

SOUTH AFRICA / JUDGMENT

Mahlango v S (A37/2024) [2025] ZAGPPHC 228 (7 March 2025)

[2025] ZAGPPHC 228**COURT**

North Gauteng High Court, Pretoria

BEFORE

M P Motha, Potterill

CASE / FILE NUMBER

A37/2024

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Source record**REPUBLIC****OF SOUTH AFRICA****IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****DIVISION, PRETORIA****Case****Number: A37/2024****(1)****REPORTABLE: NO****(2)****OF INTEREST TO OTHER JUDGES: NO****(3)****REVISED: NO****DATE:**

7/3/2025

SIGNATURE

In

the matter between:

FRANCE

MAHLANGO

Appellant

and

THE

STATE

Respondent

JUDGMENT

MOTHA, J

Introduction

[1] Following his conviction on two counts of rape read with the provisions of s 51(1) of the Criminal Law Amendment Act 105 of 1977, the appellant was sentenced to two life imprisonment terms. The appellant has an automatic right of appeal against the sentence. However, during the hearing, the appellant's counsel proffered that the conviction and sentence of the appellant on count 1 were well-founded and cannot be disturbed. Accordingly, this court is seized with the conviction and sentence on count 2.

Grounds of appeal**On conviction**

[2] The appellant's grounds of appeal can be summarised as follows:

- That the learned Magistrate erred in finding that the State had proven its case beyond reasonable doubt.
- That the learned Magistrate erred in finding that the appellant's version was not reasonably possibly true.

On sentence:

- That the learned Magistrate's imposition of the sentence of life imprisonment is strikingly and shockingly inappropriate in that it is out of proportion to the accepted mitigating factors.
- That the learned Magistrate disregarded time spent by the appellant awaiting trial.
- Furthermore, that the court erred in not finding that substantial and compelling circumstances existed which justified a deviation from the prescribed minimum sentence.

The versions in brief

[3] In proving count 2, the state called a 10-year-old boy-child to the stand. He testified that the appellant invited him and a 10-year-old girl-child into his shack. Once they were inside the shack, he closed the door and switched off the globe. He undressed the 10-year-old girl-child's trousers and put his penis on her anus. He said that it was not going through. Under cross-examination, the boy-child testified that the appellant inserted his penis into the girl-child's vagina. Once the appellant was finished with the girl-child, he testified that the appellant tried to put his penis inside his anus, but it did not go in. After giving them money, the appellant allowed them to go.

- [4] To the stand, the state called the girl-child, who corroborated the boy-child's testimony. She testified that the appellant inserted his penis into her anus and did the same to the boy-child's anus.
- [5] The appellant testified that he treated the kids as his children, and they used to help him with cleaning the salon. He denied sexually molesting or raping the children. He suspected that Mzwandile was behind these lies because Mzwandile dated the appellant's ex-lover.

Ad count 2

- [6] The appellant's appeal against count 2 pivots around the word "sexual penetration". Faced with a similar situation, the court in the matter of *Matyala v S*[1] held:

"The thrust of the appellant's attack against the conviction before this court concerned the question of whether the state had proven beyond reasonable doubt that there had been penetration to constitute the offense of rape. In this regard, the appellant's counsel relied heavily on Dr Zikalala's inconclusive findings. However, section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 provides that "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". In addition "sexual penetration" is defined as "any act which causes penetration to any extent whatsoever by - (a) the genetical organs of one person into or beyond the genetical organs, anus, or mouth of another person". Therefore the fact that there were no visible injuries in the private organs of the two minor children on its own, does not help the appearance cause any penetration no matter how slight constitutes sexual penetration, and therefore rape. The expanded definition in terms of SC3 is applicable to all forms of sexual penetration without consent."[2]

- [7] Relying on the evidence presented in court, the appellant submitted that the state did not prove its case beyond a reasonable doubt that penetration had occurred. The evidence relied on reads:

- [8] The boy-child testified that:

"He tried to put his penis on my anus then I said it is not going through."

- [9] The prosecutor asked the following:

"And then what happened?"

- [10] The boy-child answered:

"I also told him that it is not going in or through, so it is not possible"

- [11] The prosecutor:

"And what happened then?"

- [12] The boy-child said:

"Then, your worship, it did not happen. And then he left us, and we wear our trousers."

