

SOUTH AFRICA / JUDGMENT

Hadebe v S (A282/2020) [2021] ZAGPPHC 341 (24 May 2021)

[2021] ZAGPPHC 341

COURT

North Gauteng High Court, Pretoria

BEFORE

Mokose, Strijdom

CASE / FILE NUMBER

A282/2020

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO : A282/2020

REPORTABLE:NO

OF

INTEREST TO OTHER JUDGES:NO

DATE:24/5/2021

In

the matter between:

SAMUEL
NKOSANA
HADEBE
Appellant
and
THE
STATE
Respondent

JUDGMENT**MOKOSE J**

- [1] The appellant was charged in the Regional Division of Gauteng sitting at Benoni with one count of rape in contravention of Section 3 of Act 32 of 2007 read with the provisions of Section 51 of Act 105 of 1997 and one count of theft. The appellant, who was represented, pleaded not guilty to the charges.
- [2] The appellant was found guilty and sentenced to life imprisonment on the charge of rape of a child in terms of Section 51(1) of Act 105 of 1997 and a further three months' imprisonment for theft. The Magistrate did not make an order for the sentences to run concurrently stating that it would be superfluous to do so as the appellant would be serving a life sentence. Furthermore, the appellant was declared unfit to possess a firearm and his particulars were ordered to be placed on the register for sexual offenders.
- [3] On an automatic right of appeal in terms of Section 10 of the Judicial Matters Amendment Act 42 of 2013, the appellant appealed against both conviction and sentence. The appellant appealed on the grounds that the State failed to prove beyond a reasonable doubt that the complainant was raped by the appellant. The appellant furthermore submits that the Magistrate misdirected himself in not properly analysing and evaluating the evidence before the court. In particular, the appellant contends that the Magistrate erred in finding that the DNA evidence had not been tampered with.
- [4] The charges arise from an incident which occurred on 1 July 2018 when the appellant, the father of the complainant's friend, arrived at the home of the complainant and enquired as to the whereabouts of his daughter. He requested the complainant to bring her phone to him so that he could check it. She handed over her phone to the appellant who then drove off with it. He was in the company of a friend.
- [5] On 2 July 2018 the appellant returned to the complainant's home and told her that the phone had been taken by his friend and that she should accompany him to collect it from him. She agreed and accompanied the appellant. On the way, the appellant told the complainant that the phone was with his wife at his home. Thereafter, he told the complainant that the phone was at his wife's place of employment.
- [6] The complainant testified that as they walked in a bushy area towards the wife's place of employment, the appellant tripped her up, pulled out a firearm and proceeded to rape her. She testified that after he raped her, they boarded a taxi to an unknown house where she refused to enter. The appellant entered the house alone whereupon she escaped from the appellant and reported the matter to the police at Actonville Police Station.

- [7] The second witness, Mr Dershen Chetty, a warrant officer in the employ of the Forensic Science Laboratory, testified that the DNA sample obtained from the complainant matched the DNA of the appellant. This evidence was not disputed by the appellant .
- [8] Dr Muka testified that she examined the complainant on 2 July 2018 at which time she took a DNA sample. She testified that she did not observe any fresh injuries on the complainant but that did not exclude a sexual assault .
- [9] Sargeant Angelina Mfolo testified that she had taken a buccal sample from the appellant which was duly sealed and in the presence of the appellant then handed to the investigating officer for safe-keeping .
- [10] Constable Masondo testified that he had taken the statement of the complainant and also taken the Complainant together with the crime kit to the doctor. He testified that after the complainant had been examined, he received the crime kit back from the doctor and placed it in a safe place.
- [11] The sixth witness was Constable Modiba who transported the specimens to the Forensic Science Laboratory.
- [12] It is trite law that the onus of proof rests with the State to prove the guilt of an accused beyond reasonable doubt. It is not for the appellant to rebut an inference of guilt by providing an explanation . If the appellant's version is only reasonably possibly true, he would be entitled to be acquitted. The court in the matter of *Shackle v S* [1] held :

"The court does not have to be convinced that every detail of an accused's version is true, if the accused's version is reasonably possibly true, in substance the Court must decide the matter on acceptance of that version. Of course, it is permissible to test the accused's version against the inherent probabilities; but it cannot be rejected merely because it is improbable. It can only be rejected on the basis of inherent probabilities if it can be said that it will be so improbable that it cannot be reasonably possibly true."

- [13] Heher AJA in the matter of *S v Chabalala* [2] said:

" The correct approach is to weigh up all the elements which point toward 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 to the accused's guilt. The result may prove that one scrap of evidence or one defect in the case for either party (such as failure to call a material witness concerning an identity parade) was decisive but that can only be on an ex post facto determination and a trial court (and counsel) should avoid the temptation to latch onto one (apparently) obvious aspect without assessing it in the context of the full picture in evidence."

