

SOUTH AFRICA / JUDGMENT

Masango v S (A175/2021) [2024] ZAGPPHC 64 (5 February 2024)

[2024] ZAGPPHC 64

COURT

North Gauteng High Court, Pretoria

BEFORE

E van der Schyff, J A Kok

CASE / FILE NUMBER

A175/2021

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG DIVISION,

PRETORIA

CASE NO: A175/2021

(1)

REPORTABLE: YES/NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: NO

Date: 5

February 2024

E van der Schyff

In

the matter between: JEREMIA
ZOLANI MASANGO
APPELLANT
and
THE
STATE
RESPONDENT

JUDGMENT

Van der Schyff J

Introduction

- [1] The appellant was convicted on a charge of rape in contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007 (the Act). He was sentenced to life imprisonment. This appeal is against the conviction and sentence imposed.
- [2] The appellant submits that the trial court misdirected itself in relying on the complainant's single evidence and claims that there is little reliable corroboration regarding the perpetrator's identity. He contends that the trial court misdirected itself in finding that his version could not be reasonably possibly true. As for the sentence imposed, the appellant contends that the trial court misdirected itself in not finding that substantial and compelling circumstances exist that justify a lesser sentence.

The approach to be taken on appeal

- [3] Well-established principles govern the hearing of appeals against findings of fact.[1] An appeal court's powers to interfere with the findings of fact by the court a quo is limited.[2] In the absence of demonstrable and material misdirection by the trial court, its findings of facts are presumed to be correct. Such findings will only be disregarded if the record shows them to be clearly wrong:[3]

'In the absence of any misdirection, the trial Court's conclusion, including its acceptance of a witness's evidence, is presumed to be correct. In order to succeed on appeal, the appellant must therefore convince the Court of appeal on adequate grounds that the trial Court was wrong in accepting the witness' evidence- a reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage which a trial Court has of seeing, hearing and appraising a witness, it is only in exceptional cases that the Court of appeal will be entitled to interfere with a trial Court's evaluation of oral testimony.'

- [4] In order to determine whether the trial court materially and demonstrably misdirected itself, it is necessary to evaluate the evidence as reflected in the typed record of the proceedings against the trial court's findings.

The presiding officer's analysis of the evidence

Ad conviction

- [5] The State presented the evidence of five witnesses, to wit, the complainant, her mother, the investigating officer, the police officer in charge of the police exhibit store, and the medical doctor who examined the complainant. Two witnesses testified on behalf of the defendant, himself, and the police officer who took the complainant's statement.
- [6] Although the appellant chose not to provide a plea explanation, the only disputed issue was the question as to whether the appellant was the person who raped the complainant. The appeal against the conviction is thus, in essence, an appeal on facts. The sole issue is whether the appellant had sexual intercourse with the complainant.
- [7] The complainant's evidence that she was raped is corroborated by the doctor, who confirms not only that she had sexual intercourse

that caused bruising, but also that her jersey was torn. The complainant's evidence of the events that preceded her abduction is corroborated by her mother. Her testimony that the appellant raped her is corroborated by her mother, who testified that she approached not only the appellant's mother but also the appellant the next morning and confronted the appellant. The complainant's mother's evidence that she visited the accused's home the morning following the event, that she had sight of the knife, empty alcohol bottles, and handcuffs in his room, and confronted the accused, whereafter he apologised and said that he is sorry for the incident but that he was drunk, was never disputed when this witness was cross-examined. The accused confirmed in his evidence in chief that the complainant's mother visited his homestead, although he then said that she only came to the gate. In these circumstances, the failure to challenge the evidence that she spoke to him and that he acknowledged the incident and apologised in cross-examination, holds consequences. It is trite that a failure to challenge the evidence of a witness on a particular issue in cross-examination may affect the findings of the court on that issue.[4]

- [8] The discrepancy between the complainant's statement and her viva voce evidence does not go to the substance of her testimony. It must be considered that she was still severely traumatised when she made the statement. A witness is not required to provide a minutely detailed statement to the police when making the statement. The few inconsistencies in the state's case do not boil down to the substance of the state's case but are rather indicative of the respective witnesses' imperfect recollection. The contradictions in the complainant's evidence are likewise not material.
- [9] After considering the evidence and the trial court's analysis thereof, it is clear that the trial court did not materially and demonstrably misdirect itself when the evidence was considered.

