

SOUTH AFRICA / JUDGMENT

Maqhware v S (2019/A171) [2021] ZAGPJHC 619 (26 October 2021)

[2021] ZAGPJHC 619**COURT**

South Gauteng High Court, Johannesburg

BEFORE

F Karachi, W L Wepener

CASE / FILE NUMBER

2019/A171

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Source record**REPUBLIC****OF SOUTH AFRICA****IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****DIVISION, JOHANNESBURG****Case****number: 2019/A171****REPORTABLE:**NO
OF
INTEREST TO OTHER JUDGES: NO
REVISED
26
October 2021
In**the matter between:**MAQHWARA,
AYANDA
Appellant
and
THE
STATE
Respondent**Delivered:**

26 October 2021 - This judgment was handed down electronically.

JUDGMENT

Karachi AJ

1. The appellant was convicted in the Magistrates Court for the District of Johannesburg Central held at Protea (“the trial Court”) on 1 September 2017 on three counts of rape in contravention of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007 (“the Sexual Offences Act”).
2. The charges against the appellant in respect of all three counts were that on 26 December 2015 and at or near Motsoaledi in the Regional Division of South Gauteng, he unlawfully and intentionally committed an act of sexual penetration with the complainant, who was a 70-year-old women at the time, by inserting his genital organ into her genital organ without her consent.
3. The appellant was sentenced on 14 December 2017 in terms of section 51(1) of the Criminal Law Amendment Act 105 of 1997 (“the Criminal Law Amendment Act”), to imprisonment for life. The trial Court took all three counts of rape together for purposes of sentence.
4. The appellant was legally represented throughout the proceedings in the trial Court. Leave to appeal is not required as the appellant was sentenced by a court in terms of section 51(1) of the Criminal Law Amendment Act.
6. The appellant raises the following grounds of appeal in his written application for leave to appeal and/or notice of appeal:
 - 6.1. That the trial Court erred in finding that the State had proved beyond a reasonable doubt that the appellant slept with the complainant with intention to rape the complainant;
 - 6.2. That the trial Court erred in finding that the State had proved beyond a reasonable doubt that the appellant repeatedly forced himself raping the complainant;
 - 6.3. That the trial Court erred in finding that the State had proved that the appellant repeatedly raped the complainant as alleged in the charge sheet;
 - 6.4. That the trial Court erred in not having regard to the evidence of the complainant’s backyard neighbour that she “didn’t even see/heard any noise (regarding to rape)”;
 - 6.5. That the trial Court erred in not having regard to the fact that no evidence was adduced by the State that it was not rape because the appellant was “in love with [the complainant] and [the appellant] use to slept with [the complainant]”;
 - 6.6. That the trial Court erred in finding that the evidence given by the appellant that the complainant was the appellant’s “side chick as [the appellant] has [his] wife at home ([the appellant’s] children’s mother)”;

6.7. That the trial Court was incorrect in not finding that the evidence of the appellant that he “slept with [the complainant] in [the complainant’s] room and was a deal to pay [the complainant]”;

6.8. That the trial Court did not take into account that the appellant slept with the complainant, but did not rape her. The appellant states that:

6.8.1. The complainant called him to visit her at her room;

6.8.2. When he arrived at the complainant’s room, the complainant was not there “but opened at the door then [the appellant] stayed waiting for her”;

6.8.3. The appellant realised that the problem started when the appellant and the complainant “took agreements, because she wanted R200 and [the appellant] had only R100”;

6.8.4. The appellant promised to give the complainant the balance of the money in the morning but was delayed by his younger sister and therefore the appellant thought this is why the complainant “took a decision to go to the police station and report thinking that [the appellant] wont come back whereas [the appellant] was going to take the money and come back to pay her.”

