

SOUTH AFRICA / JUDGMENT

Mbipha v S (CA 08/2020) [2021] ZANWHC 66 (20 September 2021)

[2021] ZANWHC 66

COURT

North West High Court, Mafikeng

BEFORE

R D Hendricks, A M Mthembu

CASE / FILE NUMBER

CA 08/2020

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IN

THE NORTH WEST HIGH COURT, MAFIKENG

CASE

NO: CA 08/2020

In

the matter between: LINDA
MBIPHA
Appellant
and
THE
STATE
Respondent
DATE
OF HEARING
: 10
SEPTEMBER 2021
DATE
OF JUDGMENT
: 20
SEPTEMBER 2021
FOR
THE APPELLANT
: MR
GONYANE
FOR
THE RESPONDENT
:
ADV. PHATLANYANE

JUDGMENT

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 17 September 2021.

ORDER

- (i) Condonation for the late noting and prosecuting of the appeal is granted.
- (ii) The appeal against the convictions on both counts (count 1: rape and count 2: assault with intent to do grievous bodily harm), as well as the sentence imposed is dismissed.
- (iii) The convictions and sentence are confirmed.

HENDRICKS DJP

- [1] The appellant Mr. Linda Mbipha was convicted in the Regional Court on two counts, namely Rape (count 1) and assault with the intent to do grievous bodily harm (count 2). He was sentenced to life imprisonment on count 1 and twelve (12) years imprisonment on count
- 2. The sentences run concurrently ex lege although the Regional Magistrate ex abundanti cautela ordered it to run concurrently. The appellant appeals the conviction on both counts as well as the sentence imposed. There is also an application for condonation for the late noting and prosecuting of the appeal. The application for condonation is not opposed by the

respondent (State). It is quite apparent from the contents of the affidavit, attached to the notice of application for condonation, deposed to by the appellant that he was all along desirous to prosecute his appeal. This, despite the fact that he is incarcerated. He endeavoured to prosecute his appeal shortly after his case was finalized in the court a quo. I am of the view that the requisite condonation should therefore be granted.

- [2] The facts can be succinctly summarized as follows. On 11 February 2012 the complainants in count 1 and 2, S[....]1 M[....]1 and M[....]2 S[....]2, were enjoying themselves at the 'Love & Peace' tavern. They consumed alcoholic beverages while dancing and also playing games of snooker. The appellant attempted to drag the complainant in count 1, S[....]1 M[....]1, by force out of the tavern. She resisted. Sometime later that evening, the two complainants left the tavern for home on foot. They had to walk along the road next to a soccer field. They were accosted by five (5) men. Four of the men approached the complainant in count 2 M[....]2 S[....]2 and assaulted her. Amongst the men was the appellant who was armed with a stick, which he used to assault the complainant in count

2. One of the men apprehended the complainant and held onto her

whilst waiting for his companions to finish their attack on the complainant in count 2.

- [3] After the appellant finished his assault on the complainant in count 2, he joined his comrade who arrested the complainant in count 1. He assaulted her and they caused her to undress. The man who arrested her first had sexual intercourse with the complainant in count 1, against her will and without her consent and then left. Thereafter,

the appellant got hold of her. He forced her to perform fellatio on him whilst he was armed with a knife and thereafter had sexual intercourse with her per anus, without her consent. She managed to escape and ran home and made a report to Refilwe. She was medically examined by Dr. Steyn, who compiled a report and who also testified and corroborated the complainant in count 1's version that she endured a vaginal sexual encounter and even anally.

- [4] The convictions are attacked on the basis that the identity of the appellant is doubtful; that the complainants were inebriated; that there are contradictions in their evidence as well as that of the other state witness. On behalf of the appellant, Mr. Gonyane his legal representative, points out that there is a contradiction as to whether the area where the complainants were accosted was indeed illuminated. On the version of S[....]1 M[....]1 there was a flash light or street light and on the version of M[....]2 S[....]2 it was a bit dark. The issue whether the flash light is the same light as the street light was left open. This in my view is immaterial. The fact of the matter remains that on the version of both complainants there was sufficient illumination to enable them to positively identify the appellant as one of their assailants. The appellant was known to both complainants by sight as they use to meet each other and greeted.

