

SOUTH AFRICA / JUDGMENT

Mbayeka v S (CA&R 11/2022)

[2025] ZANCHC 41 (16 May 2025)

[2025] ZANCHC 41

COURT

Northern Cape High Court, Kimberley

BEFORE

Williams, Nxumalo

CASE / FILE NUMBER

CA&R 11/2022

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IN THE HIGH COURT OF

SOUTH AFRICA

(NORTHERN

CAPE HIGH COURT, KIMBERLEY)

Case

no: CA&R 11/2022

HEARD

ON: 04-03-2024

DELIVERED:

16-05-2025

REPORTABLE:

YES/NO

CIRCULATE

TO JUDGES

YES/NO

CIRCULATE

TO MAGISTRATES YES/NO

In

the matter between: LUZOKO
 WAYNE MBAYEKA
 Appellant
 AND
 THE
 STATE
 Respondent

CORAM: WILLIAMS J et NXUMALO J

JUDGMENT

WILLIAMS J:

1. The appellant was convicted on 26 January 2022, in the Regional Court, Kimberley on two counts of contravening the provisions of s 3 read with s1, 56(1), 5 1, 57, 58, 59, 60 and 61 of Act 32 of 2007 (rape) and further read with the provisions of s 51(1) of Act 105 of 1997.

The charges were taken together for sentencing purposes and the appellant was given a sentence of life imprisonment. This appeal lies against the convictions and sentence imposed.

2. The grounds of appeal can be summarized as follows:

2.1 Ad conviction:

2.1.1 That the trial court erred in accepting the evidence of the complainant, a single witness, as being credible and reliable;

2.1.2 That the trial court erred in not considering the contradictions in the evidence of the state witnesses as material;

2.1.3 The trial court erred in rejecting the evidence of the appellant; and

2.2 Ad sentence:

2.2.1 That the trial court erred in finding that there were no substantial and compelling circumstances present which would justify a deviation from the prescribed minimum sentence of life imprisonment; and

2.2.2 The sentence of life imprisonment is shockingly harsh and inappropriate in the circumstances.

3. The complainant, Ms JM, a 40 year old woman, testified that on the afternoon of 9 November 2019, after cleaning her uncle's house, she got a lift home with the appellant. She did not know the appellant but was assured by her aunt S[...] that it would be safe to accept a lift with him.

4. After buying some beers and dropping off his friend Thabo, the appellant told the complainant that he first had to attend to some livestock which he had on the outskirts of town, after which he would take her home. The appellant instead drove to a shack where he stopped his vehicle and asked the complainant to go in with him to chat for a few minutes. She entered into the shack with

him because her aunt had told her she would be safe with him. By then it was between 19:00 and 20:00.

5. Once inside the shack, the appellant pushed the complainant against the corrugated iron the dwelling was constructed of, so that she found herself stuck between a bed and the wall of the shack. She testified that she screamed at that stage.
6. The complainant testified that she asked the appellant to assist her to get up from where she had fallen but that once she had gotten up, he pushed her onto the bed and pulled off her dress and panties. She fought with him but he slapped her with an open hand and pulled her braids. Thereafter he held her down by the right wrist and raped her. The complainant testified

that the appellant had undressed himself while she was stuck between the bed and wall and was already naked when he threw her onto the bed.

7. After the appellant had raped her, he accused the complainant of taking his car keys. He hit her again and thereafter proceeded to rape her for a second time. She had been screaming and while the appellant was still busy raping her, some people started knocking on the door of the shack and shouted for the appellant to open up. When the appellant opened the door, still naked, the complainant managed to run out of the shack, dressed only in her bra. She then fainted. According to the complainant she woke up to find herself in the hospital.
8. During cross-examination the complainant was confronted with the statement she had made to the police the day after the incident. In this statement the complainant related that she had told the witnesses who had come to her assistance, after she had escaped from the shack, that she had been raped. She also stated that one of the women told her that she had heard the screaming and that another woman had shone her cellphone torch in her face and had recognized her and called her uncle and the police, that

the police van arrived but did not approach them, that the appellant had driven off in his vehicle, and that they had been taken to the police station by the woman who had called the police and her husband. She also stated that she told the police officer at the police station that the appellant had not used protection when he was raping her. In her evidence in court the complainant

testified that she could not remember anything after she had fainted and had only woken up in hospital.

