

SOUTH AFRICA / JUDGMENT

Khene v S (CA 39/2022) [2023] ZANWHC 168 (15 September 2023)

[2023] ZANWHC 168

COURT

North West High Court, Mafikeng

BEFORE

DJAJE, DIBETSO-BODIBE

CASE / FILE NUMBER

CA 39/2022

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IN THE HIGH COURT OF
SOUTH AFRICA
NORTH WEST DIVISION –
MAHIKENG
APPEAL
CASE NO: CA 39/2022

Reportable: YES / NO
Circulate
to Judges: YES
/ NO
Circulate
to Magistrates: YES
/ NO
Circulate
to Regional Magistrates: YES / NO
In

the matter between: SHANDO
KHENE Appellant
And
THE
STATE
Respondent
CRIMINAL
APPEAL
DJAJE
AJP & DIBETSO AJ
ORDER
In

the result the following
order is made:

1. The appeal against
conviction and sentence is dismissed.

JUDGMENT

DJAJE AJP

[1] The appellant was convicted of rape in the Regional Court of Klerksdorp and sentenced to twelve years imprisonment on 31 July

2018. He now appeals against conviction and sentence.

[2] He applied for leave to appeal on 17 October 2018 which was refused. Subsequently, he petitioned the High Court and leave was granted on 12 February 2019 against both conviction and sentence. He was only advised during July 2022 that leave was granted against both conviction and sentence by an attorney from Legal Aid South Africa. Since he was incarcerated he was not able to make contact with his attorney to prosecute his appeal. It was only in May 2023 that he was able to consult with his current attorney from Legal Aid and prosecute the appeal. It was on these grounds that the appellant now applies for condonation for the late prosecution of this appeal. These were stated as the grounds for the late filing of this appeal. Condonation is not opposed and the reasons for the late prosecution of the appeal are found to be reasonable. Condonation is granted.

[3] It was alleged in the charge sheet that the appellant on 28 September 2016 unlawfully and intentionally committed an act of sexual penetration with a female person of thirty (30) years by forcefully having sexual intercourse with her without her consent. The appellant pleaded not guilty and made formal admissions in terms of section 220 of the Criminal Procedure Act 51 of 1977. He admitted that he did have sexual intercourse with the complainant on the date alleged in the charge sheet. The contents of the medical report (J88) were also admitted which indicated that the complainant was on her menstrual cycle, no sign of trauma and specimen collected.

[4] The complainant testified that the appellant was known to her as a family friend. On the date of the incident, he arrived at her place, knocked and upon enquiring who it was, the appellant responded that it was him. He entered after she opened for him. The complainant was home alone. As she was dealing in dagga, the appellant asked her for some dagga but she did not have stock that day. The appellant then asked for a cup of water. Thereafter, the appellant informed her that he was there to help her to conceive and that they should have sexual intercourse. The complainant was surprised and she refused. He throttled her and managed to have sexual intercourse with her despite her having told him that she was on her menstrual cycle. After the intercourse he asked for a towel to wipe the blood on his private part and he left. On his departure he told the complainant that he was coming back for more sexual intercourse.

- [5] The complainant went to Mike who was running a tuck shop on her premises and reported to him that she was raped by the appellant. She bought a razor at the tuck shop to use it to take her life by cutting her wrists. Whilst at home, her friend Lerato arrived and she reported to her that the appellant raped her. Eventually she went to the police station to report the incident.
- [6] Lerato testified that when she arrived at the complainant's place she was crying and notice minor injuries on her wrists. The complainant was crying and she reported that she was raped by the appellant. Lerato did not accompany the complainant to the police station. She indicated that at that time she was pregnant and did not do anything to assist the complainant. She however knew the appellant.
- [7] The appellant testified in his defence that the complainant was a friend to his girlfriend and also his girlfriend in 2015. He indicated that on 28 September 2018 they were still in a relationship with the complainant. On that day he was on his way to see one Jerry when he saw the complainant peeping through a window asking him to light a cigarette for her. He approached her and went inside the house to light the cigarette for her. They started a conversation with the complainant telling him that she wants a child and the doctors are not able to help her. The appellant suggested that they should have sexual intercourse and the complainant just smiled. The appellant started to kiss the complainant and she kissed him back. They had consensual sexual intercourse. Thereafter, the appellant left to go to Jerry's place. On his way back from Jerry's place he passed the complainant with three women and he gave her R10,00 to buy cigarette.
- [8] The appellant denied that the sexual intercourse with the complainant was without consent. He was surprised to hear the following day that the complainant laid charges of rape against him.