[5] Another aspect that was proffered to cast a doubt on whether the appellant was positively identified is the issue of the cap. On the version of the complainant in count 1, he was wearing a cap. The complainant in count 2 did not mention the fact that he was wearing a cap. It was contended that this is a contradiction. Ms. Phahlanyane on behalf of the respondent (State) submitted, quite correctly I must add, that it was an omission on the part of the complainant in count

2 and not that she contradicted the complainant in count 1. Once again, this aspect was not satisfactory clarified during either

examination-in-chief or during cross-examination. Again, I am of the view that it is not material. It does not warrant the rejection of either of the two complainants' evidence. Sight should not be lost of the fact that the appellant was seen earlier that evening in the tavern when he wanted to drag the complainant in count 1 out of the tavern by force and the fact that he was known to both complainants. This is not a case of mistaken identity.

See: *S v Mthethwa* 1972 (3) SA 766 (A).

[6] The complainants testified that they consumed five (5) quarts (750ml) of Hansa beer, which they shared, over a considerable passage of time, that evening in the tavern. On their version, they were moderately under the influence of alcohol and definitely not intoxicated to the extent that they could not appreciate what was happening, especially to them individually. Much has been made about the testimony of Joseph S[....]2, the witness to whom the report was made, who testified that the complainant in count 2, was drunk and could not been able to walk and speak properly. However, the complainant in count 2 suffered an injury to her leg, which explains why she could not walk properly. Second, she suffered trauma as a result of the ordeal that just befell her where she was severely assaulted, which also contributed to her not to walk properly. I am of the view that based on the evidence presented, the complainants were not drunk especially not to an extent that they could not appreciate what befell them.

[7] There is also another issue raised of an alleged contradiction in the evidence tendered by the State witness. This contradiction relates to the attack on the complainants. The Learned Regional Magistrate was alive to this contradiction and dealt comprehensively with it in the judgment. He states: "The only contradiction in their testimony is that according to them while they were walking and she was walking in front of Mamaki she then said five people emerged. She did not explain whether, they emerged from the front or behind. Whether it is Mamaki, his testimony is to the effect that as they walk some people, came from the front, others were approaching from behind. Two of them and that those who were approaching from behind had sticks and the accused was one of them." This reasoning by the learned Regional Magistrate cannot be faulted. Contradictions per se do not automatically lead to the rejection of a witness' evidence. It may be indicative of an error or the fact that a genuine bona fide mistake has been made. Different people also observe things differently and may place different emphasis on the different things they observe. The trial court must

weigh the evidence of a witness, look at the merits and demerits and determine at the end of it all where the truth lies.

See: S v Mkhole 1990

(1) SACR 95 (A).

[8] In S v Mafaladiso en andere 2003 (1) SACR 583 (SCA) the following is stated :

“Die juridiese benaderingswyse tot weersprekings tussen twee getuies en weersprekings tussen die weergawes van een en dieselfde getuie (soos onder andere tussen sy of haar viva voce getuienis en vorige verklaring) is, in beginsel (indien nie in graad nie)

identities. Die doel is immers in geen geval om te bewys welke van die weergawes die korrekte een is nie, maar om oortuiging te bring dat die getuie kan fouteer, hetsy weens 'n defektiewe rekolleksie of weens oneerlikheid (sien Wigmore a w paragraaf 1017). In die geval van self-weerspreking, in die besonder, word tereg deur Wigmore (t a p paragraaf 1018) gesê :

'(a) Since, in the words of Chief Baron Gilbert (§ 1017 supra), it is "the repugnancy of his evidence" that discredits him, obviously the prior self-contradiction is not used assertively; i.e., we are not asked to believe his prior statement as testimony, and we do not have to choose between the two (as we do choose in the case of ordinary contradictions by other witnesses). We simply set the two against each other, perceive that both cannot be correct, and immediately conclude that he has erred in one or the other - but without determining which one. It is the repugnancy and inconsistency that demonstrates his error, and not the superior credibility of the prior statement. Thus, we do not necessarily accept his former statement as replacing his present one.'

Wigmore se benadering t a p is onderskryf in S v Oosthuizen 1982

(3) SA 571 (T) deur Nicholas R op 576 A - 577 B, wat op sy beurt deur hierdie Hof in S v Mkohle 1990 (1) SA SV 95 (A) op 98 f - g goedgekeur is.

