

SOUTH AFRICA / JUDGMENT

M.B. v S (A94/2024) [2025] ZAGPJHC 707 (14 July 2025) [2025] ZAGPJHC 707

COURT

South Gauteng High Court, Johannesburg

BEFORE

Mdalana-Mayisela, Moosa

CASE / FILE NUMBER

A94/2024

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, JOHANNESBURG

CASE

NO: A94/2024

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: NO

14 July 2025

In

the matter between:

M[...]

B[...]

Appellant

And

THE

STATE

Respondent

JUDGMENT

Mdalana-Mayisela et Moosa JJ

Introduction

[1] This is an appeal against the conviction and effective sentence of life imprisonment imposed upon the appellant by the Regional

Magistrate court, Randfontein. The appellant enjoys an automatic right to appeal his conviction and sentence upon issuing a notice of appeal. The appeal is opposed by the respondent.

[2] The appellant was charged on count 1 with assault to do grievous bodily harm; count 2 with contravention of section 3 read with

sections 1, 56(1), 57, 59 and 61 of the Criminal Law Amendment Act 32 of 2007 (“Sexual Offences and Related Matters Act”),

further read with section 1 of the Criminal Law Amendment Act 1 of 1998, as amended, and further read with section 51(1) and Schedule 2 of the Criminal Law Amendment Act 105 of 1997, as amended (“the CLAA”); count 3 with contravention of section 3 read with sections 1, 56(1), 57, 59 and 61 of the Sexual Offences and Related Matters Act, further read with section 1 of the Criminal Law Amendment Act 1 of 1998, as amended, and further read with section 51(2) and Schedule 2 of the CLAA; count 4 with theft; and count 5 with kidnapping.

[3] He was legally represented throughout the proceedings in the lower court. He pleaded not guilty to all counts and gave no plea

explanation. He was convicted as charged on all counts. He was sentenced on count 1 to 5 years’ imprisonment; count 2 to life imprisonment; count 3 to 10 years’ imprisonment; count 4 to 3 years’ imprisonment; and count 5 to 5 years’

imprisonment. The sentences imposed on counts 1, 3, 4 and 5 were ordered to run concurrently with the sentence imposed on count

2. He was declared unfit to possess a firearm in terms of section 103 of Act 60 of 2000.

Factual

background

[4] The facts leading to conviction and sentence are from two incidents which occurred on the 7th and 20th of November 2022 and briefly, are as follows. The complainant, D[...] S[...] and appellant were in a love relationship and lived together before the incidents in question. According to the complainant, the relationship ended, and she moved out of their communal residence and went to stay in a shack in the same neighbourhood.

- [5] On the 7th of November 2022 at around 5:30 am, the appellant went to the complainant's shack. He found her sitting on the bed. He grabbed her on her left arm and pulled her out of her shack to his room. On arrival in his room, he locked the door and played music loud. He interrogated her about her whereabouts during the previous night. He assaulted her with open hands and clenched fists and kicked her all over the body. She sustained injuries. Her face was bruised, swollen and bleeding. Her jaw was dislocated. Her eyes could not open fully. Her ribs were sore.
- [6] After assaulting her, he removed her jeans and underwear. He instructed her to kneel on the bed and bend forward. He pushed her

upper body forward and called her a prostitute. He then inserted his penis into her anus from behind without her permission. She could not resist him because he was stronger than her physically and the door was locked. She was screaming during the penetration and telling him that it was painful. He did not care. No one came to her rescue during the incident. When he was finished penetrating her, she left the room. She saw the accused's mother in the yard. The accused's mother noticed the injuries on her face and gave her a scarf to cover her face. She then went to her shack.