AD CONVICTION

- [9] In the main the appellant's ground for setting aside the conviction is that the state failed to prove beyond reasonable doubt that the sexual intercourse with the complainant was not consensual. It was argued that the state failed to call Mike as a witness as the complainant testified that she reported to him after the sexual intercourse with the appellant. Further that the complainant failed to mention in her statement to the police that she had reported the incident to Mike. This was clear that the complainant fabricated the whole issue of the appellant having raped her.
- [10] It was argued that it is improbable that the complainant reported the rape to Lerato but failed to give her the details of how it happened. In addition, Lerato after being told of the rape and seeing the cuts on the complainant's wrists failed to assist her.

- [11] According to the appellant, the doctor could not see any sign of trauma during the examination of the complainant. Further that the doctor did not make a note of any injuries on the complainant's wrist as testified by Lerato. The appellant's case is that his version that the sexual intercourse with the complainant was consensual is reasonably true and should have been accepted as such.
- [12] In contention the respondent argued that failure to call Mike to testify was not fatal to the evidence of the complainant. It was submitted that the complainant testified that Mike had relocated and his whereabouts were unknown. Of importance, the respondent contended that the purpose of calling a first report witness is to show consistency in the evidence of the complainant. Therefore, in the absence of Mike, the state called Lerato who confirmed that the complainant reported to her shortly after the incident that she was raped by the appellant. In its argument on the evidence of a first report the respondent relied on the decision of *Vilakazi v The State* [2016] SCA 103; 2016 (2) SACR 365 SCA at par 15 where the court held that:

"our courts have not considered lack of first report to be fatal to the charge of rape".

- [13] It was submitted that by calling Lerato, the state showed consistency in the evidence of the complainant that she was raped by the appellant. The argument that Lerato was not provided details of the rape by the complainant was criticised as being irrelevant in proving consistency. The respondent argued that lack of any evidence of trauma noted by the doctor cannot exclude forceful penetration as the doctor indicated that the complainant was on her menstrual cycle.
- [14] In convicting the appellant the court a quo found that the complainant was a single witness and there were no material contradictions in her evidence. Further that even in the absence of a first report evidence, the evidence presented by the complainant and Lerato proved that there was no consent to the sexual intercourse with the appellant.

- [15] Rape is defined in section 3 of the Sexual Offences Act 32 of 2007 as

"Any person ("A") who unlawfully and intentionally commits an act of sexual penetration with a complainant ("B")

without the consent of B, is guilty of the offence of rape".

- [16] The state bears the onus to prove the accused's guilt beyond a reasonable doubt and the accused version cannot be rejected only on the basis that it is improbable but once the court has found that his explanation is false beyond reasonable doubt. See: *S v V* 2000(1) SACR 453 (SCA) at 455B.
- [17] In order for a conviction of rape to be sustained the state has to prove beyond a reasonable doubt that all the elements of the offence are present and that the offence has been committed by the accused. The following was said about cautionary rule in *S v Jackson* 1998(1) SACR 470 (SCA) at 476 e-f:

“In my view, the cautionary rule in sexual assault cases is based on an irrational and out-dated perception. It unjustly stereotypes

complainant in sexual assault cases (overwhelmingly women) as particular unreliable. In our system of law, the burden is on the

state to prove the guilt of the accused beyond reasonable doubt- no more no less. The evidence in a particular case may call for a cautionary approach, but that is a far cry from the application of a general cautionary rule.”

[18] In dealing with the issue of caution in sexual offence cases the legislator in section 60 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 stated that:

“Notwithstanding any other law, a court may not treat the evidence of a complainant in criminal proceedings involving the alleged commission of a sexual offence pending before that court, with caution, on account of the nature of the offence.”

[19] In relation to the evidence of first report the following was stated in Milton, in South African Criminal Law and Procedure Vol II 3 ed that:

“It is not mandatory that there should be evidence that the woman has complained that she has been raped. However, if she has, such [a] complaint is admitted in evidence to show consistency and to negative a defence of consent, but not as proof of their contents nor to corroborate the complainant.”..... The purpose of admitting evidence of a complaint is that it serves to rebut any suspicion that the woman has lied about being raped. The corollary is, of course, that should a woman not complain, or not complain timeously, the conclusion may be drawn that she is lying in her evidence that she was raped. The conclusion may well be unfair to the victim, since women may hesitate to complain of rape for reasons of shame, embarrassment or fear.”