Die blote feit dat daar self-weersprekings voor hande is, moet deur 'n hof met omsigtigheid benader word. Eerstens moet nougeset vasgestel word wat die getuie werklik bedoel het om op elke geleentheid te sê, ten einde te bepaal of daar 'n weerspreking voor hande is en wat die presiese omvang daarvan is. In hierdie verband moet die feite-beoordeelaar in ag neem dat 'n vorige verklaring nie by wyse van kruisverhoor afgeneem is nie, dat daar taal- en kultuurverskille tussen die getuie en die opskrifsteller mag wees wat die korrektheid van wat presies bedoel is in die weg staan, en dat die verklaarder selde of ooit deur 'n polisiebeampte gevra word om in detail sy of haar verklaring te verduidelik. Die eerste sin in paragraaf 8 van die klagster se verklaring is 'n duidelike geval waar 'n meer nougesette benaderingswyse aan die kant van die afnemer van die verklaring die gewraakte sin sou opgeklaar en verhelder het of anders bewoord het. (Sien oor die gevare van vertaalde getuienis en m i, a fortiori, polisieverklarings, R v Gumede 1949

(3) SA 749 (A) op 757 in fine.

Tweedens moet dit steeds voor oë gehou word dat nie elke fout deur 'n getuie en nie elke weerspreking of afwyking die getuie se geloofwaardigheid aantas nie (sien S v Mkohle 1990 (1) SASV 95 (A) op 98 f - g). Nie-wesenlike afwykings is nie noodwendig relevant nie. (Sien S v Bruiners en 'n Ander 1998 (2) SASV 432 (SOKPA) op 437g e v.)

Derdens moet die weersprekende weergawes steeds oorweeg en ge-evalueer word op 'n holistiese basis. Die omstandighede waaronder die weergawes gemaak is, die bewese redes vir die weersprekings, die werklike effek van die weersprekings ten aansien van die getuie se betroubaarheid of geloofwaardigheid, en die vraag of die getuie voldoende geleentheid gehad het om die weersprekings te verduidelik

- en die kwaliteit van dié verduidelikings - en die samehang van die weersprekings met die res van die getuie se getuienis moet o a in ag geneem en opgeweeg word. (Sien S v Mkohle, supra, op 98 f - g; sien ook R v Gumede, supra, op 756
- 758 in medio; S v Jochems 1991 (1) SASV 208 (A) op 211 f - j; S v Bruiners en 'n Ander, supra, op 437 i - 438 a.)

Ten slotte word die eindtaak van die verhoorregter nl om die gewig van die vorige verklaring teen dié van die viva voce getuienis op te weeg, ook in hierdie soort gevalle tereg soos volg in S v Sauls and Others 1981

(3) SA 172 (A) op 180 F saamgevat :

'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 the truth has been told.'

- [9] Insofar as the convictions on both counts are concerned, no material misdirection has been made by the learned Regional Magistrate. The convictions on both counts should be confirmed, and the appeal against the convictions on both counts should consequently fail.
- [10] Insofar as sentence is concerned, it is trite that the powers of a court of appeal to interfere with the sentencing discretion of a trial court is limited. Unless for example, there is a material misdirection or the sentence is shockingly severe and totally disproportionate to the crime committed, a court of appeal will not interfere with the sentence imposed by the trial court. In this appeal, the attack on the sentence imposed is centered upon the contention that the sentence of life imprisonment on the rape charge (count 1) is shockingly severe and excessive, especially because there are substantial and compelling circumstances present in this case which warrant a deviation from imposing life imprisonment, as the prescribed minimum sentence.
- [11] The following personal circumstances of the appellant were placed on record in mitigation of sentence: he was 33 years of age at the time of sentencing; he was unmarried; he is the father of a minor child which was aged eight (8) months by then. The child stays with his mother; he attended school and passed standard 10; he was employed as a general worker

earning R 2000.00 per month. It is trite that the personal circumstances of an accused person must be taken into account in determining an appropriate sentence. The learned Regional Magistrate did take it into account but found nevertheless that it

was not substantial and compelling enough not to impose the prescribed minimum sentence of life imprisonment on the rape charge

(count 1).

[12] In *S v Malgas* 2001 (2) SA 1222 (SCA) it was held that:-

“[12] The mental process in which courts engage when considering questions of sentence depends upon the task at hand. Subject of course to any limitations imposed by legislation or binding judicial precedent, a trial court will consider the particular circumstances of the case in the light of the well-known triad of factors relevant to sentence and impose what it considers to be a just and appropriate sentence. A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate court is at large. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as “shocking”, “startling” or “disturbingly inappropriate”. It must be emphasised that in the latter situation the appellate court is not at large in the sense in which it is at large in the former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned. No such limitation exists in the former situation.

