

SOUTH AFRICA / JUDGMENT

Mahlangu v S (A7/2021) [2021] ZAGPPHC 702 (26 October 2021)

[2021] ZAGPPHC 702

COURT

North Gauteng High Court, Pretoria

BEFORE

H.M.S. Msimang, R. Strydom

CASE / FILE NUMBER

A7/2021

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES

26 October 2021

CASE NO.: A7/2021

In the matters between:-

MTHETHWA JOHANNES MAHLANGU

Appellant

And

THE STATE

Respondent

JUDGMENT

MSIMANG, AJ

- [1] The appellant was arraigned and convicted on the 7th June 2012 in the Pretoria Regional Court on a count of Rape read with the provisions of Section 51(1) of the Criminal Law Amendment Act[1] and further read with the provision of Section 94 of the Criminal Procedure Act[2] and one account of Assault.
- [2] He was sentenced to 18 years imprisonment for the rape which occurred on the 5th November 2005 and 4 months imprisonment for the assault on the same date. The court ordered that a non-parole period of 10 years and nine months will be effective on the rape charge and that the sentence for assault will run concurrently with the rape.
- [3] The appellant, who was legally represented at the trial, obtained leave from the court a quo to appeal against the conviction and sentence.

THE CHARGES:

- [4] He was charged with the following: -

4.1 Count One:

Rape of B[....] C[....] M[....] a 14 year old minor during an unknown date in October 2005 – read with the provisions of Section 51(1) of the Criminal Law Amendment Act, (Act 105 of 1997 and Section 94 of the Criminal Procedure Act, Act no 51 of 1997.

4.2 Count Two:

Rape of B[....] C[....] M[....] a 14 year old minor on the 5th November 2005 – read with the provisions of Section 51(1) of the Criminal Law Amendment Act, Act 105 of 1997 and Section 94 of the Criminal Procedure Act, Act no 51 of 1997.

4.3 Count Three:

The assault of B[....] C[....] M[....] on the 5th November 2005.

The appellant was convicted on counts 2 and 3.

THE FACTS:

- [5] The complainant, B[....] C[....] M[....], a 14 year old minor was allegedly raped by the appellant, her step-father, during an unknown date in October 2005 and on the 5th November 2005. When the trial commenced in February 2008 she was 18 years old and was in Grade 10.
- [6] The complainant testified that during October 2005, she was not certain of the date, she was at home in Mamelodi West. Her mother was not at home and her younger siblings were at their grandmother's place. She went to fetch water and upon her return the appellant shouted at her for having taken too long to fetch water. He asked her to accompany him to buy beers and dagga. Along the way he asked her if she had a boyfriend and she responded that she had none. He then asked her if she does not want him to teach her how to propose love. She responded that she is not interested and she will learn in her own time and when

she is ready to do so.

- [7] They went home where he sat outside drinking the beer and smoking dagga. He asked her to bring him a newspaper. He started to assault her with an open hand accusing her of being disrespectful and he threw water over her. He ordered her to wash and change her wet clothes. Whilst taking off her clothes to wash he called her. At that time she was only wearing her panties. He ordered her to lie on the sponge and to remove her panties in order for him to see if she was ready to “jol” and to make love.
- [8] He told her not to tell anybody as he would kill her. He showed her a knife which, according to her, he always used when threatening to kill her and her mother where after he would throw them into a toilet pit. As she lay on the sponge he ordered her to open her legs. He applied campher cream on her vagina, went on top of her and raped her. Thereafter he ordered her to stand up and go and wash. She did not tell her mother of the incident because of the threats but she did mention to her that the appellant was abusing her.
- [9] The complainant further testified about the incident that took place on the 5th November 2005. She testified that during the 5th November 2005 she was at home with her mother and her two siblings. They were asleep when the appellant arrived at night. He knocked on the door so hard that they were scared. He forced the door open. He then awoke the complainant and her mother and said they were as good as dead.
- [10] Her mother inquired why and he ordered her to keep quite. She obeyed, started crying and tried to go to the toilet. He prevented her from going to the toilet. The complainant then enquired from her mother why she was crying and he ordered the complainant not to make any enquiries. He started shouting. He left the house to buy two Blacklabel beers and upon his return he drank the beer.
- [11] He told the complainant to pack her clothes and leave his house. He accused the complainant of having slept with Prince and Themba. He forced her to admit same and assaulted her by hitting her on the face. He hit her several times and she cried. She testified that he hit her as if he was hitting and kicking a person of the same age as him.
- [12] She managed to get out of the house, and ran to the partially completed outside room. The appellant followed her, held her and continued assaulting her. She fell down and he removed her panty and skirt, and used his hand to cover her mouth. He got on top of her and raped her. He thereafter said he is going to the house to get something to kill her with. She understood that to mean the knife he always used to threaten them with. She got a chance to run away to the neighbour’s house.
- [13] She was assisted by the neighbour’s husband who took her in and called his wife who was already asleep. She told the neighbour’s wife what happened particularly that the appellant raped her. The neighbours took her to the police to report the rape. Thereafter she was taken to Mamelodi Day Hospital where she was examined by a medical doctor.

