

SOUTH AFRICA / JUDGMENT

# Ndlovu v S (A27 / 2020) [2023]

## ZAMPMBHC 9 (17 February 2023)

[2023] ZAMPMBHC 9

## COURT

Mbombela High Court, Mpumalanga

## BEFORE

Kgoele, D Greyling – Coetzer

## CASE / FILE NUMBER

A27 / 2020

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

### Source record

## SAFLII

## Note: Certain

personal/private details of parties or witnesses have been redacted  
from this document in compliance with the law and SAFLII

## Policy

## THE

HIGH COURT OF SOUTH AFRICA MPUMALANGA DIVISION,

MBOMBELA

MAIN SEAT

CASE

NO: A27 / 2020

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED.

DATE:

16 DECEMBER 2023

In

the matter between:

MANDLA

PATRICK NDLOVU

APPELLANT

and

THE

STATE

RESPONDENT

## JUDGMENT

KGOELE J:

A.

## INTRODUCTION

- [1] This is an appeal by the appellant, Mr Mandla Patric Ndlovu, against the three rape convictions and the resultant sentences imposed by the Regional Court for the Regional Division of Mpumalanga held at Carolina (the trial Court). The trial Court took the first two counts of rape together for the purpose of sentence and the appellant was sentenced to an imprisonment for life in respect thereof. With regard to the fourth count (rape as well), he was sentenced to ten (10) years imprisonment. All the sentences were ordered to run concurrently with the result that the effective sentence the appellant had to undergo was the imprisonment of life.
- [2] The matter involves three rape incidents. The first two (count 1 and 2), relate to a minor child A[....] P[....] M[....] (A[....] ), and the third one (count 4), relates to L[....] S[....] M[....]2 (L[....] ). The arguments raised in respect of all the rape counts are fairly similar and this Court is requested to pronounce on two issues. First, whether the State had proved its case beyond a reasonable doubt as there were material contradictions including a series of improbabilities in the evidence of the two complainants which were allegedly ignored by the trial Court. Secondly, and with regard to the sexual penetration per se, whether the absence of medical evidence (the J88) in respect of the two complainants, renders their allegations of rape highly improbable.

## B. CONVICTION

### Count 1 and 2

- [3] The events which gave rise to the appellant's convictions are briefly as follows: The complainant in both these counts ( A[....] ) is the biological daughter of the appellant. It is common cause that at the time of the alleged incidents A[....] was fifteen years of age. Her mother had passed away and she was no longer staying with her grandparents but with the appellant. The rape incidents occurred on the 16 and 17 May 2010 respectively. In addition to the evidence of A[....] , the State led the evidence of Happy Jele (Jele), a police officer at the local police station who interviewed her; M[....]3 K[....] (M[....]3 ), who was the girlfriend of the appellant at the time of the incident; Ronnie Mokoena (Ronnie), the uncle to A[....] whom the second report was made to him; Dudu Guluwe, (Dudu) a cousin to A[....] , who testified about the sexual grooming A[....] reported to her; and lastly, R[....] S[....], (R[....]) the other cousin of A[....] , to whom A[....] made the first report to. The State also relied on the result of the DNA analysis of two condoms which were found in the dustbin at the appellant's place which results implicated the appellant.

- [4] Summarized, the evidence of A[...] is that on 15 May 2010 when the appellant came back home in the evening, he woke her up and raped her. Further that, the rape continued the next morning on 16 May when the appellant called her to his bedroom and he raped her again. The appellant's defence is a bare denial coupled with the fact that at that particular time his girlfriend, M[...]3, was present, therefore, he could not have raped the complainant. In explaining the condoms that were discovered at his place that implicated him, he testified that they were the condoms that he used when he had sexual intercourse with M[...]3, his girlfriend, a night before the alleged rape incidents. He also called his sister Ouma Tjikobe. His sister mainly testified about the reasons why A[...] changed her residency to stay with the appellant after she stayed with her grandparents for a long time.
- [5] M[...]3 confirmed when she was testifying on behalf of the State that she had a relationship with the appellant around the time of the alleged incidents. She confirmed further that she slept over at the appellant's house the night before the alleged rape incidents but denied that she and the appellant had sexual intercourse or used any condom or that any used condoms were left in the appellant's room during the sleeping over. She testified that they agreed that they will not have sexual intercourse

as their relationship had ended one week before the night she slept there.

