

SOUTH AFRICA / JUDGMENT

Matsimela and Another v S (A16/2021) [2021] ZALMPPHC 76 (26 October 2021)

[2021] ZALMPPHC 76

COURT

Limpopo High Court, Polokwane

BEFORE

Kganyago, Semenya

CASE / FILE NUMBER

A16/2021

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REPUBLIC

OF SOUTH

AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

LIMPOPO

DIVISION, POLOKWANE

CASE

NO: A16/2021

REPORTABLE:

NO

OF

INTEREST TO THE JUDGES: YES

REVISED

In

the matter

between:

BEN

MALESELA

MATSIMELA FIRST

APPELLANT

MANKWE

STEVEN

KEKANA SECOND

APPELLANT

And

THE

STATE

RESPONDENT

JUDGEMENT

KGANYAGO J

- [1] The two appellants appeared before Motubatse MJ in the regional court Mokerong on one count of rape read with the provisions of section 51(1) and Part I of Schedule 2 of the Criminal Law Amendment Act[1] (CLM) in that it is alleged that the complainant was raped by more one person. Both appellants were found guilty as charged and each sentenced to life imprisonment. The appellants have automatic right of appeal by virtue of the fact that they were sentenced to life imprisonment in the regional court. The appellants are appealing against both conviction and sentence.
- [2] On conviction, the appellants grounds of appeal are that the court a quo erred in failing to properly analyse and evaluate the evidence of the State witnesses; properly considering the improbabilities inherent in the State's version; rejecting the appellants' version as not being reasonably possibly true; accepting the evidence of the State witnesses and rejecting that of the defense; by holding against the appellants minor contradictions in their evidence; and giving importance to minor discrepancies between the defense evidence.
- [3] On sentence the appellants grounds of appeal are that the sentences of life imprisonment on each of the appellants is harsh and disproportionate under the circumstances, and that it induces a sense of shock; that it disregarded the fact that the appellants are still youth; that it is out of proportion to the totality of the accepted facts in mitigation; that the court a quo over emphasised the interest of society and failed to strike a balance; that the court a quo over emphasised the crime, seriousness and its impact on the complainant; that the court a quo over emphasised the prevalence of the offence, the deterrent effect and retributive element of sentencing; and that the court a quo erred in not finding that there are substantial and compelling circumstances to justify a deviation from the prescribed minimum sentence.
- [4] The State version is that the complainant was gang raped by the appellants and also more than once, whilst the appellants' version is that they had consensual sexual intercourse with the complainant. The complainant testified that on 16th December 2018 she was on her way from her uncle's place at about 19h00 to 20h00 when she met eight boys who were unknown to her. As the complainant was about to pass the eight boys, they blocked her way. One of the appellants held the complainant by her hand and tried to kiss her. She resisted and tried to scream, but one of the appellants took out a knife. The two appellants took the complainant to a shack where they took turns in raping her.
- [5] After they finished raping her, the first appellant said they must go and look for water so that the complainant can bath. The two appellants took the complainant to a certain house where the second appellant prepared water and also brought a soap for the complainant to bath. She was told not to bath the whole body, but only her private parts. After she finished bathing, the complainant told the two appellants that she wanted to go home, but the two

appellants pushed her on top of a bed, undressed her, and again took turns in raping her for the second time. After both of them have finished raping the complainant, they told her to bath. After that they all slept. The complainant slept with the second appellant on the bed, whilst the first appellant slept on the couch. The appellants were in possession of the complainant's two cell phones.

- [5] As they were sleeping, one of the complainant's cell phone rang. The complainant saw that the two appellants were deep in their sleep, and took one of her cell phone and send a message to her brother about her whereabouts. She did not know the area well, but it was in the area where her brother was dating a certain lady. In her message she told her brother not to phone as the appellants have told her that they could rather be arrested for murder than rape. She also told her brother that he should not enter the house as it has burglar proofs and she was afraid that she will be killed. After sending the message she deleted it. A few minutes later the complainant's brother arrived with other people and the appellants released her. When the two appellants released the complainan,t they told her not to tell her brother what they did to her, but that they were just sitting and she agreed.
- [6] On being released, her brother told her that they should go to the police station, but her uncle's wife said they should go to the clinic. They went to the clinic, and at the clinic they referred them to the hospital. However, they went to the police station where they opened a criminal case, and later the police took the complainant to the hospital. The complainant denied that she had consensual sexual intercourse with the two appellants, and further that it was for the first time she sees the appellants.
- [7] The complainant's brother also testified. He testified that on 16th December 2018 at about 22h10 he was a DJ at a certain village, when he received a call from his father telling him that the complainant and her younger sibling had met eight boys. He went home to find out what was happening. On arrival at home he tried to phone the complainant but she did not answer her phone. Later the complainant sent him an sms telling him not to phone her. However, he phoned her, and the complainant picked up the phone and told him that she was locked in a house that had burglar proofs next to Thembe's house. Thembe is name of the girlfriend of the complainant's brother. Thembe reside next to the second appellant's homestead.
- [8] The complainant's brother sent an sms to the complainant telling her that he was coming to that homestead. The complainant sent him an sms telling him that if he comes and make a noise, the appellants will kill her. The complainant's brother, his uncle and others went to the second appellant's homestead where they rescued the complainant. At that house they found the complainant in the company of the two appellants. When the complainant saw his brother she started crying, and he advised her that they should go to the clinic. The complainant's brother further testified that he knew the two appellants before the incident. Andries also testified and corroborated the evidence of the complainant's brother.

