

SOUTH AFRICA / JUDGMENT

## Kavi v S (CA&R40/2021) [2022] ZAECBHC 19 (10 June 2022)

[2022] ZAECBHC 19

### COURT

Eastern Cape High Court, Bhisho

### BEFORE

Z M Nhlangulela, A Beyleveld

### CASE / FILE NUMBER

CA&R40/2021

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#### IN

THE HIGH COURT OF SOUTH AFRICA

[EASTERN

CAPE DIVISION, BHISHO]

#### CASE

NO: CA&R40/2021

#### Heard

on: 10 JUNE 2022

#### Delivered

on: 10 JUNE 2022

#### In

the matter between:

SIMPHIWE

Kavi

Appellant

and

THE

STATE

Respondent

APPEAL

## JUDGMENT

NHLANGULELA DJP

- [1] This is an appeal arising from the whole judgment of the Regional Magistrate, Queenstown (per Ms Sityata) convicting the appellant for rape and sentencing him to undergo imprisonment for life.
- [2] The judgment on the conviction is impugned on the ground that the magistrate erred in not accepting the evidence of the appellant as being reasonably possibly true; and that the magistrate erred in accepting the evidence of the complainant despite the fact that she was a child and single witness. The grounds of appeal against sentence are that the magistrate over-emphasized the retribution and deterrence, the aims of sentencing; and also placed

much weight on the principle that a sentence of life imprisonment should be imposed as a measure of protecting child victims of rape and assault with HIV disease.

- [3] The magistrate approached the matter on the basis that since the State was enjoined to discharge the onus based on the entire evidence that was led at the trial it was not open to the appellant to seek the determination of the verdict on the basis merely of the evidence that was adduced by him. In this regard the magistrate applied the case of *S v Van der Meyden* 1999 (1) SACR 447 (W) where the following was stated at 448f-g:

*“The onus of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent (see, for example, R v Difford 1937 AD 370 at 373 and 383)...*

In whichever form the test is expressed, it must be satisfied upon a consideration of all the evidence. A court does not look at the evidence implicating the accused in isolation in order to determine whether there is proof beyond reasonable doubt, and so too does it not look at the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true.”

- [4] The evidence adduced at the trial came from the complainant, accused and two witnesses for the State. On the consideration of all the evidence the decision to convict, followed by sentence, ensued. For the purpose of this appeal, the first question arising is whether the conviction for rape is supported by the evidence that was adduced at the trial.
- [5] I recount the salient facts of this matter which appears from the record, and captured in the judgment of the magistrate.
- [6] A [...] K [...] was 10 years old when she was raped; and 14 years old when she testified. During the night of 23 April 2017, a Sunday, she was with her mother at Tender-Gate Location, Queenstown, when the appellant arrived on his motor vehicle, a double cab bakkie, to fetch her for a pre-arranged trip to T [...] . The complainant and her mother had not expected the appellant to arrive at night, but due to trust that the mother had in the

appellant that her child would, nevertheless, be in good hands, she allowed the complainant to leave home. Since the complainant was schooling at N [....] , T [....] doing grade 5, the appellant would deliver the complainant to the house of her aunt on Sunday where she would sleep and wake-up in the morning to attend school. According to the complainant she and the appellant were alone in the vehicle at the time when they left the Tender-Gate residence. As they were travelling, the complainant noticed that the vehicle was driven

towards Tsolwane Village, an opposite direction to that of T [....] . The vehicle proceeded through the bushes until the appellant stopped it, ordered the complainant to go to the back-seat, undressed and got on top of her and inserted his fingers into her vagina in preparation for penal penetration. She cried. The physical under-development of the complainant thwarted the appellant's attempt to penetrate the vagina with the result that the appellant left the child at the back-seat and drove off to, yet again, another dark spot of the bush where he stopped and went for the complainant again. On the second occasion, the appellant lubricated his fingers with saliva, inserted them into the vagina and, thereafter, forcefully inserted his penis into it. The excruciating pain that the complainant felt and the vaginal bleeding she experienced due to penal penetration caused her to cry. At some stage the appellant stopped the molestation, wiped off blood using his T-shirt and then drove out of the bushes until they reached Nalithemba Village, still in Queenstown where he took on board V [....] , his girlfriend, and V [....] 's sister together with her boyfriend. The trip to T [....] then commenced. Before these three passengers joined into the vehicle, the appellant issued a stern order that the complainant was not to tell anyone that he had molested her, failing which, he would shoot and kill both her mother and father. On the way to T [....] , V [....] saw the blood stained T-shirt

of the appellant and having asked the appellant about it she was told by the appellant that he had been involved in a fight with certain male persons on that day.

