

SOUTH AFRICA / JUDGMENT

Malebo v S (A153/2021) [2022]

ZAFSHC 297 (4 November 2022)

[2022] ZAFSHC 297

COURT

Free State High Court, Bloemfontein

BEFORE

C van Zyl, Snellenburg

CASE / FILE NUMBER

A153/2021

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IN

THE HIGH COURT OF SOUTH AFRICA

FREE

STATE DIVISION, BLOEMFONTEIN

Reportable

Yes

Of Interest to other

Judges Yes

Circulate to

Magistrates: Yes/No

Case

No.: A153/2021

In

the matter between:

SHADRACK

MALEBO

Appellant

and

THE

STATE

Respondent

CORAM:

C VAN ZYL J et SNELLENBURG, AJ

HEARD:

23 MAY 2022

JUDGMENT

BY: SNELLENBURG AJ

This judgment was handed down electronically by circulation to the parties' representatives by email, and release to SAFLII. The date and time for hand-down is deemed to be 04 November 2022 at 15h00.

- [1] The appellant was charged with 14 counts of which only the following counts are relevant: count 1, the contravention of s 3 of the Sexual Offences and Related Matters Amendment Act 32 of 2007, read with the provisions of s 51(1) of Act 105 of 1997, in that he committed an act of sexual penetration with the complainant who was at the time of the commission of the offence 10 years old; and counts 10, 11 and 12, sexual exploitation of children by contravening s 17(1)(b) of the Sexual Offences and Related Matters Amendment Act 32 of 2007 by committing sexual acts with the children mentioned therein by engaging their services with their consent for financial or other reward.
- [2] On 6 February 2019 the Regional Court, Bloemfontein (LBJ Moeng presiding) convicted the appellant on counts 1, 10, 11 and 12. The appellant was sentenced to life imprisonment in terms of the provisions of s 276(1) of Act 51 of 1977 on count 1; 15 years imprisonment in respect of count 10; 15 years imprisonment in respect of count 11; and 15 years imprisonment in respect of count 12.
- [3] The 14 counts preferred against the appellant all related to contraventions of different provisions of the Sexual Offences and Related Matters Amendment Act 32 of 2007. For sake of completeness the court a quo concluded that count 13 constituted a duplication of count 1; count 6 constituted a duplication of count 11; count 7 constituted a duplication of count 12; and count 5 constituted a duplication of count 10. The appellant was eventually found not guilty and discharged on counts 2, 3, 4, 5, 6, 7, 8, 9, 13 and 14.
- [4] Since a sentence of life imprisonment was imposed on count 1, the appellant has had an automatic right of appeal. This appeal gives effect to that right.
- [5] The appeal is directed against both the conviction on the four counts as well as the sentences which the court a quo imposed.
- [6] This judgment concerns sexual misconduct with children by the appellant. The children are properly identified in the chargesheet and in the court a quo's judgment. To protect the identities of the complainants and child witnesses, where relevant, reference will be made to the different complainants or witnesses by using only initials.

[7] Regarding the conviction, the appellant contends that the court below erred in (a) concluding that his guilt was proved beyond a reasonable doubt; (b) concluding that the state witnesses were credible and reliable witnesses; (c) concluding that the contradictions between the state witnesses were not material, (d) concluding that the sequence of events and the dates of the alleged offences were not material; (e) by rejecting the evidence of the appellant as not being reasonably possibly true; (f) by rejecting the evidence of the defence witness as not being reasonably possibly true; and (g) in

concluding that the appellant's evidence did not rebut the case of the state.

[8] For sake of context it is necessary to briefly deal with the different charges.

8.1 In respect of counts 1 to 3 the state alleged that the appellant was guilty of rape in contravention of the provisions of Section 3, read with the provisions of Section 51 (1) Schedule 2 Part 1 of the Criminal Law Amendment Act 105 of 1997 as amended in that the appellant committed acts of sexual penetration during the period between 28 December 2016 and 3 January 2017 with the complainants named therein, being 3 boys respectively aged 10, 12 and 13 by inserting his penis into their anuses without their consent.

8.2 In respect of count 4 the state alleged that on 3 January 2017 the accused contravened the provisions of Section 55(1)(a) in that he attempted to commit an act of sexual penetration with a 10-year-old boy named in the chargesheet, by instructing him to undress and to lie on the ground.

