

SOUTH AFRICA / JUDGMENT

Galeboe and Another v S (A138/2023)

[2024] ZAFSHC 212 (18 July 2024)

[2024] ZAFSHC 212**COURT**

Free State High Court, Bloemfontein

BEFORE

Van Rhyn, Majosi

CASE / FILE NUMBER

A138/2023

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****FREE****STATE DIVISION, BLOEMFONTEIN****Reportable:**

YES/NO

Of

Interest to other Judges: YES/NO

Circulate

to Magistrates: YES/N

Case

No. A138/2023

In

the matter between:

SAKENG

ISAAK GALEBOE

FIRST

APPELLANT

GEORGE

MAGOQA

SECOND

APPELLANT

And

THE

STATE

RESPONDENT

CORAM:

VAN RHYN, J et

MAJOSI, AJ

HEARD

ON:13 MAY 2024

JUDGMENT

BY: MAJOSI, AJ

DELIVERED ON: 18 JULY 2024

- [1] The appellants were convicted in the Regional Court, Brandfort on individual counts of contravening section 3 of the Sexual Offences and Related Matters Act 32 of 2007(SORMA) under the purview of section 51(1) of the Criminal Law Amendment Act 105 of 1997. They were sentenced to undergo life imprisonment.
- [2] Both accused were declared unfit to possess firearms in terms of section 103 of the Firearm's Control Act 60 of 2000. It was ordered that their names be entered into the National Register of Sex Offenders in terms of section 50 of SORMA and in terms of section 120(4) of the Children's Act 38 of 2005, they were found unsuitable to work with children.
- [3] In their notice of appeal, the appellants assailed their respective convictions on count 1 and 2:
- 3.1. namely that the court a quo erred in finding that the state proved its case beyond a reasonable doubt despite contradictions in the state's case;
- 3.2. the court a quo erred in rejecting the appellants and accepting the version of the state;
- 3.3 The court erred in not finding the complainant's version improbable.
- For sentence, the appellants stated that the court erred in imposing life imprisonment and not finding the presence of substantial and compelling circumstances:
- 3.4 the accused were never found guilty of similar offences;
- 3.5 the complainant did not sustain serious bodily injury;
- 3.6 not considering all mitigating factors which cumulatively constituted substantial and compelling circumstances;
- 3.7 both appellants are capable of rehabilitation.
- [4] For count 1, the complainant, a 13-year-old girl testified that on the evening of the 9 October 2017 at 18h30, she was alone at home when her next-door neighbour, the second appellant came to her house. Upon realizing she was alone at home, he came inside the house, instructed her to close the door and instructed her to lie on the couch.

- [5] He undressed her pants and underwear and thereafter undressed himself and sexually penetrated her without her consent. When he had ceased his up and down movements, he got dressed and instructed her to fold the blanket he had used. Before he left her house, he threatened to assault her should she disclose what had just transpired. The complainant went to look for her friend and her mother, but she did not report this incident to anyone.
- [6] On the 20 of October 2017 at 12h00 midday, the second appellant in the company of a friend, found her alone at home. After his friend left, he sexually penetrated her again without her consent and closed her mouth to prevent her from screaming. The second incident again occurred when the complainant was left alone at home. She was 11 years of age at the time of both incidents.
- [7] In respect of count 2, the very same complainant in count 1, testified that on the 21 of October 2017, whilst playing with a friend, the first appellant, a neighbour, approached her and asked her to buy him cigarettes and bring it to his house. She did as she was told. Upon her return, he lost interest in the cigarettes and instead he undressed her bottom half and removed his pants and sexually penetrated her with his penis without her consent.
- [8] When he was done, she got dressed outside his house. The first appellant told her to keep the R 1.00 change from the cigarettes. She left his house and went to Ous Mudau's house where she reported that she was raped and a case was opened with the police. She was taken for a medical examination the following day and the two appellants were arrested in connection with the offences.
- [9] Ms. Molefi (referred to as Ous Mudau by the complainant) stated that on the 21 October 2017, the complainant came to her house walking with great difficulty. When she enquired, it was reported to her that the second appellant had raped her earlier that day. After she examined the complainants' genitals, she informed the complainant's mother of the situation and the two went to the police station to open a criminal case.
- [10] The medico - legal examination report of the complainant revealed that she was examined on the 21st of October 2017 at National Hospital by a forensic nurse who observed no genital injuries but concluded that the absence of genital injuries does not exclude sexual abuse.
- [11] The second appellant denied any knowledge of the offences in count 1 and contended that the complainant is falsely implicating him as he caught her stealing his peanut butter. The first appellant, with regard to count 2, alleged that he is being falsely implicated by the complainant as she and her mother were evicted from his uncle's house. Both accused confirmed that they were known to the complainant.
- [12] The courts powers to interfere on appeal with the findings of fact of a trial court are limited unless there is a clear misdirection by the court a quo.[1] In S v Naidoo[2] at paragraph 46, the following was stated:

“As an appellate court it is essential that we remain cognisant of the strictures on us as far as the trial court’s factual findings are concerned. Absent demonstrable, material misdirections and clearly erroneous findings, we are bound by the trial court’s factual findings. It is not for an appellate court ‘to second-guess the well-reasoned factual findings of the trial court’. We are not the triers of fact at first instance...”

- [14] The appellants were convicted based on the evidence adduced by the complainant who is a single child witness. Section 208 of the Criminal Procedure Act provides that an accused may be convicted on the evidence of a single witness provided that the evidence of the witness is satisfactory in all material respect.[3] In *Maile v S*, the following was stated at paragraph 18:

“This Court has, since Woji, cautioned against what is now commonly known as the double cautionary rule. It has stated that the double

cautionary rule should not be used to disadvantage a child witness on that basis alone. The evidence of a child witness must be considered as a whole, taking into account all the evidence. This means that, at the end of the case, the single child witness’s evidence, tested through (in most cases, rigorous) cross-examination, should be ‘trustworthy’. This is dependent on whether the child witness could narrate their story and communicate appropriately, could answer questions posed and then frame and express intelligent answers.

Furthermore, the child witness’s evidence must not have changed dramatically, the essence of their allegations should still stand. Once this is the case, a court is bound to accept the evidence as satisfactory in all respects; having considered it against that of an accused person. ‘Satisfactory in all respects’ should not mean the evidence line-by-line. But, in the overall scheme of things, accepting the discrepancies that may have crept in, the evidence can be relied upon to decide upon the guilt of an accused person...”

- [15] The transcribed record reveals that the complainant, in both counts, answered all questions posed to her during examination in chief and did not deviate from her version despite extensive cross examination which took place over a period of two days. The evidence of Mrs. Molefi corroborates the complainant’s version where count 2 is concerned in that shortly after she was raped, she was seen walking with difficulty and after further enquiry the complainant confirmed that she was raped and immediately identified the first appellant as her assailant.
- [16] The medico legal report indicated that there were no visible genital injuries but in the same breath, did not exclude sexual abuse. It can thus be termed as neutral. The first two rapes were not reported to Mrs. Molefi but, that does not mean that they did not occur as described by the complainant. These rapes were reported at the police station when the complainant and her mother opened the criminal cases. No negative inference can be drawn from her delay in reporting that the second appellant raped her more than once as per count 1 as this was reported to the police.[4]

