

SOUTH AFRICA / JUDGMENT

Motloung v S (A109/2021) [2022]

ZAFSHC 109 (18 May 2022)

[2022] ZAFSHC 109

COURT

Free State High Court, Bloemfontein

BEFORE

Van Zyl, Mbhele

CASE / FILE NUMBER

A109/2021

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IN

THE HIGH COURT OF SOUTH AFRICA

FREE

STATE DIVISION, BLOEMFONTEIN

Appeal

number: A109/2021

Reportable:

YES/NO

Of

Interest to other Judges: YES/NO

Circulate

to Magistrates: YES/NO

In

the appeal between:

TSHEPISO

JEFFREY MOTLOUNG

Appellant

and

THE

STATE

Respondent

CORAM:

MBHELE, AJP et VAN ZYL, J

JUDGMENT

BY: VAN ZYL, J

DELIVERED ON: 18 MAY 2022

- [1] The appellant was accused 1 in the court a quo. The appellant and his co-accused (“accused 2”) were charged of two counts, namely count 1, rape (by more than one person) and count 2, assault with the intent to do grievous bodily harm. At the close of the State’s case the appellant was discharged on count 2 in terms of section 174 of the Criminal Procedure Act, 51 of 1977 (“the Act”). Accused 2 was discharged on both counts in terms of section 174 of the Act.
- [2] On 7 August 2017 the appellant was convicted on the count of rape and on 8 September 2017 he was sentenced to life imprisonment.
- [3] This appeal is directed against both the conviction and the sentence in terms of the appellant’s automatic right to appeal.

The State’s evidence:

- [4] With regard to the rape count, it was alleged that on or about 4 February 2006 and at or near Bloemfontein the appellant unlawfully and wilfully had sexual intercourse with Ms NG P[...], who was 17 years old at the time, without her consent. The appellant pleaded not guilty on the said count. His legal representative in the court a quo presented the appellant’s plea explanation. He indicated that the appellant admits that he had sexual intercourse with the complainant, but that it was with her consent. It was further explained that on 4 February 2006 the appellant was in a love relationship with the complainant. They had consensual sexual intercourse at a car wash which was situated in front of a tavern. After that when they were walking home together, they were approached and attacked by three men, who then grabbed the complainant. The appellant ran away, but after a while he returned and followed them in order to see where they were going and what was happening.
- [5] Before the presentation of evidence commenced, certain documents were handed in as exhibits, the contents of which were formally admitted by the defence in terms of section 220 of the Act. This included the J88 medical report pertaining to the complainant, a positive DNA result pertaining to the appellant and a police identification parade

form with regard to an identification parade which was held on 10 August 2006.

- [6] The complainant, Ms P[...], testified that on the night of the incident which occurred 11 years ago, 4 February 2006, she was at Macufe Tavern. She was with her friend M[....]1, her own boyfriend at the time, M[....]2, and M[....]1’s boyfriend, S[....]. On their way home in the early hours of the morning, they passed a certain school, Mangaung, and walked across a veld. Five men unexpectedly appeared, one of whom was carrying a firearm and another one was carrying a knife. M[....]1 and Ms P[....] ran away, whilst Ms P[....]’s boyfriend tried to

fight off the people. One of the five men chased

Ms P[...], grabbed her and walked her to a field, whilst holding a knife. That man had dreadlocks. Two of the other men joined them. They put their lumber jackets on the ground, instructed her to lie on it and thereafter all three of them raped her, the one after the other. Only one of the perpetrators used a condom. After all three had finished raping her, they told her to stand up, where after the other one said that they should kill her. The man who grabbed her and walked her to the field objected to the suggestion that she should be killed and whilst an argument pursued between the three men, the first one told her to run away. She ran to her parental home, where she found her sister, Mamello, to be home. Initially she was scared to tell her sister what had happened to her, but eventually she did. They went to the police station and she was also taken to National Hospital for a medical examination.