Admissibility of the complainant's evidence

- [10] This is not the end of the matter. A question that arose when I read the record is whether the complainant's evidence is admissible. The complainant's evidence was led with the assistance of an intermediary.[5] The complainant turned 15 the day before the trial commenced. The complainant's competency to testify was not an issue raised before the trial court.
- [11] However, after perusing the record, I requested counsel to prepare submissions on the question of whether the trial court established that the witness could distinguish between truth and falsehood and understood the nature and import of the oath before the oath was administered. The record reflects that the presiding officer did not conduct an extensive formal enquiry, on the basis of which it can be said that the complainant's competency to testify was determined. During argument, counsel for both the state and the appellant submitted that this apparent lack-of-investigation or enquiry constituted an irregularity that rendered the complainant's evidence inadmissible.
- [12] Both counsel submitted that it is trite that a trial court is obliged to assess the competence of a child witness and establish whether the witness is capable of distinguishing between truth and lies. Appellant's counsel referred the court, amongst others, to *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and Other*,^[6] and *S v Nedzamba*.^[7] A court is not bound to submissions made by counsel. Even where concessions are made, the court should weigh these concessions in

light of prevailing principles of law as the court sees it.

- [13] In casu, the exchange between the presiding officer and the witness proceeded as follows:

'Court: Can I have the full names of the witness?

Witness: R[...] S[...] M[...]

Court: How old are you?

Witness: 15 years, Your Worship

Court: Do you understand what it is to take the oath?

Witness: (No audible reply)

Court: Let me explain to you: If a person wants to testify in Court that he has got a religion, it is usually expected from that person to take the oath. The oath means you swear before God that you will tell the truth and nothing but the truth. And what then happens, is that you went to the police and complain about something, they usually take a statement under oath from you, where you must swear under oath that you will tell the truth, that if you come to court and swear again that you're going to tell the truth and it is different –

what you tell the Court, is different from what you said in the statement, you've got trouble; you may then be sentenced

because you did not tell the truth if the two statements are not the same. And they call that perjury. Do you understand?

Witness: Yes I understand, Your worship.

Court: Okay, I also want to explain to you that because you are still very young – you are 15 years old – you are sitting in that room with that lady and not inside the Court, because we want you to feel at ease, to speak openly about what happened to you. This is a very serious charge against the Accused, but all what is expected from you, is to tell the truth, to tell the Court what really happened to you. If you can't remember, just say you can't remember. Don't feel forced to think about an answer, if you can't remember, but you must really try to answer all the questions. You must also take note of the fact that, except for the people who must be in court, there's no-one else in court. The Court is sitting in camera. There's no part of the public sitting in court, who will listen to the case. It's only the people working here and the Accused and his attorney. So you must feel free to speak openly.

Witness: Yes, Your Worship

Court: Okay, are you prepared to take the oath?

Court: Okay, you swear that the evidence you're about to give, will be the truth, the whole truth and nothing but the truth. Say so help me God.

Interpreter: Sworn in Your Worship.'

[14] For the discussion that follows, it is essential to note that the discussion in *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and Others* dealt with s 164(1) of the Criminal Procedure Act 55 of 1977. The Constitutional Court affirmed the statutory position that s 164(1) allows a court to allow a person who does not understand the nature or importance of the oath to give evidence without taking an oath. When the court perceives a child witness not to understand the nature and importance of the oath, the presiding officer admonishes the person to speak the truth. The court must, however, determine whether such a witness is able to distinguish between the truth and falsehood. It is implicit, if not explicit, in the provision that the person must understand what it means to speak the truth.

