

SOUTH AFRICA / JUDGMENT

K.C.N v S (A176/2023) [2024]

ZAFSHC 306 (1 October 2024)

[2024] ZAFSHC 306

COURT

Free State High Court, Bloemfontein

BEFORE

NS Daniso, E Mahlangu

CASE / FILE NUMBER

A176/2023

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IN

THE HIGH COURT OF SOUTH AFRICA

FREE

STATE DIVISION, BLOEMFONTEIN

Reportable

/ Not reportable

Case

no: A176/2023

In

the matter between:

K[...]

C[...] N[...]

APPELLANT

And

THE

STATE

RESPONDENT

Neutral

citation: K[...] C[...]

N[...] v S (A176/2023)

Coram:

NS DANISO, J & E MAHLANGU, AJ

Heard: 29 JULY 2024

Delivered: 01 OCTOBER 2024

Summary: Criminal Law- Appeal: Conviction and sentence. Appellant convicted of rape involving the infliction of grievous bodily harm - Appellant sentenced to life imprisonment in terms of section 51(1) Part I (c) of Schedule 2 of Act 105 of 1997 (the CLAA)-Whether the trial court erred in convicting the Appellant on the evidence of a single witness -Whether the rape involved grievous bodily harm as contemplated in the CLAA- Whether the trial court erred in not finding substantial and compelling circumstances warranting a deviation from the prescribed minimum sentence-Applicable principles restated.

ORDER

1.
The appeal against conviction is dismissed.
2.
The appeal against sentence succeeds to the extent that the sentence imposed by the magistrate Bothaville is set aside and replaced with a sentence of 15 years' imprisonment antedated to 3 October 2023.

JUDGMENT

Daniso, J (Mahlangu, AJ concurring)

- [1] The appellant was tried in the regional court Bothaville on three counts, including two counts of rape involving the infliction of grievous bodily harm (counts 1 and 3) in contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 and Kidnapping. On 3 October 2023 he was convicted of the rape in count 3 after pleading not guilty to all the charges. He was acquitted in respect of the remaining counts.
- [2] Count 3 pertained to the incident which occurred on 28 November 2022 at the residence of the appellant's cousin. The State alleged that the appellant grievously assaulted and raped his cousin's partner, Ms K[...] P[...] K[...], then 17 years old. He was subsequently sentenced to life imprisonment in terms of section 51(1) of the Criminal Law Amendment Act 105 of 1997 read with item (c) of Part I Schedule 2 ("the CLAA").
- [3] This appeal is directed against both the conviction and sentence and it is opposed only in respect of the conviction.

- [4] The appellant was convicted on the testimony of the complainant and her mother Ms S[...] L[...] K[...].
- [5] The appellant and her boyfriend are cousins. She testified that immediately before the incident she was sleeping alone at her boyfriend's residence whilst he was away on nightshift duty. He was expected to be home around 2am.
- [6] The appellant came and asked her to open for him saying he was with her boyfriend but when she opened the door he was alone. He asked her to let him in, telling her that her boyfriend was on the way. She left him at the dining room and went back to sleep in the bedroom. When the rain started to fall she offered the appellant a blanket and a couch to sleep. Around midnight, the electricity went off and through the darkness she observed the appellant standing next to her. She asked him what is it that he wanted, he responded by saying "give me the vagina", when she refused he assaulted her. He slapped her with an open hand, hit her with a cup at the back of her head and also hit her with a clenched fist on the nose causing her to bleed. When she cried and screamed he covered her face with a pillow and placed a knife on her neck to subdue her. He then tore open her shorts and undies, forced open her thighs and penetrated her vagina with his penis. When he was done raping her he ejaculated on her thighs, wiped himself off and began to weep begging her not to lay charges against him. When she tried to leave he prevented her from leaving by removing the key from the door. Around 5am he left and she also went home where she reported the incident to her mother. She also called the police who came and transported her and her mother to the police station where she made a statement and later taken to the hospital for examination. Under cross-examination, she stated that except for the bleeding nose she did not sustain any other injuries and she also did not report any injuries to the examining doctor. When it was put to her that her sexual encounter with the appellant was consensual, she vehemently denied that assertion stating that she would not have had consensual intercourse with the appellant as he was related to her boyfriend and she was aware that he was afflicted with the Human Immuno-deficiency Virus (HIV).
- [7] The gynaecological clinical findings recorded on the medical report (J88) handed in by consent as Exhibit "A" indicates the presence of a yellowish mucus resembling semen. No physical injuries were observed.
- [8] Ms K[...] corroborated the complainant's first report of the rape incident. She states that the complainant arrived home early in the morning and woke her up. She was crying and spontaneously reported that she was raped by the appellant. The complainant was wearing a bloodied T-shirt, she also showed her some marks on her neck ...being throttled by the appellant. She asked for money to buy airtime in order to call the police. When the police arrived, the complainant relayed the rape incident to the police who took them to the police station where the complainant laid the charge.

