

SOUTH AFRICA / JUDGMENT

Makhaola v S (A186/2024) [2025]

ZAFSHC 146 (23 May 2025)

[2025] ZAFSHC 146

COURT

Free State High Court, Bloemfontein

BEFORE

Van Zyl, Deane

CASE / FILE NUMBER

A186/2024

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IN

THE HIGH COURT OF SOUTH AFRICA

FREE

STATE DIVISION, BLOEMFONTEIN

Not

reportable / Reportable

Case

no: A186/2024

In

the matter between

MAKHAOLA

MAKHAOLA

APPELLANT

And

THE

STATE

RESPONDENT

Neutral

citation:

Makhaola
v The State (A186/2024)
[2025]

Coram:

Van Zyl J,
et
Deane AJ

Heard:

19 May 2025

Delivered:	This judgment was handed down electronically by circulation to the parties' representatives by email and released to SAFLII. The date and time for hand-down is deemed to be 23 May 2025 at 15:00 pm.
Summary:	Trial court conducted the proceedings without error or misdirection - No material disparity between the sentence imposed by the trial court and the sentence this court would have imposed under similar circumstances - No justification exists for interfering with the sentence handed down by the trial court. ORDER 1 The appeal against both the conviction and sentence is dismissed. 2 The conviction and sentence imposed by the Regional Court on the appellant are confirmed.

JUDGMENT

Deane AJ (Van Zyl J concurring)

Introduction

[1] This is an appeal against both conviction and sentence as handed down by the regional court magistrate on 27th August 2024, on a charge of rape. The appellant's grounds for challenging his conviction and sentence can be briefly summarised as follows:[1]

- (a) The court erred in finding that the complainant was a credible witness and passed the necessary test applicable to her testimony.
- (b) The court erred in finding that the complainant and the other state witnesses were credible witnesses and that there were no material

contradictions in their testimony.

- (c) The court erred in not accepting the version of the appellant and by making a negative inference against him.

- (d) The court erred in not finding that there were substantial and compelling circumstances present to deviate from the prescribed minimum

sentence.

[2] The following facts are not in dispute:[2]

- (a) That the appellant and the complainant were in a love relationship.
- (b) That they met at a tavern on 1 July 2023.
- (c) That they eventually ended up at the appellant's place.
- (d) That sexual intercourse took place.
- (e) That the appellant assaulted the complainant with a stick.
- (f) That the complainant sustained injuries.

Factual

background

- [3] The State's case was that the appellant and the complainant were once in a relationship but that, at the time, the sexual intercourse took place they were no longer in a relationship; that they had been separated for a period of about two months, and that there was no consent. The relationship had ended because the appellant was abusive and insulting. The complainant testified that on the day in question she was at a tavern in the company of her cousins and other people and that the appellant also happened to be at the same tavern on that day. The complainant, at some stage, had a chat with a male person with whom she was acquainted. The appellant became jealous and confronted the complainant. The complainant then left the tavern, but the appellant followed her and, in the street, the appellant accosted her and started assaulting her. The appellant then dragged her to his shack. He assaulted her with his hands and amongst other things kicked her on her vagina. When they got to the appellant's shack, he overpowered her and proceeded to rape her more than once. The appellant further assaulted the complainant with a stick in his shack. The next morning the appellant let the complainant go and she took a taxi and went to a police station where charges were laid against the appellant.
- [4] The appellant denied raping the complaint and claimed that they had consensual intercourse. The appellant was convicted of raping the complainant more than once and sentenced to life imprisonment.
- [5] The issue to be decided was if they were still in a love relationship and if the incident occurred under the circumstances as the complainant testified.[3]

Ad conviction

- [6] It is trite law that the onus rests on the state to prove the guilt of the appellant beyond reasonable doubt. If the accused's version is reasonably possibly true, he is entitled to his acquittal.[4]

[7] The guilt of an accused must be proven beyond reasonable doubt.[5] It is also putative that the State bears the onus of proving the guilt of the accused beyond a reasonable doubt. There exists no

burden on the accused to prove his version or his innocence. The accused's version only has to be reasonably, possibly true.[6]

[8] In *S v Mbuli*, the Court, making reference to *Moshephi and Others v R*[7] and *S v Hadebe and Others*,[8] held that:[9]

'The question for determination is whether, in the light of all the evidence adduced at the trial, the guilt of the appellants was

established beyond reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees.'