- [14] The complainant's mother, Ms M[....] J[....] M[....], corroborated the evidence of the complainant particularly that the appellant assaulted her alleging that she was disrespectful. She denied that the complainant was disrespectful. She testified further that the complainant never came home late but in instances where she would attend school sporting activities that would necessitate her coming home late she always reported that she would come home late.
- [15] Dr Geetha Vijayah completed the J88 that was handed in. He examined the complainant on the 6th November 2005 at Mamelodi day Hospital. He testified that there were no physical injuries noted on general examination. On gynaecological examination he noted redness around the urethra, the labia majora and minora as well as the posterior fourchette were normal. The hymen was ruptured with old tears at two o'clock and six o'clock position which is most probably consistent with forceful penetration. There were fresh tears at four o'clock and nine o'clock positions. The doctor's conclusion was that there was vaginal penetration.
- [16] The court called witness M[....] M[....] who testified that on the 5th November 2005 at approximately 22h00 or 22h30 she and her husband heard a noise. When they went to investigate they found a child (the complainant) sitting outside on a trolley. It was a rainy day. They let the complainant into their home. She only had a skirt on and was shivering. She was wearing no top. She was crying and unable to explain. She calmed her down. The complainant told her that she had been raped and needs to be accompanied to the police station. She gave the complainant clothes, an orange T-shirt and a maroon tracksuit to put on. She, her husband and neighbour A[....] M[....] took her to the Police Station to report the incident.
- [17] The appellant testified in his defence. He admitted hitting the complainant but alleged that it was with a belt. He said she was disrespectful because her mother complained that when he was not around she came home late. He denied that he raped her in October and November. He testified further that the complainant left the house on the 5th November 2015 at night. He went out to look for her and could not find her and he returned to the house. He denied all allegations about the assault of the complainant in October and the rape. He also denied that he followed the complainant out of the house on the 5th November where he repeatedly assaulted and raped her. He basically denied all the allegations against him.

THE APPEAL

- [18] The appellant brought this appeal on the basis that the trial court erred in finding that the state proved its case beyond reasonable doubt. He further submitted that the trial court misdirected itself in finding that the contradictions in the state case were not material and submitted that the appellant's version was reasonably possibly true.
- [19] The thrust of the arguments made on behalf of the appellant were:

19.1 That the complainant was 14 years old in 2005 when the crime was committed and, notwithstanding the fact that, she was 18 years when she testified, the court ought to have exercised caution when dealing with her evidence in all material respect and;

19.2 That her evidence was not clear and satisfactory in all material respects;

19.3 Her evidence was not corroborated by other state witness.

THE LAW

[20] The appellant relied on the following authorities which succinctly set up the legal requirements in such matters:

S v Hanekom[3]

“So in evaluating the evidence of a single witness who is also a child, our courts have laid down certain general guidelines which are of assistance when applying the cautionary rules. In such a case:

- (a) A court will articulate the warning in the judgement, and also the reasons for the need for caution in general, and with reference to the particular circumstance of the case.
- (b) A court will examine the evidence in order to satisfy itself that the evidence given by the witness is clear and substantially satisfactory

in all material aspects.

- (c) Although corroboration is not a prerequisite for a conviction, a court will sometimes, in appropriate circumstances, seek corroboration which implicates the accused before it will convict beyond reasonable doubt.
- (d) Failing corroboration, a court will look for some feature in the evidence which gives the implication by a single child witness, enough of a hallmark of trustworthiness to reduce, substantially, the risk of a wrong reliance upon her evidence.”