- [14] The complainant's evidence called for a cautionary approach as a single witness in some aspects of the alleged rape. Guidelines were enunciated in the matter of *S v Sauls* [3] where the court said:

“There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of a single witness...the trial judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether despite the fact that there are shortcomings or defects or contradictions in his testimony, he is satisfied that the truth has been told. The cautionary rule may be a guide to a right decision but it does not mean that the appeal should succeed if any criticism, however slender, of the witnesses’ evidence were well founded....It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense.”

- [15] The appellant testified in his own defence and called no witnesses. He denied that the rape had taken place at all and as such, is entitled to an acquittal.
- [16] The complainant’s evidence was that of a single witness. As such, the cautionary rule applicable to evaluation of singled witness evidence was applicable and taken into consideration by the Magistrate who carefully evaluated the body of evidence before the court and found that there was no motive for the complainant to implicate the appellant of the rape. Secondly, the Magistrate found that the DNA results linked the appellant to the complainant and corroborated the evidence of the complainant.
- [17] I am of the view that there were no material contradictions in the evidence of the St ate. The evidence of the St ate witnesses corroborated that of the complainant. In consideration of all the evidence, it is evident that the appellant’s submissions were clearly false and fabricated and clearly evidence that the court could not rely upon. In view of the evidence presented, this court is of the view that it will not interfere with the findings of the court a quo and accordingly dismisses the appeal against the conviction.
- [18] The appellant also appeals against the sentence imposed by the court a quo. The ground of appeal against sentence is premised on the court a quo’s failure to find substantial and compelling circumstances to deviate from the mandatory sentence of life imprisonment.
- [19] It is trite law that sentence is pre-eminently at the discretion of the trial court. The court of the appeal may interfere with the sentencing discretion of the trial court if such discretion had not been judicially exercised. The test which has been enunciated in numerous cases is whether the sentence imposed by the trial court is shockingly inappropriate or was violated by misdirection .The trial court considers for the purposes of sentence, the following:
- (i) The seriousness of the case;
 - (ii) The personal circumstances of the Appellant;
 - (iii) The interests of society.

[20] The provisions of Section 51(1) of Act 105 read with Part 1 of Schedule 2 of the Criminal Law Amendment Act 51 of 1977 were explained to the Appellant prior to him pleading to the charges. The section states that an offender shall be sentenced to imprisonment as per the minimum sentence unless there are compelling and substantial reasons to deviate from the prescribed minimum sentence. The specified sentences are not to be departed from for flimsy reasons and must be respected at all times.

S v Matyityi[4]

[21] There is no definition of what constitutes compelling and substantial

reasons.

The court must consider all the facts of the case in determining whether compelling and substantial circumstances exist. To arrive at an equitable sentence, this court is enjoined to weigh the personal circumstances of the accused against the aggravating factors, in particular, the interests of the society, the prevalence of the crime, and its nature and seriousness.

[22] In mitigation of sentence, the following personal circumstances of the appellant were placed before the court a quo:

- (i) he was 38 years of age;
- (ii) he was single with two minor children aged [...] and [...] years' old respectively who lived with him;
- (iii) he was unemployed, so too was the mother of his two minor children;
- (iv) he dropped out of school at Grade 9 and did not obtain any life skills;
- (v) he had spent 1 year and 5 months in custody awaiting trial.

[23] Given the seriousness of the crime as well as the mitigating circumstances which were taken into consideration by the Magistrate in the court a quo, I am of the opinion that the Magistrate did not err in sentencing the Appellant. There were no substantial and compelling reasons to sentence the Appellant to a lesser sentence than that prescribed by the provisions of Section 51(1) of Act 105 read with Part 1 of Schedule 2 of the Criminal Law Amendment Act 51 of 1977 nor is there any evidence of the discretion of the Magistrate having been incorrectly exercised.

ORDER

[24] In the premises, the following order is made:

- (i) the appeal against the conviction is dismissed;
- (ii) the appeal against sentence is accordingly dismissed.

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MOKOSE J

Judge of the High Court of

South Africa

Gauteng Division , Pretoria

I agree and is so ordered

STRIJODOM

Acting Judge of the High Court

of South Africa

Gauteng Division,

Pretoria

For the Appellant :

Mr S Moeng instructed by

Legal Aid South Africa

For the State :

Adv A Roos instructed by

The Office of the Director of Public Prosecution

Date of hearing: 18 May 2021

Date of judgement: 24 May 2021

[1] 2001 (1) SACR 279 (SCA) at 288 E

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[2] 2003 (1) SACR 134 (SCA) at page 140 A - B

[3] 1981 (3) SA 172 (A)

[4] 2011 (1) SACR 40 (SCA) at page 53 E

- F

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