7. In the written submissions filed on behalf of the appellant, counsel for the appellant raises two grounds of appeal in respect of conviction:

7.1. The first is that the State failed to prove the guilt of the appellant beyond reasonable doubt. She argued that the appellant’s version was one of arranged consensual sexual intercourse once with the complainant at her residential place and that the appellant testified on how the complainant sustained injuries to her face which should only be reasonably and possibly true to be acquitted. She argued further that although the complainant presented gynaecological injuries, the complainant’s age (70 years of age) at the time of the intercourse and menopausal should also play a role in the extent of the complainant’s injuries.

7.2. The second is that the evidence produced by the State was not sufficient to discharge its onus of proof beyond a reasonable doubt regarding the three charges of rape of the complainant. In this regard, counsel for the appellant argued that the complainant’s evidence suggests that the sexual acts were closely linked and amount to a single continuing course of conduct and therefore proved one continued act of sexual intercourse. She argued that even if the length of time was an irrelevant factor, because the appellant did not withdraw from the complainant and no evidence was led by the State that there were different penetrations, the State did not discharge its onus of proof of three charges of rape.

8. In respect of sentence, counsel for the appellant stood by her written submissions, she argued that the trial Court erred by

8.1. not giving proper consideration of the appellant’s personal circumstances, specifically his chances of rehabilitation;

8.2. not giving enough weight to the fact that the appellant was a first offender;

- 8.3. emphasising the interests of the community and the seriousness of the crime;
- 8.4. not giving due consideration to the element of mercy to be afforded to the appellant and gave the element of retribution too much weight;
- 8.5. placing too much emphasis on the lack of remorse by the appellant;
- 8.6. over-emphasising the deterrent and retributive aspects of punishment.
9. Counsel argued further that life imprisonment is “shockingly inappropriate and out of proportion with the totality of the accepted facts in mitigation”; that another court would have found substantial and compelling circumstances to divert from the minimum sentence of life imprisonment and that the following factors considered cumulatively should be construed as substantial and compelling factors which warrant a deviation from the prescribed life sentence:
- 9.1. Rehabilitation – that the long sentence imposed will not aid the appellant’s rehabilitation and that the prescribed minimum sentence of life imprisonment is reserved for the most heinous crimes;
- 9.2. Personal factors – the appellant was 38 years old at the time of the offence and was a security guard earning an income of R 3800 per month; he is single with two minor children of respectively 8 years and 1 year; the eldest son is physically handicapped and resides with his paternal grandmother; the appellant was responsible for the provision of his son’s needs; the appellant is a first offender and spent almost 24 months in prison awaiting trial.
10. Counsel further submitted that if the appellant is convicted on one count of rape, the minimum sentence of life imprisonment will not be applicable but that the appellant will be facing a minimum sentence in terms of section 51(2) Part II Schedule 2 to wit ten years’ imprisonment.
11. Counsel appearing on behalf of the State argued that, in respect of conviction,
- 11.1. An accused may be convicted of any offence on the single evidence of any competent witness and that the court is entitled to convict on the evidence of a single witness if the court is satisfied that the evidence of the single witness is satisfactory in all material respect. He submitted that the court applied the cautionary rule in respect of the witness’s evidence and it gave reasons in its judgment for finding the complainant’s evidence to be logical, confident, and consistent and came to the

conclusion

that her evidence was clear and unambiguous.

11.2. That the trial Court correctly took into consideration the medical findings of Dr Llyod Huddlestone Thompson (“Dr Thompson”) in respect of the complainant’s report to and the observations in respect of her injuries. The evidence of the doctor regarding the injuries were indicative of forceful penetration and not consistent with consensual intercourse.

11.3. That the trial Court correctly approached the multiple acts of penetration in finding that each erection amounted to different acts of penetration and correctly convicted the appellant on three counts of rape.

12. As regards sentence, counsel for the State argued that the reasoning of the trial court was well ventilated on sentence and the court correctly found aggravating circumstances present in this matter, the seriousness of the offence, the age of the complainant, the nature and degree of violence on the complainant, the seriousness of the injuries, the use of a knife in the commission of the offence, lack of remorse on the part of the appellant and the prevalence of the offence. The State submitted that even if the Court should find one count of rape and not three, in light of the aggravating circumstances that are present in this case, the sentence would remain the same.