And also:

[25] What stands out quite clearly is that the courts are a good deal freer to depart from the prescribed sentences than has been supposed in some of the previously decided cases and that it is they who are to judge whether or not the circumstances of any particular case are such as to justify a departure. However, in doing so, they are to respect, and not merely pay lip service to, the legislature’s view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of the specified kind are committed. In summary -

A. Section 51 has limited but not eliminated the courts’ discretion in imposing sentence in respect of offences referred to in Part 1 of Schedule 2 (or imprisonment for other specified periods for offences listed in other parts of Schedule 2).

B. Courts are required to approach the imposition of sentence conscious that the legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.

C. Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts.

D. 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.

E. The legislature has however deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored.

F. All factors (other than those set out in D above) traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process.

G. The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick (“substantial and compelling”) and must be such as cumulatively justify a departure from the standardised response that the legislature has ordained.

H. In applying the statutory provisions, it is inappropriately constricting to use the concepts developed in dealing with appeals against sentence as the sole criterion.

I. If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.

J. In so doing, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the bench mark which the legislature has provided.”

[13] In *S v Matyityi* 2011 (1) SACR 40 (SCA), the following is stated:

“[23] Despite certain limited successes there has been no real let-up in the crime pandemic that engulfs our country. The situation continues to be alarming. It follows that, to borrow from Malgas, it still is ‘no longer business as usual’. And yet one notices all too frequently a willingness on the part of sentencing courts to deviate from the minimum sentences prescribed by the legislature for the flimsiest

of reasons – reasons, as here, that do not survive scrutiny. As Malgas makes plain courts have a duty, despite any personal doubts about the efficacy of the policy or personal aversion to it, to implement those sentences. Our courts derive their power from the Constitution and like other arms of state owe their fealty to it. Our constitutional order can hardly survive if courts fail to properly patrol the boundaries of their own power by showing due deference to the legitimate domains of power of the other arms of state. Here parliament has spoken. It has ordained minimum sentences for certain specified offences. Courts are obliged to impose those sentences unless there are truly convincing reasons for departing from them. Courts are not free to subvert the will of the legislature by resort to vague, ill-defined concepts such as ‘relative youthfulness’ or other equally vague and ill-founded hypotheses that appear to fit the particular sentencing officer’s personal notion of fairness. Predictable outcomes, not outcomes based on the whim of an individual judicial officer, is foundational to the rule of law which lies at the heart of our constitutional order.”

- [14] Having regard to the aforementioned dicta, I am unpersuaded that the learned Regional Magistrate committed a misdirection when he imposed life imprisonment as a suitable sentence on count 1 (rape), for the following reasons: At first, this offence was pre-planned or pre-meditated. Evidence to this effect can be found in the words of the co-perpetrator who said “let us do what we wanted to do”; Second, it was a so-called gang rape in that the complainant in count 1 was raped more than once and by more than one person; third, grievous bodily harm was inflicted in that the complainant was assaulted with a stick and she suffered serious bodily injuries. Fourth, she was penetrated sexually both in her vagina and anus by the appellant and his accomplice. Lastly, he was not a first offender but had a previous conviction of robbery with aggravating circumstances which was committed less than ten (10) years before these offences. Robbery, like rape has an element of violence which shows that the appellant has a propensity to commit violent offences.
- [15] The aggravating features in this case by far outweigh the mitigating features and personal circumstances of the appellant. The sentence of life imprisonment on count 1 (rape) is justified and appropriate. So too is the sentence of twelve
- (12) months imprisonment on count 2 (assault with the intent to do grievous bodily harm) also an appropriate sentence. There was no serious attack launched on the sentence imposed on count 2. The appeal against sentence should consequently also fail

Order

[16] Resultantly, the following order is made:

- (i) Condonation for the late noting and prosecuting of the appeal is granted.
- (iii) The convictions and sentence are confirmed.

R D HENDRICKS

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT,

NORTH WEST DIVISION, MAHIKENG

I agree

A M MTHEMBU

ACTING JUDGE OF THE HIGH COURT

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