[21] Woji v Santam Insurance Co Ltd[4]

“Trustworthiness, as is pointed out by Wigmore in his Code of Evidence para568 at 128, depends on factors such as the child’s power of observation, his power of recollection, and his power of narration on the specific matter to be testified. In each instance the capacity of the particular child is to be investigated. His capacity of observation will depend on whether he appears “intelligent enough to observe”. Whether he has the capacity of recollection will depend again on whether he has sufficient years of discretion “to remember what occurs” while the capacity of narration or communication raises the question whether the child has “the capacity to understand the questions put, and to frame and express intelligent answers.”

[22] S v Sauls and Others[5]

“There is no rule of the thumb test against or formula to apply when it comes to a consideration of the credibility of a single witness (see the remarks of Rumpff JA in S v Webber 1971 (3) SA 754 (A) at 758). The trial Judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told”

THE ARGUMENTS

[23] It was argued that the complainant contradicted herself in the following respect:

23.1 She testified that the appellant took off her pants as well as her panty and raped her.

23.2 Whereas the neighbour testified that when they took her in she was only wearing a “skirt”.

[24] The complainant never testified that she was wearing pants that night. Her evidence was that she was wearing “a skirt” or “’n romp”. She testified that:

“Hy het na die slaapkamer toe gegaan. Ek het net die romp gevat en ek het uitgegaan met net die romp”

Counsel for the appellant conceded this.

[25] It was further argued that she contradicted herself when she testified that she went to knock at the neighbour’s door when in fact the neighbours heard a noise and when they investigated they found her sitting on a trolley next to the corrugated iron outside.

[26] The evidence of the noise actually corroborated the evidence of the complainant. She testified that appellant assaulted her and thereafter she ran away and knocked at the neighbour’s door. The source of the noise that the neighbour heard could have been either the assault or when she knocked at the door. On the contrary, the evidence of the appellant is that he went outside to look for her and returned when he could not find her.

[27] The argument that the evidence of the complainant was not corroborated is without substance. The testimony of the complainant was corroborated as follows:

27.1 The mother of the complainant corroborated her evidence that the appellant assaulted her on the 5th November 2005 by slapping and kicking her. She denied that the child was disrespectful and arrived late from school when the appellant was not around. She further testified that he raped in the other room.

27.2 Dr Vijayan examined the complainant on the 6th November 2005 and confirmed his findings in his evidence in chief particularly that the injuries sustained by the complainant were consistent with forceful sexual intercourse. He further testified that the hymen was ruptured which was consistent with the previous rape of October 2005.

27.3 The neighbour Ms M[...] corroborated the evidence of the complainant that when she took her into her house she only had a “skirt” on and she told her that she was raped by the appellant.

- [28] It was further argued on behalf of the appellant that the evidence of the complainant was not clear and satisfactory in all material respects. However, there is nothing in her evidence which is unsatisfactory. Her testimony was never challenged in any material respect. She was 14 years old when the offence was committed and her evidence was corroborated by the neighbour, her mother and the medical doctor.
- [29] She testified that the appellant is the only father she knows. She acknowledged that he was responsible for bringing her up and had no reason to falsely implicate him in the rape case.

THE CONVICTION

- [30] The court in evaluating the evidence took into account the fact that at the time of the commission of the offence the complainant was a 14 year minor child and that her testimony should be approached with caution particularly in that she could be susceptible to undue influence.
- [31] The court also considered the fact that this was a case of rape involving a minor child and a single witness which should be approached with caution. The court was cognizant of the fact that there may be some criticism of the evidence but was nevertheless satisfied with the evidence of the complainant, the independent witness and the medical doctor.
- [32] The court made the observation that the swift action of the neighbours by letting the complainant into their home is the answer why the parents could not find her when they went looking for her. It found it strange that the appellant accused the minor child of having sexual intercourse with Themba on the previous occasion and that she was actually raped on the same night of his return.
- [33] The court correctly rejected the version of the appellant. The appellant was correctly convicted and there is no reason for this court to interfere with the conviction.