13. A brief review of the facts is necessary.

The complainant’s version

14. The complainant testified that she was at home in her house on 26 December 2015. She was residing in a shack. She was inside the shack when the incident occurred. It was 23:00 in the evening. She was in her bedroom when she heard the sound of something kicking the door, the door was closed. The lights were on in her bedroom and kitchen. When the complainant went to see what caused the sound, she saw the appellant. The complainant testified that she knew the appellant as he grew up in front of her. The complainant asked the appellant what he wanted in her house at that hour. The appellant responded by stating that he was going to kill the complainant. The complainant took out a knife from his trouser pocket. The knife was black and gold. The complainant grabbed the

appellant’s wrist. The complainant and appellant wrestled for a while for the appellant’s knife. The knife fell behind the complainant. The complainant started screaming whereafter the appellant slapped the complainant and thereafter held the complainant’s neck. The complainant could not breathe at that time. The appellant then let go and grabbed hold of the complainant’s pants and proceeded to pull the complainant’s clothing off of her. The appellant picked the complainant up and placed her on the

bed, split the complainant’s leg and inserted his hand in her vagina, fondled the complainant and then inserted his penis inside the complainant’s vagina. He penetrated the complainant against her consent. The appellant then lost his erection and regained it again after he rested whilst still on top of the complainant. This happened three times.

15. It is important to look more closely at the complaint's evidence in respect of the allegation of multiple acts of rape. Under examination in chief, the complainant testified as follows:

“PROSECUTOR: Okay, what happened after he inserted his penis in your vagina, what happened?”

[THE COMPLAINANT]: He proceeded with his business of the day, Your Worship. ...

[THE COMPLAINANT]: He penetrated me, he made me feel pain, Your Worship. He did what he was there to do. ...

[THE COMPLAINANT]: It did not come to an end, he rested and then he raped me actually three times. ...

[THE COMPLAINANT]: He never took his penis out Your Worship, he rested whilst being on top of me. ...

COURT: Can you say the first time, you referring to three times, whether he ejaculated or not. Do you know?

[THE COMPLAINANT]: I do not know but I did feel the wetness, Your Worship.

COURT: Did he lose his erection, did it go soft?

[THE COMPLAINANT]: Yes Your Worship. ...

[THE COMPLAINANT]: He then repeated the same act again until he repeated it three times, Your Worship.

COURT: Alright, so the second time, did he again get an erection?

[THE COMPLAINANT]: Yes Your Worship.

COURT: And then when it was over, did he lose his erection?

COURT: And the third time, did he become erect again?

[THE COMPLAINANT]: Yes, Your Worship.

[THE COMPLAINANT]: When he tried, he attempted to penetrate me for the fourth time, but his manhood was now weak, limp, Your Worship, he could not.”

16. Under cross examination, the complainant further testified that:

“[THE DEFENCE]: ...The accused says that he had sexual intercourse with you once.

[THE COMPLAINANT]: He is lying.

[THE DEFENCE]: I just want you to explain to this Court, yesterday you said the accused had sexual intercourse with you and he rested on you. Do you still remember?

[THE COMPLAINANT]: Yes, I remember that.

[THE DEFENCE]: And you further told this Court that he never removed his penis inside you. Do you still remember?

[THE COMPLAINANT]: Yes.

THE DEFENCE]: Now are you telling this Court that on that one sexual act the accused repeated himself three times.

[THE COMPLAINANT]: Yes.”

17. It was several hours later, at 05:00 when the appellant was leaving the complainant’s home when the complainant managed to blow a whistle to call her neighbours. The appellant jumped over the fence and left. The complainant opened the gate for her neighbour Maria. Other neighbours came and transport was arranged for the complainant to be taken to hospital. The complainant was taken to Baragwanath Hospital. The complainant sustained injuries to her hip, her eye and her face was swollen. The doctor examined her. Blood was drawn from her they cleaned her and gave her an injection.