- [9] The first appellant testified in his defence. He testified that on 16th December 2018 he was walking with the second appellant when they met the complainant. The first appellant knew the complainant to be a prostitute and he became interested in the services of the complainant. The first appellant talked to the complainant and asked her how much does she charge for two rounds, and the complainant told him that she charges R300.00. The first appellant and the complainant agreed on that amount. From there both appellants left with the complainant and went to Magadi's tavern where the second appellant bought them alcohol.
- [10] Whilst at the tavern, the first appellant told the complainant that he was having R200.00 and that the balance of R100.00 he will pay her the following day after doing some odd jobs and they agreed. The first appellant then told the complainant that they should go to the second appellant's homestead. They agreed and left the second appellant behind and went to the second appellant's homestead. At the second appellant's homestead, the first appellant and the complainant had consensual sex intercourse where he had two rounds. After they finished having sex, the first appellant paid the complainant R200.00. At that moment the second appellant arrived, and the first appellant told the complainant and the second appellant that he was going to attend to a braai and he left both of them at the second appellant's homestead. The first appellant was surprised when the police arrested him the following day.
- [11] The first appellant denies that he was in the company of eight people when they met the complainant, but that it was only he and the second appellant. The first appellant denies that either of them was having a knife, and also of ever going to a shack with the complainant and the second appellant. The first appellant denies raping the complainant but that it was as per agreement.
- [12] The second appellant also testified in his defence, and he corroborated the version of the first appellant. The second appellant further testified that he also talked to the complainant when they met about her services, and they agreed on an amount of R500.00 for three rounds. Further that after the first appellant and the complainant left him at the tavern, he continued drinking his beer. After he finished drinking his last beer he went home. When he arrived at his homestead he met the first appellant who was leaving. The first appellant told him that he was going to attend a braai. The second appellant went inside the house where he found the complainant. The second appellant agreed with complainant to have sexual intercourse, and after they finished having sex, he paid the complainant.
- [13] After that the second appellant sat together with the complainant, and as he was failing asleep, he saw the complainant pressing her phone. Around 2h00 whilst asleep he heard a knock at the door from the complainant's uncle. The second appellant went outside to go and find out what was happening, and the complainant's uncle told him that they were looking for the complainant. The complainant's uncle was in the company of other people and they were five in number armed with knives and pangas. The second appellant pleaded with them not to kill him, and that he will give them the complainant. Amongst the five

people was also the complainant's brother who was in a love relationship with the second appellant's sister. The complainant's brother told the second appellant that he got him exactly where he wanted him. After that the complainant's brother and his company left with the complainant. The second appellant was surprised when he was arrested the following day.

- [14] The appellants are appealing against both conviction and sentence. Both appellants have pleaded consent and have also conceded that they both had sexual intercourse with the complainant and more than once. It is trite that the onus rest on the State to prove all the elements of the offence of rape, including the absence of consent and intention. The first issue which this court must determine is whether the complainant had not consented to sexual intercourse with the appellants, and also whether the necessary intention on the part of the appellants had been proved.
- [15] In terms of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act[2] (CLA), any person who unlawfully and intentionally commits an act of sexual penetration with a complainant without the consent of the complainant is guilty of the offence of rape. In *Otto v The State*[3] Plasket AJA said:

"In terms of s 1(2), consent for purposes, inter alia, of the offence created by s 3 means 'voluntary or uncoerced agreement'. Section 1(3) provides that the circumstances in respect of which a complainant 'does not voluntarily or without coercion agree to an act of sexual penetration include, but are not limited to 'situation' where there are abuse of power or authority by A to the extent that B is inhibited from indicating his or her unwillingness or resistance to sexual act, or unwillingness to participate in such a sexual act."

- [16] The two appellants by pleading consent have placed themselves on the scene, and therefore the issue identity and penetration is no longer in dispute. The complainant has testified that after the appellants have finished raping her, the two appellants fell into a deep sleep, and that is when she got an opportunity to send an sms to her brother notifying him of her whereabouts. This version was corroborated by the complainant's brother, and the second appellants also seems to corroborate this version as he testified that as he was about fall asleep he saw the complainant pressing her cell phone and later the complainant's uncle in the company of the complainant's brother and others arrived at his homestead looking for the complainant.
- [17] In relation to the actual rape, the complainant was a single witness, and therefore her evidence must be clear and satisfactory. The appellants' version is that the complainant is prostitute and that they both have agreed to have sex with her for a fee. In my view, if the sexual encounter was a financial transaction which the complainant and the appellants have agreed upon, the complainant would not have waited for the appellants to fell asleep, and secretly notified her brother about her whereabouts and that she was locked in house with burglar proofs. The complainant had given her evidence in a clear and satisfactory manner, and counsel for the appellants had correctly conceded that the appeal on both conviction

and sentence had no merit. The appellants' version is false beyond reasonable doubt, and the court a quo has correctly rejected it. The court a quo has correctly accepted the version of the complainant that she did not give consent to have sexual intercourse with the appellants. On conviction, there is nothing to fault the court a quo, and therefore, the appeal stands to fail.

