

SOUTH AFRICA / JUDGMENT

Mashego v S (A49/19) [2024] ZAMPMBHC 37 (3 June 2024)

[2024] ZAMPMBHC 37

COURT

Mbombela High Court, Mpumalanga

BEFORE

Roelofse AJ, Phahlamohlaka AJ

CASE / FILE NUMBER

A49/19

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA,

MPUMALANGA

DIVISION (MAIN SEAT)

Case

Number: A49/19

1.

REPORTABLE: YES/ NO

2.

OF INTEREST TO OTHER JUDGES: YES/NO

3.

REVISED.

DATE

[SIGNED]

SIGNATURE

In

the matter between:

JOHN
MASHEGO
Appellant
and
THE
STATE
Respondent

This
judgment shall be delivered to the parties by e-mail and shall be
published on Saflii. The date and time of the delivery of
this
judgment is deemed to be on 3 June 2024 at 10:00.

JUDGMENT

CORAM: Roelofse AJ et Phahlamohlaka AJ

Roelofse AJ:

- [1] The appellant was arraigned and convicted in the Regional Court for the Division of Mpumalanga on a count of rape[1] read with the provisions of Section 51(1) and Schedule 2 of the Criminal Law Amendment Act 105 of 1997. The appellant was sentenced to life imprisonment. The rape victim was a seven-year old girl.
- [2] The appellant is exercising his automatic right of appeal[2] and challenges both his conviction and sentence.
- [3] The appellant's ground of appeal in respect of this conviction is that the court below erred in finding that the respondent has proved beyond a reasonable doubt that the appellant has penetrated the victim's vagina with his penis ".....despite contradictions by the witness on this aspect and lack of medical evidence to corroborate or confirm penetration"[3] The appellant therefore seeks to challenge the factual finding made by the court below over the penetration of the victim's vagina.
- [4] The appellant challenges the sentence that was imposed by the court below on the following grounds: the sentence is strikingly inappropriate; the court erred in not imposing a shorter sentence in light of the appellant's age and personal circumstances; that the appellant was a first offender; and the court below over-emphasized the seriousness of the offence, the interests of society, the prevalence of the offence and deterrence.
- [5] In my view the appeal must fail on both conviction and sentence. These are the reasons.
- [6] The appellant challenges the factual findings made by the court and the court's sentence, both of which are not to be

interfered by a court of appeal unless there has been a material misdirection committed by a court a quo or an injustice may result.

- [7] By now it is trite that a court on appeal should not interfere with the trial judge's factual findings and/or conclusions unless it is satisfied that the trial court was plainly wrong.[4] However, this is not an inflexible rule as set out in *Bernert v Absa Bank Ltd*[5]

"What must be stressed here, is the point that has been repeatedly made. The principle that an appellate court will not ordinarily interfere with a factual finding by a trial court is not an inflexible rule. It is recognition of the advantages that the trial court enjoys which the appellate court does not. These advantages flow from observing and hearing witnesses as opposed to reading "the cold printed word". The main advantage being the opportunity to observe the demeanour of the witnesses. But this rule of practice should not be used to "tie the hands of the appellate courts". It should be used to assist, and not to hamper, an appellate court to do justice to the case before it. Thus, where there is a misdirection on the facts by the trial court, the appellate court is entitled to disregard the findings on facts and come to its own conclusion on the facts as they appear on the record. Similarly, where the appellate court is convinced that the conclusion reached by the trial court is clearly wrong, it will reverse it."

- [8] In *S v Bogaards*[6] , with regards to the interference by a court of appeal on sentence, Khampepe J stated:

"Ordinarily, sentencing is within the discretion of the trial court. An appellate court's power to interfere with sentences imposed by courts below is circumscribed. It can only do so where there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it."

The conviction

- [9] The question to consider whether the appellant's conviction should stand is to consider whether there had been a misdirection committed by the lower court on the facts.
- [10] The respondent relied upon the evidence of the complainant to prove rape. Section 3 of the Act provides:

"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.

- [11] Section 1 of the Act defines "sexual penetration", in relevant part, as:

"sexual penetration" includes any act which causes penetration to any extent whatsoever by—

- (a) the genital organs of one person into or beyond the genital organs, anus, or mouth of another person;..."