THE SENTENCE

- [34] Ms Baloyi argued for the appellant that the court misdirected itself when making an order that the appellant not be released on parole until he has served 10 years and nine months of the imposed sentence of 18 years imprisonment.
- [35] She conceded that rape is a very serious offence, that the complainant was 14 years old at the time of the offence and that the prescribed minimum sentence of life imprisonment was applicable.
- [35] It is trite law that the imposition of sentence is primarily a matter for the discretion of the trial court and that the Court of Appeal may only interfere with the sentence imposed where it is disturbingly inappropriate or totally out of proportion to the gravity or magnitude of the offence or sufficiently disparate or vitiated by misdirection's of a nature, which shows that the trial court did not exercise its discretion reasonably[6].
- [36] In *S v Matyityi*[7] the court held that:

“one notices all too frequently a willingness on the part of sentencing courts to deviate from the minimum sentences prescribed by the legislature for the flimsiest of reasons – reasons, as here, that do not survive scrutiny. As Malgas makes plain courts have a duty, despite any personal doubts about the efficacy of the policy or personal aversion to it, to implement those sentences. Our courts derive their power from the Constitution and like other arms of state owe their fealty to it. Our constitutional order can hardly survive if courts fail to properly patrol the boundaries of their own power by showing due deference to the legitimate domains of power of the other arms of state. Here parliament has spoken. It has ordained minimum sentences for certain specified offences. Courts are obliged to impose those sentences unless there are truly convincing reasons for departing from them. Courts are not free to subvert the will of the legislature by resort to vague, ill-defined concepts such as ‘relative youthfulness’ or other equally vague and ill-founded hypotheses that appear to fit the particular sentencing officer’s personal notion of fairness.”

- [37] In *S v Rabie*[8] it was stated that punishment should fit the criminal as well as the crime, be fair to the society and be blended with a measure of mercy accordingly to the circumstances. Corbett J A stated:

“A judicial officer should not approach punishment in a spirit of anger because, being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interests of society which his task and the object of punishment demand of him. Nor should he strive after severity; nor, on the other hand, surrender to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with humane and compassionate understanding of human frailties and the pressures of society which contribute to criminality. It is in the context of his attitude of mind that I see mercy as an element in the determination of the appropriate punishment in the light of all the circumstance of the particular case”

- [38] It was conceded on behalf of the appellant that the court a quo was satisfied that “substantial and compelling circumstance” in terms of section 51(3)(a) of the Amendment Act existed justifying the court to impose a lesser sentence than the prescribed sentence.
- [39] Notwithstanding such concession Ms Moloi argued that the court misdirected itself in making an order that the appellant not be released on parole until he had served 10 years and nine months of the imposed 18 years imprisonment sentence. She has already conceded that the offence of rape is very serious and more so that the complainant was 14 years at the time of the incident.
- [40] She relied on section 276B of the Criminal Procedure Act “the Act” of section 276B which states the following:

“Fixing of non-parole period

40.1(a) If a court sentence a person convicted of an offence to imprisonment for a period of two years or longer, the court may as part of the sentence, fix a period during which he person shall not be placed on parole.

- (b) Such a period shall be referred to as the non-parole period, and may not exceed two thirds of the term of imprisonment imposed or 25 years, whichever is the shorter.

40.2 If a person who is convicted of two or more offences is sentenced to imprisonment and the court directs that the sentences of imprisonment shall run concurrently, the court shall, subject to subsection (1) (b), fix the non-parole-period in respect of the effective period of imprisonment.”

[41] Ms Moloi submitted that there were no exceptional circumstance that imperatively called for the trial court to invoke the provisions of section 276B of the Act. Her argument was that trial court failed to consider the following facts: -

41.1 The time spent awaiting trial;

41.2 There are prospects of rehabilitation;

41.3 The age of the appellant;

41.4 The appellant was gainfully employed;

41.5 He was the sole bread winner.

[42] She argued that the court should not have fixed the non-parole period and that same should have been left to be decided by the Department of Correctional Services. She relied on the following authorities:

S v Stander[9]

“Despite the fact that S 276B grants the power to venture onto the terrain traditionally reserved to the executive, remains generally desirable for a court not to exercise that power.

An order in terms of S 276B should therefore only be made in exceptional circumstances, when there are facts before the sentencing court that would continue, after sentence, to result in a negative outcome for any future decision about the parole”.

S v Mahlakaza & Another[10]

“The function of a sentencing court is to determine the maximum term of imprisonment a convicted person may serve. The court has no control over the minimum or actual period served or to be served... The lack of control of courts over the minimum sentence to be served can lead to tension between the Judiciary and the Executive because the executive action may be interpreted as an infringement of the independence of the Judiciary.”

S v Jimmale & Another[11]

“The order should be made only in exceptional circumstances, which can be established by investigation of salient facts, legal argument and sometimes further evidence upon which a decision for non-parole rests. In determining non-parole period following punishment, a court in effect makes a prediction on what may well be inadequate information as regards to the probable behaviour of the accused. Therefore, a need for caution arises because a proper evidential basis is required.”