- [18] Turning to sentence, it is trite that sentencing is the prerogative of the trial court, and should not lightly be interfered with. At an appeal in which interference with the sentence will be justified, is when it is found that the trial court has misdirected itself in some respect or if the sentence imposed was so disturbingly disproportionate that no reasonable court would have imposed it. The test is not whether the trial court was wrong, but whether it exercised its discretion properly. (See *S v Romer*[4]).
- [19] The appellants were charged with rape falling under section 51(1) Part I of the CLAA in that the complainant was raped by more than one person. From the appellants own version, they both had sexual penetration with the complainant, and both of them did so more than once. Beside the complainant being raped by more than one person, they both raped her more than once. Ordinarily the court a quo was compelled to impose life imprisonment unless it finds that substantial and compelling circumstances exists which justifies the deviation from the prescribed minimum sentences.
- [20] The first appellant had previous convictions of rape and robbery with aggravating circumstances, whilst the second appellant was a first offender. According to the pre-sentencing report of the first appellant, he was raised by his mother and grandmother, and he also had a relationship with his father who was not married to his mother; and he was raised well until he started residing with his brother and uncle after their mother got married. The first appellant's aunt felt that the first appellant lacked parental guidance, hence he was easily influenced by friends. The first appellant was not married; did not have a child; was never employed; has dropped out of school in grade 9; and was said to be troublesome in the community. The first appellant was aged 23 years of age at the time of the commission of the offence.
- [21] According to the presentencing report of the second appellant, he is having one minor child; he is not married; he does not know his father, and was raised by her mother together with his four siblings; her mother was employed as a domestic servant, and tried her best to meet the needs of her family. The second appellant's mother described him as a humble person, further that the second appellant was exposed to violence in his upbringing. The second appellant's mother had before the incident warned the second appellant about his relationship with the first appellant. The second appellant was 25 years of age when he committed this offence.
- [22] According to the victim impact report, the complainant and her brother are being raised by their maternal grandmother as their mother has passed away, and she does not have information about her father. The complainant was diagnosed with depression after the

incident, and she is currently taking chronic medication; she does not feel safe around male people; and after she was raped, she has no desire to have sexual intercourse anymore. The complainant is currently seeing a psychologist to help her deal with her ordeal. She cannot cope academically as she is always crying whenever she thinks about what had happened to her. The complainant started experiencing nightmares after she was raped.

[23] The question is whether the court a quo was correct in finding that there were no substantial and compelling circumstances justifying a deviation from the prescribed minimum sentences. In *OPP, Gauteng v Tsotetsi*[5] Coppin AJA said:

"As held in *Malgas*, confirmed in *S v Dodo*, and explained in *S v Vilakazi*, even though 'substantial and compelling' factors need not be exceptional, they must be truly convincing reasons, or 'weighty justification', for deviating from the prescribed sentence. The minimum sentence is not to be deviated from lightly and should ordinarily be imposed".

[24] The appellants have been convicted of a serious offence. From what was conveyed to the probation officer by the second appellants mother, the two appellants were troublesome, hence the second appellant's mother had to warn the second appellant about his association with the first appellant. The first appellant had a previous conviction of rape, and does not seem to have learned from his previous error with the law. The second appellant had failed to heed to the wise words of advice from her mother, and therefore had himself to blame. The second appellant is older than the first appellant, and it can therefore not be said that he was unduly influenced by the first appellant. Even though the appellants were still within the age group which they are regarded as youth at the time of the commission of the offence, there is no evidence presented that they were both of immature age. The appellants did not show any slight remorse at all. In my view, what the appellants had presented, do neither singularly nor cumulatively constitute substantial and compelling circumstances justifying a deviation from the prescribed minimum sentence. The court a quo can therefore, not be faulted for finding that there were no substantial and compelling circumstances justifying a deviation from the prescribed minimum sentence. The appeal on sentence therefore stands to fail.

[25] In the result I make the following order:

25.1 The appeal on both conviction and sentence is dismissed.

JUDGE OF THE IDGH COURT OF SOUTH

AFRICA, LIMPOPO DIVISION,

POLOKWANE

I AGREE

SEMENYA DJP

JUDGE OF THE IDGH COURT OF SOUTH

APPEARANCES:

Counsel for the appellants : Scott PR

Instructed by : Legal Aid SA Polokwane Office

For respondent :Adv Magoda P

Instructed by : Office of the DPP Polokwane

Date heard : 8th October 2021

Electronically delivered on : 26th October 2021

[1] 105 of 1997

[2] 32 of 2007

[3] [2 017] ZASCA 114 (21 September

2017) at para 15

[4] 2011(2) SACR 153 (SCA) at paras 22 and 23

[5] 2017 (2) SACR 233 (SCA) at para 27

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