8.3 In respect of counts 5, 6 and 7 the state alleged that between the period 28 December 2016 and 3 January 2017 the accused contravened the provisions of Section 15(1) in that he committed acts of sexual penetration with the children named therein being respectively boys aged 12, 13 and 15 by penetrating them anally without their consent and telling them to have sexual intercourse with other minor boys.

8.4 In respect of counts 8 and 9, the state alleged that between 2 and 3 January 2017 the accused contravened the provisions of Section 4 in that he compelled the children named therein, being two 10-year-old boys to commit acts of sexual penetration with the complainant named therein, a 13-year-old boy without the complainant's consent.

8.5 In respect of counts 10, 11, 12, 13 and 14 it is alleged that the appellant sexually exploited children by contravening the provisions of Section 17(1) read with Sections 1, 56(5), 56(a), 57, 58, 59, 60 and 61 of the Criminal Law Amendment Act Sexual Offences and Related Matters 32 of 2007 as amended as well as Section 92(2) and 94 of the Criminal Procedure Act 51 of 1977 in that he, during the period 28 December 2016 to 3 January 2017 (during the periods and on the dates named in the chargesheet), unlawfully and intentionally engaged the services of the children mentioned therein, being respectively two boys aged 10, as well as a 12, 13 and 15-year-old boy with or without the said complainants' consent for financial or other reward, favour or compensation to the said complainant or to a third person to wit, the children named in the chargesheet, by committing a sexual act with the said complainants by penetrating them anally

and telling them to penetrate other children.

[9] The appellant's representative responsibly and in my view quite correctly conceded during argument that the grounds of appeal regarding both the conviction and the sentence were unmeritorious.

[10] The respective complainants were all children at the time as appears from the summary of the charges. Their ages ranged between 10 and 15 when the offences forming the subject matter of the charges preferred by the state against the appellant were perpetrated. The complainants were all still minors when they testified during the trial.

[11] The advantage of the trial court to observe witnesses in court is well established. Although a court of appeal is not hamstrung by the findings of the court a quo, lest the appellant's appeal become illusory, a court of appeal will not lightly interfere with credibility findings.

Naturally the court a quo's observations and findings must be borne out by the record of proceedings. *S v Heslop* 2007

(4) SA 38 (SCA) para 13; *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000

(1) SA 1 (CC) paras 77– 80.

[12] The court below delivered a detailed and thorough judgment accounting for all the evidence, including the contradictions in the evidence of the witnesses on behalf of the state. *S v Doorewaard and Another* 2021 (1) SACR 235 (SCA); *S v Trainor* 2003

(1) SACR 35 (SCA) ([2003] 1 All SA 435; [2002] ZASCA 125) para 9 and *S v Hadebe and Others* 1998 (1) SACR 422 (SCA) at 426E – H.

[13] The court a quo properly evaluated the evidence of the state witnesses whilst being acutely aware and appreciating that he was faced with the evidence of several children that needed to be treated with caution. The court a quo discussed the reasons for the cautionary rule, including amongst others that children are highly imaginative, and their evidence may be of suggestion by others. The learned Magistrate referred to *S v Viveros* 2000 (2) SACR at 86 (SCA) at para 2 where it was held that '[S]uch evidence may also be as a result of lack of judgement, immaturity and proneness to influence.'[1]

[14] In *S v V* 2000 (1) SACR 453 (SCA) ([2000] 2 All SA 86) Zulman JA said:

"In view of the nature of the charges and the ages of the complainants it is well to remind oneself at the outset that, whilst there is no statutory requirement that a child's evidence must be corroborated, it has long been accepted that the evidence of young children should be treated with caution (R v Manda 1951 (3) SA 158 (A) at H 163 C; Woji v Santam Insurance Co Limited 1981 (1) SA 1020 (A) at 1028B - D); and that the evidence in a particular case involving sexual misconduct may call for a cautionary approach (S v J 1998 (2) SA 984 (SCA) at 1009B). For reasons which will presently emerge the present case is plainly one which calls for caution."