- [7] On arrival in her shack, she took a bath. Her son observed the blood coming from her anus and asked her if the appellant stabbed her. She told him that he was still young, and he would not understand. Her friend D[...] M[...] saw her injuries on the same day, and she informed her that she was assaulted by the appellant. She went to the clinic two days after the incident.
- [8] On the 20th of November 2022 at around 4:00 am, she arrived at her shack from an all-night outing. She was drunk. She went to bed without undressing her clothes and fell asleep. Her son was in the shack. He woke her and asked what was causing the bed to shake. The appellant answered that he was having sexual intercourse with the complainant. She then noticed the signs in the bed and on her lower body which confirmed that the appellant had penetrated her vagina. Her lower body was naked. She was not aware that the appellant was in her shack before her son woke her. She asked her son if he opened the door for the appellant and he denied. She did not consent to have anal intercourse with the appellant.
- [9] She noticed that the appellant had taken his phone which was in her possession. He also took her bank card and identity document without her permission. On the same day she went to the police station to open a case against the appellant. She also went to the clinic. She was referred to Leratong hospital. She was examined by Dr Leonard John Maringa who completed a J88 form that was handed in as evidence by the State.

Ad conviction

- [10] In his notice of appeal, the appellant contended that the lower court erred in convicting him on all counts without the evidence proving his guilt beyond reasonable doubt. Further, he contended that the lower court erred in rejecting his version as not being reasonably possibly true.
- [11] It was argued on behalf of the appellant that the complainant was not a credible witness for the following reasons. She did not report the rape which occurred on 7 November 2022 to Mlambo. She did not report the incident to the police immediately. She was drunk during the incident on the 20th of November 2022 and that might have limited her factual recollection of the incident. Her version of anal penetration during the second incident was not corroborated by the J88 completed by Dr Kashif on 25 November 2022.
- [12] First, I deal with the contention that the complainant was not a credible witness. The lower court made a credibility finding that she was a credible witness. There were no improbabilities or material contradictions in her evidence. I concur with the credibility findings made by the lower court. It had the advantage of observing and hearing the complainant and other witnesses firsthand. I perused the record, and I found no misdirection in this regard.
- [13] It is common cause that she was drunk during the second incident. However, that fact does not mean that the rape incident did not take place. Her version on penetration during the second incident was corroborated by the appellant. The issues in dispute were consent and whether he penetrated her vagina. She disputed the appellant's version that the penetration was consensual. Her version of anal penetration was corroborated by a medical report. Dr Maringa conducted a clinical examination and found that there was scarring at 6 o'clock on the orifice, which is a slighter inner part of the anus. The orifice was 1 centimetre dilated, meaning you could push a finger in without any form of resistance. He concluded that there was anal penetration.
- [14] The appellant's version on the rape that occurred on the 7th of November 2022 was a bare denial. The complainant testified that he inserted his penis into her anus without her consent after assaulting her all over the body. She stated that she did not inform Mlambo about the rape because the appellant had threatened to kill her if she told anyone about the incident. She also did not inform the accused's mother about the rape when she found her in the yard and the medical nurses at the clinic when she consulted two days after the incident because of the death threat. She reported both incidents to the police on the 20th of November 2022 because the appellant's conduct was affecting her young child and she could no longer tolerate it.
- [15] She testified that her anus was injured after the first incident of rape. She had cuts and she was bleeding. She could not defecate for two days. During her testimony she stated that she was still struggling to defecate. She went to the clinic after two days and the nurse gave her painkillers and ointment to apply on her injuries. Her anal injuries and medication received from the clinic were not disputed by the appellant. She was cross-examined about the J88 completed by Dr S Kashif on 25 November 2022, which did not mention anal penetration.

Her answer was that J88 was completed from the clinic records of the first incident. She did not mention anal penetration to the clinic staff when she consulted two days after the first incident because of the death threat that was made to her by the appellant.

[16] In his examination in chief, the appellant initially admitted to assaulting the complainant on the 7th of November 2022 but later denied it and said it happened in October. He also denied that it was assault with intent to do grievous bodily harm and said that he only assaulted her with an open hand because she went to the tavern and left him with a child. The complainant testified that the appellant went to her relatives' house after the assault incident on the 7th of November 2022 to apologize for assaulting her. He also came to her shack bribing her with some stuff and asking her not to report him to the police. Mlambo corroborated the complainant's version that she was assaulted on the 7th of November 2022. She testified that she called the police, but the complainant refused to speak to them.

