

SOUTH AFRICA / JUDGMENT

Magele v S (CA09/2022) [2024] ZANWHC 275 (8 October 2024)

[2024] ZANWHC 275**COURT**

North West High Court, Mafikeng

BEFORE

Mfenyana, Ramolefe

CASE / FILE NUMBER

CA09/2022

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**IN THE HIGH COURT OF
SOUTH AFRICA
NORTH WEST DIVISION,
MAHIKENG
CASE NUMBER: CA09/2022**

Reportable:

NO
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to Judges: NO
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to Magistrates: NO
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to Regional Magistrates: NO
In the matter between:-
GODFREY
MAGELE
Appellant
and
THE STATE
Respondent
CORAM: MFENYANA J
ET RAMOLEFE AJ

Delivered:

This judgment was handed down electronically by circulation to the parties' representatives via email. The date for hand-down is deemed to be 08 October 2024.
ORDER
(1)
The appeal against conviction and sentence is dismissed.

JUDGMENT

MFENYANA J

- [1] The appellant stood trial in the Regional Court in Stilfontein, North West on charges of attempted rape for contravening the provisions of Section 55(a) read with sections 1, 3, 55, 56(10, 57, 58, 59, 60 and 61 of the Sexual Offences Act 32 of 2007 (count 1), and robbery (count 2).
- [2] He pleaded not guilty on both charges and did not provide a plea explanation. He was convicted on both counts. On 4 November 2020 he was sentenced to 8 years imprisonment for the attempted rape, and 6 years imprisonment for the robbery. The two sentences were ordered to run concurrently.
- [3] He made an application for leave to appeal in the court a quo against his conviction and sentence in respect of both charges. This appeal is with leave of that court.
- [4] The respondent has opposed the appeal.

Appeal against conviction

- [5] The appellant contends that the trial court erred in finding that the evidence of the complainant was satisfactory in all material respects, particularly in respect of the identity of the appellant.
- [6] In the notice of application for leave to appeal, the appellant contends that the complainant's testimony was initially that she saw the appellant and identified him for the first time next to the police station where the bus was parked. She later testified that she identified the appellant inside the bus stop.
- [7] This, according to the appellant, is a misdirection by the court a quo as it found that the complainant made a proper and reliable observation regarding the identity of the appellant. It was further

the appellant's contention that the as the complainant testified that she was pushed further into the stall and the assailant was holding her by her "ponytail", it is impossible that she was looking at the assailant as she would have been facing away from the assailant.

- [8] The complainant further testified that she identified her assailant when the light from a passing taxi shone on his face. The appellant avers that the light from the taxi would have illuminated only for a second and therefore not sufficient for the complainant to identify him.
- [9] Lastly, the appellant avers that the court a quo erred in finding that the complainant knew the appellant before the incident and therefore her evidence in identifying him was reliable.

- [10] In heads of argument filed on behalf of the appellant, it is contended that the appellant was essentially convicted on the evidence of a single witness, the complainant, as the complainant's co-worker could not identify the assailant, and his evidence was limited to confirming that he came to the complainant's aid to prevent the rape and chased after the assailant. Thus, the appellant contends that the evidence of the co-worker was not relevant to the question of the identity of the assailant.
- [11] The issue of the attempted rape and the robbery were not placed in dispute. What was disputed is the identity of the perpetrator. It is common cause that the appellant did not testify. What the appellant argues in this regard, is that because the trial court considered the complainant to be a reliable witness, it drew a negative inference from the appellant's failure to testify and found that the state had proved the accused's guilt beyond reasonable doubt.
- [12] In this regard, Mr Friedman, counsel for the appellant, submitted that the court a quo was of the view that the complainant's evidence, even considering the cautionary rule, was sufficiently cogent to call for a response from the appellant. However Mr Friedman challenged the fact that the complainant's evidence with regard to the identity of the appellant does not give a clear indication that she told her co-workers that she knew the identity of her assailant, as she repeatedly stated that this "was confirmed by the police officer who was doing nightshift saying that yes it is Godfrey Magele because I saw him when he came out of the police station."
- [13] Mr Friedman further contended that the evidence of the complainant's co-worker, Thabo, created an impression that the complainant did not know her assailant, and that they were hoping that the police would assist them in identifying him. He further averred that the evidence of Papie, the complainant's other co-worker was that the complainant did not mention the appellant's name to them, but only told them that she had been attacked by 'someone' who emerged from the side of the police station.
- [14] It is therefore the appellant's contention that the court a quo failed to consider the implications of this evidence as well as the circumstances under which the appellant was arrested. On the

latter aspect, counsel pointed out that the appellant was only arrested a week after the incident even though the complainant testified that she had identified the appellant to the police and described to them where he lived, although she did not know the street number.