- [6] The evidence of Jele, Ronnie, Dudu, and R[...] relates to the reporting of the sexual grooming including the rape itself. Although some of their evidence was also criticised by the legal representative of the appellant even in this appeal, nothing crucial stems from the criticism advanced. I am of the view that this exposition of their evidence suffices as their evidence was set out fully in the judgment of the trial Court.
- [7] It is trite law that in the absence of demonstrable and material misdirection a trial Court's findings of fact are presumed to be correct and that they will only be disregarded on appeal if the recorded evidence shows them to be clearly wrong[1].
- [8] The first attack on the testimony of A[...] is that she gave two versions regarding the date of her arrival (eventually the date of the two rape incidents) at her father's place. Initially, she said it was on the 15th (Saturday) and later, on the 16th (Sunday). This argument can be summarily disposed of by stating that the criticism that the trial Court overlooked this contradiction is not justified.
- [9] The trial Court, although it acknowledged this contradiction, concluded that it is not material after evaluating the evidence as a whole. It took into consideration that it became common cause during the trial and by virtue of the evidence tendered by the other witnesses of the State, including that of the appellant, that, the date of the incident is the 16th, a Sunday. The evidence also reveals that she reported to other people on the 17th, the Monday, and a charge was laid on the 17th. Therefore, the date of the incidents was eventually accepted by all as the 16 and 17 May. This finding by the trial Court that the contradiction is immaterial cannot in my view be disturbed.

- [10] The second criticism was that A[...] contradicted herself by saying that after the rape she could not call for help as she had to stay home for the people from Eskom to arrive, whereas in cross-examination she indicated that there was a stage after the second rape occurred, that the appellant sent her to collect money from her aunt. The trial Court regarded the contradiction as immaterial too, correctly so in my view because, the time factor in respect of calling for help or reporting an accident, is a neutral factor that does not affect her credibility at all. At any rate, A[...] did eventually make a report around 19h00 but on the same day, the 17th. Therefore, the finding of the trial Court in this regard is sound.
- [11] The last contradiction bemoaned by the appellant relates to the difference between the evidence of Jele and that of R[...] regarding the emotional state of A[...] at the time she made a report to them. Jele indicated that she was crying whereas R[...] said she was calm. A proper reading of the record of the proceedings reveals that this is not a contradiction per se. It is clear from the record of the proceeding that A[...] did not report to the two at the same time. The evidence of Jele was also corroborated by M[...]3 that when she talked to A[...] over the phone she was crying. This criticism has no merit as well.
- [12] It was also submitted that as far as the sexual penetration is concerned, the State did not hand in the J88 to support this allegation even though A[...] was examined at a hospital and, she is a single witness. This, according to the appellant, signifies that the J88 did not support the allegation that she was sexually penetrated and further, strengthens the probability that she was not raped.
- [13] This attack on the evidence of A[...] is narrow. Of critical importance is the fact that even though the appellant denied having had sexual intercourse with A[...] , it is common cause from the evidence as a whole that he (the appellant) had sexual intercourse during that weekend. To this end, he made two significant concessions in this regard. He admitted having had sexual intercourse but said that it was with M[...]3 , his girlfriend. He admitted that the two condoms that were found at his place on the 17th by the police were used by him and M[...]3 . The central question was therefore, with whom did he have sexual intercourse on the 16th because his girlfriend M[...]3 , denied that they had sexual intercourse over that weekend?
- [14] The trial Court, after evaluating the whole evidence, rejected the appellant's version that he had sexual intercourse with M[...]3 and they used condoms at that time. This finding cannot be disturbed at all. If the appellant's version is accepted, the following intractable questions remain a mystery on the facts of this matter. First, if the appellant didn't have sexual intercourse with A[...] , how did it come that she know that the condoms were in the dustbin? Secondly, is it a coincidence that

A[...] mentioned in the reports she made to the witnesses and the police the fact that she was raped twice and two condoms were found immediately after she reported the matter?

- [15] The discovery of condoms is a fact that is not in dispute. Unfortunately, this evidence serves as corroboration that strengthens the version of A[...] that the appellant had sexual intercourse with her, contrary to the exculpatory version the appellant gave. Therefore, the absence of the J88 is not crucial to the case of the State, and cannot justify the sort of negative inference the appellant wanted the trial Court to draw. More so and specifically to the facts of this matter, sexual intercourse is not an issue in this matter as already indicated above.
- [16] There were further several improbabilities that were bemoaned of by the legal representative of the appellant concerning the evidence of A[...] in as far as the two sexual encounters. The conclusion I reached above makes it unnecessary to consider them, it suffices to state that they were all ill-conceived and were rightly rejected by the trial Court because there is an overwhelming corroboration to the evidence tendered by the State which was accepted by the trial Court. The said corroboration overcomes the cautionary rules applicable to the evidence of A[...] that the appellant had sexual intercourse with her.

