

SOUTH AFRICA / JUDGMENT

Mosothwane v S (CA36/2020) [2021] ZANWHC 73 (22 October 2021)

[2021] ZANWHC 73

COURT

North West High Court, Mafikeng

BEFORE

Mtembu, R D Hendricks

CASE / FILE NUMBER

CA36/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH

WEST PROVINCIAL DIVISION, MAHIKENG

Case

No.: CA36/2020

Reportable:

YES / NO

Circulate

to Judges: YES / NO

Circulate

to Magistrates: YES / NO

Circulate

to Regional Magistrates: YES / NO

In

the matter between:

EMMANUEL

KHOLISILE

MOSOTHWANE

Appellant

and

THE

STATE

Respondent

JUDGMENT

MTEMBU AJ

INTRODUCTION

- [1] The appellant was charged in the Regional Court, Mmabatho on charges of housebreaking with the intent to commit an offence unknown to the State and rape. The rape charge was brought in terms of section 3 of Act 32 of 2007, read with the provisions of sections 1, 50,55,56(1), 56A,57,58,59,60, and read with the provisions of section 51(1) of Act 105 of 1997.
- [2] The appellant was convicted on all the charges. On count 1, the appellant was sentenced to three (3) years imprisonment, on count 2, he was sentenced to life imprisonment and he was declared unfit to possess a firearm.
- [3] The appellant has an automatic right to appeal in terms of section 309(1)(a) of the Criminal Procedure Act 51 of 1977. This appeal is against the convictions on both counts and the sentence on count 2.
- [4] The appellant seeks condonation for late filing of his appeal. The appellant was convicted on 27 October 2017 and was subsequently sentenced on 23 November 2017. Without any procrastination, the appellant on 24 November 2017, instructed his legal representatives to lodge an appeal. It appears that there had been a delay in terms of dispatching a full set of records from the Regional Court's Registrar. The records have been incomplete until March 2021. It is only then that the appellant was able to properly prosecute his appeal. It will be inimical to the interests of justice to penalise the appellant for this delay. The condonation application is also unopposed. There is no prejudice that has been suffered by the State. In fact, it is the applicant that has suffered prejudice for not being able to expedite his appeal. He has been on tenterhooks about the result of his appeal for a considerable period.
- [5] The Regional Court Registrar's inordinate delay in the preparation of the record to be placed before the appeal court is undesirable and unacceptable. This kind of delay gives credence to the adage that justice delayed is justice denied. It must be avoided at all cost. I see no reason why condonation should not be granted.

See: Ngobeni v S (741/13) [2014] ZASCA 59 (2 May 2014) at [14].

SUMMARY OF THE FACTS

- [6] The complainant testified that on Saturday, 24 June 2017, at 20h30, she closed and locked all doors and windows of her house. Thereafter, she went to sleep. While sleeping, in the early hours of the morning, on 25 June 2017, 01h45, the complainant heard a sound and woke up. She went to check. She found that the window at the centre of the

door was open. The complainant peeped through the window and saw nothing. She closed the door and placed a broom on the handle to block it. She also placed the sofa behind the door and went back to sleep.

