

SOUTH AFRICA / JUDGMENT

Lesele v S (CA 53/2020) [2024] ZANWHC 257 (17 October 2024)

[2024] ZANWHC 257

COURT

North West High Court, Mafikeng

BEFORE

R D Hendricks, A H Petersen

CASE / FILE NUMBER

CA 53/2020

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IN
THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION,
MAHIKENG
CASE
NO: CA 53/2020
REGIONAL
MAGISTRATES CASE NO: RCM 22/2016
In

the matter between:

VICTOR
NYABELA LESELE
Appellant
and
THE
STATE
Respondent

CORAM:

HENDRICKS JP et PETERSEN J
DATE

OF HEARING:

28 NOVEMBER 2023
DATE

OF JUDGMENT:	17 OCTOBER 2024 FOR THE
APPELLANT:	ADV. MZILIKAZI FOR
RESPONDENT:	ADV. MOLEFE
Delivered:	This judgment was handed down electronically by circulation to the parties' representatives via email. The date and time for hand-down is deemed to be 15h00 on 17 October 2024. ORDER Resultantly,
the following order is made:	The appeal against conviction and sentence on counts 4 and 5 are dismissed.

JUDGMENT
HENDRICKS JP

Introduction

- [1] This is an appeal which was enrolled on 28 November 2023. The scribe assigned D Joubert AJ did not produce a judgment for more than ten months. Because this appeal was part of an appeal project in an endeavour to eradicate the appeal backlog, I re-allocated it to a differently constituted Full Bench. The decision was based on the fact that counsel for the parties intimated in their respective practice notes, that they were amenable to the appeal being adjudicated on paper in terms of section 19 (1) (a) of the Superior Courts Act 10 of 2013. The delay is indeed regrettable. The adage justice delayed is justice denied is acknowledged.
- [2] The appellant was arraigned in the Regional Court, Madikwe on four counts of rape and one count of robbery. The first three counts (counts 1 and – rape; and count 2 – robbery) is not assailed on appeal. The appeal lies only against the convictions on counts 4 and 5 and the resultant sentences of life imprisonment imposed on these counts.
- [3] On count 4 it is alleged that the appellant engaged in sexual intercourse with T[...] R[...] (complainant) without her consent more than once. On count 5 it is alleged that the appellant engaged in sexual intercourse with GM, an eight-year-old girl. The provisions of the minimum sentence regime were duly explained to the appellant.

Convictions on counts 4 and 5

Count 4

- [4] The facts relevant to count 4 can be succinctly summarized as follows. The appellant was well known to the complainant as they lived in the same vicinity. She regarded him as a brother. On 6 August 2015 the complainant visited a tavern, in the company of her friend Mothabi. As they were leaving the tavern, Mothabi engaged in conversation with a male patron at the tavern, whilst the complainant waited at the gate of the premises. The appellant approached the complainant and suggested that they leave together. When she refused, he grabbed her hand and pulled her along. The appellant took the complainant to a dilapidated house. In one of the rooms of this abandoned house, he instructed her to undress. When she refused, he assaulted her with a stick on her back. He undressed the complainant and himself. He caused her to lie on her back and engaged in non-consensual sexual intercourse with her. When he was done, he dressed himself and instructed the complainant to likewise. They then left the dilapidated house.
- [5] Whilst walking, the appellant continued touching and fondling the complainant. He took her to his shack where he opened the door and pushed her inside. After closing the door, the appellant instructed her to get onto the bed, but she refused. He pushed her onto the bed and undressed her pants and panty. He again undressed himself and engaged in non-consensual sexual intercourse with her. When the appellant fell asleep, the complainant stood up, dressed herself and escaped through a window.
- [6] The complainant met a certain gentleman by the name of Sakkie and reported the incidents to him. Sakkie phoned the police who indicated that the complainant should wait along the road for them. The police arrived and transported the complainant to the police station where she provided a statement. The complainant was ferried to hospital where she was medically examined, and a report compiled by the doctor. She had bruises on her back which was consistent with her evidence that she was assaulted. The complainant denied that she was romantically involved with the appellant or that the sexual intercourse was consensual.
- [7] The appellant who testified conceded that he and the complainant were well acquainted. This was therefore not a case of mistaken identity. He further admitted that he engaged in sexual intercourse with the complainant on the evening in question. He, however, maintained that the sexual intercourse was consensual as they were in a love relationship. The appellant also denied that the two distinct incidents of sexual intercourse with the complainant. The explanation proffered by the appellant for the motive for falsely implicating him was his failure to give the complainant R100.00.
- [8] The Regional Magistrate correctly rejected the version of the appellant as being untenable and far-fetched; and correctly made strong credibility findings in favor of the complainant as opposed to the appellant. These findings cannot be faulted. In the words of the Regional Magistrate, it was highly improbable that the complainant would trump up a serious charge of rape against her boyfriend after a 'beautiful night of intimacy, romance and sexual romps and escapades'. The escape through a window after the second ordeal and the injuries noted by the doctor upon examination speaks for itself. There is no plausible explanation why the

complainant would leave the shack by escaping through the window when she could so easily have asked him to open the door for her and to accompany her home. The evidence of the appellant was rightfully found to be 'glaringly false as being disingenuous and fanciful'.

