

SOUTH AFRICA / JUDGMENT

Gumede v S (A51/2017) [2021] ZAMPMHC 22 (24 May 2021)

[2021] ZAMPMHC 22**COURT**

Middelburg High Court, Mpumalanga

BEFORE

Brauckmann, Legodi

CASE / FILE NUMBER

A51/2017

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Policy**IN**

THE HIGH COURT OF SOUTH AFRICA,
MPUMALANGA
DIVISION, MIDDELBURG (LOCAL SEAT)

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: YES**CASE NO: A****51/2017****In**

the matter between:

BONGANI
GUMEDE
APPELLANT
And
THE
STATE
RESPONDENT

JUDGMENT

BRAUCKMANN AJ

INTRODUCTION

- [1] This is an appeal by Mr Gumede (the appellant) against his conviction and sentence where he was sentenced to a term of life imprisonment in terms of the Criminal Law Amendment Act 105 of 1997 (the Act) on two counts of rape. The two counts were correctly taken together for purpose of sentence by the trial court.
- [2] The charges were in terms of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (“the Sexual Offences Act”). The appellant was initially charged with four counts of rape. All the victims were below the age of twelve at the time and therefore the offences resorted under Schedule 2 Part I, read with section 51(1) of the Act and as such, each contravention attracted a prescribed minimum sentence of life imprisonment.

CONDONATION

- [2] At the previous appearance Mr Gumede’s legal representative failed to file heads of argument as prescribed by this Division’s Practice Directive. An application for condonation was prepared and filed by Adv Erasmus in that regard. The application is not opposed.
- [3] It appears from the application that the heads of argument were to be filed by 21 February 2021, but it did not happen. Adv Erasmus explains that she was involved in a motor vehicle accident on 12 November 2020. She suffered serious injuries and was subjected to operations that left her incapacitated until 31 January 2021. On her return to work Adv Erasmus, who is employed by Legal Aid SA, was committed to trial in Graskop.
- [4] Due to Covid – 19 restrictions she only managed to submit the heads of argument on the 4th March 2021. The directive to the effect that the record which is mainly in Afrikaans language should be translated to English language was also not complied with, as it would apparently have cost implications that would be “severe”.
- [5] The court accepts the explanation by Ms Erasmus in so far as the delay in filing the heads of argument is concerned. However, there is no explanation why the heads were not filed timeously when the matter was struck off from the roll on 19 May 2019. The failure to translate the record, after this court directed is not acceptable. In order to finalise the matter, the court will however proceed with the appeal as it was not the appellant’s doing.

THE GROUNDS OF APPEAL**CONVICTION**

- [6] Firstly, the appellant appeals against the factual findings and secondly, the evaluation of the evidence by the court a quo that resulted in his conviction. No plea explanation was given and no admissions were made by the appellant in terms of section 220 of the Criminal Procedure Act No. 51 of 1977 (“the CPA”), the state had the burden of proving his identity beyond a reasonable doubt.
- [7] According to the appellant the evidence by the state witnesses differed on crucial aspects as to how the incident actually happened. Even the version by the mother of one of the complainants differed from the child’s evidence. The time it took to report the incident also created doubt as to whether the crime was perpetrated.
- [8] As it was alleged that the victims of the alleged crime were younger than 12 years at the time of the commission of the offences, the state had the burden to prove the complainants’ ages. The state handed in copies of the first and fourth complainants’ birth certificates as evidence, as well as completed J88 reports which reports were handed in by agreement. It is contended on behalf of the appellant that the documentations are inadmissible as it is hearsay evidence. The defence argues that a vital requisite for conviction of the crime and for the sentence was that the state had to prove that

the complainants were younger than 16 years old at the relevant time.

- [9] The court a quo also allegedly erred in not heeding to the cautionary rules with regards to the testimony of children in sexual abuse cases, and by rejecting the appellant’s version as untrue, so it is contended on behalf of the appellant. Nothing turns on this ground as the appellant was identified by an independent witness (Mr N[...] P[...] N[...]) as being present on the day in question.
- [10] Mr N[...] confirmed under oath that three of the children exited the toilets on the particular day. He spoke to the appellant and asked him what he was doing with the children in the toilet. The appellant responded that the girls were his nieces and that they were on their way home. Later, one Mr Bheki told Mr N[...] where the appellant was residing. Mr N[...] positively identified the appellant as the person who came out of the toilet on the day in question. The trial court therefore correctly found that the identity of the appellant was proved beyond reasonable doubt.

