

SOUTH AFRICA / JUDGMENT

Mathumbu v S (A34/ 2021) [2023] ZAMPMBHC 32 (30 May 2023)

[2023] ZAMPMBHC 32

COURT

Mbombela High Court, Mpumalanga

BEFORE

Ratshibvumo, Greyling-Coetzer

CASE / FILE NUMBER

A34/2021

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Source record**THE****HIGH COURT OF SOUTH AFRICA****MPUMALANGA****DIVISION, MBOMBELA MAIN SEAT****CASE****NO: A34 / 2021****(1)****REPORTABLE: NO****(2)****OF INTEREST TO OTHER JUDGES: NO****(3)****REVISED.****DATE:****30 MAY 2023****SIGNATURE:****In****the matter between:****LUCAS****MATHUMBU****APPELLANT****and****THE****STATE****RESPONDENT**

JUDGMENT

RATSHIBVUMO J:

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 10H00 on 30 May 2023.

[1]

Background.

Muchongolo traditional dance is not just a centre of attraction to the tourists who visit the Province of Mpumalanga; it is also a specular display of art and performance for the locals in and the surrounding areas of Bushbuckridge, especially amongst the Shangaan people. The feasting that comes with it literally attracts the young and old, including the big and small. And so it happened that on 09 August 2015, Ms. LM had the initiation ceremony at her home in Orinoco, in Bushbuckridge. She invited all for the feast and the muchongolo dance that goes with the ceremony that day. Her home was the hive of activity, with children playing behind the house and the elders, drinking beer and dancing on the lappa, in front of the house.

- [2] Of the guests who arrived for the ceremony, there was Sinet Mokoena (Sinet) who came alongside his father Halani Mokoena (Halani) and his mother, Nessie Masuku. The trio had arrived in the company of Lucas Mathumbu – the Appellant in this case. Although not everybody at the ceremony was familiar with the Appellant, there was something peculiar about him that would attract the attention of all in attendance. Although he was obviously an adult, his height was that of a child, prompting others to refer to him as a “dwarf” during the trial, referring to his dwarfism condition. Over and above that condition, he was also physically disabled in that he walked with a limp. That however, was not a hindrance to indulging in all that was availed for the feast.
- [3] The children playing at the back of the house included a boy named DM, aged 6, AS, a girl aged 7, TN, a girl also aged 7 and M, a girl of the same age group. DM is a grandson to LM while all the other kids came from the neighbouring houses.
- [4] As it would be expected when people sit and drink, the Appellant walked to the back of the house to pass out urine, walking past the playing kids. When he finished, he did not go back to the lappa at the front. As to where he went to after passing out urine, would depend on whose version one is listening to. According to him, he went straight to his home. According to the children playing behind the house, he left with two of them, being TN and AS saying he was going to buy them sweets and snacks.

[5] It is however common cause that TN and AS went missing without a trace and that their mothers, LN and AS were thrown into a frantic search for them. They were joined in the search by the police and members of the community. They searched following the clues given by DM who saw the departure of the kids from his home as he was playing with them. In fact, it was DM's grandmother, LM, who upon hearing from DM as to how the two children left her home, she alerted TN's mother, LN as she had reservations and

deep concerns on the intentions of the Appellant.

[6] It is also common cause that the kids were found later the same day after they emerged from Masweng bushes. They were re-joined with their mothers who were still searching for them together with the police. At the request by the police, the children's mothers inspected them to see if they were injured. Whereas no injuries were found on AS, TN was found bleeding from her vagina and her panty was bloodstained. She reported to her mother that she was raped at Masweng bushes in the presence of her playmate, AS.

[7] According to the two children, they were lured from DM's house while they were playing, by a "short crippled man" whom DM greeted as "Lucas" when he came to the back of the house. He promised to buy them sweets and snacks, and they went with him. He however led them to Masweng bushes, where he tied AS against a banana tree using shoe laces. He then proceeded to have sexual intercourse with TN, having undressed himself and placed her on his clothes. He did this having made her to lie on her back. When he finished, he dressed himself and left them there on their own. He did not give them the sweets or snacks he had promised. It was TN who rose up and untied AS and the two ran until they reached the house where they entered and asked to be shown the way to their homes.

[8] When they entered the house, they found a lady there named, DDM. DDM gave them bread and soft drink and they ate and drank. In a true African display of Ubuntu and giving a meaning to a phrase that "it takes a village to raise a child," DDM then walked out with the kids, carrying TN on her back and leading AS holding her by her hand. She started her journey in search of the children's homes. She did not know where to start as they were strangers to her and they gave poor description of their

residential addresses. It was while she had entered the first house to ask if the kids were known where she was spotted by the police who were driving by, together with the children's mothers. The children were thus reunited with their mothers.

[9] Injuries in TN's private parts were confirmed by Dr. Mkhabela who examined TN that day. The doctor found that there was evidence of vaginal penetration as there was a fresh tear on the posterior fourchette, and the child was bleeding even during the examination.