#### Count 4

- [17] With regard to this count of rape, the allegations are that the complainant, L[...] M[...]<sup>2</sup> (L[...] ) was also raped by the appellant at his house when she had gone there with a relative of the appellant, Felicia, and her other friends, to assist Felicia to clean the house of the appellant. The incident occurred on 2 January 2011 and L[...] was sixteen years at that time. The State called Thandokuhle Mdlalose (Thando), who is a friend of L[...] that accompanied her to the appellant's place, and also Godfrey Mashimbi (Mashimbi), a police officer who took a warning statement from the appellant. The appellant testified and called his brother, Themba Ndlovu as well as his sister, Ouma Tjikobe.
- [18] A brief explanation of how the rape occurred is as follows: At the time when L[...] and her friend Thando, together with the appellant's relative, Felicia, were in the kitchen busy with a slaughtered chicken the appellant requested them to de-feather, the appellant approached them and requested L[...] to go and clean his bedroom. After a short while, the appellant followed her to the bedroom. The appellant raped her in the bedroom. After this encounter, L[...] immediately decided to leave the appellant's house.
- [19] Thando corroborated the evidence of L[...] in material respect except as to what happened inside the bedroom as she remained behind in the kitchen. In particular, that the two were in the bedroom for a long-time together; that L[...] was crying and insisted on leaving immediately when she came out of the bedroom; and that she reported to her that appellant raped her on the way when she

was accompanying her to her home. Mashimbi's evidence related only to the warning statement that the appellant made to him wherein he stated among others that he had sexual intercourse with L[...] but with her consent.

- [20] The appellant similarly, denied the allegation that he had sexual intercourse with L[....] . Although he agreed to the fact that he was with L[....] in his bedroom at some stage, he indicated that it was not upon his request. His version is that L[....] called him to the bedroom where they only sat and talked as they were in love. Further that, when L[....] left her place, there was no problem between them, he even accompanied her home. His brother Themba, only confirmed that he was with the appellant on the 1st and 2nd of January 2011 at the appellant's place where he met a certain lady who was with the appellant. He was not able to indicate who this lady was. His evidence mainly relates to how he spent the two days with the appellant. With regard to the warning statement, even though the appellant admitted that he made the said statement to Mashimbi, he disavowed the portion of the statement where it refers to the fact that he had consensual intercourse with L[....] only. The rest of the contents of the statement were admitted by him.
- [21] The question the trial Court was grappling with in this count was therefore whether there was sexual intercourse that took place between the appellant and L[....] at the time they were in the bedroom.
- [22] In this Court, the case for the appellant was argued along the following confines in an attempt to convince this Court that the trial Court did not take sufficient consideration of the improbabilities and contradictions in the evidence of L[....] :
- 22.1 It is highly improbable that the appellant will rape her whilst there were many other people in the house;
- 22.2 It is highly improbable that the people in the house could not hear her screaming as she alleged that she did scream;
- 22.3 The absence of the J88 must also strengthen the improbabilities in this matter as it creates doubt as to the reliability and credibility of L[....] 's version;
- 22.4 The trial Court also agreed that there were contradictions in the evidence of L[....] as well, but erred in disregarding them and treating them as immaterial;
- 22.5 The evidence of the appellant that he had a love relationship with the complainant was also corroborated by the evidence of Thando who testified on behalf of the State. The version of the appellant is therefore reasonably probably true.
- [23] Regarding the rape in this count, the State capitalised on the last argument submitted on behalf of the appellant and conceded that there was a contradiction in the State case which was material. The contradiction relates to the fact that L[....] testified that it was the first time she saw the appellant whereas a witness called on behalf of the State namely, Thando, indicated that the complainant told her that the appellant proposed love to her the previous day and she accepted the proposal. This version corroborates that of the appellant, argued the State. According to the State, it is surprising that the complainant was not forthcoming with the truth regarding her relationship with the appellant and this, exposes her dishonesty, which taints her credibility. The fact that a J88 was not presented in the

proceedings before the trial Court, the argument continued, exacerbates the issue.