- [9] On the other side, only the appellant testified in his defence. He confirmed that he is related to the complainant's boyfriend and that the residence where the complainant's boyfriend lives is actually their family home, it belonged to their late grandfather. He also admitted that he had sexual intercourse with the complainant on the date and place alleged by the State. He however denied having raped the complainant and averred that he was falsely accused by the complainant for refusing to give her money after they had engaged in consensual sexual intercourse initiated by the complainant.
- [10] It was his testimony that when he arrived at his grandfather's place he found the complainant and they started a smoking crystal and dagga till 2am. The complainant told him that she was tired and invited him to sleep with him. They had consensual sex, slept and woke up around 4am and smoked drugs again until they ran out. The complainant wanted more drugs and when he told her that he had no money to buy more drugs she told him no one will sleep with her for free or for drugs, she demanded money. He promised to go and ask his sister for money and to then give it to her. The complainant then left around 6am and 7am. He told the trial court that it was not the first time that he had sexual intercourse with the complainant, she had previously visited and stayed with him on several occasions where they would have sexual intercourse. She would also sleep with other men including foreign nationals for drugs and he would pretend to be his brother and go around demanding money from the men who were sleeping with her.
- [11] After all the evidence had been proffered, the fact that the appellant and the complainant had engaged in a sexual intercourse at her boyfriend's residence on the date alleged in the charge sheet was indisputable. The appellant raised consent in his testimony and also denied having assaulted the complainant. The only issue which then remained for determination by the trial court was whether the appellant raped the complainant.
- [12] In support of the challenge to the conviction, it was argued on behalf of the appellant that in convicting the appellant, the trial court erred in its conclusion that the State had proved its case against him beyond a reasonable doubt despite the fact that the State's evidence was unsatisfactory and was riddled with contradictions and improbabilities. It is the appellant's case that the trial court also failed to exercise caution when evaluating the complainant's evidence; in rejecting the appellant's version as being reasonably and possibly true, and by violating his right to a fair trial when it insisted that the trial should proceed despite the fact that the appellant was exhausted after sleeping uncomfortably thus needed few days to recuperate.
- [13] The principles applicable in appeals where the findings of a trial court are attacked, are now established: the court of appeal will not interfere with or tamper with the trial court's judgment or decision regarding either conviction or sentence unless it (the court of appeal) finds that the trial court misdirected itself as regards its findings of facts or the law. See *R v Dhlumayo & Another* 1948

- (2) SA 677 (A). The principle was also restated in *AM & Another v MEC Health, Western Cape* 2021(3) SA 337 (SCA) at paragraph 8 as follows:

“It is trite that an appeal court is reluctant to disturb findings of that character by a trial judge, who was steeped in the atmosphere of a lengthy trial and had the advantage of seeing and hearing the witnesses. Such findings are only overturned if there is a clear

misdirection or the trial court’s findings are clearly erroneous. That has consistently been the approach of this court....”

- [14] It is clear from the record of the proceedings that the trial court undertook a thorough analysis of the evidence, and taking into account the complainant’s ability to give a succinct version of what the appellant did to her, which remained intact even after a rigorous cross-examination, and was also corroborated by her first report, including her honesty in admitting her past drug use, justified it in accepting her version as a trustworthy and reliable account of what had happened. I cannot fault the trial court for the manner in which it applied the cautionary rule to the evidence proffered by the complainant as a single witness implicating the appellant in the rape. See *S v Sauls and Others* 1981 (3) SACR 172 (A) at 173 and *S v Mahlangu* 2011 (2) SACR 164 (SCA) at 171 B.
- [15] In the appellant’s heads of argument, a number of improbabilities and contradictions are raised in the State’s evidence, namely that: it is improbable that the complainant would let the appellant stay over in the middle of the night whereas she realized that her boyfriend was not coming and also that the appellant had said to her that her boyfriend was on the way but she knew that her boyfriend was working nightshift. The contradictions in the complainant’s evidence pertain to her testimony that the appellant did not use a condom during rape whereas in her statement to the police she said he used a condom. In her statement she also mentioned that her boyfriend had knocked on the window around 1:30am whilst she did not mention this fact in her testimony. Her evidence of being assaulted with a fist on the nose and with a mug on the head was not confirmed by the medical report. Her mother’s evidence was also contradictory in that she testified that when the police arrived the complainant was still narrating the incident to her whereas under cross-examination revealed that she only became aware of what happened to her daughter after the police had arrived.
- [16] I am in agreement with the trial court’s conclusion that the contradictions and improbabilities referred to by the appellant are immaterial for the determination of whether the appellant raped the complainant having regard to his defence of consensual intercourse.

