

SOUTH AFRICA / JUDGMENT

Mashego v S (A173/2024) [2024] ZAGPPHC 1293 (27 November 2024)

[2024] ZAGPPHC 1293

COURT

North Gauteng High Court, Pretoria

BEFORE

Labuschagne AJ, Mngqibisa Thusi J

CASE / FILE NUMBER

A173/2024

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

SAFLII

Note: Certain

personal/private details of parties or witnesses have been redacted from this document in compliance with the law and SAFLII Policy

FLYNOTES:

CRIMINAL – Rape – Mens
rea –
Misrepresentation regarding
identity is alleged to give rise to an invalid consent –
Complainant consented to intercourse
under impression that it was
with her boyfriend – Consent by its nature must be informed
– Complainant did not
give valid consent – Accused was
under impression that complainant did consent – Lacked mens
rea regarding alleged
rape – Appeal succeeds –
Conviction and sentence set aside.
IN
THE HIGH COURT OF SOUTH AFRICA
GAUTENG
DIVISION, PRETORIA
CASE
NO: A173/2024
(1) REPORTABLE:
YES/NO
(2) OF INTEREST TO
OTHER JUDGES: YES/NO

(3) REVISED.
SIGNATURE

DATE: 27/11/2024
In

the criminal appeal of: MPHO
MARVIN MASHEGO
Appellant
and
THE
STATE
Respondent

JUDGMENT

LABUSCHAGNE AJ

CONCURRING: MNGQIBISA THUSI J

- [1] The appellant was convicted of rape and sentenced to the minimum period of 10 years imprisonment by the Court a quo.
- [2] This is an appeal against conviction alone, leave to appeal against the sentence having been refused.
- [3] The facts do not disclose violence on the part of the accused in perpetrating a rape. Rather it is an occasion where a misrepresentation regarding identity is alleged, giving rise to an invalid consent. By virtue of the facts of this matter specific focus will be given to the issue of consent in such circumstances and also the issue of mens rea on the part of the accused.
- [4] The accused was charged with the contravention of Section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, in that he sexually penetrated the complainant without consent.

[5] The section in question reads:

"3. Rape

Any person ('A.') who unlawfully and intentionally commits an act of sexual penetration with a complainant ('B.'), without the consent of B, is guilty of the offence of rape."

THE

FACTS

- [6] The complainant is a disc jockey whose services were contracted for a gig in Tsakane on 29 May

2021. When her return transport to Johannesburg failed after the event due to an accident, her boyfriend (a friend with benefits), T[...], arranged that she sleep at the house of his friend, the accused. The house was close by. He would come and pick her up and take her home the next morning.
- [7] She was introduced to the accused who was called Simz. After being introduced, the accused got a call from his girlfriend and left. The complainant and T[...] went to the house of the accused which had two bedrooms, one of which was empty. In the bedroom where the bed was located, they then had sex after which the complainant dozed off.
- [8] During the course of the gig, she had consumed two beers, two gins and tonic and had been smoking weed, something she had done for many years. After she fell asleep, T[...] left without telling the accused. The next morning, when the sun was already up, the complainant, who was facing the wall, while lying on her left side, felt someone touching her. He first touched her breast, then her belly and then her vagina. She did not look who it was, assuming it to be T[...]. After touching and fingering her vagina, he penetrated the complainant and they engaged in sex. She was a willing participant, under the impression that it was T[...]. She did not make eye contact with him or speak. She contends that at one stage she turned, but that he was completely covered in the blanket while engaging in sexual intercourse with her. After intercourse, she dozed off again. When she felt his hands touching her a second time, she reciprocated by touching his body, only to realise that it was not T[...]’s body. The accused is taller and thinner than T[...]. She contends that she panicked but did not show it. She covered herself in the blanket, moved his hands off her body and said that he must leave her alone. He then asked her: "What was it?" She told him that what he did amounted to rape. He asked her how that could be? - a question that he repeatedly asked. He left the room, and she dressed. He returned and asked her to calm down and suggested that they speak about it. She raised her voice and told him that what he had done to her is something for which he would pay. She went to the bathroom and then left the house, only to find that the gate was locked. The walls were too high for her to climb over. She returned to the house and asked the accused to open the gate for her, which he then did, while asking her to calm down. She returned to the venue where she had her gig. She told an acquaintance who was cleaning the venue what had happened. She contacted T[...] and then went to a friend's house where T[...] arrived. When he arrived, she saw that the accused and his brother were also in T[...]’s car. He however got out and they went to the Police Station where she filed a complaint of rape.
- [9] The accused's version is that he usually sleeps in that bed. He arrived at his house at about 01:00 am in the morning, finding the complainant in his bed. He got undressed, woke her and asked her whether they could have sex. She said she was tired and went back to sleep. He then also got into bed and fell asleep. The next morning between 06:00 and 07:00, he touched her again and she was a willing participant in the sexual intercourse that followed.
- [10] He contends that they later had a second round of consensual intercourse as well.