- [15] One must however also be mindful, as the court a quo fittingly remarked, that children's 'power of narration is markedly different from that of adult witnesses. Whether we like it or not, children will always remain children.' The trier of fact, as the court a quo observed, must be satisfied that the truth has been told. Ultimately the question remains: did the state produce evidence by means of which such a high degree of probability was raised that the ordinary reasonable man, after mature consideration, would come to the conclusion that there exists no reasonable doubt that the appellant committed the crimes charged? *R v Mlambo* 1957 (4) SA 727 (A) at 738A. The court a quo applied the test enunciated in *S v Chabalala* 2003 (1) SACR 134 (SCA) at paragraph 15:

"The correct approach is to weigh up all the elements which points towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strength and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weighs so heavily in favour of the state as to exclude any reasonable doubt about the accused guilt. The result may prove that one scrap of evidence or one defect in the case for either party was decisive, but that can only be an ex post facto determination and the Trial Court should avoid the temptation to latch onto one obvious aspect without accessing it in the context of the full picture presented in evidence."

- [16] The judgment clearly establishes the court a quo did not only pay lip service to the cautionary rule. The court a quo was recorded, as point of departure immediately after discussing the need to approach the evidence of the child witnesses with caution:

"I should at the outset mention that the evidence of the complainants was blemished by a number of contradictions. I am alive to these shortcomings, and I may not be able to detail each and every conceivable contradiction due to the nature and intricacy of the evidence that was presented herein. The mere fact of not referring to each and every conceivable discrepancy does not mean that I have ignored such discrepancy. All these discrepancies, whether mentioned or not, will be viewed in light of the totality of the evidence. I will however try my utmost best to relate these discrepancies with the necessary detail."

- [17] The court proceeded to meticulously record the contradictions in the evidence of the state witnesses and then aptly remarked:

"The question is whether the above discrepancies are material viewed in light of the evidence in its totality. The above discrepancies should be adjudicated in light of the fact that the evidence was narrated by two 10-year-olds, as well as a 12-, 13- and 15-year-old. One can also not lose sight of the fact that the evidence was tendered sometime after the commission of the alleged offences and one should likewise admit that for this evidence to have been suggested to the complainants or for the evidence to be accepted as a product of the imagination of someone, extreme and intense planning should have gone into preparing this version. There are in my view a number of aspects that negate any suggestion that this might have been a suggested or concocted version."

The Court proceeded to consider the materiality of the contradictions during the evaluation of the evidence with specific reference to the aspects which negates any suggestion that the complainants' narration of events was the product of suggestion by someone else or a 'concocted version'.

[18] It should in my view also be borne in mind that contradictions per se do not necessarily lead to the rejection of a witness' evidence, they may simply be indicative of an error. Not every error made by a witness affects his/her credibility. In each case the trier of fact must make an evaluation taking into account inter alia the 'nature of the contradictions, their number and importance, and their bearing on other parts of the witness' evidence'. *S v Mkohle* 1990 (1) SACR 95 (A) at 98F–G and *S v Oosthuizen* 1982 (3) SA 571 (T) at 576B–C and 576G – H.

[19] As stated above, the appellant was convicted on counts 1, 10, 11 and 12.

19.1 The charge in count 1 is the rape of a minor on or about the 2nd to 3rd of January 2017 at or near Bloemfontein by unlawfully and intentionally committing an act of sexual penetration with OM, a 10-year-old boy, by penetrating him anally without consent.

19.2 The charge in count 10 is sexual exploitation of children on or about the 28th of December 2016 to the 3rd of January 2017 and at or near Bloemfontein in the Regional Division of the Free State unlawfully and intentionally engaging the service of KN, 13 years old, with or without the said complainant's consent for financial or other reward, favour or compensation to the said child complainant or to the third person to wit KN by committing a sexual act with the said complainant by penetrating him anally and by telling him to have intercourse with other minor children.

19.3 The charge in count 11 is sexual exploitation of children on or about the 28th of December 2016 to the 31st of December 2016 and at or near Bloemfontein in the Regional Division of the Free State unlawfully and intentionally engaging the service of TR, 12 years old, with or without the said complainant's consent for financial or other reward, favour or compensation to the said child complainant or to the third person to wit TR by committing a sexual act with the said complainant by penetrating him anally and by telling him to have intercourse with other minor children.

19.4 The charge is count 12 is sexual exploitation of children on or about the 31st of December 2016 and at or near Bloemfontein in the Regional Division of the Free State unlawfully and intentionally engaging the service of KM, 15 years old, with or without the said complainant's consent for financial or other reward, favour or compensation to the said child complainant or to the third person to wit KM by committing a sexual act with the said complainant by penetrating him anally and by telling him to have intercourse with other minor children.

[20] The sexual misconduct forming the subject matter of the charges were perpetrated at the Revival ground.