- [7] Ms P[...] testified that when the five men initially appeared, she was not able to identify them. However, when the three men were with her in the field, they were closer to her and she was able to identify them. She confirmed that she attended the identification parade already referred to above, but was unable to remember how many people she pointed out. In court she made a dock identification of the appellant and accused 2 as two of the three men who raped her.
- [8] After re-examination the court enquired from Ms P[...] whether the person whom she says had dreadlocks is present in court, she confirmed same and pointed the appellant to be that person.
- [8] During cross-examination it was put to Ms P[...] that according to the appellant the two of them were in a love relationship at the time of the incident. They had consensual intercourse at the car wash opposite the tavern. The appellant was thereafter escorting her home when some men appeared and grabbed her. Ms P[...] denied this version of the appellant, stating that she was in the company of her boyfriend, M[...],2, that night.
- [9] M[...],2 K[...],1 was also called as a witness. He testified that at the time of the incident he was no longer in a relationship with the complainant. However, they “were still sorting things out” since he wanted to get back with her again. According to him the complainant was not involved with anybody else at that stage. Mr K[...],1 testified that they were at Macufe Tavern the night of the incident. It was himself, the complainant, M[...],1 and David. David has since passed away. When they were walking home later that night, past midnight, and near Mangaung School, some people suddenly appeared in the dark. Two of those people approached them and there were other people at the back, but Mr K[...],1 is not sure how many they were. He knew the one man who came towards them, since they went to the same school at some stage. Mr K[...],1 explained that he did not know his name, but he knew where he stayed. The two men in front were holding knives. The complainant screamed and Mr K[...],1 ran away, but then decided to go back. When he went back, he met with M[...],1 and David on the other side of the field. The three of them went to the police station. At the police station they explained to the police what had happened. The police took them with a

car in the direction of the field in order to see whether they could find the complainant, but were unable to do so. Mr K[....]1 then told the police that he knew one of the perpetrators and also knew where he stayed. On their way to his home, they met up with that very same person and the police arrested him. According to Mr K[....]1 that was

the appellant. Mr K[....]1 accompanied the police back to the police station. The complainant also arrived at the police station in the morning and during cross-examination Mr K[....]1 testified that she was accompanied by her sister. He could not speak to her, as she was crying. In court Mr K[....]1 pointed the appellant out as the perpetrator whom he knew from when they went to the same school.

[10] During cross-examination Mr K[....]1 was asked whether the appellant had dreadlocks the night of the incident, but he testified that he could not say, since he was wearing a beanie hat. It was put to Mr K[....]1 that the person who was arrested that night, was not the appellant, but the brother of the appellant. Mr K[....]1 testified that he saw him, being the appellant, at the tavern, when the incident occurred and later when he pointed him to the police. However, during further cross-examination Mr K[....]1 indicated that he cannot remember clearly whether the person that he pointed to the police that night as one of the perpetrators and who was then arrested, was the appellant or one of the other perpetrators. It was put to Mr K[....]1 that the appellant was with the complainant at the tavern that night. Mr K[....]1 responded that he did not see the

appellant with the complainant. It was also put to Mr K[....]1 that the appellant, at the time, did in any event not have dreadlocks.

[11] The version of the appellant that he had consensual sexual intercourse with the complainant at the car wash opposite the tavern that night was put to Mr K[....]1. He responded that he has no knowledge of it. It was further put to him that the complainant was taken away from the appellant by two male persons whom he does not know, to which Mr K[....]1 responded that he has no knowledge of that.

[12] During further evidence in chief which was allowed on special request by the prosecutor, Mr K[....]1 was asked whether he could remember who he pointed out during the identification parade held on 16 August

2006. He testified that the appellant was the only person that he pointed out.

[13] Before the State closed its case, the prosecutor indicated that the State was willing to make the following formal admissions:

1. On the morning of the incident during the arrest of the suspects a certain Motsume Areal Sedibe was arrested by the police.
2. The complainant had said that he, Sedibe, was not one of the suspects in the matter and he was subsequently released.

3. During the identification parade on 16 August 2006 the complainant pointed Motsume Areal Sedibe, the same person, out as a suspect with regard to her rape.
4. It was not the appellant who was arrested by the police immediately after the incident, but the brother of the appellant, Tsietsi Motlounge.

[14] That concluded the State case.

The appellant's evidence:

- [15] The appellant testified in his own defence. He testified that his relationship with the complainant started during 2005. His younger brother and his friend with whom he was staying knew about the relationship, so did the complainant's friend, M[...]. The night of the incident they incidentally met at Macufe Tavern, where she was with M[...]. Whilst she was sitting and drinking with M[...], the appellant was sitting and drinking with his friends. At some stage he called her and asked her whether she was willing to go with him and sleep at his place. The complainant told him that she was going to leave with someone else, but that they can go to the place opposite the tavern "and do our things". The appellant testified that she told him to give her a few minutes because she did not want her friend M[...]. The complainant eventually joined the appellant at the car wash where they had consensual intercourse. Thereafter they went back to the tavern. When they arrived at the tavern, M[...]. The complainant's friends were no longer there. The appellant told her that since her friends had left, she should go home with him. On their way home, in the middle of a street, they met with three men. The three men stood behind them and took out knives. The appellant thought that they were going to rob them and ran away. The complainant could not get away, since they were holding her. The appellant ran for a distance of about 5 – 6 metres and then remained there in order to watch them. They were dragging the complainant and the appellant was arguing with them from where he was standing. The three men left with the complainant and the appellant followed them. They reached an open field and then they raped the complainant. After they finished raping her, they left the scene and left the complainant. The complainant walked with him towards her home, but at a certain point he turned back. According to the appellant he intended to go and see her during that day, but he was arrested at about 14h00/15h00 that very same afternoon. He was arrested at his house. Although the police told him that they were arresting him for rape, he said nothing about the three men whom he saw raping the complainant.
- [16] According to the appellant he knew all three of the perpetrators. Although the appellant and they did not reside in the same vicinity, the appellant used to see them in the vicinity where he resided at the time.
- [17] At the end of his evidence in chief, when his legal representatives enquired from the appellant whether he had anything more to say, he added that he and Mr K[...]. were fighting over the complainant because they were both involved with her during 2005.

[18] During cross-examination the appellant was, inter alia, confronted with the following issues:

1. According to the appellant he never attended the same school with Mr K[....]1, but this denial was not put to Mr K[....]1 in response to his evidence in this regard.
2. Mr K[....]1 was never confronted with a version that there were issues between the appellant and Mr K[....]1 due to the fact that they were both involved in a relationship with the complainant. The appellant conceded that he never told his legal representative about the alleged problems between himself and Mr K[....]1.
3. The appellant saw how the complainant was being dragged and raped, but he never tried to protect or rescue her. The appellant responded that they were three men against him on his own and they were armed. According to him he watched what they were doing so that he can report “the following day” what happened. When confronted with the question as to why he did not immediately go to the police, he responded that he did think about going to the police, but then realised that they would not know where to find the perpetrators when they return. The appellant was then confronted with his own evidence that he knew the three men, that he at least knew them from seeing them in the vicinity where he lived and that he therefore would have been able to give the police the necessary information about the perpetrators, the excuse of the appellant was that he watched what was happening in order to be able to be the complainant’s witness.
4. The appellant did not respond in the manner one would have expected the boyfriend of the complainant to respond. It was put to the appellant that the actions of Mr K[....]1 were in accordance with what one would have expected from the complainant’s boyfriend.
5. Although the appellant alleges that he watched the rape process because he intended to be the complainant’s witness, he made no mention of the incident the following day when he was arrested by the police.
6. The appellant never told his legal representative about the fact that he witnessed how the complainant was raped by the three men who took her away from him.
7. Considering the appellant’s version that he walked the complainant to her home he would probably have told her that he saw the rape incident and that he knew the three rapists. In the circumstances and considering that it was now 11 years later, one would have expected the complainant to testify openly that the appellant witnessed the ordeal and would be able to point out the true perpetrators.
8. The only reason why the appellant is averring that he had a relationship with the complainant and that they had consensual intercourse that evening is because of the DNA results which directly link the appellant to the rape.

[19] That concluded the evidence of the appellant.

[20] Although the appellant's legal representative at that stage indicated that the appellant wants to call one J[....] K[....] as a witness, it was thereafter indicated that since the said witness was not available, the appellant wishes to close his case without calling the witness.

Grounds of Appeal:

[21] The appellant's grounds of appeal regarding the conviction of the appellant contained in his Notice of Appeal are summarised in the heads of argument filed on behalf of the appellant to be the following:

"1.4.1 The court erred in finding that the Appellant was guilty in terms of

Sec 51(1) of the Criminal Law Amendment Act.

1.4.2 The court erred in finding that the complainant and the state witnesses were credible witnesses and that there were no material contradictions in their testimony.

1.4.3 The court erred in not accepting the version of the appellant and by making a negative inference against him."

Merits of the appeal against the conviction:

[22] Despite the aforesaid grounds of appeal and the contentions in the appellant's heads of argument, Mr Van der Merwe, who appeared on behalf of the appellant and who was also the author of the heads of arguments, spontaneously conceded at the commencement of the appeal hearing that the version of the appellant cannot be considered to be reasonably possible true and that the appeal against the conviction can consequently not succeed.

[23] In my view the aforesaid concession was correctly and responsibly made. From a reading of the judgment of the court a quo it is evident that the court a quo duly considered the totality of the evidence, applied the applicable cautionary rules and came to the well-reasoned conclusion that the State proved its case against the appellant beyond reasonable doubt.

[24] There is no basis upon which the aforesaid conclusion of the court a quo can be faulted or interfered with.