- [17] The contradictions are indeed insignificant to the question of the accused's guilt and they are to be expected from an honest but imperfect recollection, observation and reconstruction of the evidence.[1] The improbabilities raised by the appellant are also unsound. They actually militate against his version that the complainant initiated the sexual intercourse during a drug fuelled binge throughout the night at her boyfriend's home when he was expected to return in the early hours of the morning.
- [18] There is nothing improbable about the complainant allowing the appellant to stay over at night, the appellant was family, on his own version that house belonged to his late grandfather.
- [19] The trial court correctly rejected as false the evidence of the appellant by pointing out the discrepancies in his version namely that: he knew the complainant as his cousin's girlfriend, then he said she was also visiting and sleeping with him for a few months prior to the incident, he further said he was also pimping out her out to some men including foreign nationals where the complainant would sleep with them and he would collect the money. With regard to the alleged false implication, the trial court took into account that on his own version there was no bad blood between him and the complainant therefore no reason to falsely implicate him in the rape. The complainant's version that she would never have sexual intercourse with him due to him being her boyfriend's cousin and because of his HIV status.
- [20] There is also no merit to the appellant's cryptic complaint that his right to a fair trial was violated when the trial court ordered that he should proceed with his testimony despite his complaint that he was exhausted. As correctly pointed out by the trial court, the defence's request to postpone the matter was solely based on a speculation that the appellant's concentration and ability to defend himself may be hampered. Section 35(3)(d) of the Constitution places a duty on a court to ensure that the proceedings before it, are fair by ensuring that the trial begin and conclude without unreasonable delay. The appellant's contention that his right to fair trial was infringed by having to testify despite being exhausted is contradictory to his assertion that in convicting him, the trial court erred in rejecting his version as false as he "testified well and he stuck to his version, there were no inherent contradictions in his testimony..." I detect no irregularity in the conduct of the proceedings.
- [21] Having regard to the facts of this matter and the available evidence, I am satisfied that the trial court correctly found that the State proved the guilt of the appellant beyond a reasonable doubt. The appellant was correctly convicted.

- [22] As regards the sentence, it is trite that punishment is pre-eminently a matter for the discretion of the trial court. The court of appeal must approach an appeal against sentence with due deference to the trial court and may only interfere where it is clear that the trial court misdirected itself or imposed a sentence that is disturbingly inappropriate.[2]
- [23] In the court a quo it was common cause that section 51(1) of the CLAA prescribes a minimum sentence of life imprisonment for rape involving the infliction of grievous bodily harm unless there are substantial and compelling circumstances warranting a deviation from the prescribed sentence.
- [24] It is the appellant's case that life imprisonment is strikingly inappropriate and induces a sense of shock, the trial court should have found that there were substantial and compelling circumstances warranting a deviation for the sentence of life imprisonment instead it over-emphasized the seriousness of the offence and did not take into consideration the appellant's personal circumstances, that the complainant did not sustain injuries and that this was not the worst rape case ever encountered. The sentence must thus be set aside and replaced with a sentence of 20 years' imprisonment.
- [25] The sentence of life imprisonment is also not supported by the State albeit on other grounds. It is the State's case that the complainant did not sustain serious injuries therefore, the trial court erred by invoking the provisions of section 51 (1) of the CLAA when sentencing the appellant as the assault did not involve the infliction of grievous bodily harm to bring it within the purview of section 51(1) of the CLAA. For that reason, the appellant should not have been sentenced to life imprisonment. The State contends that the trial court should have imposed a sentence in terms of section 51(2) of the CLAA and having regard to the appellant's personal circumstances and the aggravating factors, there are no substantial and compelling reasons to warrant a deviation from the minimum sentence prescribed by section 51(2) of the CLAA. The sentence that would be appropriate is 15 years' imprisonment.
- [26] Accordingly, the question that arises in this matter is whether the trial court misdirected itself in its finding that there were no substantial and compelling circumstances warranting a deviation from the sentence prescribed by section 51(1) of the CLAA and by treating the offence as rape involving grievous bodily harm thereby sentencing the appellant to life imprisonment as contemplated in section 51(1) of the CLAA.
- [27] It is recorded that at the time of sentencing, the appellant was 37 years old, unmarried and had one 18 year- old daughter. He dropped out of school in Grade 11 in order to provide for his family with the income he earned from doing odd jobs. He was previously convicted of housebreaking with intention to steal and theft and malicious damage to property in 2005.