9. During her cross-examination regarding this inconstancy, the complainant answered that she had not told anybody outside the shack what had happened and that she could not remember saying that to the police officer who took down her statement.
10. The complainant had also at one stage during her cross-examination stated that the appellant had started looking for his keys after he had raped her the second time. When cross-examined about this inconsistency, she responded by stating that she could not remember testifying in that fashion.
11. Ms M Mpondo and Mr E Singozo, who were sitting in front of Ms Mpondo's shack, about 25 meters away from the shack used by the appellant, testified in the state's case. They had heard the complainant screaming and crying for help. They also heard banging against the corrugated iron of the appellant's shack.
12. They went to investigate, banged on the door of the shack and shouted for the door to be opened. They heard the appellant say "voetsek" from inside the shack before the door was opened. A woman dressed only in a bra, came running out of the shack and fainted.

The appellant, who stood in the door of the shack, had held, according to Ms Mpondo, a black cloth, like a vest, in front of his

genitals, but was otherwise naked. According to Mr Singozo, the appellant had a vest on.

13. Ms Mpondo called for someone to bring a blanket to cover the complainant and asked that the police be called. During that time the appellant had entered his shack again and came out fully clothed. He got into his car and drove off.
14. Mr Singozo had seen a police van patrolling and had gone to inform the police of the incident. When he arrived at the police van the appellant was already speaking to the police. He saw the appellant get back into his car and the police van followed him. The police never attended to the scene that night.
15. According to Ms Mpondo and Mr Singozo, the complainant did not speak to them that night.
16. Ms L Diamond who had also heard the commotion from her shack, joined the group. At the time the complainant was standing and speaking to Ms Mpondo and Mr Singozo very fast, telling them that the appellant had slept with her and that he wanted his car keys. The complainant then fainted. Someone sprinkled water over her and covered her with a blanket.
17. When the complainant recovered she explained that the appellant was supposed to give her a lift home but that he brought her to the shack to sleep with her. The complainant fainted again and she was then taken to the police station in Ms Diamonds' husband's vehicle, accompanied by Ms Mpondo, Mr Singozo and Ms Diamonds. According to Ms Diamonds when she first saw the appellant at his shack he was completely naked, but later came back out with a vest tied around him like a skirt.

18. Ms Diamonds knew the complainant's uncle, Oom L[...] B[...], and called him to tell him that his niece was with them and what had happened to her. The complainant's uncle told her that the appellant was with him and that they would go to the scene.
19. Mr T Malope, the complainant's uncle testified that after Ms Diamonds had called him to tell him that his niece had been raped, he went outside looking for a lift to take him to the scene. He saw the appellant's car stop across the street and heard the appellant calling for his friend Thabo. Mr Malope saw Thabo approach the appellant's vehicle and talk with the appellant through the window. When Mr Malope approached them, he insisted that the appellant take him to the scene. He could see that both Thabo and the appellant appeared to be afraid of him. When he got into the car the appellant told him that he did not rape the complainant and that the complainant's panties were behind the driver's seat. Mr Malopa testified that he was so hurt by what had happened that he did not look for the panties.
20. At the scene, Mr Malope found the complainant lying down, covered with a blanket. At some stage she tried to stand up but fell down again. They waited for the police, but eventually went to the police station in Ms Diamond's vehicle.
21. Constable Speek, who was on patrol duty with a colleague that specific night testified that they had received a complaint about a rape which had been committed at Lerato Park and had arranged to meet the caller at a tuckshop since the informal settlement was still new and there were no street names. He waited at the tuckshop, but when no one appeared he patrolled the area. A vehicle stopped next to them and the driver, the appellant, informed them that there were people chasing him who wanted to pelt his vehicle with stones, accusing him of having committed a sexual offence. At the time there was another man in the vehicle with the appellant. Constable Speek stated that because he did not know at the time if the appellant was connected to the complaint received, he told the appellant to go home and should he be identified as the suspect he would be arrested at his home.
22. Dr M Mulunga examined the complainant at the local hospital in the early hours of the next morning. He also compiled the J88 medical report. His evidence was that he did not notice any lesions or marks on the complainant's body. He testified that whether or not a person would be left with bruises or marks due to being slapped would depend on the force of the slap, the lapse of time and the colour of the victim's skin. On examination of the genitalia of the complainant the doctor found no abnormalities except for a yellowish discharge due to an infection incurred most probably prior to the event. Dr Mulunga explained that the vaginal muscles of a woman who had given birth to children would be used to dilation and expansion and that it could be the reason why some women have minimal or no lesions after a rape. The complainant had three children of her own.