[7] It was still night time when the appellant and his passengers reached T [....] . He dropped off V [....] 's sister and her boyfriend at their place of residence and proceeded to the house of V [....] where the complainant was caused to sleep for the night. In the next morning the appellant took complainant to the residence of the complainant's aunt, Aunt Babes. She was scared to report her ordeal to Aunt Babes for fear that her parents would be killed by the appellant. She could only complain of extreme fatigue which disabled her from attending school. In turn, Aunt Babes reported the situation

to the complainant's mother through the telephone. On the request of the mother, the appellant was told to return the child

back to Tender-Gate Village on Wednesday 26 April 2017. He adhered to that request. Having reverted to the custody of her mother, the complainant reported that the appellant had raped her. On 30 April 2017 the complainant was taken to the doctor for medical examination. The complainant told the court that she would not have been able to report her ordeal to V [....] during the trip to T [....] and Aunt Babes in T [....] during her stay with her as the appellant had warned her that should she do so he would kill her parents.

- [8] Dr Nombulelo Fani-Sicu testified on behalf of the State. She told the court that the complainant had indeed been forcefully penetrated vaginally as vaginal injuries coupled with the evidence of broken hymen that she observed during medical examination supported the report given by the complainant that she had been raped. The examination also revealed that the child was infected with HIV most probably at the time when she was sexually penetrated. The medical report of Dr Fani-Sicu was exhibited in court as evidence.
- [9] Ms T [...] D [...] is the mother of the complainant and her father was married to the sister of appellant's mother. In turn, the appellant related to the complainant on uncle-niece basis. She testified that the appellant had accepted her request to transport her child to T [...] on 23 April 2017. She and the complainant had waited from the morning until his arrival at night for the trip to be undertaken. She and the complainant were already sleeping when the appellant arrived only after 9 pm to fetch the child. Having suspected no evil and their relationship having been a good one she had not suspected that her child could be sexually abused by the appellant. Ms D [...] confirmed that the complainant did report to her that she had been raped by the complainant, whereafter, she invited the appellant to a meeting at her house to explain to her as to why he abused the child. According to Ms D [...], the appellant merely denied that he had abused in any way the child. She, nevertheless, reported the matter to the police who wasted no time to arrest the appellant in order to account for his criminal deeds. She told the court that the child had been diagnosed with HIV for the first time after she was raped.
- [10] Ms D [...] also told the court that one A [...] M [...], the local man, informed her that the appellant had hired him to shoot and kill her and the complainant in order to obliterate the evidence and escape prosecution for raping the complainant. Such information was given at a meeting held in T [...] in which Ms D [...]’s mother was also present, and Mr M [...]. She gave a sum of R200,00 as a reward for having refused to carry out the instructions of the appellant. Ms D [...] told the magistrate that her family and that of the appellant were in good terms. She denied that her father was a source of rift between the families despite that appellant's family members has a suspicion that her family had misused pension monies earned by her father while he was staying with L [...], his sister, away from his wife (sister to the appellant's mother). Ms D [...] disputed the appellant's version that one Boss, her niece aged 19 or 20 years old in 2017, was the person who raped the complainant because Boss had barely left the Eastern cape for Cape Town at the time when the complainant was six months old. On the issue of HIV infection, she testified that the complainant never had that disease until after the occurrence of rape.
- [11] Mr M [...] was called to testify on behalf of the State. He confirmed the evidence of Ms D [...] in so far as it related to him, and stated that he had reported to Ms D [...] that the appellant was planning to kill her and the complainant for the reason that he, the appellant was facing prosecution for raping the complainant.

