

SOUTH AFRICA / JUDGMENT

Makala v S (A114/2022) [2023] ZAFSHC 283 (24 July 2023)

[2023] ZAFSHC 283**COURT**

Free State High Court, Bloemfontein

BEFORE

Naidoo, Mahlangu

CASE / FILE NUMBER

A114/2022

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA,****FREE****STATE DIVISION, BLOEMFONTEIN****Reportable:**

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APPEAL

NUMBER: A114/2022

In

the matter between:

SIMON

SEHLOHO MAKALA APPELLANT

and

THE

STATE RESPONDENT

HEARD

ON: 27

FEBRUARY 2023

CORAM:

NAIDOO,

J et MAHLANGU, AJ

JUDGMENT

BY: NAIDOO, J

DELIVERED ON: 24 JULY 2023

- [1] The appellant was convicted on 15 September 2020 on one count of Rape, in the Odendaalsrus Regional Court. He was sentenced on 29 October 2020 to life imprisonment. The appellant approaches this court in terms of his automatic right of appeal, and the appeal lies against both his conviction and sentence. Ms S Kruger appeared for the appellant and Mr WJ Harrington for the respondent (the state).
- [2] The Appellant's grounds of appeal against the conviction and sentence are, in essence, that the court a quo erred in:
- 2.1 finding that the state had proved its case beyond reasonable doubt;
 - 2.2 not properly analysing and evaluating the evidence of the state witness;
 - 2.3 finding that the state witness gave her evidence in a satisfactory manner;
 - 2.4 rejecting the appellant's evidence as not being reasonably possibly true;
 - 2.5 attaching too much weight to the factors in aggravation (of sentence), such as the seriousness of the offence and the interests of society;
 - 2.6 not attaching any weight to the appellant's personal and mitigatory circumstances, in finding that no substantial and compelling circumstances exist to justify deviating from the imposition of the minimum sentence of life imprisonment, which is shockingly inappropriate and out of proportion.
- [3] It is perhaps useful to sketch a brief background relevant to this matter. The complainant was at a tavern with her boyfriend and a female friend of hers, called Zonke. The complainant's boyfriend indicated to her that he was leaving. Shortly thereafter she received a call, on her mobile telephone, from her uncle and went outside to answer the call. While she was still talking on the telephone, the appellant approached her and asked who she is talking to. The appellant is her ex-boyfriend, the relationship between them having ended a few months prior to this incident. She told him that she was talking to her uncle and even showed him her mobile telephone. He then began assaulting her by throwing stones and empty bottles at her. As a result, she suffered lacerations to her back, which were bleeding.
- [4] The appellant then said that they were going to his place of residence and pulled her forcibly away. The people present at the tavern, including her friend Zonke, were too scared to intervene. Zonke called the complainant's stepfather. It seems that at some stage her stepfather and uncle were present at the tavern when the appellant assaulted the

complainant, but they did not intervene, nor did they try to stop the appellant from abducting the complainant from the tavern. The appellant dragged the complainant along until they reached his residence, where he asked her to undress. He then raped her, after which he went outside. While he was outside, she found a shoebox that she had left at his house. Inside the shoebox, she found a firearm and some ammunition. She “stole” one bullet and put it in her pocket. Thereafter they slept until 6h00 the next morning.

[5] When they awakened, he raped her again. At 7h30 she wanted to go home. The appellant gave her a T-shirt to wear as hers was blood-stained. He then walked her halfway home. When she got home, she narrated the story to one Zanele. The latter accompanied the complainant to the police station where a charge was opened against the appellant. She was taken for a medical examination which was performed by a nurse. The medical report (J88) completed by the nurse was handed in as an exhibit, with the consent of the appellant. The J88 indicated injuries, being a fresh 2,8 cm cut and fresh “barrel line” bruises, on the complainant’s back, and the gynaecological examination revealed no visible injuries. The conclusion of the nurse was that the absence of injuries does not rule out vaginal penetration.

[6] The appellant’s version is that at the time relevant to this matter, he and the complainant were in a love relationship and had been for approximately eight months before the incident. On the night in question, he and the complainant were at a tavern. He went outside, and a woman walked out behind him. The complainant followed him out and accused him of having a relationship with that woman. A fight ensued between them, and they were throwing empty beer bottles at each other. The complainant’s father

intervened and said the appellant should leave with the complainant, which they did. They went to his house, where the complainant showed him her injuries. He heated some water and cleaned her wounds. They then went to bed and had consensual sexual intercourse. The next morning, which would have been 27 January 2019, he accompanied the complainant to town, and left her at another woman’s house.

[7] The appellant also testified that after he returned home, the complainant arrived with the police, alleging that he was in possession of firearm and ammunition. The police searched his house but found nothing. They alleged that the complainant had brought ammunition to the police station. He was arrested and taken to court, where he was released. On 29 January 2019, he was arrested again, this time for rape, which culminated in the trial of this matter.