[20] The evidence of the complainant in this matter as correctly pointed out by the court a quo was satisfactory and without any contradictions. She was a single witness and the court a quo was correct in accepting her evidence as being truthful in all material respects. As argued by the respondent, the purpose of a first report is to show consistency in the evidence of the complainant. Failure to call Mike by the state does not in any stretch of imagination negate the evidence of the complainant that she was raped by the appellant. Lerato's evidence is sufficient even though not regarded as first report, but it does show consistency in the evidence of the complainant. Lack of details in reporting to Lerato cannot be fatal to the evidence of the complainant as far as the rape is concerned.

[21] In *Tshiki v S* [2020] ZASCA 92 (SCA) the court dealt with approaching the evidence holistically as follows:

“In a criminal trial, a court's approach in assessing evidence is to weigh up all the elements that point towards the guilt of the accused against all that which is indicative of their 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."

- [22] The evidence of the appellant that the sexual intercourse was consensual is improbable. According to him after they had sexual intercourse with the complainant, he left saying he was going to his friend. However, immediately after he left, the complainant went to report to Mike and again reported to Lerato. Lerato found her crying and said she was raped by the appellant. If indeed the complainant had agreed to the sexual intercourse, there was no reason for her to report to her friends when she was alone in the house.
- [23] In the J88 that was handed in as evidence the doctor indicated that there was no sign of trauma. The absence of trauma on the genitalia of the complainant cannot mean there was no rape especially when the doctor noted that the complainant was on her menstrual cycle. I find that the appellant was correctly convicted by the court a quo.

AD SENTENCE

- [24] It was argued on behalf of the appellant that the offence that the appellant was charged with is within the purview of section 51(2) (b) of the Criminal Law Amendment Act 105 of 1997 which call for a minimum sentence of ten (10) years imprisonment unless there are substantial and compelling circumstances. However, in this matter the appellant was sentenced to twelve (12) years imprisonment without giving reasons or circumstances why the minimum sentence was increased.

- [25] Section 51(2) of the Criminal Law Amendment Act 105 of 1997 provides that:

"Notwithstanding any other law, but subject to subsection (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in

- (b) Part III of Schedule 2, in the case of

- (i) a first offender, to imprisonment for a period not less than 10 years;"

In Part III Schedule 2 the offence of rape other than in circumstances referred to in Part I carries the minimum sentence of ten (10) years imprisonment.

- [26] The sentence in terms section 51(2) (b) of the Act may be increased by a period not more than five (5) years by the Regional Court.

- [27] Section 51 (3)(a)(A)(ii) of the Criminal Law Amendment Act provides that:

" 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:

- (i).....

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

- [28] In sentencing the appellant the Court a quo applied the provisions of section 51(2) of the Act and increased the sentence by two years. The court found that the appellant violated the complainant in her home when he was regarded as a family friend. There were no substantial and compelling circumstances found by the court a quo.
- [29] A Court of Appeal will be entitled to interfere with the sentence imposed by the trial court if the sentence is disturbingly inappropriate or out of proportion to the seriousness of the offence. See: *S v Romer* 2011
- (2) SACR 153 (SCA) para 22
- [30] In imposing the appropriate sentence the court should always balance the nature and circumstances of the offence, the personal circumstances of the offender and the impact of the crime on the community, its welfare and concern. See: *S v Banda and Others* 1991(2) SA 352 BGD) at 355.
- [31] The appellant in this matter is convicted of an offence which has been described as a horrific and dehumanizing violation of a person's dignity. It not only violates the mind and body of a complainant but also one that infuriates the soul. The appellant was known by the complainant and also trusted by her. The complainant regarded him as a friend trusting that he would protect her, but little did she know that she would come out traumatized and scarred for life.
- [32] The appellant had a girlfriend with three children but failed to act responsibly on that day. He forced himself on the complainant despite being told that she was on her menstrual cycle. He acted selfishly showing no compassion to the complainant. The court a quo correctly found that there were no substantial and compelling circumstances.
- [33] Having considered the submissions on behalf of the appellant and the respondent the appeal against both conviction and sentence stands to be dismissed.

Order

[34] Consequently, the following order is made:-

J T DJAJE

ACTING JUDGE PRESIDENT

NORTH WEST DIVISION, MAHIKENG

I AGREE

O DIBETSO- BODIBE

ACTING JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF HEARING : 18 AUGUST 2023

DATE OF JUDGMENT : 15

SEPTEMBER 2023

COUNSEL FOR THE APPELLANT : MR GONYANE

COUNSEL FOR THE RESPONDENT : ADV NTSALA

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