- [12] Under cross examination the complainant and Ms D [...] denied that the appellant was being implicated in raping the complainant on fabricated evidence. The complainant and D [...] also denied that one Boss was the person who raped the complainant. According to Ms D [...] the complainant had never met Boss in her life. Ms D [...] refuted that the allegation that Boss raped her child as Boss was not present in Queenstown on 23 April 2017.
- [13] The appellant testified in his own defence. He told the Court that there was never a stage during the night of 23 April 2017 at which he alone had to fetch the complainant, his niece, on a motor vehicle. The version he gave is that they were four people in his double-cab bakkie when he fetched the complainant. He did not know that the complainant was raped until he was confronted by the complainant's mother on Thursday, which was the 27 April 2017, and asked to apologise for raping the complainant by paying a sum of R10 000,00 which he refused to do. He also told the magistrate that it was Ms D [...] who told him that Boss had sexually abused the complainant. Under cross-examination he contradicted himself regarding in

testifying that he was asked to return complainant back to her mother due to the upcoming holiday on 27 April 2017, having earlier on conceded that Ms D [...] had asked him to return the child back to her as she was not in good health.

- [14] In her judgment, the magistrate made critical findings implicating the appellant in the commission of the offence of rape and that, inferentially the HIV infection in the appellant had been transferred to the complainant in the cause of rape. She found that the evidence of the complainant, treated cautiously, was satisfactory in all material respects. She accepted the medical evidence led on behalf of the State that the complainant was indeed sexually penetrated by the appellant. In so far as the approach of the magistrate to the evidence adduced by the complainant is concerned the following words as recorded in the judgment are relevant and repeating them here is appropriate in my view. She said:

*"The court has searched (sic) the evidence as a whole. The complainant as a single child witness has been found to be a very impressive witness. Her evidence comprised of detailed and consistent narration of facts. She maintained stability throughout her testimony, she never showed reluctance [indistinct]. The complainant even though she was a child witness she is found to be tangible (sic) and reliable. There could be no reason to believe that she had been couched or she was imagining facts."*

- [15] The magistrate found that the evidence of the appellant was not reasonably possibly true. She took into account numerous disturbing features of the appellant, such as the misrepresentation of the fact that he was not in company of 3 people in the double-cab bakkie at the time when he fetched the complainant for a trip to T [...]. He fabricated a version that there was a friction between his family and that of the complainant's mother. He misrepresented the facts in substituting himself for Boss as the rapist well knowing that Boss had not been living with the family of the complainant. He was not honest in telling magistrate that he was not aware that he had already been diagnosed with HIV and Aids in 2016 when he raped the complainant.

[16] In this case the magistrate did approach the evidence of the complainant with necessary caution deserving to be applied to a child victim of rape and a single witness as it was warned in *R v Manda* 1951 (3) SA 158 (A) at 162E – 163E; and recently in *S v Dyira* 2010 (1) SACR 78 (ECG) at 84, para [6] where the following was said:

*“The courts should be aware of the danger of accepting the evidence of a little child because of potential unreliability or*

untrustworthiness, as a result of lack of judgment, immaturity, inexperience, imaginativeness, susceptibility to influence and

suggestion, and the beguiling capacity of a child to convince itself of the truth of a statement which may not be true or entirely true, particularly where the allegation is of sexual misconduct, which is normally beyond the experience of small children who cannot be expected to have an understanding of the physical, social and moral implications of sexual activity (*S v Viveiros* [2000] 2 All SA 86 (SCA) para 2). Here, more than one cautionary rule applies to the complainant as a witness. She is both a single witness and a child witness. In such a case the court must have proper regard to the danger of an uncritical acceptance of the evidence of both a single witness and a child witness (*Schmidt Law of Evidence* 4-7).”

[17] The complainant did not contradict herself in the witness box; her evidence was not shown to be improbable in that she was with the appellant at the time relevant to the commission of rape when the appellant had the opportunity to rape her; and she reported the sexual assault upon her at the earliest opportunity dispelling any possible notion that she was bent towards implicating the appellant in the commission of rape falsely; or that she was acting on suggestibility by elders.