- [7] While sleeping, the complainant felt someone holding her throat and choking her. Someone was also hitting her with fists on her face. She fought back and bite him on the fingers. It was the appellant. The appellant informed her that she must buy King Korn sorghum beer and slaughter a goat and talk to her ancestors so that nobody will ever bother her again. During the altercation, the appellant took a garden fork and threatened to kill her with it. The appellant thereafter ordered her to lie down. He was very violent. Fearing for her life, she complied.
- [8] The appellant pulled down her pajamas trousers and panty simultaneously. The appellant inserted his penis inside her vagina. The penetration was from the back without him using a condom. He had sexual intercourse with her until he ejaculated. The appellant then fell asleep thereafter. While he was fast asleep, the complainant alighted from the bed and went outside. She went to her neighbour, Mr Nkgwang to report the incident.
- [9] Mr Nkgwang went to the complainant's house whilst she remained behind at Mr Nkgwang's house. Mr Nkgwang came back and confirmed that indeed the appellant was fast asleep. Mr Nkgwang gave her a cellphone to call the police. The police arrived. When the police arrived, the complainant was still at Mr Nkgwang's place. The police found the appellant still sleeping and woke him up. The police said to the appellant: "Did you not say that you are no longer a rapist, you are employed". The complainant was taken to hospital, where she was medically examined by a doctor and she also received some other treatment.
- [10] Mr Kenneth Nkgwang corroborated the evidence of the complainant that she came to his house. He was woken up by the complainant, who sought assistance from him. He testified that the complainant looked frightened. The complainant had scratches across her face and she was bleeding from her mouth. Her clothes were covered with blood. She made a report that Kolisile has raped, throttled and assaulting her. The complainant told him that Kolisile was fast asleep in her house and that she managed to escape. He went to the complainant's house and found the lights off and switched them on. He found the appellant in the complainant's bedroom. He knew the appellant because he was working for him. He advised the complainant to call the police. According to Mr Nkgwang, the appellant looked intoxicated.
- [11] Police Officer Kgorogole testified that they proceeded to the complainant's house. Upon arrival, they found the appellant sleeping. Officer Kgorogole recognized the appellant. He testified that there were some drops of blood on the bed. The appellant was not dressed. His underpants and trousers were on his knees. The appellant appeared to be drunk. They then arrested him. He saw visible scratches around the complainant's neck. The appellant had no visible injuries, except that his trouser had bloodstains on it.

- [12] Complainant's evidence is corroborated in many aspects by the witnesses called by the State. The evidence of the complainant and other witnesses paint a picture of events that is consistent and probable.
- [13] The Medico legal report was admitted as evidence in terms of section 212 of the Criminal Procedure Act 51 of 1977. The evidence contained on the form revealed that the complainant was 58 years of age at the time of the incident. Her clothing had bloodstains from the front to back. It also had the hand marks or prints on both sides of the pajamas which was purple in colour.
- [14] The fresh injuries noted were consistent with the history given by the complainant. The complainant was given treatment for blood reddish eyes. Gynaecological examination revealed that the complainant's clitoris was injured, the frenulum of the clitoris was injured, urethral orifice was reddish in colour, paraurethral folds were vented. The vaginal Injuries noted were consistent with vaginal penetration.
- [15] The appellant testified. He admitted having had sexual intercourse with the complainant, but said, it was consensual. He testified that he had a relationship with the victim. He was a 'Ben Ten' to the complainant and he was romantically in love with her. He received a call at 20h00 from the complainant to come and sleep over. He was socializing with his friends and consuming alcohol when he received the phone call. At 23h00, he received a call again. He told her that he was coming. He then went to the complainant's house.
- [16] The complainant opened a door for him. She asked where he was coming from at that time of the night. He told her that he was from Star shop. The complainant told him that he was lying and started assaulting him. She assaulted him with open hands. He held her hands and told her that he was tired and drunk. He pleaded with her that he be allowed to sleep. She said no. She dragged him to the bedroom. She undressed him. She performed fellatio and he got erected. They had sexual intercourse with inter-changed positions. They finished.
- [17] She started again assaulting him. She said, he was not strong like every time when they were having sexual intercourse. His weak performance was due to the fact he was from his other girlfriend. The complainant assaulted him until he was bleeding. His shirt was covered with blood. He could no longer take it anymore. He ended up throttling her. She became powerless. She started to talk well with him and gave him a chance to sleep. He was surprised to be woken up by police. He deny that he broke any door. He could not break any door because the complainant was his fiancé. He was the one who got injured. The bloodstains on the sheets were his. If he did not throttle her, he does not think the complainant would have stopped. The complainant did not want their relationship to be known by her neighbours because they held her in high esteem. He would go

to complainant's house at night and leave early in the morning before he could be seen by neighbours.

- [18] The complainant denied the appellant's version.

CONVICTION

[19] It is trite that the onus rests on the state to prove beyond a reasonable doubt that the accused committed the crime accused of. Equally trite is the principle that an accused should be acquitted if his or her exculpatory testimony can be reasonably possibly true. It has long been our settled law that the trier of fact should not consider the evidence implicating the accused and evidence exculpating the accused in a compartmentalised manner. The Court must evaluate the evidence before it in its totality and judge the probabilities in the light of all the evidence.[1]

[20] The proper approach of a Court was laid down by Malan JA in *R v Mlambo*:

"In my opinion, there is no obligation upon the Crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the Crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged. He must, in other words, be morally certain of the guilt of the accused."