[15] In *S v Nedzamba*, the Supreme Court of Appeal essentially confirmed that the same principles apply where a child testifies under oath. The court said:

'First, the complainant was 14 years old at the time of the trial. She was a child witness with whom care should have been taken at the outset. No thought was given to whether the child understood the nature and import of the oath. It was not determined at the outset whether the child knew what it meant to speak the truth. ... To admit evidence of a child who does not understand what it means to tell the truth undermines the accused's right to a fair trial. The court below did not even begin to address any of these concerns.'

[16] The Supreme Court of Appeal's ruling in Nedzamba confirmed the position as stated, amongst others, in *S v V* by Rose Innes J,

[8] as he then was. He held that the capacity to understand the difference between truth and falsehood is a prerequisite for the oath. In *S v B*[9] and *Director of Public Prosecution, KwaZulu-Natal v Mekka*,[10] it was established that a formal inquiry to determine whether a child witness understands the oath, need not be undertaken.[11] In these cases, the Supreme Court of Appeal clarified that a presiding officer may conclude that a child will not understand the

oath based on their youthfulness. In *Mekka*, supra, the court found it appropriate for the trial court to assume that a nine-year-old did not understand the nature and import of the oath.

[17] In *S v Gallant*,[12] where the witness was 11 years old, a full bench of the Eastern Cape Division held that there had been no reason for a departure from administering the prescribed oath and resorting to an admonition in terms of s 164 of the CPA, even in the case of relatively young complainant. In *S v Sikhapha*,[13] the Supreme Court of Appeal held that 14 years was regarded as sufficiently old to presume an understanding of the oath, and an

inquiry was not deemed necessary. The court explained:[14]

'Section 164 of the Criminal Procedure Act permits a presiding officer to dispense with the taking of an oath where it appears that a child does not understand the nature and import of the oath. In such circumstances an enquiry should be held as to the level of understanding of the witness, and the presiding officer must admonish the child to tell the truth. But a formal enquiry is not necessary, as long as the presiding officer has formed an opinion that the witness does not understand the meaning of the oath. In this case, however, the oath was administered to both the complainant, who was 14 at the time of the trial, and her brother, whose age does not appear from the record. The situation is different. There is no requirement that the trial court must formally enquire whether a witness understands the oath nor that the presiding officer must record that fact. Of course, a presiding officer must be satisfied that a witness does understand the oath, but he or she may form a view in this regard without formally making an enquiry or recording his or her view. There is nothing in the evidence to suggest that either the complainant or her brother was ignorant of the import of the oath.' (Footnotes omitted).

[18] An understanding of the oath presupposes the following components: (1) an understanding of the religious obligation of the oath;

(2) the meaning of the truth, and (3) the difference between truth and falsehood. The evidence before the court was that the complainant, a 15-year-old girl, was enrolled in grade

8. She did not lack formal education. If it is considered that children older than 14 are regarded as *doli capax*, and in line with the decision in *Sikhapha*, it follows that a child older than 14 can be presumed to be able to distinguish between right and wrong and, concomitantly, between truth and falsehood.