[13] The assertion that there was not any penetration must be measured against the decided cases on this aspect. In the matter of ICS v The State[3], the court held:

“Dr Van Wyk’s testimony to the effect that because the complainant’s hymen was intact, she had never been penetrated was disputed by Dr Sommerville. Dr Sommerville testified that the hymen would not necessarily be torn after penetration because it will depend on the extent of the penetration. In any event, Dr Van Wyk did not testify about sexual penetration as defined in our law. Even under the common law, when rape was narrowly defined as penile penetration of the vagina without consent, the slightest form of penetration was sufficient to prove penetration. ‘Sexual penetration’ is defined in the Act as, inter alia, including any act which causes penetration to any extent whatsoever by any other part of the body of the person into or beyond the genital organs or anus of another person. It is clear from the definition that the slightest form of penetration is enough to constitute penetration. Penetration certainly does not mean that the hymen must be torn as Dr Van Wyk testified. Dr Van Wyk’s opinion is clearly untenable and was correctly rejected”

[14] From the case law, it is patent there need not be any injuries to conclude that there was penetration. Therefore, the fact that the J88 form of the boy-child reflected no anal injuries is of no moment and, in and of itself, does not prove that there was no penetration. The reality is that this court is confined to the evidence before it. When examining the aforementioned verbal exchange, can this court conclude that there was penetration, however, slightly? Penetration is not understood to mean the touching of any other part of the body

of a person to the genital organ of another. Penetration involves going into or beyond the genital organ, even in the slightest form. The state must prove beyond a reasonable doubt that there was penetration.

[15] I am alive to the fact that the state does not need to prove its case beyond a shadow of all doubt. As it was stated in State v Ntsele 1998 (2) SASV 178 at page 182 b. However, the state bears the onus, not the appellant. In the matter of S v V,[4]the court stated that:

“It is the right that there is no obligation upon an accused person, where the State bears the onus, ‘to Convince the court’.

If his version is reasonably possibly true, he's entitled to his acquittal even though his explanation is improbable. A court is not entitled to convict unless it is satisfied not only that the explanation is improper but that beyond any reasonable doubt it is false.”[5]

[16] The boy-child testified that it was not going in or through. I am of the view that the state did not prove the offence of rape beyond a reasonable doubt. In the result, the court a quo misdirected itself in concluding that the state had proven its case on count 2 beyond a reasonable doubt. I am in full agreement with the submission of the appellant’s counsel that the court a quo should have returned a guilty verdict of attempted rape, a competent verdict. Counsel for the respondent submitted that the evidence

accepted by the trial court on count 2 proves attempted rape. Consequently, the verdict of rape is set aside, and the appellant is found guilty of attempted rape on count 2.

Sentence

[17] In mitigation, the appellant submitted the following factors:

- He is a Mozambican national and was 39 years old at the time of sentencing.
- He has two younger siblings.
- Both his parents are still alive but divorced.
- He was raised by his mother.
- He dropped out of school in an unspecified grade due to financial problems.
- He is married and has four children who are aged 18, 15, 13, and 7.
- He is a first-time offender.
- He was kept in custody awaiting trial for 2 years and 6 months.
- He was self-employed as a hairdresser.

[18] Addressing this very issue of personal circumstances in serious cases, the court in *Vilakazi v The State*[6] held:

“The personal circumstances of the appellant, so far as they are disclosed in the evidence, have been set out earlier. 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. But they are nonetheless relevant in another respect.”[7]

[19] To strike a balance, this court must consider the aggravating factors too. It is not without significance that the appellant’s victim was a 10-year-old child. Being in a position of authority as an adult, a businessman, and a male figure, he was supposed to help protect, and not harm, the child. The victim impact report is most worrying because it indicates that the child cries and becomes very angry when he thinks of the incident. He has turned into an aggressive and stubborn person. This has affected his academic performance. The appellant abused the trust that the parents of the child placed in him.

[20] In passing down a sentence, this court is guided by the principles stated in the well-known and often-quoted case of *S v Rabie*,[8] where the court said:

“Punishment should fit the criminal as well as the crime be fair to society and be blended with the measure of mercy according to the circumstances.”[9]

[21] Little has changed in the 50 years since Rabie, the main purpose of punishment remains the following: deterrent, preventative, reformative and retributive. Finally, in imposing a sentence on count 2, I am mindful of what was said in *State v Borgaards* [10] at para 41:

“Ordinarily, sentencing is within the discretion of the trial court. An appellate court’s power to interfere with sentences imposed by courts below is circumscribed. It can only do so where there has been an irregularity that results in a 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. A court of appeal can also impose a different sentence when it sets aside a conviction in relation to one charge and convicts the accused of another.”

[22] Having set aside the conviction of rape in count 2, I am of the view that a sentence of 10 years direct imprisonment for count 2 is appropriate. It is trite that this sentence will be subsumed by and will run concurrently with the life sentence on count 1.

M. P. MOTHA

JUDGE OF THE HIGH COURT

PRETORIA

I CONCUR

POTTERILL

For the Appellant: Adv. J. L. Kgokane instructed by Legal Aid South Africa For the Respondent:

Adv. E. Mafunisa instructed by DPP Date of appeal: 4 March 2025 Date of judgment: 7 March 2025

[1] 2015 ZAGPPHC 52 (30 January 2015).

[2] Supra para 13.

[3] 2022 ZASCA 108 (15 JULY 2022)

[4] 2000(1) SACR 453

[5] Supra para 455 b

[6] (576/07)

[2008] ZASCA 87

[7] Supra para 58

[8] 1975

(4) SALR 855 (SCA)

[9] 862 G-H,

[10]

[2012] ZACC 23

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