[18] The findings of the magistrate and the conclusion she made regarding the commission of rape are not assailable in my view.

[19] Counsel for the appellant attacks the verdict of the magistrate on a myriad of fronts, which may be abbreviated as follows:

(a) There is evidence that called for the magistrate to call for the evidence of Boss as he is the person who allegedly raped the complainant; the medical evidence is not satisfactory; V [....]

should have been called as a witness to clarify the report given by the complainant to the doctor that the blood-stained T-shirt belonged to the complainant; Ms D [....]’s aunt attended a meeting in which the appellant disavowed knowledge of rape and refused to pay R10 000,00 which required the magistrate to do the following:

(i) seek corroborating evidence as stated in the case of *R v Miranda*, supra;

(ii) caution herself about the principle of law that the peculiar difficulties often presented in the prosecution of rape cases always call for greater caution to be exercised by the courts, and moreso where the complainant is a child witness, as the courts were instructed to do so in the case of *S v Matshivha* 2014 (1) SACR 29 (SCA);

(iii) to be alive of a need for careful preparation and presentation of evidence by the prosecution, and for the court to scrutinise such evidence meticulously as instructed in the case of *S v Vilakazi* 2009 (1) SACR 552 (SCA).

[20] The thrust of the submissions advanced on behalf of the State is that the issue raised at the trial was the identity of the perpetrator. The occurrence of rape was never the issue. And the issue concerning the ability and capacity of the complainant to identify the appellant as the rapist was not raised when the complainant testified in the witness box. Indirectly, however, it was put to the complainant that Boss, not the appellant, raped her. The complainant together with her

mother denied that version. When the mother testified she made it plain that Boss was in Cape Town at the time when her child was

raped; and that he was not even known to the complainant as he had last been at the family home when the complainant was barely six months old. The appellant did not pursue this version when he testified because he merely said that he did not see Boss raping the complainant but he was told by the complainant's mother that Boss had raped the complainant. In the circumstances, the magistrate correctly rejected the appellant's evidence as inadmissible hearsay.

[21] The version of the appellant that Ms D [...]’s mother and aunt were present at the meeting where R10 000,00 was sought to be extorted from him could at the very least be indicative of opportunism for wealth-making rather than a distorted account about rape on the part of the complainant who is proved by her own evidence to be steadfast in her convincing narrative that she was sexually molested by the appellant. At no stage of the proceedings was she shown by evidence to have told a lie that she was raped merely to ramp up fear in the mind of the appellant to facilitate payment of R10 000,00. That version was in any event correctly rejected by the magistrate.

[22] The evidence of the complainant that the appellant used his T-shirt to wipe-off blood caused by vaginal injury that was later on discovered by V [...] was not challenged by the appellant. That being the case, the magistrate was correct in accepting that admitted evidence without corroborating evidence of V [...] .

[23] In the event, a need for the magistrate to call for the evidence of Ms D [...]’s aunt and V [...] did not arise.

[24] Equally so, there is no basis for the submission that the magistrate ought to have discredited the expert/medical evidence of Dr Fani-Sicu that the complainant's vagina showed signs of sexual penetration. It was not open to the magistrate to reject such evidence without regard to another expert evidence of better quality. In so far as the doctor adverted to factual

evidence of a report given to her by the complainant concerning the history of her injuries, including that of a blood-stained T-shirt, the appellant ought to have challenged that evidence with the complainant at the time when she testified. That did not happen.

[25] Consequently, it is not hard to see that the case law sought to be relied upon in argument advanced on behalf of the appellant does not address the proven facts. On the contrary, to the extent that the cases of Manda, Matshiva and Vilakazi relate to the cautionary rule that is applicable to the single evidence of a child witness in rape cases, the principles set out therein were adhered to by the prosecution as well as the magistrate.

[26] In the circumstances, the appeal against conviction does not have a merit.