[9] It is also accepted that a court of appeal will be extremely reticent to interfere with the credibility findings of the trial court as well as the evaluation of the oral testimony, given the better position of the trial court in hearing and appraising the evidence of the witnesses. It will, however, interfere if it is convinced that the credibility findings made by the trial court are patently

incorrect.[10]

[10] It is further trite law that the evidence of a single witness must be approached and evaluated with the necessary caution.[11] However, the exercise of such caution should and ought not to displace the exercise of common sense.[12] All the contradictions, inconsistencies and probabilities must be weighed up to arrive at a conclusion that the State has proven its case beyond a reasonable doubt.

[11] The appellant argues that the inconsistencies between the complainant's testimony and her statement to the police are significant, including:

- (a) where the complainant and the appellant spoke when they met at the Tavern;
- (b) whether the complainant was assaulted near the Tavern or inside the house;
- (c) whether the complainant was dragged to the house; and

(d) whether the appellant hit the complainant with a stick.

[12] It is apparent from the evaluation of the evidence presented that the trial court was indeed alive to the fact that this was single witness testimony in respect of the rape and was alert to the dangers attendant thereto.[13] The record indeed evinces that the evidence of the complainant was properly scrutinised and that the cautionary rule was properly

applied in the appraisal of her evidence as a single witness.

[13] The trial court, in applying the cautionary rule, correctly found the evidence of the complainant to be satisfactory in all material respects. A conspectus of the record reveals that the complainant indeed presented a coherent and cogent account of events. Her evidence was forthcoming and there were no attempts at evasion. She did not unnecessarily embellish and indeed had no reason to falsely incriminate the appellant.

[14] Notwithstanding the contradiction that existed between her testimony and in her statement to the police or any omission in her testimony, the trial court correctly found it to be immaterial having regard to the totality of the evidence tendered.

[15] Indeed, the court stated that:

'... there are indeed discrepancies in the complainant's testimony as against the statement that she made to the police. However, there is what I call an established principle of evidence, that the statement the deponent makes to the police can never be elevated to the evidence by complainants' testimony made in court.'[14]

The court further wrote that 'from the word go when she was examined, she told the medical examiner or medical officer that she was also kicked on her vagina and on her pubic area'.[15]

[16] The court found that the complainant reported the matter as soon as she could to the police and that her version of the incident was supported by the testimony of the police officer and the nurse who filed the J88 report. From the J88, it is clear that the complainant did suffer injuries and these are consistent with being kicked, punched and being hit with a stick.

[17] The defence denied that the appellant had kicked or punched the complainant but acknowledged that he had used a stick. However, upon reviewing the record and the injuries sustained by the complainant, the court found that the evidence was consistent with both kicking and punching.

[18] The court found that the complainant's version of the events was satisfactory in all material respects,[16] and stated that, 'unfortunately, I cannot say the same thing about the accused. He was not a satisfactory witness at all, and he made up his story and painted a false picture of what transpired on the day in question. Accuseds version has no head nor tail, it is just a fabrication as he was trying to mislead us'.[17]

[19] Constable Mashumba's evidence was also found by the court a quo to have corroborated the complainant's testimony. The court wrote that he testified that:

'... from the word go, the complainant told him that the accused started the whole thing at the Tavern where the accused, accused the complainant of being with another man whilst he was there. Constable Mashumba further told us that the complainant they and then told him that the accused assaulted and raped her on this day. The complainant went on and said the same thing to the medical examiner. So, this consistency in the complainant's version from the word go supports her credibility.'[18]

A review of the record confirms this.

