

SOUTH AFRICA / JUDGMENT

Mabaqa v S (A53/2023) [2024] ZAFSHC 244 (15 August 2024) [2024] ZAFSHC 244

COURT

Free State High Court, Bloemfontein

BEFORE

Reinders, Majosi

CASE / FILE NUMBER

A53/2023

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IN

THE HIGH COURT OF SOUTH AFRICA

FREE

STATE DIVISION, BLOEMFONTEIN

Reportable:

YES/NO

Of

Interest to other Judges: YES/NO

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Case

No. A53/2023

In

the matter between:

NEO

SIMON MABAQA

APPELLANT

And

THE

STATE

RESPONDENT

CORAM: REINDERS, J et
MAJOSI, AJ
HEARD

ON: 03 JUNE 2024

JUDGMENT

BY: MAJOSI, AJ

ELIVERED ON: 15 AUGUST 2024

- [1] The appellant was convicted in the Regional Court, Koffiefontein on two counts of contravening s 3 of the Sexual Offences and Related Matters Act 32 of 2007. He was sentenced to undergo life imprisonment for both counts in terms of s 51(1) of the Criminal Law Amendment Act 105 of 1997. He was declared unfit to possess firearms in terms of s 103(1) of the Firearm's Control Act 60 of 2000.
- [2] The appellant assailed his convictions on counts 1 and 2 on the following grounds:
- (a) that the court a quo erred in finding that the state witnesses were credible witnesses;
 - (b) the court a quo erred in drawing a negative inference from the appellants version and not making a credibility finding in his favour of his testimony;
 - (c) the court erred in finding that the state proved its case beyond a reasonable doubt not finding the complainant's version improbable;
 - (d) the court erred in finding that the contradictions in the complainant's testimony and the other state witnesses was not material.
- [3] In respect of count 1, the complainant, Ms. M[...] testified that on the evening of the 29th of October 2011, she was at a tavern enjoying alcoholic beverages with her friends and her boyfriend. After a stabbing incident at the tavern, she discovered that her companions left her behind and walked home with one Panic. On their way home, the appellant, a friend to her brother, accosted them in the street. He chased her escort away by wielding a brick and pulled her by the arm in a particular direction while threatening to stab her with a bottle if she refused to accompany him.
- [4] Upon their arrival at a certain house, they entered the yard and went to a shack situated in the yard and the appellant knocked on the door. She then saw an opportunity to flee. She freed herself from his grip and ran, but did not get very far as she ran straight into a wire fence and injured herself on the neck. She immediately started bleeding from this wound.

- [5] The appellant caught her, pulled her back to the shack and the door was opened by one Seiso. Once inside, the accused sexually penetrated her vaginally with his penis without her consent. Later that very same morning, the appellant instructed her to wear another t-shirt as hers was soiled with blood as well as other shoes. The three of them exited the shack and went inside the main house where she encountered Seiso's mother.
- [6] After identifying another opportunity to flee, she ran out of the yard into a nearby field but the appellant and his friend caught up with her. They walked her to another house. After leaving this unknown residence, she was informed that they are going into town, she then asked the appellant if she could change clothing at a nearby friend's house and he agreed. Once inside her friend's house, she reported that she was raped by the appellant. The police were called and she was taken to National Hospital for a medical examination the following day, after opening a charge of rape against the appellant.
- [7] Ms. Letebele, the mother of Seiso, testified that she saw the appellant and the complainant entering her yard and knocking at her son's shack door. In that process, the complainant loosened herself from the appellant's grip and ran away, right into a fence which caused her to sustain injuries. She was then taken into the shack by the appellant after the door was opened by her son Seiso.
- [8] Just before sunrise, she observed the three exiting the shack and entering her house. Once she was alone with the complainant, she enquired if she was in a relationship with the appellant but received no response. When she looked at her more closely, she appeared to be afraid and observed her clothing and hair to be untidy. When the appellant went into the bathroom, the girl ran away and the appellant gave chase and caught her. She instructed her son to go after them so that the appellant does not hurt her. The three did not return to her house but left the area. Later, the very same day, the complainant returned in the company of the police and retrieved her shoes from the shack.
- [9] The medico-legal examination report of the complainant revealed that she sustained injuries to her neck and her jeans was observed to be bloodstained. It was concluded that the injuries sustained were consistent with the history provided by the complainant.
- [10] In respect of count 2, Ms. K[...] testified that on the 4th of May 2013, after leaving a tavern in the early hours of the morning, she asked her sister's boyfriend, M[...], to walk her to her boyfriend's house. Upon their arrival there, they knocked on the door, but in vain. Whilst sitting on the gate, the appellant, a male person known to her, approached them, knife in hand and instructed M[...] to leave, which he did.
- [11] The appellant pulled her off the gate and took her to a nearby shack, which he unlocked, took her inside and sexually penetrated her without her consent. When it became light outside, he unlocked the door and told her to leave. Once home, she reported the rape to her sister and a case was opened with the police on the same day. She was also taken to National Hospital for a medical examination.