23. The only other relevant witness for the state was Ms S[...] M[...], the complainant's aunt. Her evidence was that at about 17:00 to 18:00 that specific day she was walking to a friend's house when she saw the appellant's vehicle parked in front of the house she was about to visit. As she approached the vehicle she saw the complainant leaning against it.

She stopped and greeted the complainant and asked her if she knew the appellant. The complainant responded by saying that she was just asking for a lift. Ms M[...] told the complainant that it was her choice if she took a lift with the appellant and his friend Thabo, but if it were up to her she would not do it because it was obvious that the appellant and Thabo had had too much to drink. She then left them there.

24. The appellant testified in his own defence. His evidence was that he had gone to pick up his friend Thabo at about 14:00 that specific Saturday to watch a televised soccer match in Barkly West. At Thabo's house, a male by the name of Martin approached his vehicle and asked if he could give his cousin, the complainant, a lift to Club 2000. He agreed. The complainant, whom he did not know, then came to stand next to his vehicle. While standing there, Ms M[...] came to speak to the complainant. When Ms M[...] left, the complainant got into the vehicle with the appellant and Thabo.

25. According to the appellant, he stopped at a bottle store called Tikibar, where he asked Thabo to buy two beers for them. When Thabo returned with the beers, he drove on. The complainant started chatting with him, telling him that she would also like a beer. The appellant then stopped at another bottlestore and gave Thabo money to get the complainant two beers. While Thabo was in the store, he and the complainant conversed and he could see that she had now become relaxed. She asked him where

he and Thabo were going and when he told her they were going to Barkly-West, she told him that she was not in a hurry and would go with them.

26. On the road to Barkly-West the appellant realised that the energy and the situation between him and the complainant had changed and he no longer wanted to go to Barkly-West. He then turned back to the location where he dropped Thabo off at Tikkibar and told the complainant that he has the keys to a friend's shack where they could go and relax and finish their drinks.

She agreed.

27. When they got to the friend's shack, they first sat in the car chatting before going inside. Inside the shack, they drank some more, then started kissing. The appellant undressed himself, whereafter the complainant undressed and they then had consensual sexual intercourse. After chatting for a while, they both fell asleep.

28. The appellant testified that when he woke up at about 20:00 he could not find his keys and his clothes. At the time he was wearing a black boxer shorts and a vest. He shouted at the complainant while looking for his clothes and keys and she talked back loudly as well. He said that it could have sounded as if they were arguing. He eventually found his keys, wallet and clothes on the side of the mattress and apologised to the complainant. She then started screaming. There were people outside asking what was happening. The complainant then ran outside, dressed only in a bra, and after taking three steps outside, she fell.
29. He was astounded as to why the complainant would have fallen as she was just lying on the ground with her eyes open, showing no signs of life. Ms Mpondo accused him of raping the complainant. Ms Diamonds and her husband also came to the scene. The appellant went back into the shack and got dressed and left to get either the police or an ambulance.
30. As he was driving, however, he decided to fetch Thabo to assist him with the complainant. He found the complainant's uncle, Mr Malope outside Thabo's house. He said that he had received information that the appellant had raped his niece, the complainant.
31. The appellant took Mr Malope to the scene where the complainant was still lying. He dropped Mr Malope off and decided to proceed to the police station. On his way he saw Constable Speek's police van and waved at it. He testified that he knew Speek as they had worked together at some stage. He asked Speek if they were going to the scene and informed him that he was the person who had been with the complainant. Speek then asked him if he had been drinking and when he answered in the affirmative, Speek told him to go straight home and if the incident turned out to be serious and the complainant goes to the police station, they would know where to find him. The appellant then dropped Thabo off and went home.
32. The appellant denied that he had assaulted or raped the complainant. He denied that she had cried for help and maintained that the complainant had only screamed as a result of the argument they had over his missing keys.
33. In considering the evidence the trial court indicated that it was mindful of the fact that the complainant was a single witness and that the cautionary rule applied. Whether the trial court paid mere lip service to this rule or failed to apply the rule properly, as argued by the appellant, is what needs to be determined in this appeal.
34. The attack on the judgment of the trial court in this regard is two-pronged: firstly, that the trial court failed to properly consider the discrepancies and inconsistencies in the viva voce evidence of the complainant and what was contained in her statement to the police; and secondly, that given the unreliability of the version of the complainant, and there being no corroboration in the doctor's evidence, the trial court should have found the version of the appellant to be reasonably possibly true.