- [11] This version was disclosed by the accused at the Police Station to the investigating officer, Inspector Leroto. However, Inspector Leroto did not introduce himself to the accused as the investigating officer, did not advise the accused that he was a suspect, and did not advise him that he had a right to remain silent. He therefore elicited a version from the accused in breach of his right to remain silent. At the Police Station the accused apologised to the complainant and asked for her forgiveness.
- [12] It bears noting that the request for forgiveness was a manifestation of remorse for having offended the accused. In the pre-sentencing report it is also reported that the accused feels guilty because the intercourse that took place between him and the victim "ended up being an offence". According to him he did not commit an offence as he had consensual intercourse with the accused in which they both participated.
- [13] It is apparent from the versions of the complainant and the accused that she consented to intercourse under the impression that it was with T[...].
- [14] The only deviations in their versions is to be found in two contentions. Firstly, the contention by the accused that he asked the complainant for sex after 01:00 in the morning, when she said no as she was tired and wanted to sleep. The complaint denies that that discussion took place. The second difference is that the accused contends that there were two rounds of intercourse with consent the next morning. It is common cause that there was one round of intercourse, being the occasion when the complainant thought she was having sex with T[...]. That event forms the basis of the charge of rape.
- [15] Where a complainant consents to intercourse under the impression that she is consenting to 'A', when it is in fact 'B', there is no consent at all. Consent by its nature must be informed. In this instance, the identity of the person to whom she consented was vital to her and she cannot be faulted in this regard.
- [16] The finding of the Court a quo that the complainant did not give valid consent can therefore not be faulted.
- [17] That is however not the end of the enquiry. From the definition of rape, it is apparent that mens rea is part of the offence and needs to be established by the State beyond reasonable doubt. This part of the crime was identified by the court a quo, but was not assessed. This failure constitutes a misdirection.
- [18] If the accused believed that the complainant consents, then, even if his belief is unreasonable, he lacks mens rea (see JRL Milton, South African Criminal Law and Procedure, Volume 2, page 458).

- [19] In *DPP v Morgan* [1975] UKHL 3; [1975] 2 All ER 347 the Court of Appeal in the United Kingdom applied the principle that an accused lacked mens rea for rape if he believed the woman had consented to intercourse. If, however, the accused acted "recklessly, not caring whether the victim was a consenting party or not", the necessary mens rea was present. See also *R v Logan*
- [1975] 2 All ER 1059 where the Court of Appeal followed *Morgan*.
- [20] On the accused's version, the first request that he made to the complainant for sex was refused as she was sleepy and tired. Having rested, he approached her again and she was then a willing participant. He was under the impression that she was consenting.
- [21] That state of mind is echoed by the evidence of the complainant. When she accused him of rape the next morning, he asked her how that could be. It is apparent from this question that he did not believe that he had done anything wrong as she was a willing participant.
- [22] The question also arises whether the accused knew or foresaw the possibility that the complainant had not consented to intercourse. On his version, she had turned down his first request. At that time that she was tired, had been drinking and had smoked marijuana. Even though she contends that she was still high because of the marijuana when she awoke after 6am, she did not vocalise this to the complainant at the time. These facts do not point to the scenario of the accused knowing or foreseeing the possibility that the complainant was not consenting to intercourse. This is more consistent with him believing her to be a willing participant because she had rested a few hours.
- [23] The State has consequently not established the presence of mens rea on the part of the accused, accepting the version of the complainant. There are aspects of the accused's version that cannot be accepted as correct. His contention that there was a second round of intercourse with the consent of the accused cannot be accepted. If this were so, they would have parted on amicable terms. He did not attest to that being the case.
- [24] The complainant's version is more probable. But, on her version, the accused expressed surprise when she alleged in the bedroom that his conduct amounted to rape.
- [25] On a conspectus of the facts and the evidence, and particularly with reference to the complainant's version, it is apparent that, although she did not consent to the intercourse, the accused was under the impression that she did consent. In those circumstances he lacked mens rea as far as the alleged rape is concerned and his conviction cannot stand.
- [26] In the premises the following order is made:
1. The appeal succeeds on the issue of conviction.
 2. The conviction and the sentence imposed by the Court a quo is set aside.

JUDGE OF THE HIGH COURT

I AGREE AND IT IS SO ORDERED

NP MNGQIBISA THUSI J

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPPHC/2024/1293.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/mashego-v-s-unknown-topic-agpphc-2024>

Prepared on 12 October 2026 · Esheria