[25] For the sake of completeness and because it may also impact upon the applicable prescribed minimum sentence, I wish to very briefly deal with the ground of appeal which states that the court a quo erred in finding that the conviction of the appellant falls within the ambit of Section 51(1) and therefore Part 1 of Schedule II of Act 51 of 1997. In support of this contention reference was made in the notice of appeal to the unreported judgment in *Mahlase v The State*, (255/2013) [2011] ZASCA (29 May 2011).

[26] In paragraph 3.8 of the appellant's heads of argument Mr Van der Merwe indicated that he cannot and does not support the aforesaid ground of appeal, since it is not correct. This stance of Mr Van der Merwe is in fact correct.

[27] In *S v Mthombeni* 2020 (2) SACR 384 (KZP) the court dealt with the aforesaid Mahlase-judgment and concluded that it is to be interpreted to be restricted to instances of rape within the ambit of item (a)(ii) of Part I of Schedule 2 and not where “the victim was raped more than once” as provided for in item (a)(i). I respectfully agree with such an interpretation. In an article titled *Sentencing, S Terblanche*, 2021 SACJ 398 at 404 – 405 the aforesaid two judgments were also discussed:

“In my view, the most convincing judicial effort to limit the effect of Mahlase has been in S v Mthombeni 2020

(2) SACR 384 (KZP). Gani AJ (with Seegobin J concurring) noted that the basis for the Mahlase judgment is not clear (at para [13]), as already noted at the beginning of this discussion. The court continued (at para [16]) that Mahlase could not be applied to all the rapes included in Part I and concluded that it only applied to the 'precise form of rape . . . to which Mahlase relates'. This form of rape related to 'a common-purpose scenario' (at para [18]). This means that Mahlase is authority only for item (a)(ii) and 'not in respect of an offence of rape of any other form' (at para [21]; see also at paras [29]–[39]). Most notably, it does not apply to proof of the facts in item (a)(i), namely when the 'victim was raped more than once' (at para [22]). Most gang-rapes are covered by the characterisation in item (a)(i). Therefore, it is submitted, the limitation that the interpretation in *Mthombeni* effects is not only academic, but real.”

[28] The appeal against the conviction can consequently not succeed.

AD SENTENCE:

[29] In terms of the notice of appeal the sentence of life imprisonment is shockingly inappropriate as it is disproportionate to the offence committed, the personal circumstances of the appellant and the surrounding circumstances.

[30] As correctly reflected in the judgment on sentence by the court a quo, in determining an appropriate sentence, the three elements of sentencing are to be considered, namely the personal circumstances

of the accused, the nature and seriousness of the crime and the interests of society.

[31] I already found earlier in this judgment, and as also determined by the court a quo, that a prescribed minimum sentence of life imprisonment in terms of section 51(1) of Act 105 of 1997 is applicable in the present matter. In terms of section 51(3) of the said Act the court a quo was consequently compelled to impose life imprisonment, unless it found that substantial and compelling circumstances exist which justify the imposition of a lesser sentence.

[32] The court a quo duly referred to the locus classicus on the issue of determining whether such substantial and compelling circumstances exist in a particular case, namely *S v Malgas* 2001(1) SACR 469 (SCA), in which judgment the court held, inter alia, as follows at para [25]:

[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. ...

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 ... are to be excluded.

E. ...

F. ...

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. ...

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. ..."

[33] After the conviction of the appellant on 7 August 2017, the State proved another conviction of rape against the appellant, for which he was convicted on 25 May 2007. On that conviction the appellant was sentenced to 18 years imprisonment. At the time of the sentencing proceedings in the present matter, during September 2017, the appellant was in custody serving his aforesaid sentence. In his address to the court a quo on sentence, the appellant's legal representative submitted that the present incident of rape occurred before the incident of rape for which the appellant had already been sentenced at the time and that the first conviction should therefore not be considered to be a previous conviction. The prosecutor

made a similar submission in the court a quo, although the prosecutor also submitted that the other conviction should not merely be ignored when considering an appropriate sentence. To me it appears that the other incident of rape in fact occurred before the present one, since it is evident from the SAP 69 that the CAS number of that case was Batho 943/12/2001. If so, the other conviction in fact constitutes a previous conviction. However, the court a quo sentenced the appellant on the basis that he was a first offender and we are consequently necessitated to do the same. I may add that even should the other conviction be considered to be a previous conviction, it in any event occurred more than 10 years before the present conviction.