The evidence of Ms Maria Ellias

18. Ms Maria Ellias (“Ms Ellias”) testified that on 27 December 2015, she was at her house in her shack when she was called by the complainant.
19. It was in the early hours of the morning at 05:30. She went to the complainant’s yard and the complainant unlocked the gate. Other members of the community came into the complainant’s yard. The complainant reported that she had been raped.
20. On the night of the incident between 23:00 to 05:00 the next morning she was already asleep and did not hear anything.

The evidence of Dr Thompson

21. Dr Thompson testified that on 27 December 2015 at 09:55 he completed the necessary forms. He examined the complainant, a 70-year-old female. She presented with a blue-black swollen jaw and a periorbital around the eye. He further concluded the genital examination and his findings made were consistent with vaginal penetration.
22. He confirmed the findings that appear at Exhibits A1 and A2, and confirmed that the injuries of the complainant were consistent with the complainant’s version in respect of the physical injury and the sexual assault.

The appellant’s version

23. The appellant testified that on 20 December 2015, he walked past the complainant’s house when the complainant called him into her house. The complainant said to him that they should have a love relationship. The appellant’s response was that he was staying with the mother of his child. The complainant proceeded to ask the appellant about his off days to which he responded that he would be off duty on the 25th and 26th.

24. They ended up agreeing to the complainant's proposal to have a love relationship because the complainant had no problem with the appellant staying with the mother of his child. The complainant wrote her phone number down on a paper and the appellant took the complainant's phone and punched his number into the complainant's phone. They then agreed to see each other on the

25th and 26th after which the complainant said that the appellant should bring R200 to which the appellant agreed. The complainant told the appellant that she would not lock the door.

25. On the 25th, the appellant could not go to the complainant as he had visitors. The appellant went to the complainant on the night of the 26th at approximately 01:30. He saw the lights were on and the chain on the gate was not locked. He proceeded to the door and noticed that the door was slightly open. He knocked on the door and the complainant said come in. The appellant walked in and greeted and

heard the complainant greeting back while she was in her bedroom. The complainant asked the appellant to sit where he was. He sat on a chair in the kitchen and fell asleep. At around 01:45 the complainant woke him up. The appellant stood up from the chair and the complainant held him by his hand and they both walked to the bedroom.

26. The complainant asked the appellant if he had the parcel that they discussed about to which he responded that he did but it was not the amount that they had agreed on. The complainant said she wanted the full amount and began pushing the appellant and he fell to the floor. The complainant proceeded to attack the appellant whilst he was on the floor. The complainant landed on the floor and knocked herself against the bed. The appellant stood up to leave and proceeded to the kitchen. The complainant said that if the appellant dare walk out and she will also walk out and scream. The appellant went back into the room saw the complainant kneeling down holding her face and proceeded to pick her up. The complainant then took the appellant to another bedroom. The complainant sat on the bed while the appellant sat on a chair. The complainant and the appellant spoke about the complainant's eye. The appellant confirmed that the complainant's eye was haemorrhaged, she had a blue eye.

27. The complainant got into bed and told the appellant to sleep as well. They slept on the same bed but faced in separate directions. Whereafter the appellant felt the complainant's hand touching him. The complainant indicated to the appellant she was ready and ordered him to lie on top of her. The complainant proceeded to place her hand on the appellant's private parts and inserted

it into hers and they had consensual sexual intercourse once. Thereafter they went to sleep, the complainant told the appellant to leave in the morning before people could see him.

28. The appellant woke up at 04:45 in the morning and told the complainant that he would fetch his bank card at his home, withdraw the money and be back by 06:30.
29. The appellant did not give the complainant the R100 that he had with him because the complainant wanted the whole amount. Thereafter, the appellant did not manage to withdraw the money because when he got home, his younger sister phoned him and told him that she had learnt from other people that he had sexual intercourse with the complainant by force. The appellant then went back to the complainant but could not find her as she had gone to the hospital.