- [43] The anomaly in Ms Moloi’s argument is that she conceded that the court established that special circumstances existed to enable it to deviate from applying the prescribed minimum sentence. However, when the court establishes exceptional circumstances to invoke the provisions of section 276B of the Act she finds that unacceptable.
- [44] The court has a discretion whether to invoke the provisions of section 276B and this discretion has to be judicially exercised in accordance with principles of fairness and justice.

S v Mhlongo[12]

Mocumie J A stated that the effect of section 276B non-parole order

“Its effect is to ultimately restrict the liberty of a person who is sentenced to a term of imprisonment, since such a person cannot be released on parole, or correctional supervision, until the expiry of the non-parole period. The fixing of a non-parole period entails the exercise of a discretion vested in a court which, like all discretionary powers, must be judicially exercised. Especially in criminal matters where the liberty of a person is at stake, it must be exercised judiciously and in accordance with principles of fairness and justice.”

- [45] The court considers the nature of the offence, the circumstances and the legal duty of the person committing the offence and other factors such as the lack of remorse. In this matter the appellant was the step-father of the complainant and he betrayed that position of trust.

S v Pakane and others[13]

Maya JA states:

“The serious nature of the offence, especially when committed by a police officer who has a legal duty to protect the public, and his lack of remorse, amply demonstrated by his iron resolve to conceal the truth to the bitter end - from the elaborate steps he took to cover up and hamper police investigations; the shooting of the deceased in the head of which, if not perpetrated by him, he was nonetheless aware and should have prevented, especially as the leader of the mission; knowingly and silently watching innocent people languish in jail for years for a crime he committed; the false statements made to the magistrate and police disciplinary tribunal; and giving false testimony in court.”

- [46] The court a quo did consider the provisions of S276B and section 73(6)A of the Act 111 of 1998. The learned magistrate stated the following on page 523 of the record:

“Die Hof het ‘n diskresie ingevolge Artikel 276(B) van die Strafproseswet sowel as die Artikel 73(6)(A) van die Wet op Korrektiewe Dienste van 1998 om die nie-parool periode die standard nie-parool periode van die helfte te vermeerder tot en met twee derdes. Die Hof is van mening dat in hierdie geval in die lig van al die faktore, die omstandighede van hierdie saak veral in die lig van al die faktore, die omstandighede van hierdie saak veral die verswarende omstandighede rondom hierdie verkragting, die feit dat die slagoffer se beskuldigde se stiefdogter was dat hy dan in ‘n vertrouensposisie was, dat sy moes veilig voel by hom en in stede het hy haar verkrag”

[47] I am accordingly of the view that the trial court considered all the factors in this matter and that the magistrate exercised his discretion judiciously and in accordance with the principle of fairness and justice, consequently, there is no reason to interfere with either the conviction or sentence of the court a quo. The appeal should fail.

ORDER

In the premises, I propose the following order:

1. The appeal is dismissed.

H.M.S. MSIMANG AJ

ACTING JUDGE OF THE GAUTENG DIVISION, PRETORIA

I agree and it is so ordered.

R. STRYDOM J

JUDGE OF THE GAUTENG DIVISION, PRETORIA

Heard on: 12 AUGUST 2021

For the Appellants: Ms M.B. MOLOI

Instructed by: LEGAL AID

For the Respondent: ADV S SCHEEPERS

Instructed by: THE STATE ATTORNEY

Date of Judgment: 26 OCTOBER 2021

[1] Act no 105 of 1997

[2] Act no 51 of 1977

[3] 2011 (1) SACR 430 (WCC) at 435e-h

[4] 1981 (1) SA 1021 (A) at 1028A-D

[5] 1981 (3) SA 172 (A) at 180E-F

[6] S v Saltzwedel and Others 1999 (2) SACR 586 (SCA) at 591f-g

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- [7] 2011(1)SACR 40 (SCA) at 53c-g
- [8] 1975(4) 855 AD at 866A-C
- [9] 2012(1) SACR 537 SCA of paragraph 12 and 16
- [10] 1997(1) SACR 515 SCA at 521
- [11] 2016(2) SACR 691 CC at 696d-e
- [12] 2016 (2) 611 SCA at 614e-f
- [13] 2008 (1) SACR 518 SCA at 535c-e
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