- [19] A child of fifteen years is an adolescent. Such a child is often described as a ‘young person’ and is in the process of developing from a child into an adult. The complainant might be regarded as a young person but cannot be described as a ‘child of tender years’. To treat an adolescent who is *doli capax* the same as a toddler and summarily regard the adolescent’s evidence as inadmissible on the basis of youthfulness because the trial court did not conduct a formal inquiry as to whether the child is able to differentiate between truth and a lie is devoid of logic. Where there is no other factor indicating that an adolescent who is in the age-appropriate grade in high school does not understand the nature and import of the oath and is unable to discern between truth and a lie, the presiding officer cannot be faulted for implicitly forming the opinion that the witness is competent to testify understands the nature and import of the oath, and asks her if she is prepared to take the oath after explaining that it requires the telling of the truth.
- [20] If the exchange between the presiding officer and the child witness is analysed, it is evident that the court explained to the witness that it is expected of people who has a religion to take an oath, and to tell only the truth. The presiding officer also explained the potential adverse consequence of lying. By indicating that she does not have an objection to taking the oath after hearing this explanation, the fifteen-year-old complainant indicated that she has a religion and is bound to tell only the truth. A sane, educated fifteen-year-old can be presumed to know and understand what the concept of ‘the truth’ entails. If the exchange between the regional court magistrate and the complainant is considered, it is evident that the presiding officer was satisfied that the witness appreciated the duty to speak the truth, had sufficient intelligence, and could communicate effectively. She was entitled to administer the oath.
- [21] The trial court then carefully considered the complainant’s evidence within the body of evidence before the court and found
- substantiation and corroboration for it in the evidence of her mother, the investigating officer, and the doctor. If the evidence
- before the court is considered in totality, it cannot be said that an irregularity in the administration of the oath occurred that resulted in a failure of justice. The complainant’s competence to testify was reinforced and substantiated by the manner in which she gave evidence.[15]
- [22] The manner in which the presiding court dealt with the child witness is open for criticism. I am, however, of the view that in light of the witness’s age and level of education, the explanation given by the presiding officer that preceded the question as to whether the witness was prepared to take the oath, sufficiently explained the nature and purport of the oath, and emphasised the need to tell the truth. In the circumstances of this case, there was no need to doubt the complainant’s capacity to provide reliable evidence an opinion could be formed from the circumstances.

[23] The Constitutional Court confirmed in *S v Zuma*[16] that the Constitution ‘embraced a concept of substantive justice.’ The ideal of substantive justice is not restricted to the accused. The Supreme Court of Appeal explained in *Rodrigues v The National Director of Public Prosecution and Others*,[17] that the right of an accused to a fair trial requires fairness not only to him, but fairness to the public as represented by the State as well.

[24] Rape is undeniably a degrading, humiliating and brutal invasion of security of the person. In cases of sexual abuse, the minor witness is more often than not a single witness to the offence. Minors should not be let down by the judicial system because presiding officers fail to conduct extensive formal investigations regarding witnesses’ competence to testify, and their understanding of the nature and import of the oath. The principle that judicial officers can form an opinion regarding a child witness’s competence to testify based on circumstances goes both ways. Although it is not obligatory, it is preferable for presiding officers to record findings regarding these aspects and note the reasons substantiating the findings. A failure to record such a finding should not, without more, in the absence of an indication that the evidence might not be reliable, render the child witness’ evidence inadmissible. The age of fifteen in itself should not be regarded as an exclusionary factor. The fifteen-year-old child is a mere three years from attaining majority and in this context, the witness’s age alone cannot cause any doubt as to whether he or she understands the difference between truth and falsehood. Where the adolescent is educated, her evidence needs to be considered in the context of the totality of evidence led during the trial to determine whether the State made out its case beyond a reasonable doubt.

[25] As a result, I believe that no reasons exist to interfere with the conviction.

Ad sentence

[26] The presiding officer imposed a sentence of life imprisonment. She found that no compelling circumstances existed that allowed leniency. The Supreme Court of Appeal in *S v Malgas*[18] held that in determining whether there are substantial and compelling circumstances, a court must be conscious that the Legislature

determined that a sentence should ordinarily be imposed for the crime specified. There should be truly convincing reasons to impose a lesser sentence. In *Sikhipha*, the Supreme Court of Appeal stated that the circumstances that might justify imposing a lesser sentence include the mitigating factors

traditionally taken into account in sentencing. These must then be weighed together with aggravating circumstances but need not be ‘exceptional.’

