda v Coko*[2], the Supreme Court of Appeal (the SCA) reiterated that the powers of an appeal court to interfere with the trial court's factual findings, are circumscribed. Thus, the appeal court is not at large to interfere unless it is satisfied that the trial court committed

material misdirection or a demonstrable blunder in evaluating the evidence. They quoted from the earlier judgment of *R v Apter and Apter*[3] where the Appellate Division said:

"[W]here the judicial officer in the trial court has taken every point into consideration and has not misdirected himself or been guilty of any error of law, an appeal court, in a case in which the ground of appeal is that the trial court ought to have had a doubt, will not be entitled to interfere with the verdict unless it is satisfied that the trial court ought to have had a doubt ..."

[20] It has further been stated in *R v Dhlumayo & Another*[4] that:

"The trial court has advantages which the appellate court cannot have - in seeing and hearing the witnesses and in being steeped in the atmosphere of the trial. Not only has the trial court had the opportunity of observing their demeanour, but also their appearance and whole personality. This should never be overlooked. The mere fact that the trial court has not commented on the demeanour of the witnesses can hardly ever place the appeal court in as good a position as it was. Even in drawing inferences the trial court may be in a better position than the appellate court, in that it may be more able to estimate what is probable or improbable in relation to the particular people whom it has observed at the trial... The appellate court should not seek anxiously to discover reasons adverse to the conclusions of the trial court... Where the appellate court is constrained to decide the case purely on the record, the question of onus becomes all-important. In order to succeed, the appellant has to satisfy an appellate court that there has been 'some miscarriage of justice or violation of some principle of law or procedure'."

CONVICTION:

- [21] The complainant's evidence provides a detailed and consistent account of the assault and rape that occurred on the 7th and 8th of December 2019. She described the initial attack, where the appellant grabbed her, dragged her into the street, and assaulted her with his fists and a knife. The complainant's specific recollections of the knife injuries and the sexual assault are corroborated by medical evidence. Her testimony, although traumatic and graphic, remains consistent throughout her recounting of the events, lending significant credibility to her account.
- [22] Witness testimonies further support the complainant's narrative. T[...] U[...] and M[...] M[...] both described the complainant's distressed state, her injuries, and the appellant's violent behavior when she sought refuge in M[...]'s house. T[...]'s testimony about the appellant holding a knife and making threats corroborates the complainant's account about the knife attack. Additionally, both T[...] and M[...] witnessed the appellant's attempts to prevent them from calling an ambulance and his threats to kill the complainant, which aligns with her account of the continued threats and violence.
- [23] The medical evidence provided by Nurse Julia Sekgodi is particularly compelling. The nurse's examination revealed injuries consistent with the complainant's testimony, including a swollen left eye, multiple stitches on her forehead and fingers, abrasions, and a fresh tear on her labia minora. This objective medical evidence substantiates the physical and sexual assault claims made by the complainant and confirms that the injuries were recent, thereby supporting her version of events over the appellant's claims of accidental injuries.

- [24] The appellant's evidence attempts to portray the events as a consensual encounter followed by a minor altercation. He claims the complainant's injuries were accidental, caused by her falling onto broken tiles after being pushed. However, this explanation is inconsistent with the nature and extent of her injuries, particularly the knife wounds and the sexual assault. The appellant's denial of key aspects of the complainant's account, such as the knife attack and kidnapping, further undermines his credibility.
- [25] T[...] M[...]’s testimony failed to corroborate the appellant’s account and instead introduced a conflicting version of events. His testimony introduced numerous inconsistencies, particularly concerning the nature of the altercation. He claimed the altercation took place at their parental home, as opposed to the appellant’s home. While he acknowledged that an argument and physical altercation occurred, his claim that the injuries resulted from mutual combat rather than a one-sided assault diverges significantly from both the complainant’s and the medical evidence. Despite these inconsistencies, T[...]’s testimony does not exonerate the appellant but rather confirms that a physical conflict left the complainant injured. It is highly doubtful that T[...] witnessed the altercation, as no other witness corroborated his presence or account. Furthermore, it is implausible that broken tiles causing the complainant’s injuries would be present at both the appellant’s home and the parental home.
- [26] The totality of the evidence presented in this case overwhelmingly supports the conclusion that the sexual intercourse was not consensual and that the appellant is guilty of the charges. There are no significant contradictions in the key elements of the complainant’s account, and the supporting evidence aligns with her testimony. The trial court’s conviction of the appellant was based on a thorough assessment of credible and relevant evidence. Therefore, there was no misdirection from the trial court in convicting the appellant. The evidence clearly establishes the appellant’s guilt beyond a reasonable doubt.