Count 5

- [9] Regarding count 5, the complainant was eleven years old when she testified with the assistance of an intermediary. She explained in detail what happened in a coherent manner. According to the complainant she was walking when she saw a man standing next to a tree. As she walked past him, he told her that she was ill-mannered as she did not greet him, an elderly person. She ignored him and continued walking. He followed her, grabbed her hand and dragged her to a dilapidated and abandoned house. He took her into a room where he undressed her pants and panty. He caused her to lie on the floor and engaged in sexual intercourse with her. When he was done, she stood up, dressed herself and left.
- [10] She ran away crying to her aunt's shop, where she met her uncle. She reported to her uncle that she was raped and provided a description of her assailant. Her uncle accompanied her to the dilapidated house, but they did not find her assailant. As they were driving, she spotted her assailant and pointed him to her uncle. This man was the appellant. Her uncle confronted the appellant who denied the rape and became very aggressive. The appellant was carrying a garden spade at the time. They proceeded to the police station to lay a charge, and the complainant was taken to a clinic where she was medically examined.
- [11] The complainant, during her testimony was requested to leave the intermediary room and enter the courtroom, where she made a dock identification of the appellant, who was placed among other male court officials. The description to her uncle as to how the appellant was clad on the day of the incident matched the clothing worn by the appellant during the encounter with the complainant and her uncle. The evidence of the complainant was corroborated in all material respects by her uncle, R[...] N[...]. That she was sexually violated is borne out by the medical report which stated that she had fresh injuries; and had vaginal bleeding which was indicative of forceful penetration.
- [12] The trial Court made very strong credibility findings in favour of the complainant and against the appellant. Even as a young child witness, the trial court found that the complainant 'expressed herself quite eloquently and with remarkable ease.' She 'remained steadfast in her assertions' and 'called a spade a spade'. She 'was able to describe the events of that particular day with remarkable accuracy and point for point and step by step'. Within an hour or so she was able to point the accused (appellant) out as the person who had brutalized her sexually. Her explanation not only of the clothing of the appellant but also that he had a garden spade which was corroborated by her uncle and made common cause by the appellant.

When she met the appellant a few days after the incident on a bridge she recognized him again. This led to the inescapable and ineluctable conclusion that the State had succeeded in proving its case beyond a reasonable doubt as found by the trial court. This finding cannot be faulted.

Conclusion on the convictions on counts 4 and 5

[13] I am of the view that the appeal against the convictions on counts 4 and 5 should consequently fail.

Sentences imposed on counts 4 and 5

[14] It is trite that an appeal court will not lightly interfere with the sentencing discretion of a trial court and will only interfere in certain limited instances.

See: *S v Mtungwa en 'n Ander* 1990

(2) SACR 1(A); *S v Malgas* 2001 (2) SA 1222 (SCA) ; *S v L* 1998 (1) SACR 463 (SCA); *S v Kgosimore* 1999 (2) SACR 328 (SCA).

[15] Section 51(1) read with Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 is applicable to counts 4 and 5. The prescribed sentence is life imprisonment unless there are substantial and compelling circumstances to deviate from imposing the mandated sentence. The trial court carefully considered whether there were any substantial and compelling circumstances present to enable it to deviate from imposing the prescribed sentence of life imprisonment but could not find any. This finding of the trial court cannot be faulted.

[16] Due regard was paid to the case law in particular *S v Malgas* 2001 (2) SA 1222 (SCA) and *S v Matyityi* 2011 (1) SACR 40 (SCA). All relevant facts and circumstances relevant to sentencing were taken into account by the trial court. None of the factors were either over-or-under emphasized. No misdirection was committed by the trial court. Consequently, there exists no basis for

this Court to interfere with the sentence imposed by the trial court.

[17] The appeal against the sentences imposed in respect of counts 4 and 5 should fail.

Order

[18] Resultantly, the following order is made:

R D HENDRICKS

JUDGE PRESIDENT OF THE HIGH COURT OF SOUTH AFRICA,

I agree.

A H PETERSEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA,

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Prepared on 9 October 2026 · Esheria