BRIEF EXPOSITION OF FACTS

- [11] It is alleged that the appellant met the four complainants at a sport stadium in Davel during 2014. There were actually six young girls present when he first came across them. One of the complainants told the other that he owed her money. After they had approached him, he informed them to go into the toilet building where he would give the money to them. The younger girls (two of them) were ordered to leave.

- [12] In the toilet building he ordered the four girls to undress by pulling their pants and panties down. They were ordered to show him their private parts whereupon he would show them his private part. He also pulled down his pants and exposed his private parts to them.
- [13] Three of them were ordered to leave the toilet and he then proceeded to rape the complainant in count 1 who was nine years old at that time. She testified that he climbed on top of her “and also on top of my thighs”. She explained that he kept on making movements when he was on top of her, and that he inserted his penis into her vagina. She underwent a medical examination and it is indicated in the J88 form that there were healed scars in her labia minora. Her hymen was perforated and she had a cleft at 3 o'clock. The findings were suggestive of a sexual assault.
- [14] The last victim that was allegedly raped by him was the complainant in count 4. She was aged nine years at the time of the incident. Her evidence was that the appellant told them that he will give them money if they followed him to a room at the stadium. He then chased the two younger ones away. She saw how the appellant raped the complainant in count 1. He then proceeded to rape her as well. That is, the complainant in count 4.
- [15] The complainants and their friends ran away when Mr N[...] arrived at the toilets and chased them away with a belt. That was after the appellant had raped the complainants in counts 1 and 2. The children identified Mr N[...] as “N[...]”, and he confirmed in his evidence that it was his nick name.
- [16] W[...] S[...] testified that she was one of the girls that were ordered by the appellant to undress, which she did. She was not raped by him, but saw how the appellant raped complainant in count 4. She testified that she saw him insert his penis into her vagina.
- [17] Mr N[...] saw complainant in count 4 and the appellant when they were exiting the toilet whilst “tying up” their trousers. The children ran away when approached by Mr N[...]. Mr N[...] later encountered the children near their parental homes and reported to the mother of the complainant in count 1 what had happened.
- [18] The children were taken to the doctor who examined them. A day after the incident the mother of the complainant in count 1 confronted the appellant who in response said the children undressed themselves in front of him.
- [19] The defence of the appellant in the court a quo was a bare denial. He did not deny that he was known to the complainants. He however denied having spoken to or saw the complainants on the date in question. He also denied having spoken to or confronted by the mother of the complainant in count 1 about the alleged rape.

THE LAW

- [20] A court of appeal may not substitute a conviction or sentence simply because it prefers it and thereby usurp the discretion of the trial court.[1]

[21] The state's case was not without contradictions but it needed not to have been perfect. All that the Court a quo was required to do was to weigh the strengths, weaknesses, probabilities and improbabilities of the evidence pointing to the guilt or innocence of the accused in order to determine whether the State's case is such as to exclude any reasonable doubt of the accused's guilt[2]. In order to succeed, the appellant has to satisfy an appeal court that there has been some miscarriage of justice or violation of some principle of law or procedure[3]. The approach to the evaluation of evidence in a criminal trial was articulated by the Supreme Court of Appeal in *S v Chabalala*[4] as follows:

‘The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and,

having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt. The result may prove that one scrap of evidence or one defect in the case for either party (such as the failure to call a material witness concerning an identity parade) was decisive but that can only be an *ex post facto* determination and a trial court (and counsel) should avoid the temptation to latch on to one (apparently) obvious aspect without assessing it in the context of the full picture presented in evidence.’

[22] The trial judge has advantages in seeing and hearing the witnesses and in being steeped in the atmosphere of the trial. Not only has the trial judge had the opportunity of observing their demeanour, but also their appearance and whole personality. This should never be overlooked[5].

[23] Sometimes, however, the appeal court may be in a good a position as the trial judge to draw inferences, where they are either drawn from admitted facts or from the facts as found by the trial judge. Where there has been no misdirection on fact by the trial judge, the presumption is that the trial judge's 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.

[24] Lastly, referring to the ground of appeal that raises the alleged misinterpretation of facts by the court a quo, it was stated in *Dhlumayo*[6], that an appeal court should not seek anxiously to discover reasons adverse to the conclusions of the trial judge. No judgment can ever be perfect and all-embracing, and it does not necessarily follow that, because something has not been mentioned, therefore it has not been considered.

