

SOUTH AFRICA / JUDGMENT

Mhlambi v S (A252/2022) [2025] ZAGPPHC 580 (3 June 2025)

[2025] ZAGPPHC 580

COURT

North Gauteng High Court, Pretoria

BEFORE

F.J Van der Westhuizen, M.J Mosopa

CASE / FILE NUMBER

A252/2022

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IN THE HIGH COURT
OF SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA

Case

No: A252/2022

(1)

REPORTABLE: [Y/N]

(2)

OF INTEREST TO OTHER JUDGES: [Y/N]

(3)

REVISED: [Y/N]

(4)

Signature:

Date:03 June 2025
NHLANHLA
STANLEY MHLAMBI
Appellant
And
THE
STATE
Respondent

JUDGMENT

VAN DER WESTHUIZEN AJ

1.

INTRODUCTION:

The Appellant was arraigned in the Regional Court for the Regional Division of Gauteng held at Springs on the following two counts:

1.1 Contravening Section 5(1) of the Sexual Offences and Related Matters

Act, 32 of 2007. Indecent assault.

1.2 Contravening Section 3 of the Sexual Offences and Related Matters

Act, 32 of 2007. Rape (on two occasions). Further read with the provisions of section 51(1) of the Criminal Law Amendment

Act, 105 of 1997.

2.

On 25 November 2020 the Appellant was convicted on both counts. On 7 June 2022 the Appellant was sentenced as follows:

2.1 Count 1: Six (6) months imprisonment suspended for three (3) years on certain conditions.

2.2 Count 2: Eighteen 18 ((eighteen) years imprisonment. (Effective term of imprisonment being 18 years.)

3.

It was not easy to navigate through all the papers before us, because the record is incomplete and after his convictions, there were two different attorneys involved in the matter on behalf of the accused which apparently made it difficult for the parties to get a complete record before us.

4.

We, as well as the parties involved, were however of the view that what is before us, is sufficient to adjudicate the matter, and dealt with it as in the principle espoused in *S v Chabedi* 2005

(1) SACR 415 (SCA).

5.

The matter is before us with leave of the court a quo. It is not clear from the application for leave to appeal whether the appeal is against the convictions and sentences imposed or the convictions only. However, Mr Vorster, who appeared for the Appellant, assured us that it is against the convictions only.

6.

What further Complicated the appeal is that the application for leave to appeal and the heads of argument of the Appellant that was filed do not speak to each other. Although the heads of argument of the Appellant has a heading: "Evidence by the Appellant" there is no reference to his evidence at all especially his failure (through his legal representative) to cross-examine the witnesses on the most important and crucial evidence against him. His behaviour at the time of the (first) rape as well as his behaviour during the time of the alleged indecent assault was never explained.

7.

Why so much issue was taken with the age of the complainant at the time of the incident and whether she could have given consent to what have happened to her in the application for leave to appeal is also not clear. This was never the case of the Appellant during the trial and not even referred to in the "Heads of Argument".

8.

I think I should just briefly refer to the "Heads of Argument" that was filed on behalf of the Appellant. As already

mentioned, it is one sided and do not refer to all the evidence that was led during the trial. It does not constitute main points of arguments that is supposed to form part of it. It should provide the court with a concise overview of arguments and relevant authorities. By providing a clear and concise outline of the arguments and authorities, Heads of Argument help the court to efficiently and effectively resolve disputes.

9.

We keep in mind that the complainant in this matter was immature and not fully developed at the time of the incident as well as during the trial. Here I want to refer to Exhibit B which was handed in during the trial. It is a copy of an "Assessment of a minor child's witness ability to testify in court". According to the report and I am going to refer to a few lines from the report:

9.1 "Though the witness is 16 years old she appears emotionally immature for her age."

9.2 "She has also presented with stuttering when facing emotional situations."

9.3 "The child has the determination to testify. She understands the difference between right and wrong, lies and the truth."

10.

It is also clear from the record that it was not easy to get her evidence on record. The Magistrate was correct in the way that he handled and summarized her evidence.

THE TRIAL:

11.

The State called three witnesses. The first witness was Kate Skosana. She is a professional nurse and received training as a sexual assault nurse examiner. On 22 October 2018 she examined the complainant and completed a J88 form which she read out and handed it in as an exhibit. She testified that the complainant was 15 years old and complained that she had been sexually assaulted by a known male person on several occasions and that the last incident took place in June 2018. There were no signs of physical injuries. Her conclusion after the examination was “Hyman shows signs of old hymenal penetration by a hard blunt object like erect penis.”

12.

The next witness was the complainant herself. She explained to the court a quo how she is related to the Appellant, that she used to stay with them, (the Appellant’s wife is the sister of the complainant) and that there was no interpersonal problems between the Appellant and herself.

13.

As far as count 1 is concerned, she testified that Appellant called his daughter and the complainant to a bedroom at their home. He performed a virginity test on them. She had to take off her pants and panty, she opened her legs, and the Appellant looked at her vagina and/or inside her vagina, with the aid of a cellphone torch, to see if she is still a virgin.

14.

As far as the two rape incidents are concerned. On a certain day in June 2018, the Appellant fetched her from school. From there he drove to certain premises which has got something to do with his work. The Appellant is the owner of a security company. He went inside a building. She was sitting in the passenger seat of the car. He returned after a while. He ordered her to go and sit at the backseat of the car and that she should undress herself. She refused to do it but because he threatened her that there is going to be a fight, she took off all her clothing.