- [12] Her sister C[...] K[...] testified and confirmed that a report of rape was made to her and that the appellant, known to her as Compressor was identified as the perpetrator. Mr. M[...] testified that during the early hours of the morning, he escorted the complainant to her boyfriend's house and left the scene but before doing so, he observed that the appellant, a known male, was walking behind them.
- [13] The accused version of events in respect of count one was that he met the complainant at the tavern and she agreed to be his girlfriend. To that end, they left the tavern together and walked to his friend Seiso's place where they spent the night and engaged in consensual sexual intercourse. He indicated that, although the complainant sustained injuries from a fence, it was due to her falling over as she was heavily under the influence of alcohol.
- [14] In respect of count two, the appellant denied that he raped the complainant on the night in question as he was at home with his mother and sibling. He made mention of the fact that he does not even know the complainant and that she was making a mistake regarding the identity of her assailant.
- [15] The court's powers to interfere on appeal with the findings of fact of a trial court are limited unless there is a clear misdirection by the court a quo.[1]
- [16] The court a quo in count one evaluated the conspectus of the evidence and found that the evidence pointed to the fact that the complainant was an unwilling participant from the moment she met the appellant, entered the yard of Seiso until she eventually left later that same morning and later even sought refuge a friend's house. It (the court a quo) also found that her evidence was appropriately corroborated by Ms. Letebele. The medico-legal report also confirmed that she sustained injuries to her neck and that despite changing her top, the pair of jeans she wore was still bloodstained. This would effectively mean that during the rape, she was still actively bleeding from her wounds.
- [17] It is highly unlikely that she would have, under these circumstances, and after several attempts of trying to make a run for it, consented to sexual intercourse with the appellant. Although there was a discrepancy whether the complainant indeed spoke to Letebele about the rape and M[...]’s observations, same was appropriately contextualized and termed immaterial in light of the evidence put forth by both witnesses by the trial court.
- [18] The court a quo, in my view, was correct in finding the version of the appellant to be false and improbable and that the evidence of the complainant was credible and reliable in all material aspects, despite her being a single witness[2] to the actual rape as her version of events enjoyed sufficient corroboration.
- [19] The appellant for count two placed identity in dispute and denied being at the said tavern or in the vicinity of the complainant's boyfriend's house. The evidence of the state witnesses revealed that they had appropriate prior knowledge of the appellant as he is known in their residential area; both were acquainted with the appellant's unique nickname, Compressor.

- [20] The complainant, in particular, had several opportunities to observe the appellant: firstly, when he approached her outside her boyfriend's house, secondly enroute to the shack where she was eventually raped and lastly, in broad daylight when the appellant unlocked the shack door and instructed her to leave. She had an additional opportunity at a later stage in the street when he informed her the police will not take her seriously, should she open a case against him.[3] This evaluation was also accounted for by the trial court in his judgment.
- [21] The defence offered by the appellant was that of an alibi, but no further evidence was adduced in that regard. Although an adverse inference cannot be drawn from the late disclosure of this alibi, it can be taken into consideration when evaluating the evidence as a whole.[4]
- [22] Two state witnesses with prior knowledge of his identity placed him outside the house of the complainant's boyfriend before the complainant was raped and a further report identifying the appellant as the perpetrator was made to C[...] shortly after the incident. The court a quo reasoning in this regard cannot be faulted and the appellants criticism in this regard is thus unfounded. The appellant's appeal against both of his convictions must fail.
- [23] The imposition of a sentence is the prerogative of the sentencing court and an appeal court should be careful not to erode such discretion. An appeal court will only interfere if the sentence imposed by the court a quo is disproportionate as found in *S v Rabie*[5] and also *S v De Jager and Another*. [6]
- [24] In *S v Mudau*, [7] Madjiet JA stated as follows:
- ‘ . . . it is trite that each case must be decided on its own merits. It is also self-evident that sentence must always be individualised, for punishment must always fit the crime, the criminal and the circumstances of the case. It is equally important to remind ourselves that sentencing should always be considered and passed dispassionately, objectively and upon a careful consideration of all relevant factors. Public sentiment cannot be ignored, but it can never be permitted to displace the careful judgment and fine balancing that is involved at arriving at an appropriate sentence. Courts must therefore always strive to arrive at a sentence which is just and fair to both the victim and the perpetrator, has regard to the nature of the crime and takes account of the interests of society.’[8]
- [25] The Supreme Court of Appeal in *S v Chapman*[9] classified the offence of rape as follows:
- ‘Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, to privacy and the integrity of every person are basic to the ethos of the Constitution . . . Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquility of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives.’[10]