[25] There are so many factors that may have an influence on the quality of the evidence by a victim of a violent experience. As explained by J Hopper and D Lisack:

‘It is not reasonable to expect a trauma survivor – whether a rape victim, a police officer or a soldier – to recall traumatic events the way they would recall their wedding day. They will remember some aspects of the experience in exquisitely painful detail. Indeed, they may spend decades trying to forget them. They will remember other aspects not at all, or only in jumbled and confused fragments. Such is the nature of terrifying experiences, and it is a nature that we cannot ignore.’[7] [Own emphasis]

[26] The cautionary rules applicable to children and evidence about sexual crimes are not statutory provisions, but rules of practice created by the bench to assist it in the evaluation of certain classes of evidence. It must be apparent that the court has indeed treated the evidence cautiously: "What is necessary is that the judicial officer, who is also the trier of fact, should demonstrate by his treatment of the evidence . . . that he has in fact heeded the warning"[8].

[27] When more than one cautionary rule applies to a witness (who may be, for example, a child, a single witness and an accomplice) careful attention should be paid to the dangers attached to each of these categories of witness. If a child is involved, particular attention will, for example, be paid to the child's level of maturity and intelligence, whether imagination is perhaps playing a role in its evidence - and if the child was also an accomplice, attention should be paid to the possibility that it wants to attribute its share in the crime to the accused[9].

[28] Where the witness is a child, the trial court “must fully appreciate the dangers inherent in the acceptance of such evidence and where there is reason to suppose that such appreciation

was absent a court of appeal may hold that the conviction should not be sustained”[10]. If circumstances eliminate the reasonable possibility of a false identification or a motive to lie, the desirability of a particularly

cautious approach diminishes or disappears[11].

[29] Virtually all evidence abounds in conscious or unconscious incontestable identifications of people and objects, the rule cannot apply to all cases of identification. It applies only where the identification is suspect, and obviously the measure of supporting evidence required depends on how strong the possibility of a false identification is.[12] In casu the witnesses identified the appellant positively. More specifically the first and fourth complainants. He was also placed on the scene on the day in question by Mr Mr N[....]. The court a quo was correct in accepting the evidence about his identity in that regard.

[30] The belated argument about the ages of the complainants is also opportunistic. Certified copies of the complainants’ abridged birth certificates were handed in as exhibits by the prosecutor in court and there was no objection to the handing in or the contents thereof.

[31] In *R v Chizah*[13], with respect to the probative value of a birth- or marriage certificate, the court referred to the following dictum in *R.*

v. Gill, 1950 (4) S.A. 199 (C) at page 201:

„These registry entries are statutorily admissible as prima facie evidence of the particulars set forth therein. They serve a very useful purpose indeed in the numerous cases in which their data are not challenged. But the moment they are challenged, their probative value becomes so little as to make them almost worthless. Then—if the informant is not called to give evidence—they are nothing more than a second-hand record that certain information was given by some person whom the Court does not know and does not see and who is not available to admit or deny the correctness of the entry, to state the source of his own knowledge, to explain any statement he may have made or be cross-examined on his explanation.” [Own emphasis]

[32] The Births and Deaths Registration Act[14] states in section 9 (7):

“(7) The Director-General may on application in the prescribed manner issue a prescribed birth certificate from the population register.

(8) An original birth certificate issued in terms of subsection (7) shall in all courts of law be on the face of it evidence of the particulars set forth therein.”

[33] And further in section 28, dealing with the issuing of certificates

(1) The Director-General may, upon application in the prescribed manner and in compliance with the prescribed requirements, issue a certificate from the population register in the prescribed form.

(2) Every certificate issued in terms of subsection (1), shall in all courts of law be prima facie evidence of the particulars set forth therein.”[Own emphasis]

[34] “Prima facie proof, in the absence of rebuttal, therefore, means clear proof, leaving no doubt”. [15] This means that a judicial official must accept the particulars as correct until he is convinced that he cannot rely upon them. Whether such a conviction is justified must depend on the evidence which refutes or throws doubt upon the contents of the certificates. [16] The normal meaning of prima facie proof (or evidence) is that it is proof (evidence) calling for an answer. It is conclusive proof of the point in issue unless evidence is produced to rebut it. Thus Stratford JA stated in *Ex parte Minister of Justice: In re R v Jacobson and Levy* 1931 AD 466 478:

“If the party on whom lies the burden of proof, goes as far as he reasonably can in producing evidence and that evidence “calls

for an answer” then, in such case, he has produced prima facie proof, and, in the absence of an answer from the other side, it becomes conclusive proof...”