The credibility findings made by the trial Court and conviction

30. From the evidence before the court, it is clear that the trial Court was faced with two mutually destructive versions, namely; that of the complainant alleging rape, and that of the appellant denying rape.
31. In order to come to factual findings, the trial Court made credibility findings. After having applied the necessary caution, the trial Court found that the complainant was a credible witness and accepted her version. It further rejected the version of the appellant as not being reasonably possibly true.
32. The approach to be adopted by a court of appeal when dealing with the factual findings of a trial Court is trite. A court of appeal will not disturb the factual findings of a trial Court unless the trial Court has committed a material misdirection or where it is convinced that the trial Court is wrong.
33. The evidence of the complainant was clear and not contradictory. The trial Court proceeded to consider the complainant's evidence with the necessary caution. The findings by Dr Thompson were consistent with the complainant's version that she was sexually assaulted. This is an independent fact which confirms that the complainant was penetrated sexually.
34. Although the complainant was a single witness in respect of the incident, the trial Court evaluated her evidence with caution, as it was required to do. A Court is entitled to convict an accused person on the evidence of a single witness if it is satisfied, beyond reasonable doubt, that such evidence is true notwithstanding that the witness is in some respects an unsatisfactory witness. In other words, the evidence of a single witness has to be satisfactory but not necessarily perfect.
35. This court is satisfied with the finding that the appellant raped the complainant. The State proved its case beyond reasonable doubt that the appellant unlawfully and intentionally committed an act of sexual penetration with the complainant. However, this Court has difficulty with the trial Court's finding that the appellant was guilty "as charged" ie that he raped the complainant three times. Unfortunately, the learned magistrate did not analyse the evidence of the complainant to justify the conclusion that three acts of rape occurred.

36. The difficulty in this case is not the quality of the complainant's evidence but rather the sufficiency thereof. The complainant testified that she had been raped 3 times. The facts underpinning these conclusions were however not placed on record with sufficient particularity. She was not led on the three separate acts of events adequately.
37. The facts that arise in this matter are not uncommon in rape cases. Several sexual acts, committed without consent, being perpetrated by the same accused with the same complainant, within short intervals and often at the same place. The question posed is whether the several acts should account for one or more convictions of rape. It is trite that each case must be evaluated and judged on its own facts.
38. In *S v Blaauw* 1999 (2) SACR 295 (W) the court held:
- "Mere and repeated acts of penetration cannot without more, in my mind, be equated with repeated and separate acts of rape. A rapist who in the course of raping his victim withdraw his penis, positions the victim's body differently and then again penetrates her, will not, in my view, have committed rape twice. This is what I believe occurred when the accused became dissatisfied with the position he had adopted when he stood the complainant against a tree. By causing her to lie on the ground and penetrating her again after she had done so, the accused was completing the act of rape he had commenced when they both stood against the tree. He was not committing another separate act of rape. Each case must be determined on its own facts. As a general rule the more closely connected the separate acts of penetration are in terms of time (i.e. the intervals between them) and place, the less likely a court will be to find that a series of separate rapes has occurred. But where the accused has ejaculated and withdrawn his penis from the victim, if he again penetrates her thereafter, it should, in my view, be inferred that he has formed the intent to rape her again, even if the second rape takes place soon after the first and at the same place."*
39. In *Tladi v The State* 2013 (2) SACR 287 (SCA), the SCA held that:
- "[13] ...The complainant's evidence does not suggest that there was an interruption in the sexual intercourse to constitute two separate acts of sexual intercourse and, therefore, two separate acts of rape. The complainant's evidence suggests that the sexual acts were closely linked and amount to a single continuing course of conduct. There is no suggestion in her evidence that there was any appreciable length of time between the acts of rape to constitute two separate offences. The evidence against the appellant is therefore limited and is insufficient to establish his guilt on two separate counts of rape."*
40. On the facts of this case, the complainant's evidence was that the appellant inserted his penis into the complainant's vagina he penetrated the complainant, he did not withdraw from the complainant. He rested on the complainant and got another erection the second time. He rested again, and got another erection the third time.