[20] The court also found that the defence 'painted a picture of the complainant as a manipulative individual who fabricated her story. According to the accused the complainant tore her own panties and tore her own bra and threatened the accused that she was going to present them as evidence of rape and falsely implicate him of rape. I do not believe this, and it is a lie'.[19] In finding the accused version improbable, the court stated that the 'accused knows that he is the one who tore the complainants' clothes, he had to come up with an explanation. However, his story does not make sense, because there is no evidence that suggests that the complainant tore her own underwear and that she threatened to lay false charges against him...'[20]

[21] In evaluating the totality of the evidence before it, the court a quo correctly regarded the appellants version as false, improbable, and not consistent with the truth and, therefore, not reasonably possibly true.[21]

Ad sentence

[22] The cardinal principle governing an appeal against sentence is that punishment of an offender is pre-eminently a matter for the discretion of the trial court. It is putative that the court hearing an appeal against sentence should be vigilant not to erode the sentencing discretion entrusted to the trial court. It is well established that interference by the appellate court is warranted only if the discretion of the trial court was not judicially and properly exercised or if there exists a marked

disparity between the sentence imposed by the trial court and the sentence that the court of appeal would have imposed had it been the trial court.[22] The test to be surmounted in every appeal against sentence is whether the sentence is vitiated by irregularity or misdirection or disturbing inappropriateness. This was seamlessly captured in *S v Malgas*[23] which articulated the principle as follows:

'A court exercising appellate jurisdiction cannot, 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. Where material misdirection by the trial court vitiates the exercise of that discretion, an appellate court is of course entitled to consider the question of sentence afresh. In doing so, it assesses the sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate court is at large. However,

even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which appellate court would have imposed had it been the trial court is so marked that it can properly be described as 'shocking', 'startling' or 'disturbingly inappropriate'. It must be emphasised that in the latter situation the appellate court is not at large in the sense in which it is at large in the former. In the latter situation, it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may only do so where the difference is so substantial

that it attracts epithets of the kind I have mentioned.'

[23] It is trite law that the sentence of an accused person must be balanced between the interest of society, the nature, seriousness and the prevalence of the offence and the personal circumstances of the accused.[24] The seriousness of the crime that the appellant has been convicted of was given prominence in *S v S*: [25]

'The essence of the crime is an assault on the bodily integrity of a woman's femininity. If it is a function of the criminal law to protect members of society from those who would employ illegal means to prey on those less able to defend themselves, then rape is rightly regarded as a crime of the utmost gravity.'

[24] In *S v Ncheche*, [26] the court expounded upon the gravity of the offence as follows:

'Rape is an appalling and utterly outrageous crime, gaining nothing of any worth for the perpetrator and inflicting terrible and horrific suffering and outrage on the victim and her family. It threatens every woman, and particularly the poor and the vulnerable. In our country, it occurs far too frequently and is currently aggravated by the grave risk of the transmission of Aids. A woman's body is sacrosanct and anyone who violates it does so at his peril and our Legislature, and the community at large correctly expect our courts to punish rapists severely.'

[25] The interests of the community were properly enunciated in *S v Chapman*: [27]

'Women in [South Africa] are entitled to 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 tranquillity of their homes without fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives. The Courts are under a duty to send a clear message to other potential rapists and to the community. We are determined to protect the equality, dignity and freedom of all women and we shall show no mercy to those who seek to invade those rights.'

- [26] The trial court herein considered the prevalence of the crime, the gravity and type of offence,[28] the way in which the offence was committed,[29] the interests of society,[30] and the trauma and injuries suffered by the complainant.[31] The trial court correctly took these factors into account and rightly so imposed what it considered to be a just and appropriate sentence.[32]
- [27] It correctly took cognisance of the fact that the appellant was an ex-boyfriend who assaulted and raped the complainant more than once. It also noted that in persisting with his claim of innocence, the appellant wasted the opportunity to show remorse for his actions. His lack of remorse impacts negatively on his prospects for rehabilitation.
- [28] In light of the seriousness of the offence and the interests of society, these outweigh the personal circumstances of the appellant. The court a quo also correctly found that no compelling and substantial circumstances exists.[33]
- [29] It is also correct that a court hearing an appeal in which the minimum sentence legislation has application 'does not possess the proverbial clean slate on which to scribble its preferred sentence'.[34] The sentencing discretion of the trial court is circumscribed by law. It is further required that the finding of substantial and compelling circumstances must be able to stand scrutiny and not be based on the whim of the presiding officer.[35]
- [30] The charge of rape for which the appellant has been convicted of clearly falls within the ambit of s 51 of the minimum sentence legislation.[36] The minimum prescribed sentence for an offence in which the complainant has been raped more than once is life imprisonment, unless the court found that substantial and compelling circumstances existed justifying a departure. Notwithstanding the personal and mitigating factors tendered for consideration, the prescribed minimum sentence was, in the totality of the circumstances encountered here, the only fair and just sentence. The trial court correctly found that there were no substantial and compelling circumstances present. I am of the view that the manner in which the complainant was taken advantage of and the inhumane and degrading treatment she was subjected to under the circumstances cannot justify a deviation from the imposition of the applicable minimum sentence.
- [31] Having said that, I am content that the trial court did not err or misdirect itself in any manner. Nor does there exist a disparity between the sentence imposed by the trial court and the one which this court would have imposed if it were the trial court. There thus exists no reason that warrants tampering with the sentence imposed by the trial court.