- [12] The respondent therefore had to prove beyond a reasonable doubt that the appellant unlawfully and intentionally penetrated the vagina of the complainant with his penis.[7]

- [13] Sexual penetration by the appellant of the victim is the main issue in this appeal concerning the conviction. The appellant alleges

contradictions by the complainant and the lack of medical evidence that could support a finding that penetration indeed occurred.

[14] The victim testified through an intermediary. With regards to the penetration, the victim was a single witness. In her testimony the victim described the penetration as follows:[8]

“After he picked me up I wanted to scream then he blocked my mouth. Then he let me jump over the fence. After he let me jump the fence he took me to Mpho’s room. Then he closes the door. After he closed the door I do not know whether he started undressing me first or he undressed himself first.....

COURT Interpret it as it is? - - - He took his thing and put it into my thing.

All right. You told us now that he then threw you on the bed and he put his thing into your thing period can you tell us what are you referring to if you say is a thing? - - - it is his thing in front.

What does he use that thing for? - - - He uses it to urinate.

And your thing that he put his thing into, what do you use it for? - - - I also use it to urinate.

....

- - - After he took his thing and put it into my thing I screamed, I try to scream, but he closed my mouth.

PROSECUTOR: One other thing. After Shelly [the appellant] put his thing into your thing, what did he do? - - - Then he climbed on me.

Yes, and what did he do? Did he just lie on top of you or what did he do? - - - Yes, he did something that adults are doing.”

[15] The victim’s testimony over the penetration was not challenged under cross-examination save for putting it to the victim that the appellant’s instructions were that the victim was not raped. In my view, the victim did not contradict herself.

[16] It is common cause that the respondent did not present any medical evidence to support the victim’s testimony over the penetration despite the victim being taken to hospital for medical examination.

[17] The respondent led the evidence of three other witnesses, all of whom placed the appellant with the victim at the time of the alleged rape. The evidence shows that the appellant was found with the victim in the same room, the appellant’s trousers lowered to his knees and the victim’s skirt pulled up. She had no underwear on.

[18] In this appeal, this court has to consider whether the lower court was wrong in finding that the respondent had proven the appellant’s guilt on rape beyond a reasonable doubt, or to put it differently, whether the respondent had proven beyond a reasonable doubt that the accused sexually penetrated the victim. Two cautionary rules apply namely, the victim was a single witness in respect of the sexual penetration and also a child.

[19] That which was said in *S v Vilakazi*

[9] is of particular importance:

“The prosecution of rape presents peculiar difficulties that always call for the greatest care to be taken, and even more so where the complainant is young. From prosecutors it calls for thoughtful preparation, patient and sensitive presentation of all the available evidence, and meticulous attention to detail. From judicial officers who try such cases it calls for accurate understanding and careful analysis of all the evidence. For it is in the nature of such cases that the available evidence is often scant and many prosecutions fail for that reason alone.”

[20] I proceed with the caution expressed in *Vilakazi supra*.

[21] Section 208 of the Criminal Procedure Act 51 of 1977 provides that a conviction may follow on evidence of single witness. The evidence of a single witness must be clear and satisfactory in every material respect. This court is guided by *S v Sauls and Others*: [10]

“There is no rule of thumb test or formula to apply when it comes to a consideration of the single witness . . . The trial Judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. The cautionary rule referred to by De Villiers JP in 1932. . . may be a guide to a right decision but it does not mean “that the appeal must succeed if any criticism, however slender, of the witnesses’ evidence were well-founded...” It has been said more than once that the exercise of caution must not be allowed to displace the exercise common sense.

[22] The manner in which a child’s evidence who is also a single witness must be evaluated is set out in *Haarhoff and another v Director of Public Prosecutions Eastern Cape (Grahamstown)* : [11]

*“It is settled law that evidence of a child must be approached with caution. The same principle applies to the evidence of a single witness. The court has to satisfy itself that the evidence given by the witness is clear and substantially satisfactory in material respects. The court is to look for features, in the evidence, which bear the hallmarks of trustworthiness to substantially reduce the risk of wrong reliance upon the evidence of a single witness. The judgment of the trial court demonstrates that it was alive to the application of the cautionary rule on account of the complainant being a single witness to the rape and also on account of her youthful mental age. The following dictum in *S v Van der Meyden* is apposite:*