[24] It is trite that a court does not look at the evidence implicating the accused in isolation in order to determine whether there is proof beyond a reasonable doubt. It must be satisfied upon a consideration of all the evidence. [2]

[25] I choose to start with the last argument raised by the appellant which appears to be the gravamen of the appellant's

## submissions

and also a cornerstone of the concession by the State to the effect that the appellant's appeal should succeed on this count. I disagree with both the appellant and the State. The concession does not breathe life into the appellant's case as pleaded before the trial Court. The difficulty with this argument is first that, despite the fact that the trial Court acknowledged and recognized this contradiction, it concluded that, the contradiction cannot be viewed in isolation. This is a proper stance to adopt when evaluating the evidence before it. After analyzing the evidence as a whole, it regarded the contradiction as insignificant and reasoned that it cannot just latch onto one aspect without assessing it in the context of the whole picture presented in the evidence tendered by the State including that of the appellant[3].

[26] There are other reasons why I fully agree with the trial Court's evaluation of the evidence on this issue. First, the contradiction is immaterial as it relates to a peripheral aspect which was not the core issue that was before the trial Court. What was before the trial Court was not whether the sexual intercourse took place with or without consent. If this was the case, the issue regarding the existence of the love relationship or not could have been one of the relevant factors the trial Court could have considered in assessing the weight that needed to be attached to the contradiction. To recap and with the risk of repetition, the argument which the appellant as supported by the State is making a mountain out of a molehill about, flounders for the simple reason that the central issue before the trial Court was whether there was sexual intercourse with L[...] at the time they spent some time together in his bedroom. This construction is fortified by the fact that the evidence that they spent a long time in the bedroom was not disputed by the appellant.

[27] Secondly, there is another insurmountable obstacle in the version of the appellant. There were two irreconcilable versions of the appellant before the trial Court and or two inconsistent statements that were made by the appellant. First, in his plea where he indicated that he did not have sexual intercourse with L[...] at all, the second one, which is in the form of a warning statement, that he had consensual intercourse with her. The warning statement was accepted as evidence solely to prove a previous inconsistent statement made by the appellant. The trial Court made a finding that the State managed to prove that he made it and further that, it is highly improbable that the police officer who took it, Mashimbye, would have made up this story regarding "consent" which is exculpatory to the appellant if he had a motive. In the same breath and whilst grappling with the

perennial debate of the issue of the materiality of the contradiction or not, it is necessary to emphasise that the two inconsistent versions of the appellant, unfortunately, and unlike with regard to the contradiction relating to the version of L[....] , taint the root of the central issue which was before trial Court, to wit, whether sexual intercourse took place or not. It is therefore material and affects the credibility of the appellant.

- [28] Lastly, there is in this count an abundance of corroboratory evidence to support the version of L[....] that when she was called to the bedroom by the appellant, she was fine, and when she came out of the bedroom, she was not. The trial Court accepted the fact that the two were in the bedroom for a long time; L[....] came out crying and insisted on leaving immediately; she reported immediately that she was raped; the version of the appellant that she left peacefully and he accompanied her home was also disputed by Thando, who instead corroborated the evidence of L[....] that she is the one that took her halfway home. All of these proven facts were taken into account by the trial Court when it concluded that the contradiction bemoaned of could not taint the credibility of L[....] and that the absence of the J88 cannot either make her version highly improbable.
- [29] The other hurdle that stems from the considerations I made above is that the trial Court made strong factual and credibility findings in this count as well. In SLJ and another v The state,[4] citing with approval what was held in S v Pistorius,
- [5] the Supreme Court Of Appeal crafted the proper approach in dealing with the credibility and factual findings of the trial court and held:

*“21. This Court held as follows in S v Pistorius 2014 (2) SACR 314 (SCA) para 30:*

*‘ It is a time-honoured principle that once a trial court has made credibility findings an appeal court should be deferential and slow to interfere therewith unless it is convinced on a conspectus of the evidence that the trial was clearly wrong ( R v Dhlumayo & Another 1948 (2) SA 677 (A) at 706; S v Kebana*

*[2010] 1 All SA 310 (SCA) para12.’*

This is so because of the fact that as the trial court was ‘steeped in the atmosphere of the trial’ it had the advantage of observing the witnesses as they testified which the appeal court never had.”