[26] Section 51(1) of the Criminal Law Amendment Act prescribes a minimum sentence of life imprisonment to be imposed upon conviction unless substantial and compelling circumstances are present to warrant deviation. The general rule of thumb is that substantial and compelling circumstances presented to court must be truly convincing to allow the court to deviate on proper grounds and not for flimsy reasons.[11]

[27] *S v Vilakazi*[12] 2012 (6) SA 353 (SCA) at paragraph 58 where the court stated the following:

‘ . . . In cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the background.

Once it becomes clear that the crime is deserving of a substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be, and those seem to me to be the kind of “flimsy” grounds that Malgas said should be avoided . . .’[13]

[28] The appellant contended that the sentence imposed for the offences are not only shocking, but also wholly inappropriate as the court a quo overemphasized the offences at the cost of his personal circumstances. During mitigation of sentence, it was proffered that he was a first offender, 24 years of age, unmarried and he earned an income of R50 per day from casual employment. The income derived was used to support his unemployed mother, grandmother and his two minor siblings before his three-year incarceration awaiting trial in this matter.

[29] The legal representative for the appellant responsibly acknowledged that the sentence imposed may be justified for both offences, but argued that the court a quo failed to consider that this was not one of the most serious instances of rape and there was no evidence that the complainants suffered lasting emotional trauma. It was submitted that the appellant’s personal circumstances justified the imposition of a lesser sentence.

[30] Transversely thereto, the legal representative for the state argued that the court a quo correctly found that there were no compelling and substantial circumstances warranting deviation and the sentence cannot be considered inappropriate as the appellant had been convicted of two offences of rape[14] with the modus operandi of accosting female complainants whilst in the company of males and using the threat of violence to drive the men away.

[31] The cumulative effect of the appellant’s circumstances and all other mitigating factors were considered by the court and none were found to be substantial or compelling circumstances. This included the three years that the appellant spent awaiting trial. In my view, the court a quo could not have, under these circumstances, found substantial or compelling circumstances justifying the imposition of a lesser sentence in light of the numerous aggravating factors.

[32] The appellant was convicted by the trial court of two offences of rape wherein he accosted the complainants in the street, threatened their companions with violence and thereafter, brutally invaded their bodily integrity and in so doing, perpetuated the scourge of gender-based violence which not only prevalent in the Free State Division, but a raging fire in the Republic of South Africa. This type of behavior is not only unacceptable, but goes against the values enshrined in our Constitution. The sentence imposed can thus not be said to be disproportionate and his appeal against sentence must also fail.

[33] Accordingly, the following is ordered:

The appeal against convictions and sentence is hereby dismissed.

O. R MAJOSI, AJ

I concur

C. REINDERS, J

APPEARANCES: On behalf of the Appellants Mr. P. Van Der Merwe Instructed by: Legal Aid South Africa BLOEMFONTEIN On behalf of the Respondent Adv. V.J Didi Instructed by: Director of Public Prosecutions BLOEMFONTEIN

[1] S v Francis 1991

(1) SACR 198 (A); R v Dhlumayo and Another 1948

(2) SA 677 (A).

[2] Section 208 of the Criminal Procedure Act 51 of 1977.

[3] S v Mthetwa 1972

(3) SA 766 (A) at 768, A - C.

[4] S v Thebus and Another

[2003] ZACC 12; 2003

(6) SA 505 (CC), paras 51-68.

[5] S v Rabie 1975

(4) SA 855 (A) AT 857D-E.

[6] S v De Jager and Another 1965

(2) SA 616 (A).

[7] S v Mudau

[2013] ZASCA 56; 2013 (2) SACR 292.

[8] Ibid para 13.

- [9] S v Chapman [1997] ZASCA 45; 1997 (3) SA 341 (SCA).
- [10] Ibid at 3-4.
- [11] S v Malgas [2001] ZASCA 30; 2001 (1) SACR 469 (SCA).
- [12] S v Vilakazi [2008] ZASCA 87; [2008] 4 All SA 396 (SCA).
- [13] Ibid para 58.
- [14] Section 51(1)(a)(iii)(bb) of the Criminal Law Amendment Act 105 of 1997.

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