[27] I now turn to deal with the appeal against sentence of life imprisonment that was imposed under the provisions of s 51 (1) to the Criminal Law Amendment Act 105 of 1997; and in the circumstances where the appellant had been convicted of raping a 10 years old complainant without any substantial and compelling circumstances having been found to reduce such sentence to a lesser one. It was submitted on behalf of the appellant that had the magistrate not erred in finding that the appellant infected the complainant with HIV and Aids; in placing too much weight on the need to protect the appellant's right against sexual abuse; and in over-emphasizing the retribution and deterrence aspects of sentencing, a lesser sentence than life imprisonment would have been imposed.

[28] The circumstances that the magistrate took into account for the purposes of sentence were the following: the appellant was 56 years old, married and having four minor children; he was gainfully employed; he was a first offender; and he had spent three years and six months in police custody whilst awaiting for the finalization of the trial. In considering the nature of the offence of rape committed by the appellant, the magistrate had regard to the seriousness of the crime of rape committed upon the complainant who was barely 10 years old when she was sexually molested; the appellant is related to the complainant as her uncle. Trust had been reposed upon him to transport the child to T [...] without the presence of her mother. Instead, the appellant raped the child, and well-knowing that he was HIV positive with the result that the disease got transmitted to the child. The child is now suffering from trauma that has made it difficult for her to cope with her schooling. The magistrate took

into account that the commission of rapes upon vulnerable women and children is prevalent in society, referring in this regard to the case of S v S 1995 (1) SACR 50 (SCA) where the following was stated:

*"The essence of the crime and assault on the body integrity of a woman's femininity. If it is the function of the criminal law to protect members of society from those who employ illegal means to prey on those less able to defend themselves, then rape is rightly regarded as a crime with the utmost gravity."*

[29] With reference to the crime of rape specifically, the magistrate said:

*“... the complainant’s rape case has been highlighted in S v Ntsetse 2002 (3) SACR 386 (W) where the rape is described as an appalling and utterly outrageous crime. It threatens every woman and particularly the poor and vulnerable. Protection of women’s rights remains rife more especially the poor and vulnerable being considered amongst*

the key factors being considered by the courts when imposing appropriate sentences. The courts are the last hope of victims of

these kind of crimes. The court has a duty by imposing an appropriate sentence to convey a message to the community out there that this crime will never be tolerated.”

[30] The protection of women and children against sexual abuse is a matter that pretty much fall within the sentencing scheme of Act 105 of

1997. This point was underscored in the case of S v M 2002 (2) SACR 60 (W), where a victim of rapes was a child under the age of 16. In S v Snoti 2002 (1) SACR 660 (E) the full bench confirmed a sentence of life imprisonment where the victim of rape and infection with HIV and Aids was a 9 years old girl. A similar approach was followed in S v Genever & Others [2008] ZAWCHC 7; 2008 (2) SACR 117 (C) where the sentencing aims of prevention, retribution, deterrence as well as rehabilitation were considered as working in harmony with a sentencing scheme under Act 105 of 1977. On the facts that are very similar to those of the present matter, in S v Lindikhaya Mpumlo, Case No. 50/2021 (ECD, Makhanda) dated 07 March, 2022 (unreported) the court found that substantial and compelling circumstances did not exist, and imposed a sentence of life imprisonment.

[31] On the consideration of the facts of this case and the principles of sentencing as articulated in the cases referred to in para [30], it cannot be said that the sentence imposed by the magistrate is affected by misdirection; or is “shocking”; “startling” or “disturbingly inappropriate”. See: S v Malgas 2011 (1) 469 (SCA) at 478, para 12. Neither is the sentence of life imprisonment imposed disproportionate to the personal circumstances

of the appellant, the crime and the needs of society. See: S v Malgas at 482e; and S v Dodo [2001] ZACC 16; 2001 (1) SACR 594 (CC) at 614-615.

[32] In the result the following order shall issue:

The appeal against both the conviction for rape and sentence of life imprisonment is dismissed.

Z. M. NHLANGULELA

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT,

MTHATHA.

I agree:

A. BEYLEVELD

ACTING JUDGE OF THE HIGH COURT

Counsel for the appellant : Adv. N.P. Mtini

Instructed by

: Legal Aid South Africa

KING WILLIAMSTOWN.

Counsel for the respondent : Adv. N. Ngxingwa

: Deputy Director of Public Prosecutions

BHISHO

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