SENTENCE:

- [27] As to the first issue on sentence, the appellant was initially charged with attempted murder under section 51(2)(c) of Part 4 of Schedule 2 for allegedly attempting to kill the complainant by hitting her with his fist, kicking her, headbutting her, stabbing her with a knife, and hitting her with a plank. However, due to the lack of clear allegations that the injuries were life-threatening, the charge was reduced to assault with intent to do grievous bodily harm. The rape charge was read with section 51(1) of Schedule 2, as the complainant sustained grievous bodily injuries during the assault. The sentences of 5 years and life imprisonment were imposed for two distinct charges and, as such, cannot be merged for sentencing purposes. Combining these sentences would effectively

disregard the severity and impact of the physical assault, which included hitting the complainant with a fist, kicking, headbutting,

stabbing her hands with a knife, and striking her with a plank, resulting in her hospitalization. This assault is separate from the trauma and injuries inflicted during the rape. Each charge reflects a different aspect of the appellant's violent actions, and merging the sentences would fail to appropriately acknowledge the full extent of the harm caused to the complainant.

[28] When the appellant was sentenced, his personal circumstances were considered. These included his age of 38 years at the time of sentencing, indicating potential for rehabilitation. He had two minor children, aged 14 and 8, whom he supported before his arrest. It was argued that as a first-time offender with no prior convictions, the appellant's background warranted some degree of leniency. It was further argued that the trial court over-emphasized the seriousness of the offenses and the interests of society while under-emphasizing his personal circumstances.

[29] However, this court finds that the appellant's circumstances, even when considered collectively, are ordinary and do not justify a deviation from the prescribed minimum sentence. It is a well-established principle that an appellate court will not interfere with an imposed sentence unless it is convinced that the sentencing discretion was exercised improperly, unreasonably, or that the sentence is shockingly inappropriate.[5]

[30] The trial court did not err in emphasizing the seriousness of the injuries. Gender-based violence is a critical issue in this country, with many cases going unreported and survivors facing significant challenges in accessing justice and support services. In this case, the complainant had already obtained a protection order against the appellant, which he blatantly ignored, demonstrating his contempt for court orders. Furthermore, the appellant showed no remorse during the court proceedings, indicating that he does not deserve any leniency.

[31] In *S v Tshabalala*[6], Mathopo AJ (as he then was) said:

"for far too long rape has been used as a tool to relegate the women of this country to second-class citizens, over whom men can exercise their power and control, and in so doing, strip them of their rights to equality, human dignity and bodily integrity. The high incidence of sexual violence suggests that male control over women and notions of sexual entitlement feature strongly in the social construction of masculinity in South Africa. Some men view sexual violence as a method of reasserting masculinity and controlling women."

[32] In *S v Chapman*[7], Mohamed CJ the following was stated with which I agree:

"Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, to privacy, and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilisation. 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 tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality

and enjoyment of their lives."

[33] The sentence imposed on the appellant is intended to send a clear and unequivocal message that such heinous crimes will not be tolerated. It serves the public interest by highlighting the gravity of the offense and the necessity for stringent penalties to deter similar conduct. The punishment reflects society's condemnation of such acts and reinforces the importance of protecting victims.

[34] In the absence of any misdirection or error by the trial court, this court finds no basis to interfere with its findings. The trial court exercised its discretion appropriately, and the sentence aligns with legal precedents and statutory requirements. Therefore, the conviction and sentence are upheld.

As a result, the following order is made:

ORDER:

The appeal is dismissed.

L. COETZEE

ACTING JUDGE OF THE HIGH COURT

I, agree

P. PHAHLANE

JUDGE OF THE HIGH COURT

Appearances:

Attorney for the Appellant: S. Moeng Instructed by: Pretoria Justice Centre On behalf of the Respondent: EV Sihlangu Instructed by: The Director of Public Prosecutions Date heard: 14 May 2024 Date of judgment: 26 June 2024

[1] Section 51(1) of the Criminal Law Amendment Act 105 of 1997 provides as follows: "(1) 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. Part I of Schedule 2 reads as follows: "Rape as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007- ... (c) involving the infliction of grievous bodily harm."

[2] (248/2022)

[2024] ZASCA 59 (24 April 2024) at par. 38.

[3] See reference made in R v Dhlumayo 1948

(2) SA 677 (A) at p. 687.

[4] 1948(2) SA 677 (A) at 705-706.

[5] S v Pieters 1987

(3) SA 717 (A).

[6] [2019] ZACC 48; 2020 (3) BCLR 307 (CC); 2020 (2) SACR 38 (CC) at par. 1.

[7] [1997] ZASCA 45; 1997 (3) SA 341 (SCA) at paragraphs 3-4.

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