- [15] The appellant further challenged the fact that the state did not call the police officer to testify and confirm his identification. He avers that this was important if regard is had to the evidence of Thabo and Papie that the complainant failed to mention the appellant's name to them. It is the appellant's contention therefore that the court failed to consider the implications of this evidence and the delay in arresting the appellant.

[16] In her evidence, the complainant testified that on the morning of 9 May 2025 at approximately 05h00 she was walking home from work, as she was working night shift the night before. She testified that her co-workers, Thabo and Papie were walking behind her. She decided to walk slowly so that they could catch up with her. When she arrived at the Satellite Police station, she decided to wait for them. She took out a packet of popcorn from her handbag and started eating it slowly. At that point she saw a person coming out from the side of the police station and stood next to the bus. She walked past

the person. This unnamed person then walked behind her and later past her, and turned onto another street. She testified that although she knew who this person was, she acted as if she did not know him. She further testified that started seeing him clearly when he was attacking her. Close to Bakken Primary School, the unnamed person passed her for the second time and ran in front of her. When she arrived at the stalls, the unnamed person grabbed her around her neck from behind, and pinned her with his finger on her neck.

[17] She was unable to speak as this person was pinning her on her throat. He pulled her inside the stalls, took the popcorn packet and spilled the popcorn on the ground. She testified further that she had not recognised who the person was at that stage, contrary to her earlier testimony that she pretended as if she did not know him. A taxi came by, illuminating inside the stalls for approximately two seconds. At that point she realised that the person was the appellant. She testified that she had known the appellant for approximately three years from Tigane where she grew up. The appellant used to be in the company of his brothers, Tshepo and Sini. She further testified that she knew where the appellant stayed.

[18] The complainant further testified that when the taxi approached with its lights shining on them, the appellant was facing the direction where the taxi was coming from and pretended as if he was alone inside the stalls. The light shone on his face, and she could see that he had an injury on his forehead. The appellant took her handbag and put it on his shoulder. He held her by her hair and asked her for Vaseline. After the complainant gave him the Vaseline, he unzipped his trousers and put the plastic from the popcorn and placed on his private part and lubricated with the Vaseline. He put his hand

on her mouth to prevent her from screaming, as he realised that her co-workers were getting closer. He was already holding her pants about to undress her. She bit his hand and screamed telling her co-workers that someone wanted to rape her. When asked why she did not simply tell her co-workers that it was the appellant who wanted to rape her as she testified that she knew the appellant's name, the complainant responded that she was in a state of shock.

[19] After she screamed, she managed to break free from the appellant. The appellant fled, taking the complainant's handbag with him. He complainant's co-workers took chase, and the appellant threw the handbag at a nearby soccer field. Her co-workers went to retrieve the handbag and gave it to the complainant. Thereafter they all went to the police station to report the incident.

- [20] It was further the complainant's evidence that approximately a week later, Mr Botha who was the investigating officer in the matter arrived at her home and asked her to show him where the appellant was staying. She accompanied Mr Botha to the appellant's house where he was then arrested. She testified that she did not go inside the appellant's house with Mr Botha as she was still in a state of shock.
- [21] The complainant further testified that after the attack, she was not able to swallow as her throat was sore from the strangulation.
- [22] During cross examination the complainant testified that she was informed that the reason the appellant was only arrested a week later was that the police could not find him at his house. She further testified that she did not give the police the appellant's address as she did not know the house number but only knew the location of the house.
- [23] Concerning the identity of the appellant, the complainant testified under cross-examination that she did not know the identity of the person who was standing next to the bus as it was dark. She only recognised him when they were inside the stalls as the light from a passing taxi shone on the stalls. In this regard the complainant explained that when the taxi approached, the appellant was facing the street and holding the complainant by her hair, pushing her down. As the taxi approached, she managed to turn and look at the appellant. The appellant then turned her face away, pushing her, as he realised that the complainant was looking at him.
- [24] The appellant contends that there is some doubt about the identity of the complainant's attacker and the appellant ought not to have been convicted. The state bore the onus to prove the guilt of the accused beyond reasonable doubt, and so, it was required to present a comprehensive case so that even without a response from the accused, its onus would have been discharged.
- [25] In opposing the appeal, the respondent contends that the trial court did not misdirect itself, and properly evaluated the issues relating to the appellant's identification and the evidence of the complainant as a single witness. The court accepted her evidence as she was clear on how she identified the appellant and that he was a person who was well known to her. Relying on the provisions of section 208 of the CPA, the respondent argued that "an accused person may be convicted on the single evidence of any competent witness". The respondent thus avers that the appellant was correctly convicted as the state proved the guilt of the appellant beyond reasonable doubt, taking into account the totality of the evidence.
- [26] It is trite that a court of appeal will not lightly interfere with factual findings or conclusions made by the trial court, unless it is satisfied that they are clearly wrong. It is not difficult to understand the rationale behind this deference by the court of appeal. This was articulated in various decisions. In *R v Dhlumayo & Another*[1] the Appellate Division held:

“The trial court has advantages which the appellate court cannot have - in seeing and hearing the witnesses and in being steeped in the atmosphere of the trial. Not only has the trial court had the opportunity of observing their demeanour, but also their appearance and whole personality. This should never be overlooked. The mere fact that the trial court has not commented on the demeanour of the witnesses can hardly ever place the appeal court in as good a position as it was. Even in drawing inferences the trial court may be in a better position than the appellate court, in that it may be more able to estimate what is probable or improbable in relation to the particular people whom it has observed at the trial...The appellate court should not seek anxiously to discover reasons adverse to the conclusions of the trial court. Where the appellate court is constrained to decide the case purely on the record, the question of onus becomes all-important. In order to succeed, the appellant has to satisfy an appellate court that there has been 'some miscarriage of justice or violation of some principle of law or procedure'”.

[27] The trial court was mindful of the cautionary rule in respect of the evidence of a single witness and found the evidence of the complainant to be satisfactory in all material respects. Regard being had to the totality of the evidence and the prevailing circumstances of this matter, it cannot be said that the complainant did not know the appellant. The appellant’s evidence was that she knew the appellant. There is no evidence to gainsay this. There is also no evidence to gainsay that the complainant was able to identify the appellant when the light shone on his face when they were at the stalls. She could identify the appellant.

[28] In *S v Mthethwa*[2] the Appellate Division cautioned that other factors such as inter alia, lighting, visibility, eyesight, proximity, the witness’ opportunity for observation both as to time and situation, and the

extent of prior knowledge must be taken into account and “weighed one against each other, in light of the totality of the evidence, and the probabilities.”

[29] In the peculiar circumstances of this case, the undisputed evidence of the complainant suggests that she and the appellant were in close proximity to each other for quite some time. The court accepted the complainant’s evidence that as she knew the appellant, she was able to identify him within seconds when the taxi shone its lights on his face. We are not perturbed by the discrepancies in the complainant’s evidence in respect of when she realised for the first time that it was the appellant. As we have already found, we do not consider these discrepancies to be material. The fact of the matter is that the complainant had ample opportunity to observe the appellant.

[30] We do not consider the evidence of the appellant’s co-workers that she did not mention the appellant’s name, to be material. The complainant’s evidence was that she knew the appellant and had known him for a couple of years. To our mind, the contradictions in the complainant’s testimony as to when she saw that it was the appellant, are not material.

- [31] It is not the appellant's evidence that the offences were committed by somebody else, and that the applicant was mistaken in stating that it was him. The appellant offered no version, and no evidence to counter the evidence of the complainant. It does not therefore avail the appellant to attempt to poke holes on the evidence of the complainant at this stage of the proceedings. That horse has long bolted.
- [32] To our mind, the trial court properly evaluated all the evidence before it, considered the merits and demerits, and found the evidence of the complainant to be trustworthy and reliable.

Appeal against sentence

- [33] In respect of sentence, the appellant avers that the court a quo erred in imposing a sentence of 8 and 6 years imprisonment in respect of counts 1 and 2, and in not imposing only one term of imprisonment

for both counts as the two offences emanate from one unlawful conduct. He further avers that the court a quo should have ordered that the sentence should run concurrently with the sentence he is currently serving for an unrelated offence for which he is serving a term of imprisonment.

- [34] There is no merit to this argument. The appellant was convicted and sentenced for two offences. In sentencing the appellant, the court a quo took into consideration that the offences required two separate intents. There is no gainsaying this. The offences committed by the appellant are two completely different offences with separate elements. They are unrelated. We agree with the court a quo that each requires a separate intention.
- [35] The court a quo also considered the cumulative effect of the sentences, and the individualisation of punishment. It is trite that the sentence must fit the crime as well as the offender. The court a quo was alive to this. It considered that the appellant was, at the time of sentencing, serving a 12 year term of imprisonment for rape, an offence similar to what he was convicted for in this matter.
- [36] In respect of the concurrency of the sentences, the legal position is that sentencing is pre-eminently within the discretion of the sentencing court. This principle extends to an order whether sentences should run consecutively or concurrently. Section 280(2) states that where several punishments have been imposed, they shall commence... after the expiration... of the other ... unless the court directs that such sentences of imprisonment shall run concurrently.[3]
- [37] The provision applies to sentences imposed by the same court in the same proceedings. It is inconceivable that a court could legitimately usurp the sentencing powers of another court. There is similarly, no merit to this ground of appeal.
- [38] As to the personal circumstances of the appellant, it is contended that the court a quo should have considered that the appellant, at the age of 37, was relatively young at the time the offence was committed, and that he was already serving a lengthy term of imprisonment

at the time of sentencing. These were considered by the trial court. On their own, an accused's personal circumstances do not amount to mitigating circumstances. In any event, whether at the age of 35 as indicated in the record, or 37, the appellant could not be regarded as a callous youth who had no appreciation of the consequences of his conduct.