“The passage seems to suggest that the evidence is to be separated into compartments, and the ‘defence case’ examined in isolation, to determine whether it is so internally contradictory or improbable as to be beyond the realm of reasonable possibility, failing which the accused is entitled to be acquitted. If that is what is meant, it is not correct. A court does not base its conclusion, whether it be to convict or to acquit, on only part of the evidence. The conclusion which it derives at must account for all the evidence.” (Footnotes omitted)

[23] The evidence of the victim was honest. She testified about what she had experienced. Her testimony was of the nature to be expected from such a young child. The victim's testimony regarding the circumstances of how she and the appellant were found is corroborated by the other witnesses that testified for the respondent. There is no reason to reject the victim's evidence in respect of the penetration while accepting her other evidence which was corroborated. Having regard to the totality of the evidence, this court is of the view that no misdirection was committed by the court below in convicting the appellant. The court below properly evaluated the evidence and applied caution where caution was warranted.

Sentence

[24] The rape of a girl under the age of 16 years attracts a minimum sentence of life imprisonment in terms of the provisions of section 51(1) read with Schedule 2 of the Criminal Law Amendment Act 105 of 1997 unless the court satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence.

[25] Despite the provisions of section 51(1) of Act 105 of 1997, a trial court still retains a discretion to impose an appropriate sentence. I consider what was said in *S v Malgas*[12] where the Court held as follows:

"B Courts are required to approach the imposition of sentence conscious that the legislature has ordained life imprisonment, (or the particular prescribed period of imprisonment), as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.

C Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts.

D The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender,

undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation,

and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded."

[26] From the outset, the court below regarded the sentencing triad in *S v Zinn*. [13] The court below specifically addressed the sentencing discretion of that court as well as the principles in *Malgas supra*. The court below weighed both the mitigating and aggravating circumstances in considering an appropriate sentence. It also considered a presentencing report and a victim impact report for purposes of sentencing. The court below had due regard to the appellant's personal circumstances including that the appellant was a first offender. As aggravating circumstances, the court below considered the nature of the crime and the interests of society and the impact of the crime upon the victim as well as the lack of

remorse by the appellant.

[27] In my view, the imposition of life imprisonment did not result in an injustice having regard to the circumstances of the case. The

appellant committed a heinous crime ravaging the life of a young girl for whatever satisfaction he sought for himself. He forcefully took the young victim to a room raped her and prevented her outcries to be heard by smothering her mouth. I need not repeat the absolute vulgar and despicable nature of the crime, especially committed on a young girl and the prevalence thereof in society. In this regard, all has been said before. See: Director of Public Prosecutions, Eastern Cape, *Makhanda v Coko*[14]

“Rape is an utterly despicable, selfish and horrendous crime. It gains nothing for the perpetrator, save for fleeting gratification, and yet inflicts lasting emotional trauma and, often, physical scars on the victim. More than two decades ago, Mohamed CJ, writing for a unanimous court, aptly remarked that:

'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 civilization.

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 tranquility of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives.”

[28] Having considered the reasoning of the court below in imposing the sentence, this court finds no misdirection committed by that court in the consideration of its sentence. There is no reason to interfere with the sentence that was imposed.

[29] In the premises, I propose the following order:

(a) The appeal is dismissed.

Roelofse AJ

Acting Judge of the High Court

I agree and it is so ordered.

Phahlamohlaka AJ

DATE OF HEARING: 24 May 2024

DATE OF JUDGMENT:

APPEARANCES

For the appellant: NR Rasivhaga For the Director of Public Prosecutions D Roles

- [1] In terms of Section 3 of Criminal Law (Sexual Offences and Related Matters) Amendment Act.
- [2] In terms of section 309(1)(a) of the Criminal Procedure Act.
- [4] R v Dhlumayo & another 1948 (2) SA 677 (A) at 705-706.
- [5] 2011
- (3) SA 92 (CC), para. 106.
- [6] 2013
- (1) SACR 1 (CC) para. 41.
- [7] Consent is not an issue are the complainant at seven years old could never have given consent.
- [8] Postponed 12 and 13 of the record.
- [9] 2009
- (1) SACR 552 (SCA); [2008] ZASCA 87 para 21.
- [10] 1981
- (3) SA 172 (A) at 180 E-G.
- [11] [2019] 1 All SA 585 (SCA) at p 598 and 599.
- [12] [2001] 3 All SA 220 (A) para. 25.
- [13] 1969
- (2) SA 537 (A).
- [14] (248/2022) [2024] ZASCA 59 (24 April 2024).

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