

SOUTH AFRICA / JUDGMENT

Mashile v S (A217/2023) [2024] ZAGPPHC 576 (26 June 2024)

[2024] ZAGPPHC 576**COURT**

North Gauteng High Court, Pretoria

BEFORE

Neukircher, Baloyi-Mere

CASE / FILE NUMBER

A217/2023

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG DIVISION,****PRETORIA****CASE****NO: A217 / 2023****(1)****REPORTABLE: NO****(2)****OF INTEREST TO OTHER JUDGES: NO****(3)****REVISED: YES****DATE:**

26 June 2024

SIGNATURE

In

the matter between:

Mpho

Mashile

Appellant

and

The

State

Respondent

JUDGMENT

Neukircher J:

1] This is an appeal directed against the conviction of the appellant on one count of rape[1] of the 11-year old victim (BM). He was represented at trial and ultimately convicted as charged and sentenced to 10 years' imprisonment.

2] This court granted him leave, on petition, against conviction only.

The test on appeal

3] It is against the background of *S v Monyane & Others*[2] this appeal stands to be adjudicated:

"This court's power to interfere on appeal with the findings of fact of a trial court are limited... In the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong."

The

Facts

4] The State called 3 witnesses:

- a) BM – the victim;
- b) Mrs Mashile; and
- c) Ms Mbatha, the operational manager and sexual assault care practitioner at the Daveyton Care Centre Main Clinic (Daveyton Clinic).

5] BM's evidence was given through an intermediary. She testified that she, the appellant, her 7-year old younger brother (BM), mother and stepfather stayed in an RDP house. Although BM sometimes slept with her, that night he slept with her parents. Her door was locked. She noticed the door being opened at approximately midnight when she saw a basket positioned in front of the door fall over. Her parents were playing loud music in their room so she knew they would not hear her scream.

6] There was enough light from the streetlights to see the appellant. She saw the appellant had a cloth in his hand which he used to cover her mouth. He took the blankets off her and took off her pyjama pants and panty and he then undressed himself, climbed on top of her and inserted his penis into her vagina. She testified that "it was painful". When he was done, he threatened to kill her and then went back to the dining room where he was sleeping.

7] The following day she noticed that the lock to her room had been tampered with. When her mother asked her about the lock she told her that the lock had been broken for some time.

8] But after the incident she became quieter and approximately a month later her mother noticed and asked her what was wrong. In the beginning she did not tell her, but eventually she told her the truth.

9] Her parents confronted the appellant who denied everything and her mother sent him to the homelands to his biological father – but he did not go. Instead, he went to stay with his friends. When her mother found out she was very angry and went to the police – BM was taken to the Daveyton Clinic where she was examined and given medication.

Mrs Mashile

10] She testified that on the morning of 12 January 2019 she went to wake BM and her younger brother and noticed that the door handle to their bedroom was broken[3]. She woke BM and asked her if appellant had been in the room and raped her – BM denied this.

11] By 11 February 2019 she noticed that BM had become quiet and she sat her down and asked her what wrong – BM then told that the appellant had raped her and that he had tied a cloth around her mouth and hands. Mrs Mashile then took BM to the Daveyton Clinic and she then went to report the rape to the police.

12] Mrs Mashile conceded that she reported the rape after she found out that the appellant had not returned to his father after the incident despite her ultimatum to him to do so. She testified that she'd felt disrespected by him.

13] She also testified that the appellant admitted the rape to her and her husband and that he told them that “it was a mistake” and that “after that he started disrespecting us. That is why we ended up getting him arrested.”

Ms Mbatha

14] Ms Mbatha's evidence was, in essence that she examined BM on 3 February 2019 and completed the J88 at that time. Her finding was that BM's hymen was irregular due to the presence of a cleft (which was not a natural cleft) at 9 o'clock. She testified that the irregular hymen indicates that there was a tear at some point on the hymen that has now healed and left a scar which forms a “V” shape and that this was caused more than 72 hours prior to the examination. Her conclusion was

“Genital findings are consistent with previous vaginal penetration with a blunt object.”

15] She could not speculate what the “blunt object” was but testified that the “blunt object” penetrated inside the vagina. She could also not say when the injury had occurred ie whether it was in 2019 or prior to that.

The Appellant

16] The appellant also testified. He denied the charges against him. His evidence was that he went out and when he got home he found a laptop and enquired who the owner was but no-one told him[4]. He then went into the bedroom where he found “them” in the bedroom. His stepfather called him aside and told him that his mother had said he had raped BM, which he denied. He was told he would be given taxi money to go back home.[5]

17] His evidence was that his younger brother slept in the room with BM; that his mother hit BM with a wooden spoon until BM said he had raped her and that these allegations stem from incidents in 2016 when he was first chased from the family home having been accused of raping BM then already. His version was also that his mother accused him of being a Satanist which is why she did not trust him around BM.

The Court a quo

18] In my view the court a quo correctly summarised the evidence before it as well as the trite legal principles applicable in matters such as this:

- a) that the evidence of a victim that is a minor and a single witness must be treated with caution[6];
- b) that a trial judge will weigh the evidence and decide whether it is trustworthy and whether - despite any shortcomings, defects or contradictions in the testimony - the truth has been told;[7]
- c) that not every error made by a witness will affect his or her credibility and the court must weigh up the totality of the evidence to decide whether the State has proven the guilt of the accused beyond reasonable doubt[8].

19] In my view the only contradictory evidence was whether or not BM’s younger brother was sleeping in his parents’ room or not. This discrepancy, when viewed against the totality of the evidence, does not disturb the overall credibility of either Mrs Mashile or BM who corroborated each other in material respects:

- a) the door handle was tampered with;
- b) BM told her mother that appellant had entered her room and tied a cloth over her mouth;
- c) BM’s changed demeanour after the rape that prompted Mrs Mashile’s concern.

20] The findings of Ms Mbatha that BM had been penetrated with a blunt object also confirm the rape.

21] I am also of the view that the appellant’s version was correctly rejected as not being reasonably possibly true. His accusations that he was accused of a prior rape in 2016 and that this somehow played into the 2019 accusation, were correctly rejected by the court a quo which disregarded that accusation when weighing up the evidence on the charge before it.

22] I can also find no fault with the court a quo accepting Mrs Mashile's evidence that appellant initially denied the rape but then admitted it and said it was a mistake.

23] Given all this, the court a quo correctly convicted the appellant as charged.

Order

24] In the result the order made is that the appeal is dismissed.

NEUKIRCHER J

JUDGE OF THE HIGH COURT

I agree

BALOYI-MERE AJ

ACTING JUDGE OF THE HIGH COURT

Delivered: This judgment was prepared and authored by the Judges whose names are reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 26 June 2024

For the appellant: Adv LA van Wyk Instructed by: Legal Aid South Africa For the respondent: Adv M Masilo Instructed by: Director of Public Prosecutions Matter heard on: 4 June 2024

Judgment

date: 26 June 2024

[1] Section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 as read with s1, 55, 56(1), 57, 58, 59,60 and 61 of Act 32 of 2007; as well as s256, 257, 281 of Act 51 of 1997 and s92(2) and 94 of Act 51 of 1977

[2] 2008 (1) SACR 543 (SCA)

[3] The nails had been removed

[4] Not put to any of the State's witnesses

[5] He'd be living with his family since December 2018

[6] S v S 1995 (1) SACR 50 (25); S v V 1995

(1) SACR 173 (T); S v Vumazonke 2000 (1) SACR 619 (C);

[7] S v Weber 1971 (3) SA 754 (A) at 758

[8] S v Mkohle 1990 (1) SACR 95 (A)

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