35. The discrepancies regarding the state witnesses relate to; when and how many times the witnesses, who had come to the aid of the complainant, had heard her scream; whether the complainant had spoken to any of them after she had recovered from fainting; what

the appellant was wearing when he first came out of the shack; and the inconsistency between the evidence of Ms S[...] M[...] and the complainant as to how it came about that the complainant accepted a lift with the appellant.

36. The trial court dealt with these discrepancies in the evidence of the state witness in some detail and found that it was not material when the evidence was considered as a whole.

37. In dealing with the evidence of the complainant, the trial court adopted the approach to contradictions between the police statement of a witness and the evidence of such a witness as was described in *S v Mafaladiso en Andere* 2003(1) SACR 583 (SCA) at 593e-594h. *Nepgen J* in *S v Govender and Others* 2006(1) SACR 322 (ECD) gives a handy translation of this approach at 325h – 326c, which I borrow and repeat herein as follows:

“The juridical approach to contradictions between two witnesses and contradictions between the versions of the same witness (such as, inter alia, between her or his viva voce evidence and a previous statement) is, in principle (even if not in degree), identical.

Indeed, in neither case is the aim to aim to prove which of the versions is correct, but to [establish] that the witness could err, either because of a defective recollection or because of dishonesty. The mere fact that it is evident that there are self-contradictions must be approached with (circumspection) by a court. Firstly, it must be carefully determined what the witnesses actually meant to say on each occasion, in order to determine whether there is an actual contradiction and what the precise nature thereof [is]. In this regard the adjudicator of fact must keep in mind that a previous statement is not taken down by means of cross-examination, that there may be language and cultural differences between the witness and the person taking down the statement which can stand in the way [of the correctness] of precisely what was meant, and that the person giving the statement is seldom, if ever, asked by the police officer to explain (his or her) statement in detail. Secondly, it must be kept in mind that not every error by a witness and not every contradiction or deviation affects the credibility of a witness. Non-material deviations are not necessarily relevant. Thirdly, the contradictory versions must be considered and evaluated on a holistic basis. The circumstances under which the versions were made, the proven reasons for the contradictions, the actual effect to the contradictions with regard to the reliability and credibility of the witness, the question whether the witness was given a sufficient opportunity to explain the contradictions – and the quality of the explanations- and the connection between the contradictions and the rest of the witness’ evidence [must], amongst other factors, be taken into consideration and weighed up. Lastly, there is the final task of the trial Judge, namely to weigh up the previous statement against the viva voce evidence, to consider all the evidence and to decide whether it is reliable or not and to decide whether the truth has been told, despite any shortcomings.”

38. The trial court considered the contradictions in the complainant's viva voce evidence and found that the complainant had made an honest mistake, which she herself corrected, when she testified during cross-examination that the argument about the key ensued after the second rape had occurred. The trial court furthermore found with regard to the complainant's police statement and her evidence, that the complainant was by all accounts traumatised after the incident and that when the corroborative evidence of the independent witnesses is taken into account, such as the screaming and crying for help by the complainant, the banging against the corrugated iron of the shack, the fact that the complainant ran out of the shack naked, and traumatised and had fainted, the deviations in her evidence were not material. Taking into account the totality of the evidence before the trial court, it was found, correctly in my view, that the complainant's evidence regarding the material facts be believed and that of the appellant rejected. The fact that there was no medical corroboration of the rapes, is in my view a neutral factor, which as explained by the doctor, could be attributed to the fact that the complainant was an adult woman with three children and that in such circumstances, the absence of injuries to the genitalia of the complainant would not necessarily negate a complaint of rape.
39. In *S v Sauls and Others* 1981(3) SA 172, (AD), the Appellant Division held as follows at 180 E-F.
- "There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility 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 he truth has been told."*
40. It is also useful to consider the warning expressed in *S v Snyman* 1968(2) SA 583 (A) at 585 G, that when dealing with the evidence of a single witness, courts should not allow the exercise of caution to displace the exercise of common sense.
41. In my view the trial court correctly convicted the appellant on the two counts of rape he was charged with.
42. As far as the sentence is concerned, it is trite that the sentencing discretion lies pre-eminently with the sentencing court and should be exercised judiciously and in line with the established principles governing sentencing. In circumstances where there is an appeal against a sentence imposed in terms of the Criminal Law Amendment Act 105 of 1997, the proper enquiry on appeal is whether the facts which were considered by the sentencing court are substantial and compelling, or not (see *S v PB* 2013 (2) SACR 53 (SCA) at 539 e-g).
43. The trial court found that there were no substantial and compelling circumstances present to justify a departure from the prescribed sentence of life imprisonment. The question to be answered now is whether the trial court erred in making such a finding.