- [27] In my view, the presiding officer committed a serious misdirection in failing to have regard to the following mitigating factors, the appellant, although a major, was not advanced in years. By accepting the evidence of the complainant's mother, the court accepts that alcohol played a role in the commissioning of the crime. The appellant was a first offender who was his family's primary breadwinner. He has attained only a low level of education, leaving school after having completed grade
7. Before the incident occurred, he was actively involved in the Apostolic Faith Mission Church and served as the church's secretary. He spent more than a year in custody awaiting trial. After considering the pre-sentence report, I am of the view that the appellant's personal circumstances indicate that he is capable of rehabilitation. The sentence of life imprisonment must therefore be set aside, and this Court must consider an appropriate sentence mindful of the prescribed minimum sentence the Legislature deemed appropriate for the rape of a child under 16 – life imprisonment.
- [28] Considering the nature of the offence, the interest of society, the impact of the crime on the victim but also the personal circumstances of the accused, and the objectives of sentencing, I am of the view that a lengthy sentence of imprisonment is warranted. I consider that a period of 20 year's imprisonment will send a message to the community that rape will be visited with severe punishment. Such a sentence will have a strong deterrent effect, whilst accounting for the period the accused was already incarcerated. I am, however, also of the view that the appellant must attend a rehabilitation program for sexual offenders and that a portion of his sentence can be suspended if he successfully completes a program for sexual offenders. Suspending a portion of the sentence subject to the imposed conditions will have a rehabilitative and deterrent effect.

ORDER

In the result, the following order is granted:

1. The appeal against the conviction is dismissed.
2. The appeal against the sentence is upheld.
3. The sentence imposed by the Court below is set aside and replaced by the following:

'The accused is sentenced to twenty years' imprisonment, of which five years are suspended for a period of five years, subject thereto that:

- (i) The accused participates and completes a program for sexual offenders presented at the facility where he is serving his sentence;

and

- (ii) The accused is not convicted of any crime involving elements of violence or sexual misconduct during the period of suspension;

4. The sentence is antedated to 2 February 2015.

Judge of the High Court

I agree

J A Kok

Acting Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. It will be emailed to the parties/their legal representatives as a courtesy gesture.

For the appellant: Adv. H. Alberts Instructed by: Legal Aid South Africa For the respondent: Adv. J. Cronje Instructed by: Director of Public Prosecutions Date of the hearing: 24 January 2024 Date of judgment: 5 February 2024

[1] R v Dhlumayo and Another 1948

(2) SA 677 (A); S v Hadebe and Others 1997 (2) SACR 641 (SCA) 645E-F.

[2] S v Francis 1991

(1) SACR 198 (A) 198I-199A.

[3] Ibid.

[4] President of the RSA and OTHERS v South African Rugby Football Union and OTHERS 2000

(1) SA 1 (CC) para [61].

[5] On a reading of the report filed in support of the appointment of an intermediary I noted that the report contains patent errors. Since neither party took issue with this information, I am not dealing with it in this judgment.

[6] 2009

(2) SACR 130 (CC) paras [163-169].

[7] 2013

(2) SACR 333 (SCA) para [26].

[8] 1998 (2) SACR 651 (CPD) 652H-I.

[9] 2003 (1) SACR 52 (SCA).

[10] 2003 (2) SACR 1 (SCA)

[11] See also, S v Baadjies 2017 (2) SACR 366 (WCC).

[12] 2008

(1) SACR 196 (E).

[13] 2006

(2) SACR 439 (SCA).

[14] Supra, at para [13].

[15] See Tyatyeka v S 2023 (1) SACR 193 (ECB) (8 November 2022).

[16]

[1995] ZACC 1; 1995 (1) SACR 568 (CC) para [16]. See also S v Dzukuda; S v Tshilo

[2000] ZACC 16; 2000 (2) SACR 443 para [9].

[17] (1186/2019) [2021 ZASCA 87 (21 June 2021) para [34] whilst quoting from Zanner v Director of Public Prosecutions Johannesburg

[2006] ZASCA 56; 2006 (2) SACR 45 (SCA) para [21].

[18] 2001 (1) SACR 469 (SCA).

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