[21] The appellant pleaded not guilty to all the charges. The crux of the appellant's version is that the complainants were making up the evidence against him and that the incidents did not occur. In summary the appellant's version, dealt with below, is that he was involved at the soccer tournament when the alleged deeds of sexual misconduct that the complainant's testified about would have taken place at the Revival ground from 28 to 30 December 2016. From 31 December 2016 to 4 January 2017 the appellant says that he was at Mr Motlekane's home and thus he could not have perpetrated the acts he was charged with on those dates. His evidence succinctly summarised:

21.1 He was involved at 'Japs' where different teams participated in a soccer tournament between 27 to 30 December 2016. He testified that he was coaching his team during the tournament and was also one of the tournament coordinators. To this end the appellant testified that he was involved at the tournament daily from 08h30 to approximately 21h00. Mr Ikaneng assisted him as assistant or co-coach.

21.2 The appellant testified that he was at Mr Motlekane's house from 31 December 2016 to 4 January 2017. The appellant testified that he attended a party from 31 December 2016 to 1 January 2017 and from 2 January 2017 to 4 January 2017 he painted and paved at Mr Motlekane's house.

21.3 The appellant denied knowing the complainants and denied ever meeting the complainants on of the dates as testified by them.

21.4 Sello Khoare, his witness, confirmed that the accused was at the Motlekane's house from the 31st of December 2016 to the 4th of January 2017. He testified that the accused arrived at around 11 o'clock on the 31st, but he couldn't tell what the accused was doing on this particular day since he, Khoare, was busy. He said that the accused left at about 19h00 and he was there again on the 1st of January and he left around 19h30. He further confirmed that the accused assisted him with painting between the 2nd and the 4th and this in essence also concluded the case for the accused.

[22] It is common cause that a soccer tournament was held at 'Japs' and this tournament took place from 28 to 30 December 2016 when some of the alleged incidents were perpetrated. It is also common cause that the appellant coached one of the teams that played in the tournament and was involved at the tournament. The appellant also admitted that he is known as Bazooka.

[23] Any contention that the evidence of the complainants was fabricated or suggested to them or was the product of someone's imagination must be rejected.

[24] The five boys testified about incidents that spanned over a six-day period. Only one boy, KN, was present during all the incidents that the complainants testified to, throughout the entire period. The complainants' testimony regarding the modus operandi that the appellant followed in respect of the different incidents that affected them personally was virtually, or in the words of the court a quo 'in essence', the same. The charges were made with the SAPS on 3 January 2017.

[25] The 'golden thread' of financial undertakings by the appellant in exchange for sexual intercourse runs throughout the state case.

[26] The court a quo's conclusion, after evaluating the evidence in totality and accounting for all the evidence, that notwithstanding the shortcomings in the state's case the truth has been told, cannot be faulted.

[27] The court a quo correctly rejected the accused's version (and alibi).

[28] The appellant only appeals the imposition of the minimum sentence regarding the rape.

[29] Sentencing is pre-eminently a matter for the trial court's discretion. In *S v Malgas* 2001

(1) SACR 469 (SCA) para 12[2] the court held 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 its exercise of that discretion, an appellate court is of course entitled to consider the question of sentence afresh. . . . 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 the 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.'

[30] In *S v Hewitt* 2017 (1) SACR 309 (SCA) para 8 Maya DP said:

'It is a trite principle of our law that the imposition of sentence is the prerogative of the trial court. An appellate court may not interfere with this discretion merely because it would have imposed a different sentence. In other words, it is not enough to conclude that its own choice of penalty would have been an appropriate penalty. Something more is required; it must conclude that its own choice of penalty is the appropriate penalty and that the penalty chosen by the trial court is not. Thus, the appellate court must be satisfied that the trial court committed a misdirection of such a nature, degree and seriousness that shows that it did not exercise its sentencing discretion at all or exercised it improperly or unreasonably when imposing it. So, interference is justified only where there exists a "striking" or "startling" or "disturbing" disparity between the trial court's sentence and that which the appellate court would have imposed. And in such instances the trial court's discretion is regarded as having been unreasonably exercised.'

[Emphasis in original text and the footnotes are omitted.]

[31] The appellant contends that the court a quo erred in not concluding that compelling and substantial circumstances were present that would justify a departure from the prescribed minimum sentence. The appellant argues that his personal circumstances in conjunction with the fact that the complainant did not suffer any serious injuries and that the rape does not fall within the category of the 'worst cases of rape' constitute compelling and substantial circumstances.