[10] The allegations by the children were disputed by the Appellant in as far as they alleged that he was the responsible person for the injuries on TN. According to him, when he left the yard where there was a ceremony, he went straight to his home. He disputed that he left with the children.

[11] The issues that had to be determined by the trial court boiled down to the identity of the person who raped TN. The Mhala Regional Court (the court a quo), accepted the State's version and rejected the Appellant's alibi, thereby convicting him of rape of a child aged seven, on 14 March 2019. On 18 April 2019, he was sentenced to life imprisonment. He now appeals against both the conviction and the sentence.

[12] Automatic right of appeal.

Although section 309(1)(a) of the Criminal Procedure Act No. 51 of 1977 (the Criminal Procedure Act) provides for automatic right of appeal when one is sentenced to life imprisonment, the Appellant still brought an application for leave to appeal. This was unnecessary exercise, and the Learned Magistrate was alive to it.[1] As Gorven AJA (as he then was) observed, in *The Director of Public Prosecutions: Gauteng Division, Pretoria v Moabi*,[2] "there is therefore an explicit provision that an accused person in the circumstances set out in the proviso to s 309(1)(a) 'may note such an appeal without having to apply for leave'. The reason for specifying this is clear. It is stated as an exception to the general provision in that section requiring leave to appeal. In this section, the right to appeal is given, it is expressly stated that no leave to appeal is required and the person is directed to exercise that right by simply noting an appeal."

[13] Appeal against the conviction.

The Appellant avers in the notice of appeal that the court a quo erred in finding that the case for the State was proved beyond a reasonable doubt, and that the accused's version was not reasonably possibly true. He further submitted that the court a quo failed to apply the cautionary rules when it comes to evidence of the children.

[14] This appeal is opposed by the Respondent. Counsel for the Respondent submitted that the appeal should fail as the court applied the necessary caution and found that the case for the State was proved beyond a reasonable doubt.

[15] The assertion to the effect that the court erred in finding that the case for the State was proved beyond a reasonable doubt is too wide, global and vague as it does not point to the exact finding that is being challenged on appeal. To reach a finding that a case was proved beyond a reasonable doubt, the court must have considered evidence in its totality. As Nugent J puts it, "it is difficult to see how a defence can possibly be true if at the same time the State's case with which it is irreconcilable is 'completely acceptable and unshaken'. 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 was 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 arrives at must account for all the evidence." [3]

- [16] For this reason, the only ground on which the conviction is challenged, turns out to be the submission to the effect that the court failed to apply the cautionary rules when evaluating evidence given by the children. The child victim was indeed very young. At the time of the alleged incident, she was 7. She was 9 years old when she gave evidence. Talking of evidence tendered by children, Zulman JA said, “[I]n view of the nature of the charges and the age of the complainants it is well to remind oneself at the outset that, whilst there is no statutory requirement that a child’s evidence must be corroborated, it has long been accepted that the evidence of young children should be treated with caution (R v Manda 1951(3) SA 158 (A) at 163 C; *Woji v Santam Insurance Co Limited* 1981(1) SA 1020 (A) at 1028 B- D); and that the evidence in a particular case involving sexual misconduct may call for a cautionary approach (*S v J* 1998(2) SA 984 (SCA) at 1009B).”[4]
- [17] Approaching evidence with caution does not mean that evidence tendered by children should be rejected simply because of their age. Applying the cautionary rules entails that the court should be alert to the inherent dangers of just accepting whatever the child says as being the gospel truth, without further ado. It is necessary to test the child’s ability to separate the truth from lies, her conviction as to what happens when a person tells lies, her knowledge of the alleged offender, any possible grudge that could be existing between her and those close to her and the alleged offender or any possible reason for her to fabricate accusations against him. The court a quo took care of all these tests before admonishing the child. The submission to the effect that the court a quo failed to apply the necessary caution is therefore with no basis.
- [18] A possibility that the allegations against the Appellant could be rooted on any possible grudge between him and the child or people close to her is excluded because the Appellant was unknown to the child victim and her mother prior to the date of the incident. Her mother was only given the description of the Appellant and the address where he resided that day.
- [19] Over and above this, the evidence of the child victim was corroborated by a number of other independent witnesses. AS, a friend to the child victim with whom they were playing, was taken along with her under the guise that they were to be bought sweets and snacks. She also saw the actual rape being committed by the “short and crippled” man, a description alluded to the Appellant, who up to that day, she had not met. DM who was playing with the two girls who left with the Appellant also testified that the two left with him. It is DM who informed his grandmother LM, as to who left with the child victim, and LM raised the alarm by alerting the child victim’s mother.
- [20] I cannot see how the Appellant argument regarding the court’s failure to apply cautionary rules can stand, when the allegations by the two eye witnesses regarding the rape, are also confirmed by medical evidence. The Appellant was clearly described by the children, and his own evidence also places him at the house where the child victim was playing behind the house with other kids.