[35] In the absence of evidence to the contrary, the prima facie evidence, in this case in the form of the birth certificates, became conclusive evidence of the facts contained therein. In casu, the state led evidence of the complainants who both testified that at the time of the trial they were 12 years old. It would make them both nine years old at the time the incident took place. That was not disputed. So too the contents of the birth certificates were never disputed. The Court is of the view that this “defence” raised is merely a “red herring” and contains no substance. The judgment referred to by Ms Erasmus is also distinguishable from the facts in the present matter.

[36] In the case of *W v W*[17] a marriage certificate was dealt with as follows:

In terms of sec. 42 (3) of Act 81 of 1963, a marriage certificate (and other types of certificates):

“shall, in all courts of law . . . be prima facie evidence of the particulars set forth therein”.

This means that a judicial official must accept the particulars as correct until he is convinced that he cannot rely upon them. Whether such a conviction is justified must depend on the evidence which refutes or throws doubt upon the contents of the certificates. (*R. v. Chizah*, 1960 (1) S.A. 435 (A.D.)). Included in the presumption thus created would be all the essentials for the conclusion of a valid marriage including the capacity of the parties. The presumptions referred to may, of course be rebutted.

[37] This court had regard to the record of the proceedings in the court a quo. Although there were some conflicting versions, the State's case placed the appellant at the scene on the day of the incident, proved the accused's identity both by way of the evidence of the complainant in count 1 and the independent witness Mr N[...]. The medical evidence tendered by consent showed sexual abuse in respect of the victims. The mother of the complainant in count 1 confirmed that when she confronted the appellant about causing the complainants to undress, he denied it and stated, “he was only seated there and the children came there and just undressed themselves before him”. He therefore placed himself on the scene.

[38] The court a quo concluded that the complainants’ testimony made a favourable impression on him. He was alive to the difference in the versions, but only as it looked at through a magnifying glass. It is important to bear in mind too that even falsity in one part of a witness’s evidence is not necessarily an indication of falsity in other aspects thereof. It does not necessarily destroy the credibility of a witness in totality[18]. The court a quo found that their evidence was spontaneous and supported by the observations and medical evidence of injuries to their private parts[19]. The evidence about the complainants’ injuries was not disputed at all.

[39] As regards Mr N[...], the trial court accepted his evidence as that of an independent witness. The court described him as “n absoluut uitstekende getuie” (an absolute excellent witness) and that he had no interest in the case at all. The appellant’s evidence that he had problems in the past with Mr N[...] was rejected. Mr N[...] did not even know where the appellant was staying. He was told by a social worker where the appellant was staying. Mr N[...] placed the

appellant on the scene with four of the complainants on the relevant day. The trial court was therefore correct in finding that the guilty of the appellant has been proved beyond reasonable doubt.

SENTENCE

[40] As the Court held in *S v Malgas*[20], even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court, is so marked that it can properly be described as "shocking", "startling"

or "disturbingly inappropriate". However, in this situation the court may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts the epithets mentioned[21].

[41] It is true that life imprisonment is a very long sentence, but not true that the sentence is alarming, disproportionate or shocking. The appellant used money to lure the complainants into his paedophilic trap. That should be seen as aggravating. The other girls were fortunate that Mr N[...] made his appearance before their turns came.

[42] The appellant was legally represented during trial. The charges were read out to him and he was warned of the possible application of section 51 of Act 105 of 1997 i.e. the application of a sentence of life imprisonment. Despite this warning and being legally represented during trial, the mitigating circumstances placed before the court by way of verbal submissions by his attorney did not, as correctly found by the trial court, constitute substantial and compelling grounds which justified the deviation from the minimum sentence of life imprisonment. The prescribed sentences should not be departed from lightly or for "flimsy reasons" as so held in *Malgas* case. Put in positive language, the prescribed sentences should be imposed, unless there is "weighty justification" or "truly convincing reasons for a different response. . .".[22]

[43] In the judgment by the SCA in *S v Kgosimore*[23] the court stated that, the power of an appeal court to interfere when a sentence of life imprisonment imposed, remains restricted to instances where the Court a quo failed to properly and reasonably exercise this discretion. The Court a quo did not find any

substantial and compelling circumstances to warrant a deviation from the prescribed minimum sentence of life imprisonment. The accused's personal circumstances were placed on record during trial as follows:

- a) that he had no previous convictions,
- b) he was in custody for approximately 17 months awaiting trial;

- c) was 31 years old;
- d) had 3 minor children that did not stay with him; and
- e) he had previously earned an income of R2000/pm.