[34] The father of the appellant, P[....] M[....]2, testified in mitigation of sentence. He testified that:

1. The appellant is the eldest of three children.
2. The appellant has one child, who was 14 years of age at the time, and who is living with the child`s mother.
3. The mother of the child is maintaining the child and the father of the appellant contributes to the child`s maintenance.
4. The appellant used to do part time jobs and assisted his father. According to the appellant`s father he has been suffering since the appellant`s incarceration. After the death of the appellant`s mother in 2014, the appellant`s father has nobody who can assist him.
5. The health of the appellant`s father has deteriorated since the incarceration of the appellant in 2006 in respect of his previous conviction.

[35] The appellant also testified in mitigation of sentence:

1. He was 36 years old at the time and completed grade 12 at school.
2. He confirmed that he has one child, who was 14 years of age at the time, who is living with the child`s mother.
3. He has been incarcerated since 2006 in respect of his previous conviction.
4. Before his incarceration, the appellant was performing part time jobs in cleaning services and gardening.
5. Since his aforesaid incarceration he has attended programmes in life skills, anger prevention and sexual offences.
6. The appellant requested an opportunity not to be incarcerated, to be given a second chance, because he “learned a lot of positive things about life”, he “changed his life”, he has to “help the old man outside” because since his incarceration “he has been suffering” and he also wants to help with his child “so that he can be good in life”.

7. In cross-examination when it was put to the appellant that he is not remorseful for his actions, he responded as follows:

“I did nothing wrong, but I am sorry for what the court says I did.”

- [36] The court a quo duly dealt with the nature and seriousness of the offence in its judgment. The complainant was walking home accompanied by three other persons, two of whom were males, one of whom was her boyfriend at the time. Although one would have expected that the complainant would be safe in the circumstances, they were attacked by five men, two of whom were armed with a gun and a knife respectively. The court a quo appropriately referred to the well-known judgment in *S v Chapman* [1997] ZASCA 45; 1997 (2) SACR 3 (SCA) at 5B-E:

“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 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 the insecurity which constantly diminishes the quality and enjoyment of their lives.

The appellant showed no respect for their rights. He prowled the streets and shopping malls... and then proceeded to rape [the women] callously and brutally, after threatening them with a knife. At no stage did he show the slightest remorse.

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.”

- [37] The court a quo also dealt with the high prevalence of the offence of rape and correctly took it into consideration as an aggravating factor. The interests of society in the necessity of restricting the occurrence of the serious offence of rape was also duly considered by the court a quo.

- [38] With regard to the physical injuries the complainant suffer, it is evident from the J88-medical report that the complainant did not only suffer genital injuries, but also anal injuries as a result of the forceful vaginal penetration. This also constitutes an aggravating factor.

[39] A victim impact statement was submitted to the court a quo, as evident from p. 148, line 9 to p.149, line 19 of the record. The life-changing and absolute devastating emotional impact this incident had and is still having on the complainant is clearly evident from her statement. I deem it necessary to repeat the contents thereof herein:

“Before the abuse I was a brilliant child. Passed with distinctions. I was attending school every day. I never skipped school. I was very active sport wise. I played netball and cricket, but after the incident everything changed.

I was disturbed emotionally. My heart was broken. I was in grade 6 during the year I was abused. I skipped school after that. I was frightened to walk in the street. My schoolwork dropped. I was afraid to go back to school the following year because I did not pass the previous year and then I repeated grade 10 twice. I was even promoted grade 11.

After that I dropped out of school as I thought that I will forget about the incident, but I did not forget about the incident. It was always on my mind, hence I skip school.”

[40] The court a quo also made the following findings, in my view very correctly and validly so:

“In this instance when I am looking at all the circumstances it is clear that this was a brutal rape. Interesting enough, especially after the accused went through all the different courses [in prison], one to a certain extent would expect a better approach, perhaps if he entered a plea of guilty. It was possible to spare the complainant the anguish of testifying in an open court, but he decided to make her a liar. He forced her to appear in court and there is no remorse whatsoever visible from the accused.”

[41] When considering the totality of the facts and circumstances, as well as the applicable principles in relation to sentencing, I completely agree with the court a quo`s finding that there are no substantial and compelling circumstances which justify the imposition of a lesser sentence than the prescribed minimum of life imprisonment.

[42] Life imprisonment cannot be considered to be shockingly inappropriate as contended on behalf of the appellant and the appeal against the sentence can consequently not be upheld.

Order:

[43] The appeal against the conviction and sentence is dismissed.

C. VAN ZYL, J

I concur.

NM MBHELE, AJP

On behalf of the appellant: Mr. PL van der Merwe

Instructed by:

Justice Centre

BLOEMFONTEIN

On behalf of the State: Adv. LB Mpemvane

Office of the Director of Public Prosecutions

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