- [39] We find it difficult to understand the appellant's submission that because he was already serving a 12 year sentence for an unrelated offence, he deserved to be treated with clemency. To the contrary, this should count as an aggravating factor.
- [40] That the complainant sustained no injuries in the attack can only be attributed to the fact that the complainant co-operated with the appellant. In this regard the court a quo further took into account the psychological trauma it caused on the complainant, who as the record shows, was still visibly traumatised despite the incident having occurred some four years earlier. This can simply not benefit the appellant in any manner. The same goes for the fact that all the complainant's belongings were retrieved. The appellant's contention is that these factors were not given sufficient weight by the court a quo, as it overemphasized the seriousness of the offence and the interests of justice. Thus, he contends that the sentence is shockingly inappropriate. There is no correlation between the two.
- [41] In sentencing the appellant the court a quo considered that the appellant committed the offences while he was on parole and was re-admitted to the correctional facility to serve the remainder of his sentence. The trial court further considered that the appellant planned the attack as he watched the complainant over time, proceeding onto a dark street.
- [42] It is trite that a court of appeal will not interfere lightly with the trial court's exercise of its discretion.[4] In *E du Toit et al* Commentary on the Criminal Procedure Act[5], the learned authors note that:

"A court of appeal will not, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court..."[6]

- [43] Regarding the approach to be followed by a court of appeal, the Constitutional Court affirmed in *S v Bogaards*[7] that a court of appeal can only interfere with the sentence imposed by a trial court "...where there has been an irregularity that results in the failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have

imposed it."

- [44] In *S v Pillay*[9] Trolip JA noted:

“... the word ‘misdirection’ in the present context simply means an error committed by the Court in determining or applying the facts for assessing the appropriate sentence. As the essential inquiry in an appeal against sentence, however, is not whether the sentence was right or wrong, but whether the Court in imposing it exercised its discretion properly and judicially... .”[10]

[45] In my view the court a quo did not misdirect itself in any material respect so as to invite interference by this court. In the circumstances, the appeal falls to be dismissed.

[46] In the result the following order is made:

S MFENYANA

JUDGE OF THE HIGH COURT

I agree.

K D RAMOLEFE

ACTING JUDGE OF THE HIGH COURT

APPEARANCES

For the appellant: A Friedman Instructed by: Legal Aid South Africa Mmabatho
friedman@group621.co.za For the respondent: W. P Ndhlovu Instructed by: Director of Public
Prosecutions, Mmabatho wndhlovu@npa.gov.za Date reserved: 18 June 2024 Date of judgment: 27
August 2024

[1] 1948 (2) SA 677 (A).

[2] 1972

(3) SA 766 (A).

[3] Section 280 provides: Cumulative or concurrent sentences (1) When a person is at any trial convicted of two or more offences or when a person under sentence or undergoing sentence is convicted of another offence, the court may sentence him to such several punishments for such offences or, as the case may be, to the punishment for such other offence, as the court is competent to impose. (2) Such punishments, when consisting of imprisonment, shall commence the one after the expiration, setting aside or remission of the other, in such order as the court may direct, unless the court directs that such sentences of imprisonment shall run concurrently.

[3] Section 280 provides:

Cumulative or concurrent sentences

- (1) When a person is at any trial convicted of two or more offences or when a person under sentence or undergoing sentence is convicted of another offence, the court may sentence him to such several punishments for such offences or, as the case may be, to the punishment for such other offence, as the court is competent to impose.
- (2) Such punishments, when consisting of imprisonment, shall commence the one after the expiration, setting aside or remission of the other, in such order as the court may direct, unless the court directs that such sentences of imprisonment shall run concurrently.
- [4] See in this regard: S v Hewitt 2017
- (1) SACR 309 (SCA); and S v Livanje 2020 (2) SACR 451 (SCA).
- [4] See in this regard: S v Hewitt 2017
- (1) SACR 309 (SCA); and S v Livanje 2020 (2)
- SACR 451 (SCA).
- [5] (Jutastat, RS 66, 2021), ch30-p42A.
- [6] See also in this regard: S v Malgas 2001
- (1) SACR 469 (SCA); S v Mathekga and another 2020 (2) SACR 559 (SCA).
- [6] See also in this regard: S v Malgas 2001
- (1) SACR 469 (SCA); S v Mathekga and
- another 2020 (2) SACR 559 (SCA).
- [7] 2013(1) SACR 1 (CC).
- [8] Para 41.
- [9] 1977
- (4) SA 531 (A).
- [10] Para 553E.

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