[44] The court a quo had to weigh appellant's personal circumstances against both the sum conspectus of evidence both in aggravation and against mitigation of sentence. Particularly aggravating in the present case, were the following facts that the court a quo took into account:

- a) the victims were all aged below 12 years;
- b) the crimes were opportunistic;
- c) he preyed upon the vulnerabilities of his tender aged victims;
- d) he did not acknowledge any wrongdoing; nor
- e) did he show any remorse.

[45] Ms Erasmus's main argument was built on the alleged lack of evidence of the ages of the victims. It has been indicated above that the State in the court a quo succeeded in proving the ages of the two victims. Therefore, that argument does not go up.

[46] The court is therefore of the view that the court a quo correctly convicted and sentenced the appellant to life imprisonment as it did.

[47] The following order is made:

[47.1] the appeal on both conviction and sentence is hereby dismissed.

HF BRAUCKMANN

ACTING JUDGE OF THE HIGH COURT

I agree, and it is so ordered

F LEGODI

JUDGE PRESIDENT

REPRESENTATIVE FOR THE APPELLANT: ADV I ERASMUS

INSTRUCTED BY: LEGAL AID SA

REPRESENTATIVE FOR THE RESPONDENT: ADV FW VAN DER MERWE

INSTRUCTED BY: DIRECTOR PUBLIC PROSECUTIONS

DATE OF HEARING: NO HEARING – APPEAL DECIDED ON PAPERS AS AGREED

DATE OF JUDGMENT: 24 MAY 2021

- [1] S v Malgas [2001] ZASCA 30; [2001] 3 All SA 220 (A) para 12.
- [2] S v Chabalala 2003 (1) SACR 134 (SCA).
- [3] R v Dhlumayo 1948 (2) SA 677 (A) at 705–6 and Mike Ness Agencies CC t/a Promech Boreholes v Lourensford Fruit Company Ltd
- [2020] 1 All SA 314 (SCA).
- [4] S v Chabalala, supra, para 15.
- [5] President of the Republic of South Africa v South African Rugby Football Union 2000 (1) SA 1 (CC) at 43E–44A.
- [6] Footnote 3 above.
- [7] J Hopper and D Lisak: Why Rape and Trauma Survivors have fragmented and Incomplete Memories Time Magazine (2014), which was cited with approval in the minority judgment of Y v S Y v S [2020] ZASCA 42 paras 71-72.
- [8] S v Avon Bottle Store (Pty) Ltd 1963 2 SA 389 (A) 393-394 per Botha JA.
- [9] See eg S v Jacobs 1974 2 PH H57 (C): "Die risiko's wat setel in die aanvaarding van 'n kind se getuienis is wat hul kwaliteit
- aanbetref anders as die risiko's waarmee die hof te doen het wanneer hy met 'n medepligtige se getuienis handel". (The risks
- involved in accepting the evidence of a child are different in quality from those inherent in dealing with the evidence of an
- accomplice).
- [10] Viveiros v S 2000 2 All SA 86 (SCA).
- [11] R v J 1966 1 SA 88 (SRA) 94-95.
- [12] Hiemstra's Criminal Procedure.
- [13]
- [1960] 1 All SA 358 (A)Page 363 of [1960] 1 All SA 358 (A)
- [14] 51 OF 1992.
15. Ex parte Minister of Justice: In re R v Jacobson and Levy 1931 AD 474.
- [16] R. v. Chizah, 1960 (1) S.A. 435 (A.D.).
- [17]
- [1976] 2 All SA 529 (W).

- [18] R v Gumede 1949 (3) SA 749 (A) at 756 and S v Mokonto [1971] 2 All SA 530 (A); 1971 (2) SA 319 (A) at 322-323.
- [19] Indexed bundle page 96. Lines 15 to 19.
- [20] 2001 (1) SACR 469 (SCA) at 478 para 12.
- [21] Dawida Solomons and the State CA & R 21/2020, Northern Cape Division.
- [22] S v Combrink 2012 (1) SACR 93 (SCA).
- [23] 1999 (2) SACR 238 (SCA) at 241, par. 10.
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