[221] The Appellant's evidence cannot be reasonably possibly true while at the same time, the case for the State appears to have been proved beyond a reasonable doubt.[5] I am of the view that his evidence was correctly rejected by the court a quo. At first, his denial was based on his insistence that although he was at the house, he could not have left with the child victim and her friend because he left in the company Sinet and his father Halani, the persons he had come there with. These two were later called as State witnesses and they disputed that they left in the company of the Appellant. Although they came with him and were initially seated with him as they drank and watched muchongolo dance, they both did not take notice of him when he left. When the Appellant finally gave evidence, his version changed to suit the evidence tendered by the Sinet and Halani, saying, he indeed left the premises alone.

[222] This change in the Appellant's evidence is not explained. His legal representative in the trial seemed to have been taken aback as it portrayed him as a liar. It justifies a finding that his evidence was improbable and should be rejected. It is for these reasons that the Appellant submission that the conviction should be set aside stands to be dismissed.

[231] Appeal on Sentence.

The Appellant submitted further that the sentence imposed on him induces a sense of shock. He averred that the court a quo erred in not finding his age, the fact that he is a candidate for rehabilitation, and the fact that he was a first offender as substantial and compelling circumstances that justify the imposition of a lesser sentence than life imprisonment. It was also submitted that the period spent in custody pending the trial should have been taken into account for purposes of sentence.

[241] The Appellant was 36 years old at the time he was sentenced. He spent 6 years in custody as an awaiting trial prisoner. At the time of the offence, he was 30 years old. He was married and had three children.

[251] The Criminal Law Amendment Act No. 105 of 1997 has ordained prescribed sentences for certain crimes. The crime of rape of a child under the age of 16 carries a mandatory sentence of life imprisonment. The court is obliged, upon a conviction of an offender for rape of a child, to impose a sentence of life imprisonment. The only instance on which a court may deviate from this is when there are substantial and compelling circumstances. 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.[6]

[261] It is not clear from the submissions made, as to what the court should read about the offender being 36 years old that should count as substantial or compelling circumstances. In *S v Matyityi*[7], Ponnann JA said the following in respect of the offender who was aged 27,

“In my view a person of 20 years or more must show by acceptable evidence that he was immature to such an extent that his immaturity can operate as a mitigating factor. At the age of 27 the respondent could hardly be described as a callow youth. At best for him, his chronological age was a neutral factor. Nothing in it served, without more, to reduce his moral blameworthiness.”

[27] While the time spent in custody should, under normal circumstances be taken into account when imposing a sentence, this however is insignificant when the mandatory sentence is life imprisonment. In my view, rape of a child aged 7 induces a sense of shock and should be punished with an equal punishment.

[28] As for the Appellant being a candidate of rehabilitation, it is not clear as to what informs this submission. Presuming that he is indeed a candidate for rehabilitation, I am of a view that the crime he was convicted of, calls for retribution to be considered as a priority as compared to his rehabilitation. In *S v Swart*, [8] Nugent JA said,

“In our law retribution and deterrence are proper purposes of punishment and they must be accorded due weight in any sentence that is imposed. Each of the elements of punishment does not require to be accorded equal weight but instead proper weight must be accorded to each according to the circumstances. Serious crimes will usually require that retribution and deterrence should come to the fore and that the rehabilitation of the offender will consequently play a relatively smaller role.”

[29] While the sentence of life imprisonment is the harshest punishment that our courts can impose under the current constitutional dispensation, it does not induce a sense of shock when it relates to rape of a child or any of the offences listed in Schedule 2 Part 1. There is nothing in the Appellant’s circumstances out of the ordinary. The reasons furnished for deviation from the prescribed sentence are rather flimsy. For these reasons, appeal on the sentence should fail.

[30] Consequently, the following order is made:

Appeal against the conviction and the sentence is dismissed.

TV RATSHIBVUMO

JUDGE OF THE HIGH COURT

MPUMALANGA DIVISION, MBOMBELA

I agree.

D GREYLING-COETZER

ACTING JUDGE OF THE HIGH COURT

FOR THE APPELLANT: MS. NG MARIMO INSTRUCTED BY: LEGAL AID SOUTH AFRICA

MBOMBELA FOR THE APPELLANT: ADV. Z MATA INSTRUCTED BY: OFFICE OF THE DPP

MBOMBELA DATE HEARD: 28 APRIL 2023

JUDGMENT

DELIVERED: 30 MAY 2023

- [1] See p. 305 of the paginated bundle where she remarked that the Appellant had an automatic right of appeal.
- [2] 2017
- (2) SACR 384 (SCA) para 36
- [3] S v Van der Meyden 1999 (1) SACR 447 (W) at 449F-H
- [4] S v Viveiros (75/98)
- [2000] ZASCA 95; [2000] 2 All SA 86 (A) (9 March 2000) at para 2.
- [5] See S v Van der Meyden (supra).
- [6] S v Malgas 2001
- (1) SACR 469 (SCA) at 470H-J.
- [7] 2011
- (1) SACR 40 (SCA) at para 14.
- [8] 2004
- (2) SACR 370 (SCA) at para 12.
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