[8] Ms Kruger stood by the submissions in the Heads of Argument on behalf of the appellant. The argument for the appellant is that the court failed to properly assess the evidence in its totality and to take proper account of the discrepancies and contradictions in the state’s case. The complainant and appellant were the only witnesses for the state and appellant respectively. As properly acknowledged by both parties, the state bears the onus to prove its case beyond reasonable doubt, while there is no such duty on the appellant to prove his case.

- [9] The parties accept that the trial court was faced with two mutually destructive versions. It was pointed on behalf of the appellant that the complainant's statement to the police spoke of being raped once, whereas in her viva voce evidence, she indicated that the appellant raped her twice. She explained this by alleging that there was a language barrier between her and the police official who took her statement. The rest of her statement appeared to be an accurate reflection of what she said to the police official, as there were no allegations to the contrary. At least six other witnesses could have been called to corroborate the complainant's version, namely her friend Zonke who was with her at the tavern and allegedly tried to intervene when the appellant assaulted the complainant, the complainant's boyfriend, Kabelo, the complainant's stepfather and uncle, whom she said witnessed the assault and kidnap, Zanele, to whom she reported that the appellant had raped her and the police official who recorded her statement.
- [10] The appellant asserted that the court erred in finding that the discrepancies were not material, especially as the complainant was a single witness, whose testimony was not clear and satisfactory in all material respects. The court also erred in rejecting the appellant's version. The submission on behalf of the appellant is that the appeal against conviction and sentence should be upheld.
- [11] The state in its Heads of Argument set out candidly and extensively what it saw as the discrepancies in the evidence of the complainant. The state raised a number of the same issues raised by the appellant. With regard to the alleged second rape, it was pointed out that neither the statement to the police nor the J88 makes mention of the second rape, and that the contents of both documents were narrated by the complainant. The state clearly regarded the explanation in respect of both documents as improbable. The failure to call relevant witnesses was also raised by the state, which was of the view that the failure by the court to recognise the need for such witnesses and the failure to invoke section 186 of the Criminal Procedure Act 51 of 1977 as an irregularity. The state was in agreement that the evidence of the complainant was not satisfactory or reliable.
- [12] The state also raised criticisms against the evidence of the appellant, in the following respects:
- 12.1 There were contradictions in the version put to the complainant and his viva voce evidence, in that he put to the complainant that he had no knowledge of her injuries, which differed from his viva voce evidence;
- 12.2 He proffered the version in his evidence in chief that the complainant got into a fight with the woman she accused the appellant of having a relationship with. He said that it was this lady who was throwing the bottles which injured the complainant;
- 12.3 There were discrepancies in his evidence regarding the argument/disagreement between himself and the complainant regarding the money she allegedly requested from him.

[13] The state argued that no reasons were placed on record for the failure to call the witnesses I mentioned. In addition, the state pointed out that both the appellant and the complainant were at a tavern, and in spite of the complainant alleging twice in her evidence that the appellant apologised for what he did and imputed his conduct to the consumption of alcohol, this aspect was not pursued by the prosecutor, the defence or the trial court, to establish the state of sobriety of both parties. The state was of the view that the trial court incorrectly criticised the appellant for not having seen the complainant's injuries or the blood on her T-shirt when they left the tavern. This was so because there was no evidence nor enquiry into the visibility outside the tavern where the bottles were being thrown. There was also no evidence regarding the extent to which the complainant's T-shirt was bloodied. The appellant was not asked details about the fight between the complainant and the other woman, but was criticised for not giving such details.

[14] Both counsel referred to the relevant case law and I do not deem it necessary to repeat all of those cases. The learned authors Du Toit et al in the Commentary on the Criminal Procedure Act introduce their commentary on section 208 of the Criminal Procedure Act thus:

"The danger of relying exclusively on the sincerity and perceptive powers of a single witness has evoked a judicial practice that such evidence be treated with the utmost care. This practice seems to have originated in the following remarks made by De Villiers JP in R v Mokoena 1932 OPD 79 at 80:

'Now the uncorroborated evidence of a single competent and credible witness is no doubt declared to be sufficient for a conviction by section 256, but in my opinion that section should only be relied on where the evidence of a single witness is clear and satisfactory in every material respect. Thus the section ought not to be invoked where, for instance, the witness has an interest or bias adverse to the accused, where he has made a previous inconsistent statement, where he contradicts himself in the witness box, where he has been found guilty of an offence involving dishonesty, where he has not had proper opportunities for observation, etc.' (RS 67, 2021 ch24-p1).