Order

In the result, the following order is made:

- 1 The appeal against both the conviction and sentence is dismissed.
- 2 The conviction and sentence imposed by the Regional Court on the appellant are confirmed.

Deane AJ

I concur

Van Zyl J

Appearances For the appellant: P L Van Der Merwe Instructed by: Legal Aid South Africa, Bloemfontein For the respondent: D Pretorius Instructed by: National Director of Public Prosecutions, Bloemfontein.

[1] Notice of Appeal, pp. 161-163.

[2]

Judgment

p. 103, lines 11-18.

[3] Judgment,

p. 103, lines 19-25.

[4] S v V 2000 (1) SACR 453 (SCA) at 455A-C.

[5] Ibid.

[6] S v Sithole and Others 1999

(1) SACR 585 (W); S v Van Der Meyden 1999 (2) SA 79 (W) and S v Mattioda 1973 (1) PH H24 (NPD).

[7] Moshephi and Others v R (1980-1984) LAC 57 at 59F-H.

[8] S v Hadebe & Others [1997] ZASCA 86; 1998 (1) SACR 422 (SCA) at 426F-H.

[9] S v Mbuli (2002] ZASCA 78; 2003 (1) SACR 97 (SCA) para 57.

[10] S v Mkhohle 1990

(1) SACR 95 (A) at 100E.

[11] S v M 1992

(2) SACR 188 (W) at 194H-I; J v S

[1998] ZASCA 13; (1998] 2 All SA 267 (A); 1998 (2) SA 984 (SCA).

[12] S v Aardman and Ander 1968

(3) SA 339 (A).

[13] Judgment, pp. 104-105.

[14] Judgment, p. 105.

[15] Judgment, p. 106.

[16] Judgment,

p. 110.

[17] Judgment, p. 110.

[18] Judgment, p. 109.

[19] Judgment, p. 108.

[20] Judgment, pp. 108-109.

[21] Judgment,

p. 110.

[22] S v Pillay 1977

(4) SA 551 (A) at 535E-G; see also S v Rabie 1975

(4) SA 855 (A) at 857D-F; S v Shapiro 1994 (1) SACR 112 (A) at 119J-120C; and S v Anderson 1964

(3) SA 494 (A) at 495D-E.

[23] S v Malgas (2001] ZASCA 30; (2001] 3 All SA 220 (A); 2001 (2) SA 1222 (SCA); 2001 (1) SACR 469 (A) para 12.

[24] S v Banda and Others 1991(2) SA (BGD) at 355 A.

[25] S v S 1995

(1) SACR 50 (ZS) at 61D.

[26] S v Ncheche [2005] ZAGPHC 21; 2005 (2) SACR 386 (W) para 35.

[27] S v Chapman [1997] ZASCA 45; (1997] 3 All SA 277 (A)[1997] ZASCA 45; ; 1997 (3) SA 341 (SCA) at 345A-D.

[28] Judgment,

p. 135.

[29] Judgment,

p. 133.

[30] Judgment, p. 133.

[31] Judgment, p. 133.

[32] Judgment,

p. 134 and see S v Reay 1987 (1) SA 873 (A) at 877C.

[33] Judgment,

p. 136.

[34] Ncango v S

[2018] ZAFSHC 108 para 45.

[35] S v Matyityi [2010] ZASCA 127; 2011 (1) SACR 40 (SCA); (2010) 2 All SA 424 (SCA) para 23.

[36] Criminal Law Amendment Act 105 of 1997.

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