41. It is however difficult to ascertain from the testimony before us whether these were three distinct acts. The complainant was not led adequately on the interruption between the acts. There was no evidence that enabled the trial Court to determine whether there were three distinct acts or if the conduct formed part of a continuous act. The evidence led was plainly inadequate to conclude that there was more than one act of penetration.
42. Consequently, there was no basis for the conviction on the second and third counts of rape and these convictions fall to be set aside.

Sentence:

43. Turning to sentence, the appellant was sentenced to direct imprisonment for life. It is trite that an appeal court can interfere with sentence only where the sentence is affected by an irregularity or misdirection entitling this court to interfere.
44. Section 51(1) of the Criminal Law Amendment Act provides that:
“51 Discretionary minimum sentences for certain serious offences
 - (1) Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life.”
45. Part I of Schedule 2 provides that, rape as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 –
 - (a) when committed-
 - (i) in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice;
 - (ii) by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy;
 - (iii) by a person who has been convicted of two or more offences of rape or compelled rape, but has not yet been sentenced in respect of such convictions; or
 - (iv) by a person, knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus;
 - (b) where the victim-
 - (i) is a person under the age of 16 years;
 - (iA) is an older person as defined in section 1 of the Older Persons Act, 2006 (Act 13 of 2006);
 - (ii) is a physically disabled person who, due to his or her physical disability, is rendered particularly vulnerable; or

(iii) is a person who is mentally disabled as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; or

(c) involving the infliction of grievous bodily harm.

46. In this case, the complainant was 70 years old.

47. It is necessary for a court to find the existence of substantial and compelling circumstances before it is entitled to impose a lesser sentence.

48. The trial Court considered that that complainant was an elderly person, she resided alone, the appellant was known to her, the appellant showed no remorse, the appellant entered the complainant's home - the one place that the complainant is supposed to feel safe, the appellant produced a knife, slapped her and over a period of several hours subjected the complainant to inhuman cruel degrading acts. When testifying, the complainant exhibited the most terrible fear.

49. The trial Court further considered that albeit the appellant is a first-time offender, that he was in custody for two years, that he was gainfully employed and that his child is entrusted to care of an elderly relative. But the cruelty of the appellant's actions, the humiliation and degradation that shone through everything the trial Court heard, what the appellant did should not be greeted with anything less than the harshest sentence.

50. I am satisfied that, the trial Court properly considered whether there were substantial and compelling circumstances.

51. The trial Court considered the triad of factors relevant to sentencing, namely the nature of the offence, the personal circumstances of the appellant, including his moral blameworthiness and the interests of society by which include the interests of the victim.

52. There are a number of factors which are aggravating, the seriousness of the offence, the age of the complainant, the nature and degree of violence on the complainant, the seriousness of the injuries, the use of a knife in the commission of the offence, lack of remorse on the part of the appellant.

53. Rape in itself is a heinous and repulsive crime. The sentence which was imposed by the trial Court fits the appellant, the crime and serves the legitimate interests of society. In *S v Chapman* [1997] ZASCA 45; 1997 (2) SACR 3 (SCA) the court said it is "a humiliating and degrading and brutal invasion of the privacy, the dignity and the person of the victim". Its gravity in this case is aggravated by the fact that the victim was a 70-year-old woman.

54. I cannot find that the learned magistrate was incorrect in the finding that there were no substantial and compelling circumstances that warrant any other punishment than the sentence of imprisonment for life.

55. In my view the appeal against sentence must fail.

Order:

56. In the result, the following order is made:

56.1. The appeal against the conviction on count 1 is dismissed.

56.2. The appeal against the convictions on counts 2 and 3 are upheld. The convictions of the court a quo on counts 2 and 3 are accordingly set aside.

56.3. The appeal against sentence is dismissed.

F Karachi

Acting Judge of the High Court

I agree and it is so ordered.

W L Wepener

Judge of the High Court

Appearances:

For the Appellant: S Simpson

For the Respondent: J F Masina

Date of the hearing: 21 October 2021

Date of the judgment: 26 October 2021

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Prepared on 10 October 2026 · Esheria