An accused's claim to the benefit of a doubt when it may be said to exist must not be derived from speculation but must rest upon a reasonable and solid foundation created either by positive evidence or gathered from reasonable inferences which are not in conflict with, or outweighed by, the proved facts of the case."[2]

[21] This approach was approved by Olivier JA in *Phallo and Others* 1999 (2) SACR 558 (SCA) at 562G to 563E.[3]

[22] The correct approach to the evaluation of evidence in a criminal trial was enunciated again in *S v Chabalala* 2003 (1) SACR 134 (SCA) at paragraph [15] as follows:

"The trial court's approach to the case was, however, holistic and in this it was undoubtedly right: *S v Van Aswegen* 2001 (2) SACR 97 (SCA).

The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both

sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt. The result may prove that one scrap of evidence or one defect in the case for either party (such as the failure to call a material witness concerning an identity parade) was decisive but that can only be an *ex port facto* determination

and a trial court (and counsel) should avoid the temptation to latch onto one (apparently) obvious aspect without assessing it in the context of the full picture presented in evidence . . ."

This salutary approach was also adopted in *S v Trainor* 2003 (1) SACR 35 (SCA) at paragraph [9].

- [23] The grounds of appeal which the appellant relies on are that, on the charge of housebreaking, the trial Court misdirected itself by finding that the appellant had broken into the house of the complainant. The appellant's second ground of appeal on the charge of rape is that the trial Court misdirected itself by finding that the state proved its case beyond a reasonable doubt in that the appellant raped the complainant.
- [24] There are well-established principles governing the hearing of appeals against findings of fact. As was said by Marais JA in *S v Hadebe* 1997
- (2) SACR 641 (SCA) at 645, 'in the absence of demonstrable and material misdirection by the trial Court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong'. (Also see *R v Dhlumayo and Another* 1948
- (2) SA 677 (A) at 705-706; *S v Francis* 1991
- (1) SACR 198 (A) at 204D-E.)
- [25] Here, one looks in vain for any such misdirection nor does the recorded evidence show the factual findings to be clearly wrong. The trial Court demonstrably subjected the evidence to careful scrutiny. The appellant's version that he was romantically in love with the complainant, and that the sexual intercourse with the complainant was consensual is not reasonably
- possibly true. The first assault in the kitchen as alleged by the appellant leaves much to be desired. The appellant testified that he overpowered the complainant in the kitchen when she was assaulting him by grabbing her hands. In my view, this was an opportunity for the appellant to escape, but he did not do so. If the appellant had no intention to have sexual intercourse with the complainant, he could have simply walked away.
- [26] The appellant further testified that the complainant assaulted him with open hands. But strangely, he sustained no visible injuries on his face. Conversely, the complainant sustained visible injuries.
- [27] Another anomaly about the appellant's version is that their relationship was discreet. He would only come at night and leave in the early hours of the morning before he could be seen by the neighbours. He would come at night for sex purposes, as per their agreement. But if that was the true reason for their sexual rendezvous, he had no reason to pay a visit to his lover on that night, since he was tired and drunk with no energy to engage in sexual intercourse, which was the only reason for their rendezvous.
- [28] He testified that he pleaded with her that he be allowed to sleep after having held and grabbed her hands. She said no. She pulled him to the bedroom. She undressed him. It is improbable that the complainant would have been able to drag and undress him while she had already been overpowered by the appellant. The appellant's testimony that he overpowered the complainant when they were in the kitchen controverts any probability

that he could have been dragged to the bedroom by the complainant. Based on the appellant's testimony, it is conspicuously clear that the complainant had lesser physical strength compared to the appellant.