[17] Dr Kashif corroborated the complainant's version on assault with intent to do grievous bodily harm. He noted bruises, swelling

and tenderness in the zygomatic area and cheek. He also noted the dislocated jaw. He concluded that there was physical assault. Dr Maringa also corroborated the complainant on the version of assault. He found that there were bruises on both cheeks and thigh. He concluded that there was physical assault. The appellant also corroborated the complainant's version that she sustained a dislocation of the jaw, but he said it happened when she was eating beef stew.

[18] The complainant was a single witness in respect of the rape incidents. Section 208 of the Criminal Procedure Act 51 of 1977 provides that conviction may follow on the single evidence of any competent witness. It is common cause that the complainant is a competent witness. The lower court applied a cautionary rule to her evidence. I also found that her evidence was satisfactory in all material respects. Furthermore, her version on the rape incidents was corroborated in material respects by the appellant and Dr Maringa as alluded above. The appellant also admitted that he took the complainant's identity document and bank card without her permission. I find that the state proved all the elements of the offences beyond reasonable doubt.

[19] The lower court found that the appellant was not a credible witness. I agree that he was a bad witness. He testified repeatedly that he assaulted the complainant an open hand on the 7th of November 2022. He later changed and said the assault took place during October. He also testified that he went to the complainant's

shack on the 7th of November 2022 but denied any assault because he could not assault her in the presence of other residents. He later changed and said he did not go to her shack on that day.

- [20] He testified that on the 20th of November 2022, around 4:30 am he went to the complainant's shack. He knocked and the complainant saw him, the child opened the door for him, and he entered. He changed his version and said that the complainant came to his place and told him to come to her shack at night. He went to her shack at night and found her sleeping. He shook her and she woke up. Thereafter, he had a smoke, and she called him by his name. He jumped into the bed and then they had sexual intercourse.
- [21] When asked about whether the sexual intercourse was consensual, he said that they agreed to have it. When asked how they reach that agreement, he said "it is a common thing that we normally do. I would sit there and then when I arrive there and then we would touch and touch each other and then from there we would get into the bed and then we have sex." When asked to be specific on how they reached the agreement on that day, he said "then after having sex with her, at around 06:00 I went to go buy her bread, sugar and eggs and cigarettes." His counsel decided to leave the question unanswered. The version about buying bread, sugar and eggs was not put to the complainant.
- [22] The appellant's version was correctly rejected by the lower court as not being reasonably possibly true. I find no misdirection

by the lower court in convicting the appellant on all offences. Accordingly, the appeal on conviction must fail.

Ad sentence

- [23] The appellant contended that the sentence imposed by the lower court is severe and induces a sense of shock. It was argued on his behalf that the lower court overemphasized the seriousness of the offences and interests of society. It did not attach sufficient weight to his personal circumstances. It failed to deduct the period he spent in custody awaiting trial from the sentence.
- [24] It is trite that sentencing is pre-eminently a matter for the discretion of the trial court. The test for interference with the sentence imposed by the trial court is not whether or not the appeal court would have imposed another form of punishment, but rather whether the trial court exercised its discretion properly and reasonably when it imposed the sentence. The appeal court will interfere where the imposed sentence is vitiated by an irregularity, misdirection or where there is a striking disparity between the sentence and that which the appeal court would have imposed had it been the trial court or if it induces a sense of shock.
- [1]
- [25] Section 51(1) of the CLAA is applicable to count 2 and section 51(2) is applicable to count 3. The conviction on count 2 attracts the prescribed minimum sentence of life imprisonment and on count 3 attracts the prescribed minimum sentence of 10 years imprisonment, unless the court finds that there are substantial and compelling circumstances warranting a deviation from the imposition of the prescribed minimum sentences.