[32] The appellant elected not to testify in mitigation during the sentencing stage as he is entitled to do. His personal circumstances, put on record by his legal representative, are as follows: The accused was 50 years of age at the time. His highest level of education is grade eleven. The appellant was married but his wife passed away. He has two children, a daughter aged 21 who is currently unemployed and a 14-year-old son in grade eight. The appellant instructed his representative that he is suffering from prostate cancer, high blood pressure as well as diabetes. The appellant was a soccer coach and coordinator for Mangaung Football Association prior to his arrest and incarceration and he earned R1 800.00 per month. The appellant owns a furnished two-room house. His biological mother resides in Gauteng whilst his biological father is deceased. The appellant was in custody since January 2017.

[33] In *S v Chapman* [1997] ZASCA 45; 1997

(2) SACR 3 (SCA) at p5 c-e Mahomed CJ[3] issued the following warning:

'Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim.

The rights to dignity, to privacy and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilisation.

Women in this country are entitled to the 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 the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives.

The appellant showed no respect for their rights. He prowled the streets and shopping malls and in a short period of one week he raped three young women, who were unknown to him. He deceptively pretended to care for them by giving them lifts and then proceeded to rape them callously and brutally, after threatening them with a knife. At no stage did he show the slightest remorse.

The Courts are under a duty to send a clear message to the accused, 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.'

[Own emphasis added]

[34] In *Director of Public Prosecutions, Grahamstown v Peli* 2018

(2) SACR 1 (SCA) at para 11 Hughes AJA remarked that:

‘The curse in our society, of rape, is considered by the courts, and society alike, as deserving of severe punishment.’

[35] Phatshoane AJA’s observations in *Director of Public Prosecutions, Free State v Mokati* 2022 (2) SACR 1 (SCA) at para 42 are apposite to the matter at hand:

‘The crimes which impair the dignity of women and children, which violate their sexual autonomy and privacy rights, such as rape and other sexual offences, are rampant in our society. Society craves justice and looks to our courts to impose sentences commensurate with the crime and fit for the criminal.’

[36] When sentencing the appellant, the court a quo appropriately took into account the accused’s personal circumstances. No factors appear from either the submissions before us or the record which can be said not to have been properly considered. The sentence is not shockingly inappropriate. Having regard to all the circumstances encountered in this matter, the minimum sentence imposed is manifestly fair and just. The court a quo balanced the appellants’ personal circumstances against the other relevant considerations and quite correctly also took the interests of the community into consideration.

[37] In this matter life imprisonment on the count of rape is prescribed as minimum sentence. The sentencing court may only impose a lesser sentence if it is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed.

[38] The trial court did not exercise its discretion improperly or unreasonably when imposing the sentence, nor did it commit any misdirection. As stated, no substantial or compelling reasons are present in this matter that would justify the imposition of a lesser sentence. In my view any lesser sentence than the prescribed minimum sentence of life imprisonment would be totally disproportionate and therefore not constitutionally compliant.

[39] The appellant’s previous convictions show a propensity to sexually deviant conduct. The appellant preyed on vulnerable children and would have continued unabated with his conduct had it not been for the intervention of third parties. The victim impact assessment establishes that the complainant must live with the emotional scars and stigma for the rest of his life. His dignity was taken from him in the most callous manner.

[40] The appellant has neither shown any insight into his conduct nor any remorse.

[41] The minimum sentence is eminently justified in the circumstances.

[42] There is no merit in the attack on the sentence imposed by the court a quo.

[43] As result, I dismiss the appeal against the convictions and sentences.

N. SNELLENBURG, AJ

I concur and it is so ordered.

C. VAN ZYL, J

On behalf of the appellant: Mr P.L. Van der Merwe

Instructed by:

Bloemfontein Justice Centre

On behalf of the respondent: Adv M.M.M. Moroka

Instructed by:

Director Public Prosecutions

[1] The court a quo also relied on the following passage in *State v Aartman* 1968 (3) SA 339 (AD) at 341C: "While there is always a need for caution in such cases the ultimate requirement is proof beyond reasonable

doubt."

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

[3] *S v Chapman* 1997

(2) SACR 3 (SCA) (1997 (3) SA 341; [1997] 3 All SA 277; [1997] ZASCA 45.

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Prepared on 11 October 2026 · Esheria