- [29] The events in the bedroom is also improbable. The appellant's version that when they were having sexual intercourse, the complainant was on top of him, afterwards, they changed positions, and he was on top, appears to have been a long duration of a sexual intercourse, which controverts a version that seeks to suggest that he early ejaculated.
- [30] The appellant's version that the complainant assaulted him until he was bleeding and his shirt was covered with blood is also improbable. On his own version, he testified that he was naked. If indeed, he was naked, he could not have bloodstains on his shirt. The police officer also testified that they found the appellant half naked from the top. Clearly, he had no shirt on.
- [31] The appellant's testimony is that he could not stand the assault, hence he ended up throttling the complainant, and as a result, the complainant became powerless. She started to talk well with him and gave him a chance to sleep. This version too is inscrutable. It does not explain as to why the appellant would inflict such harm on a powerless woman, instead of simply walking away. It is common cause that the appellant had his own place of residence. They were not staying together at the time of incident.
- [32] The appellant's testimony that if there was no consent to have sexual intercourse, he would not have fallen asleep does not fly. He testified that he was drunk. Clearly, the only reasonable probability is that he was not be able to control his state of intoxication. Further, his version was that when he was at the complainant's house, he was required to leave in the early hours of the morning before he could be seen by neighbours, but his prolonged sleep until 05h00 when the police woke him up, does not tally with his version that he was required to leave before he could be seen by neighbours.
- [33] The learned Magistrate correctly found that it is improbable that the complainant, if she had intercourse with the appellant as the appellant testified that she initiated intercourse, would run to her neighbour. I agree, totally so, with the trial Court, that if evidence is considered in its totality, the evidence of the complainant can be relied upon and the evidence of the appellant cannot be found to be reasonably possibly true. Consequently, no fault could be found on the part of the learned Magistrate arriving at the reasonable conclusion that the appellant entered the house without permission. The complainant did not open for him.
- [34] I am satisfied that the trial Court evaluated the evidence before it in its totality and judged the probabilities in the light of all the evidence. I am satisfied that the conclusion that the trial court arrived at, cannot be faulted. He was, therefore, correctly convicted of housebreaking and of rape.

SENTENCE

[35] As already alluded to earlier on in this judgment, the appellant also notes an appeal against the sentence on count 2.

[36] There are also well-established principles governing the hearing of appeals against sentence. In short,

punishment is pre-eminently a matter for the discretion of the trial court and a court of appeal should be careful not to erode that discretion. Interference is only warranted if it is convincingly shown that the discretion has not been judicially and properly

exercised. The test is whether the sentence is vitiated by an irregularity, a material misdirection or is disturbingly inappropriate. (*S v Rabie* 1975 4 SA 855 (A) at 857D-E; *S v Malgas* 2001

(2) SA 1222 (A) paras 12-13.)

[37] This was echoed in *S v Van Wyk and Another* 2015 (1) SACR 584 (SCA) at [31] - [32], where the Supreme Court of Appeal (SCA) held that it would interfere with sentences imposed by a trial court only where the degree of disparity between the sentence imposed by the trial court and the sentence the appeal court would have imposed, was such that interference was competent and required. But then, the court cautioned, the appellate court needed to have a definite view as to what sentence it would have imposed, even if it is only able to identify a particular range within which it would have imposed the sentence. See *S v Monyani and Others* 2008 (1) SA 543 (SCA) at [23] and [26]

[38] It is trite law that the sentence of an accused person must be balanced between the interests of society, the offence and the personal circumstances of the accused (*S v Banda and Others* 1991

(2) SA 352 (BGD) at 355 A). The trial court took into account as mitigating factors the following personal circumstances of the appellant as well as the

aggravating factors: The appellant has a good relationship with his siblings, except his eldest sister. He is employed. He is not in good health. He is not married. He had been in custody for a period of five months awaiting finalisation of the trial. He has a previous conviction for an offence committed in August 2011. He had been convicted for being in possession of stolen property and sentenced to one year imprisonment. However, he received a suspended sentence for a period of five years. The suspended sentence had recently lapsed at the time of delivering sentence.

[39] The appellant committed an offence of a serious nature. Rape is prevalent in our society. The learned Magistrate quite rightly found that a heavier sentence is required when the offence is prevalent in order to deter potential perpetrators. It must also send a clear message to other would be offenders that it is not worthy to commit offences of this nature. The trial court found that breaking and entering into the premises and assaulting the complainant, and thereafter raped her is not a type of behavior that should be tolerated. The appellant has a previous conviction and that was not enough motivation for him to stay on

the right side of the law. The trial court considered a pre-sentence report. The pre-sentence report recommended that a sentence of life imprisonment in respect of the rape should be considered. The trial court correctly found that the appellant's personal circumstances do not justify a departure from the prescribed minimum sentence. The trial court correctly found that a lesser sentence would be an overemphasis of the appellant's personal circumstances to the detriment of the seriousness of the offence and the interests of society.