- [16] The trial court in its evaluation of the conspectus of the evidence, found that the complainant gave an honest and detailed account of all three incidents despite the fact that the actual incidents would have occurred almost two years before she testified.[5] The appellants' version of events boiled down to a bare denial as they indicated they were elsewhere whilst the complainant was being raped. They however did not dispute the fact that the complainant is well known to them and vice versa.
- [17] The appellants version was that they were being falsely implicated and that the evidence given by the complainant is manufactured. In my view, the details provided by the complainant as to where each rape occurred, how these rapes took place and how it came about that she was at the first appellant's house after she had been sent on an errand are intricate details. It therefore cannot be said that she imagined the incidents because it is evident that it emanates from her own experience and recollection of events.
- [18] The discrepancy in her evidence pertaining to why she was unable to scream for assistance cannot be said to be material in nature and did not affect the bulk of her evidence as correctly found by the trial court. I cannot fault the reasoning of the court a quo when it found that that the versions of the appellants were not only improbable, but also not reasonable or possibly true considering that both appellants adduced new evidence whilst they were testifying in their own defence. I am of the view that the appellants' appeal against their respective convictions ought to be dismissed.
- [19] It is trite that sentence is the prerogative of the sentencing court and an appeal court should be careful not to erode such discretion. An appeal court will only interfere if the sentence imposed by the court a quo is disproportionate as found in *S v Rabie* 1975 (4) SA 855 (A) AT 857 D- E and also *S v De Jager and Another* 1965 (2) SA 616 (A).
- [20] In *S v Mudau* 2013 JDR 0938 (SCA) at paragraph 13 Madjiet JA stated as follows:
- "...it is trite that each case must be decided on its own merits. It is also self-evident that sentence must always be individualised, for punishment must always fit the crime, the criminal and the circumstances of the case. It is equally important to remind ourselves that sentencing should always be considered and passed dispassionately, objectively and upon a careful consideration of all relevant factors. Public sentiment cannot be ignored, but it can never be permitted to displace the careful judgment and fine balancing that is involved at arriving at an appropriate sentence. Courts must therefore always strive to arrive at a sentence which is just and fair to both the victim and the perpetrator, has regard to the nature of the crime and takes account of the interests of society..."*
- [21] Section 51(1) of the Criminal Law Amendment Act (supra) prescribes a minimum sentence of life imprisonment to be imposed upon conviction unless substantial and compelling circumstances are present. The complainant was under the age of 16 years at the time of the commission of the offences. The general rule of thumb is that substantial and compelling circumstances presented to court must be truly convincing to allow the court to deviate on proper grounds and not for flimsy reasons. [6]

[22] S v Vilakazi 2012 (6) SA 353 (SCA) at paragraph 58 where the court stated the following:

“...In cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be, and those seem to me to be the kind of 'flimsy' grounds that Malgas said should be avoided...”

[23] For the first appellant it was submitted that he is a first offender of rape, 40 years of age, unmarried with two children aged 11 and 5 years respectively. He, before his incarceration, earned an income of R 600.00 per month from casual employment. As a sole breadwinner, his mother, brother and minor children, were dependent on his income. The second appellant is said to be a first offender aged 32 years, unmarried with one minor child aged 12 years old and a recipient of a disability grant of R 1500. 00 per month.

[24] The legal representative for the appellants argued the court a quo failed to consider that both appellants, due to their age, could still be rehabilitated as first offenders of rape, that the complainant did not suffer any injuries, and the cumulative effect of their personal circumstances justified the imposition of a lesser sentence.

[25] Transversely thereto, the legal representative for the state argued that the court correctly found that there were no compelling and substantial circumstances and the apparent lack of physical injuries do not constitute same.

[26] The fact remains that the complainant was 11 years of age and a vulnerable member of society at the time the offences were committed. The first two incidents of rape occurred in the sanctity of her own home which can no longer be regarded as a safe space. The victim impact statement elucidated that although these incidents would have occurred almost two years prior to her testifying in court, she still suffers from emotional trauma. She will also have to live trauma of the brutality of gender-based violence that she experienced at a very young age.

[27] In my view, the court a quo correctly found, under these circumstances, no substantial and compelling circumstances justifying the imposition of a lesser sentence. Section 51(3)(aA) (ii) of the Criminal Law Amendment Act specifically states that a complainant's apparent lack of physical injuries in cases of rape shall not constitute substantial and compelling circumstances. The cumulative effect of both appellants circumstances and all other mitigating factors do not morph into substantial and compelling circumstances in light of the numerous aggravating factors. Thus, their appeal against sentence must also fail.

[28] Accordingly, I propose the following order:

1. The appeal against conviction and sentence is dismissed.

O R MAJOSI, AJ

I concur

I VAN RHYN, J

It is so ordered.

APPEARANCES: On behalf of the Appellants Mr. P Mokoena Instructed by: Legal Aid South Africa
BLOEMFONTEIN On behalf of the Respondent Adv. M.P. Liebenberg Instructed by: Director of
Public Prosecutions BLOEMFONTEIN

[1] S v Francis 1991 (1) SACR 198 (A); R v Dhlumayo and Another 1948 (2) SA 677 (A).

[2] (333/2018)

[2019] ZASCA 52 (1 April 2019).

[3] Section 208 of the Criminal Procedure Act 51 of 1977 as amended.

[4] Section 59 of SORMA, Evidence of delay in reporting -In criminal proceedings involving the alleged commission of a sexual offence, the court may not draw any inference only from the length of any delay between the alleged commission of such offence and the reporting thereof.

[5] Transcribed record, judgment, pages 140 -141

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

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