15.

The Appellant then joined her in the back of the vehicle where he raped her. Thereafter they went home. Although her sister was there, she did not report the incident to her.

16.

The following evening the Appellant came to her bedroom while she was asleep. He woke her up and ordered her to take off her clothes. He then raped her again.

17.

The last witness was her mother. She is the person to whom the complainant made the first report about the rape.

18.

The Appellant also testified in his own defence and also called his wife as a witness. According to the Appellant he had a good relationship with the complainant, and he took care of her. At some stage he chased her away from his home and he is of the view that that is one of the reasons why she lied about all the different incidents. He denied that he had indecently assaulted her or that he ever raped her.

19.

The wife could not take the matter any further except to say that she heard from her mother that the Appellant was sleeping with the complainant.

20.

DISCUSSION:

In *R v Dhlumayo* 1948 (2) SA 677 (A) 705 it was held that “...an appeal court must be careful to not easily overturn a finding of fact of the trial court. The appeal court must be convinced that the trial court was wrong; mere doubt is not sufficient”.

21.

In *S v Chabalala* 2003 (1) SACR 134 (SCA) it was held that an appeal court must consider if the trial court considered the evidence holistically and if the full picture presented by all the evidence was assessed. The trial court should weigh against each other the parts of the case that point to the accused's guilt and the parts of the case that point to their innocence. This weighing up process must take due account of the inherent strengths and weaknesses, probabilities and improbabilities of both parties. For a finding of guilt, the considerations must then be so weighty in favour of the State that there is no reasonable doubt of the guilt of the accused.

22.

The Magistrate in the court a quo gave quite a detailed judgement. He considered the evidence holistically and took into consideration the cautionary rules as far as it concerns the evidence of the complainant. He kept in mind that the Appellant should be acquitted if there is a reasonable possibility that he might be innocent. He also took into consideration that the court must be satisfied that the state's case proves the guilt of the Appellant beyond reasonable doubt.

23.

The Magistrate was also correct when he observed during his judgement that "... it was clear to this court that the defence did not place all material facts upon which they relied to the state witnesses to see and to test their response thereto." The court a quo also took into consideration the complainants mental and intellectual abilities as is referred to earlier on in my judgement.

24.

With regard to count 1, the contention by Mr Vorster that, the complainant had been coached to give false evidence against the Appellant cannot be supported. The fact that the complainant did not testify about this incident and only testified about it after the court reconvened after taking several months of adjournment is with no merit. The complainant's recollection of the incident after resumption was not tested and the complainant was not asked why she only remembered that after resumption whereas earlier on she did not testify about that. The fact that her father might have also assisted her as he was at all material times in court, despite the ruling by the court that the proceedings be in-camera, is also with no merit. The father of the complainant approached the Prosecutor complaining about the evidence not being properly interpreted, a conduct that was discouraged by the presiding Magistrate after it was brought to his attention. It is common cause that the complainant was residing with her father at the time of her testimony and that the possibility might be that they travelled together to and from court, but cross-examination did not reveal that a discussion about her evidence was done and whether or not told what to say.

25.

The reason why the complainant left the place of the Appellant was as a result of this rape and indecent assault, not as a result of sores that the Appellant said that the complainant had. The mother had no knowledge of the complainant having sores around her mouth, but around her belly ring, a fact corroborated by the wife of the Appellant. When the wife of the Appellant made a request that the complainant come over to her place as the Appellant would be bored being alone, the conduct of the complainant alerted her mother that there might have been a problem, and that is when the complainant said that the Appellant is sleeping with her. The Appellant was contradicted by his wife that the complainant was supposed to visit her younger sister there. In actual fact, the Appellant's wife contradicted him on many occasions, including the fact that he sleeps naked even in winter.

26.

The complainant agreed to have taken a picture sitting on top of the lap of the Appellant during a ceremony they attended after the rape incident, and she proffered an explanation as to why she did that, as her mother, father and siblings were all there and she did not fear the Appellant. She also confirmed going to target shooting with the Appellant and that it was at the instance of the Appellant.

27.

We are satisfied that the Magistrate took all the evidence into account, and he applied all the correct procedures to come to a proper decision whether the accused is guilty or not. We cannot find fault with the trial court's reasoning.

CONCLUSION:

28.

There is thus no basis on which to interfere with the trial court's judgment. The appeal against the convictions stands to be dismissed.

ORDER:

In the result the following order is granted.

1. The appeal against the convictions is dismissed.
2. The Appellant's bail is hereby revoked.

The Appellant is ordered to hand himself over to the Clerk of the Regional Court, Springs withing 14 days of the date of this order,

for him to be detained at Modderbee Prison and to start serving his jail sentence.

F.J VAN DER WESTHUIZEN

Acting Judge of the High Court of South Africa

Gauteng Division, Pretoria

I agree and it is so ordered.

M.J MOSOPA

Judge of the High Court of South Africa

Gauteng Division, Pretoria

Appearances:

For the Appellant : Mr. L. Vorster

Instructed by : Luando Vorster Attorneys

For the State : Adv. D. Molokomme

Instructed by : DPP Pretoria

Date of hearing: 15 April 2025

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