44. The appellant was 45 years old at the time of sentencing. He is not married but had been living with a woman for 6 years before his arrest. They have one minor child who was 2 years old at the time of sentencing. The appellant has eleven other children ranging in ages from 7 years to 24 years old. He maintained eight of his children before his arrest.
45. The appellant had been in the South African Police Service for sixteen years before his arrest and had achieved the rank of sergeant. He had been in custody for just over two years pending the finalisation of the trial.
46. The appellant has one previous conviction for driving while his blood alcohol concentration exceeded the legal limit, for which he was sentenced to a fine during 2015. This previous conviction is not relevant for purposes of sentencing.
47. There is no doubt that rape is a repulsive crime and that the incidence of rape in this country is escalating. In these circumstances Nugent JA has stated in *S v Vilakazi* 2009(1) SACR S 52 (SCA), at paragraph 3, that:

“ . . . There is considerable risk in those circumstances that excessive punishment will be heaped on the relatively few who are convicted in retribution for the crimes of those who escape or in the despairing hope that it will arrest the scourge. But the Constitutional Court reminded us in S v Dodo that punishment must always be proportionate to the deserts of the particular offender – no less but also no more – for all human beings ‘ought to be treated as ends in themselves, never merely as means to an end’.”

48. In *S v SMM* 2013

- (2) SACR 292 (SCA), Majiedt JA stated the following at 297 b-e:

“ . . .that each case must be decided on its own merits. It is also self-evident that sentence must always be individualised, for punishment must always fit the crime, the criminal and the circumstances of the case. It is equally important to remind ourselves that sentencing should always be considered and passed dispassionately, objectively and upon a careful consideration of all relevant factors. Public sentiment cannot be ignored, but it can never be permitted to displace the careful judgment and fine balancing that are involved in arriving at an appropriate sentence. Courts must therefore always strive to arrive at a sentence which is just and fair to both the victim and the perpetrator, has regard to the nature of the crime and takes account of the interests of society. Sentencing involves a very high degree of responsibility which should be carried out with equanimity. As Corbett JA put it in S v Rabie:

‘A judicial officer should not approach punishment in a spirit of anger because, being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interests of society which his task and the objects of punishment demand of him. Nor should he strive after severity; nor, on the other hand, surrender to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a humane and compassionate understanding of human frailties and the pressures of society which contribute to criminality.’

49. Bearing in mind the above-mentioned dicta, it is my view clear that the trial court has had little consideration for the individualization of sentencing. The trial court erred in over-emphasising the prevalence of the crime at the expense of the appellant's favourable personal circumstances. The trial court also erred by finding that the fact that the appellant raped the complainant twice was an aggravating factor. The very fact of multiple rapes brings this offence within the purview of s 51(1) of the Act and should therefore not be considered as an aggravating factor. The fact that the appellant pleaded not guilty and maintained his innocence throughout led to the trial court finding that the appellant had no remorse for his actions. Whilst this may be so, it does not mean that the appellant is not capable of rehabilitation. To have reached the age of 43, when these offences were committed, with no previous convictions for any offences where violence was involved, in my view, is a sure indication that the appellant is capable of rehabilitation.
50. While there can be no argument that the rapes have had a traumatic effect on the complainant – in her victim impact report she stated that she now has to take medication for depression and has attempted suicide several times since the incident – the doctor who examined the complainant found no physical injuries. To arrive at a just and proportionate sentence, this is a factor to be considered cumulatively with the other relevant factors (see *S v SMM* at paragraph 26).
51. Taking all the relevant factors into consideration, the imposition of life imprisonment is in my view grossly disproportionate to the offence. We are therefore obliged to set aside the sentence and impose sentence afresh. Regard being had to the seriousness of the offence; a lengthy period of imprisonment is the only appropriate sentence. I would consider a sentence of 22 years imprisonment appropriate in the circumstances. However, taking into account the fact that the appellant had spent about 2 years in custody pre-sentence, a sentence of 20 years imprisonment would be proper.

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In the circumstances the following order is made:

1. The appeal against the convictions is dismissed.
2. The appeal against the sentence imposed is upheld and the sentence imposed by the trial court is set aside and replaced with the following:

"The accused is sentence to 20 years imprisonment".

3. The sentence is antedated to 22 February 2022.

CC WILLIAMS

JUDGE

I concur

APS NXUMALO

For Appellant: Mr K Biyela Legal Aid SA For Respondent: Adv S K Weyers-Gericke Office of the DPP

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