[26] In determining whether there are substantial and compelling circumstances, a court must be conscious that the legislature has ordained a sentence that should ordinarily be imposed for the crime specified, and that there should be truly convincing reasons for a particular circumstance to call for the imposition of a lesser sentence. Such circumstances may include those factors traditionally

taken into account in sentencing – mitigating factors - that lessen an accused's moral guilt. The specified sentences are not to be departed from lightly and for flimsy reasons.[2]

[27] The appellant submitted that the following personal circumstances are substantial and compelling. He was 28 years old at the time of sentencing. He was self-employed as an illegal miner. He spent almost 2 years in prison awaiting trial. He has one relevant previous conviction, and he has prospects of rehabilitation.

[28] The appellant is not married. He has no children. He has grade 7 level of education. He has not shown remorse. He has a previous

conviction of assault GBH committed in 2018. He has been convicted of serious offences. The period he spent in prison awaiting trial was a factor to be considered when imposing a sentence, but it could not be mathematically deducted from the prescribed life sentence.

[29] No evidence was led in the lower court showing that his age played a significant role in the commission of the offence and thereby reduced his blameworthiness. He elected not to testify in mitigation of sentence. In *S v Matyityi*[3] it was held that:

“Thus whilst someone under the age of 18 years is to be regarded as naturally immature, the same does not hold true for an adult. 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.”

[30] In *S v Vilakazi*[4] the Supreme Court of Appeal in relation to what constitutes substantial and compelling circumstances held as follows:

“In cases of serious crime, the personal circumstances of the offender by themselves, will necessarily recede into the background. Once it becomes clear that the crime deserves of a substantial period of imprisonment the question whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves immaterial to what that period should be, and those seem to me to be the kind of ‘flimsy’ grounds Malgas said should be avoided. But they are nonetheless relevant in another aspect. A material consideration is whether the accused can be expected to offend again.”

[31] The appellant has a very slim chance of rehabilitation, if any. The contents of the probation officer's report show that he is a danger to the society, and he must be removed permanently. His own mother fears that he would kill her one day. One of the neighbours told the probation officer that if the appellant is released from custody she is going to relocate to Limpopo because she fears the appellant.

[32] The contents of both the probation officer's report and victim impact report show that the appellant had been abusing the

complainant for a long time and sometimes in the presence of the community members. The members of the society could not protect her because they feared him. On one occasion, he assaulted a community member who tried to help the complainant. Mlambo called the police after the appellant assaulted the complainant on the 7th of November

2025. The complainant refused to speak to the police because of the death threat the appellant made to her. The appellant also abused the complainant's child. He raped the complainant in the presence of the child, and he sometimes assaulted the child. The appellant told the probation officer that he belonged to the gang that violated other people's human rights but respected only their mothers. The society must be protected against the appellant.

[33] The lower court found that the appellant's personal circumstances are not substantial and compelling. Considering what I

have stated above, the lower court's finding cannot be faulted. His personal circumstances are what was referred to in *S v Malgas supra* as flimsy. The lower court correctly imposed the prescribed minimum sentences. The effective sentence of life imprisonment does

not induce a sense of shock, and it is appropriate in the circumstances of this case.

ORDER

[34] In the result, the following order is made.

1. The appeal against conviction and sentence on all counts imposed by the lower court is dismissed.
2. The order made by the lower court is hereby confirmed.

MMP Mdalana-Mayisela

Judge of the High Court

Gauteng Division,

Johannesburg

I agree

C I Moosa

Judge of the High Court

Gauteng Division,

Date of delivery:

14 July 2025

Appearances:

On behalf of the appellant: Mr E Guarneri

Instructed by:

Legal Aid SA

On behalf of the respondent Adv M Maleleka

Instructed by:

National Prosecuting Authority

[1] S v Kgosimore 1999 (2) SACR 238.

[2] S v Malgas 2001 (1) SACR 469 (SCA) para 25.

[3] [2010] ZASCA 127 paras 18 to 20.

[4] 1967(2) SA 193 A at 199 G.

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