[15] The guidelines set out in Mokoena have solidified the manner in which courts approach the evidence of a single witness. It has become trite that the final evaluation of the evidence of a single witness can rarely be made without considering whether such evidence is consistent with the probabilities. Where there is even a small measure of corroboration, the court is no longer dealing with the evidence of a single witness., and such corroboration renders the accused's version less probable on issues in dispute. Courts generally employ corroboration as a safeguard against the dangers of relying on the evidence of a single witness. [See S v Teixeira 1980(3) SA 755 (A); S v Letsedi 1963(2) SA 471 (A); S v Gentle 2005(1) SACR 420 (SCA)].

- [16] It is well established in our law that where the state fails to call relevant and available witnesses, who can support a party's case, the court may draw a negative inference. Where the state has failed to call a witness or witnesses whose evidence is essential for a just decision to be made, then the court has a duty to call such witness or witnesses, as it would be in the interests of justice to do so. The dictum of the court in *R v Hepworth* 1928 AD 265, made some 95 years ago is still relevant and holds true today. The court said at p277:

"A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides. A judge is an administrator of justice, he is not merely a figure head, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done".

- [17] The trial court clearly accepted the version of the complainant, stating that the court found her evidence to be true, trustworthy and credible. The court accepted the complainant's explanation regarding the absence of any mention of the second rape in the police statement and the J88, without interrogating the surrounding circumstances, as pointed out by both Ms Kruger and Mr Harrington. With regard to the failure to call relevant witnesses, the trial court found that in the light of its findings regarding the manner in which the complainant was taken from the tavern, it was not necessary for the other witnesses to be called, and that the state's failure to call such witnesses was not fatal to its case. The trial court failed to take cognisance of the appellant's assertion that the complainant was his girlfriend of eight months at the time of this incident, that she was assaulted by another female and that her stepfather intervened and asked the appellant to leave with the complainant.
- [18] The court merely stopped at its acceptance of the complainant's evidence without a balanced consideration of all the other evidence. If Kabelo, the complainant's alleged current boyfriend were called, he could have confirmed whether he and the complainant were in a relationship. The complainant's stepfather and uncle would have been able to say if the appellant assaulted the complainant and forcibly removed her from the tavern or whether the stepfather intervened to prevent the assault by the other female on the complainant, as alleged by the appellant. Zonke was also an eye witness who would have been able to confirm whether she did in fact try to intervene and prevent the appellant from assaulting the complainant. The police officer who took the complainant's statement could have confirmed or denied the complainant's version about the language barrier between them. Zanele, who was the first report in respect of the rapes, would have been able to say if one or two rapes were reported to her.
- [19] These witnesses would have enabled the trial court to properly assess the complainant's version and to make a definitive ruling that the appellant's version is so improbable that it can be rejected as false. I am not in agreement that the failure to call those witnesses I have referred to was not fatal to the state's case. The trial court was alive to the fact that it had two mutually destructive versions before it and that the complainant was a single witness. In

spite of articulating the caution that it was expected to exercise, the trial court, in my view, did not give due consideration to all the evidence in its assessment of whether the complainant's version was clear and satisfactory in all respects. This is particularly so in respect of the second rape, as the sentence of life imprisonment hinges on the trial court's acceptance that the complainant was raped more than once.

- [20] The complainant's version about her retrieving a bullet from the appellant's cupboard and his version that the police did not find any firearm or ammunition in his house ought to have been a further indicator that greater interrogation of the respective versions was required. The undisputed evidence that the appellant was initially arrested only on a charge relating to the firearm and/or the ammunition, and only a day or two later arrested on a charge of rape, equally demanded interrogation and closer scrutiny.
- [21] One is left with a distinct sense that all relevant evidence was not placed before the trial court, for example, if the relationship between the complainant and appellant ended eight months prior to the incident, why did she feel so compelled to tell him who she was speaking to on the telephone outside the tavern, and go to the extent of showing him her telephone in support of her assertions? The appellant lived close to the owner of the property, and warned the complainant not to make a noise as the owner would hear her, yet she did nothing to attract the attention of someone close by. In my view, the true nature of the relationship between the parties ought to have been interrogated and not dealt with superficially. It is also my view, that the interference of this court is required in order to ensure that justice is done. It is not necessary to deal with submissions made in respect of sentence as, my view is that the conviction cannot be sustained.

[22] In the circumstances, the following order is made:

22.1 The appeal in respect of the conviction and sentence is upheld

22.2 The conviction and sentence imposed on the appellant are set aside.

NAIDOO, J

I concur.

MAHLANGU, AJ

On behalf of appellant: Ms S Kruger

Instructed by: Legal

Aid South Africa

Bloemfontein Local Office

On behalf of respondent: Mr WJ Harrington

Instructed by: The

Office of the DPP

BLOEMFONTEIN

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