[40] The facts of this case are most monstrous. The complainant was strangled; forcefully stripped off her clothes; raped by a person

younger than her first-born. The trauma caused to the complainant by these acts of violence, without any doubt, was severe and enduring. The victims of such crimes deserve the protection of the law and the sentences that are imposed should reflect that the law takes the victims' trauma into account. See: *S v Matyityi* 2011

(1) SACR 40 (SCA). To place women's lives at risk like this and to be so indestructibly cruel to them is an evil to be severely punished. It is a prevalent conduct as the Magistrate pointed out. The trial court, quite correctly, placed much emphasis on the prevalence of offences of this nature against women throughout this country.

[41] It is patently clear that the trial court took into consideration all the principles relevant to sentencing the appellant and applied them to the facts of the case before him. He did not overlook the appellant's personal circumstances. He weighed it against the aggravating factors that he found to be relevant. The conduct of the appellant was particularly reprehensible. The complainant suffered an emotional anguish. She had to attend counselling. It cannot be said that the learned Magistrate misdirected himself in identifying the aggravating factors, or in the manner in which he sought to balance the aggravating factors against factors favourable to the appellant.

[42] The Magistrate rightly found that the appellant's personal circumstances do not justify a departure from the prescribed minimum sentence. The Regional Magistrate was therefore statutorily obliged to impose the prescribed minimum sentence of imprisonment for life for the appellant's conviction of rape, which is one contemplated in s 3 of the Sexual Offences Act and committed in circumstances where the victim was raped, involving the infliction of grievously bodily harm in terms of the provisions of section 51(1) of Act 105 of 1997.

[43] Mahomed CJ in *S v Chapman* [1997] ZASCA 45; 1997

(2) SACR 3 (SCA) at 5A-E [1997] ZASCA 45; (1997

(3) SA 341[1997] ZASCA 45; ; [1997] 3 All SA 277) stated the following:

"... Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim."

The rights to dignity, to privacy and the integrity of every person are basic to the ethos of the Constitution [See ss 10, 11 and 13 of the Constitution of the Republic of South Africa 200 of 1993 and ss 10, 12 and 14 of the Constitution of the Republic of South Africa Act 108 of 1996 – Eds.] and to any defensible civilisation.

Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and insecurity which constantly diminishes the quality and enjoyment of their lives. . . .

The Courts are under a duty to send a clear message to the accused, to other potential rapists and to the community: We are determined to protect the equality, dignity and freedom of all women, and we shall show no mercy to those who seek to invade those rights.’

[44] The appellant showed no respect for the complainant’s rights nor did he at any stage show the slightest remorse. The appellant denied responsibility of the offence claiming that he and complainant had a romantic relationship. This does not show any contrition but rather indicates that according to the appellant, it is accepted to violate another person when there is a romantic relationship. The appellant was a 58 year old woman, staying alone. She was a vulnerable woman. The appellant took advantage of the complainant’s personal circumstances. Sexual assault is a widespread and serious problem in our society. Sexual assaults are pervasive crimes. The imposition of a lesser sentence than the mandatory minimum sentence will in this instance diminish the horror of rape.

[45] Therefore, the sentence is not vitiated by any irregularity or material misdirection. All the relevant factors and circumstances were considered and duly taken into account by the trial court. Interference with the imposed sentence is not warranted.

ORDER

[46] In the result the following order is made:

- (a) Condonation for the late noting and prosecuting of the appeal is granted.
- (b) The appeal against convictions and sentence is dismissed

A.M. MTEMBU

ACTING JUDGE OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG

I agree

R D HENDRICKS

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

APPEARANCES

DATE OF HEARING

: 03 SEPTEMBER 2021

DATE OF JUDGMENT

: 22 OCTOBER 2021

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[1] see R v Difford 1937 AD 373, S v Van der Meyden 1999(1) SACR 447 (W) and S v Toubie 2004(1) SACR 530 (W).

[2] 1957(4) SA 727 (A), especially at 738 A - C

[3] See also S v Sauls and others 1981 (3) SA 172 (A) at 182GH; S v Rama 1966 (2) SA 395 (A) at 401; S v Ntsele 1998 (2) SACR 178 (SCA) at 182b-h.) ; “BS” and another v S [2015] JOL 32613 (SCA) at paras 17 - 18

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