- [28] It was argued that the previous convictions were unrelated to the offence he was convicted of and they were over 10 years therefore they should not be taken into account when the sentence was considered. Having regard to his young age, the appellant could still be rehabilitated.
- [29] It is trite that the traditional mitigating factors such as an accused's personal circumstances, that he is a first offender including his incarceration pending trial may be taken into account as substantial and compelling reasons warranting the imposition of a lesser sentence than the one prescribed.
- [30] The fact that the appellant is a first offender on its own does not constitute a substantial and compelling reason to justify a deviation

from the prescribed minimum sentence.[3] Similarly, the lack of serious physical injuries does not make this rape less heinous. Rape leaves the victims with life-long emotional and psychological scars.

- [31] The emotional and psychological effects resulting from the appellant's actions are set out in the complainant's victim impact statement, Exhibit "G" admitted by mutual concurrence and it states that the complainant is now scared

to walk alone in the street at night, she does not trust men anymore including her own father and she is constantly embarrassed when people ask her about the rape.

- [32] The Supreme Court of Appeal in *Maila v The State*[4] quoting Amanda Spies 'Perpetuating Harm: Sentencing of Rape Offenders Under South African Law' (2016)

- (2) SALJ 389 at 399 pointed out that:

"[47] Counsel for the appellant submitted that the trial court did not take into account the appellant's personal circumstances. It also, according to counsel, did not take into account that this was not one of the 'brutal cases', as the complainant was not physically injured. Counsel was taken to task during the exchange with the members of the bench on this submission, but he could not take the argument further. Correctly so, because apart from this minimising the traumatic effects of rape on any victim and more so a child, it is well documented that 'irrespective of the presence of physical injuries or lack thereof, rape always causes its victims severe harm.'"

- [48] The Legislature has specifically amended the Criminal Law Amendment Act to provide categorically that the fact that a complainant was not injured during a rape cannot be considered as compelling or substantial. In terms of s 51(3) (a A) of Act 105 of 1997, which came into operation in December 2007:

'When imposing a sentence in respect of the offence of rape the following shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence:

....

- (ii) an apparent lack of physical injury to the complainant;

(iv) any relationship between the accused person and the complainant prior to the offence being committed.”

[33] The age of the appellant would count in his favour as an indicator that he is a good candidate for rehabilitation however, there is nothing in the record of the proceedings which points to some contrition for this heinous crime instead there is an attempt to

denigrate the complainant by characterizing her as a woman who slept around for drugs and money. Without remorse, an appreciation and acknowledgement of his actions rehabilitation is unlikely.

[34] Rape is “a repulsive crime, an invasion of the most private and intimate zone of a woman and strikes at the core of her personhood and dignity.”[5] The prevalence and depravity of rape causes an outrage in the society which looks up to the courts to impose sentences which speak to their plight.

[35] When measured against the aggravating factors namely that, the complainant was violated by someone she regarded as a brother and trusted enough to let inside her residence in the still of the night. It is equally aggravating that the appellant raped the complainant well aware of his HIV status thereby exposing her to the virus including his lack of remorse. His personal circumstances ought to recede to the background and the elements of retribution and deterrence must come to the fore. Accordingly, I am not persuaded that the appellant’s personal factors together with the factors alluded to by the appellant cumulatively as well as individually are sufficient to constitute substantial and compelling circumstances justifying the imposition of a lesser sentence.

[36] Turning to whether the injury sustained by the complainant constitutes grievous bodily harm to bring the rape within the purview of section 51(1) of the CLAA. It is trite that in the CLAA, there is no definition of what constitutes grievous bodily harm in the context of rape. In *S v Raboko*[6] Musi J explained the meaning of the words as follows:

“[7] There is nothing in the Act or Schedule that indicates that the words should be interpreted restrictively or widely. In my judgment the words should be given their ordinary, natural meaning. I agree with the words of Viscount Kilmuir L.C. that they only mean really serious. The words “really serious” should be illuminated lest it leads to confusion or overemphasis. The New Shorter Oxford English Dictionary: Lesley Brown (Ed) 1993 defines the word “really” as “In a real manner; in reality; actually. Used to emphasise the truth or correctness of an epithet or statement: positively, decidedly’ assuredly.” The word therefore does not indicate degree of seriousness. In this context it only serves to emphasize that the harm inflicted must actually be serious. In essence then if the injury inflicted by the accused on the body of the rape survivor is serious then it involves the infliction of grievous bodily harm. A serious injury at one extreme may mean an injury so serious as to endanger life, necessitate hospitalisation or to result in permanent loss of bodily or mental faculty at the other; it may include a wound that heals rapidly. It should not be a trivial or insignificant injury. A serious injury therefore need not necessarily be an injury that is permanent, life threatening, dangerous, or disabling. Whether the injuries were life-threatening, necessitated hospitalisation or immediate medical attention will

generally be relevant to determine the degree of seriousness but not necessarily the seriousness itself. Whether an injury is serious will depend on the facts and circumstances of every case.”

- [10] ... in order to determine whether the injuries in a particular case are serious one has to have regard to the actual injuries sustained, the instrument or object used, the number of the wounds – if any - inflicted their nature, their position on the body, their seriousness and the results which flowed from their infliction. It must be remembered that an injury can be serious without there, necessarily, being an open wound. In order to determine this, the judicial officer will be guided by medical evidence. It is therefore advisable that in all such cases – where a finding in relation to infliction of grievous bodily harm is considered – medical evidence should be presented. The absence of medical evidence however is not fatal. In this matter we have the benefit of the undisputed evidence of the complainant in relation to the injuries that she sustained as well as a medical report (J88) the contents of which was admitted by the defence. Although the J88 form that was completed by the medical practitioner who examined the complainant was not before us, it was before the regional magistrate. She read the doctor’s relevant findings into the record. From those findings, the doctor does not make mention of a wound on the complainant’s neck. The complainant pertinently testified that she sustained an open wound at the back of her neck which was sutured. The doctor did not testify. The correctness of what he recorded was not tested. Her evidence in this regard ought to be accepted.”
- [37] In the instant case, except to fleetingly remark that in terms of section 51(3) of the CLAA the absence of injuries does not constitute substantial and compelling circumstances to warrant a deviation from the prescribed sentence, the magistrate made no mention of injuries inflicted on the complainant to subdue her. On the complainant’s own version, she sustained no injuries and the only effect of the assault was a bleeding nose resulting from being hit with a fist.[7] Her version in this regard is confirmed by the J88 medical report Exhibit “A” compiled on the day of the incident. In that report, the clinical findings regarding the nature, position and extent of injuries and causation indicates no injuries except that the complainant was threatened with a knife. I am thus persuaded by the State’s contention that the complainant did not sustain an injury which constitutes grievous bodily harm.
- [38] In conclusion, the infliction of grievous bodily harm is not one of the elements of rape but a jurisdictional requirement to trigger the applicable sentence in that, rape involving grievous bodily harm attracts a minimum sentence prescribed by section 51(1) of the CLAA and rape where grievous bodily harm is absent brings the sentence under the purview of section 51(2) of the CLAA.[8] In the circumstances, the conviction on rape stands. The sentence thus qualifies to be imposed in terms of section 51(2) of the CLAA.
- [39] Having found no substantial and compelling circumstances warranting a deviation from the prescribed minimum sentence (see para 35 above), I make the following order:

2. The appeal against sentence succeeds to the extent that the sentence imposed by the magistrate Bothaville is set aside and replaced with a sentence of 15 years' imprisonment antedated to 3 October 2023.

NS DANISO, J

I concur

E MAHLANGU, AJ

APPEARANCES On behalf of appellant: Ms V. Abrahams Instructed by: Legal Aid South Africa
BLOEMFONTEIN On behalf of respondent: Adv. A. Bester Instructed by: The Director of Public Prosecutions BLOEMFONTEIN

[1] See *S v Oosthuizen* 1982

(3) SA 571 (T) at page 576 para G-H.

[2] *S v Kgosi* 1999

(2) SACR 238 SCA.

[3] *S v Muller* [2006] ZAGPHC 51 (23 May 2006) paras 55 & 59.

[4] (429/2022)

[2023] ZASCA 3 delivered on 23 January 2023.

[5] *S v Vilakazi* 2009

(1) SACR 552 (SCA).

[6] 2010

(1) SACR 320 (O) para 10.

[7] Unpaginated record of the proceedings page 8 to 14.

[8] Section 51(1) item (c) Part I of schedule 2 prescribes a minimum sentence of life imprisonment for a first offender convicted of rape involving grievous bodily harm whereas section 52(2) Part II of schedule 2 prescribes a minimum sentence of not less than 15 years' imprisonment for rape without grievous bodily harm.

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