- [30] I echo the same sentiments. I find nothing wrong with the evaluation the trial Court made regarding this contradiction relating to whether they had a relationship or not because it is neutral. The finding of the trial Court is therefore sound and demonstrates that there was no material misdirection on how the trial Court evaluated the evidence before it on this count.
- [31] As a last attempt, the appellant added a further string to the bow concerning the credibility of L[....] . It was argued on his behalf that it is highly improbable that the appellant would rape her when there were so many people in the house. Well, that may be so, but the contrary can also be said about the fact the appellant knew that he was dealing with young girls who would not have the courage to enter his bedroom without invitation. To recalibrate

this argument, it was argued further that it is highly improbable that no one heard her screaming if she was indeed being raped. To speculate why the occupants of the house did not hear the screaming and also why the appellant decided on his conduct despite other girls being there is in my view a wild goose chase. Sight should also not be lost on the fact that L[...] testified that when she was screaming, her mouth was closed by the appellant with his hand, and he also threatened to kill her. It is therefore apparent that she did not scream throughout the whole encounter. The proximity of the rooms where the other people were also might have played a role.

- [32] The trial Court was correct to find that the State proved its case beyond reasonable doubt and in rejecting the appellant's

version on the basis that it was untrue and not reasonably possibly true.

### C. SENTENCE

- [33] The appellant was sentenced on the three counts of rape to an effective term of life imprisonment. It was argued that the trial Court overlooked the personal circumstances of the appellant including, that alcohol played a role; the time spent in custody by the appellant while waiting trial; the possibility that the appellant can be rehabilitated and lastly, that the two previous convictions were more than 10 years old and the appellant was to be treated as a first offender. It was submitted that in light of the above, the sentence of life imprisonment is harsh and inappropriate.
- [34] The personal circumstances of the appellant which the trial Court took into consideration were that he was 39 years old; was working at the time of his arrest and earned R12000.00 per month; was a breadwinner at home, was customarily married but separated from her wife at that time; had six children to maintain, had previous convictions which were more than ten years old at the time of conviction.
- [35] The personal circumstances of the appellant are ordinary and there is nothing substantial and compelling about them. In fact, taken cumulatively together with the time spent in custody, are outweighed by the aggravating circumstances in this matter. This a matter wherein the father abused his biological child who was 15 years at the time, not only once, but twice. The fact that there was evidence of sexual grooming proven by the State in respect of L[...] , who was vulnerable at the time as she lost her mother, aggravates the factors in this matter further. As if it was not enough, he continued with this abhorrent conduct with another child of 16 years, almost 6 months after the first two rape incidents. Although it does not come clear from the record as to whether he was on bail or not when he committed the third rape incident, what is clear is that he does not respect the law as he committed the third rape after he was arrested on the first two rape incidents.
- [36] Losing your childhood at the age the two complainants were when they were sexually violated, is undoubtedly the most horrible thing a child can endure, and sometimes, for a long time. The previous convictions, although older than ten years, coupled with the fact

that he has a propensity of committing similar offences whilst awaiting trial on the other, paints a character of a man that cannot be tolerated by the society in which we live. It unfortunately also militates against the prospects of rehabilitation on the part of the appellant. The appellant is a man that needs to be removed from society, as he spurned the mercy the previous Courts extended to him and also, failed as a father, to protect his biological child including the children belonging to his community.

[37] The sentence the trial Court meted out cannot be said to be harsh and inappropriate. Of importance is that the trial Court was alive of the cumulative effect the sentences would have had on the appellant, hence it took some together for the purposes of sentencing and also, ordered all of the sentences to run concurrently. The appellant has not demonstrated that the trial Court was demonstrably wrong in exercising its discretion. The sentences that were meted out by the trial Court are just and fair to the circumstances of the rapes that he was convicted of and cannot be disturbed either.

[38] Consequently, the following order is made:

- a. The appeal against all of the convictions and the resultant sentences thereof is hereby dismissed.

A KGOELE

JUDGE OF THE HIGH COURT

I agree

D GREYLING – COETZER

ACTING JUDGE OF THE HIGH COURT

NB. The judgment was handed down electronically by sending it to both parties via their email addresses.

FOR THE APPELLANTS: ADV

R KRIEL

INSTRUCTED BY: P.J

LOURENS ATTORNEYS

FOR THE RESPONDENT: ADV

MATHEBULA

INSTRUCTED BY: OFFICE

OF THE DPP

MBOMBELA

DATE HEARD: 25 November 2022

**JUDGMENT**

DATE: 17 February 2023

- [1] Rose V Dhlumayo and another and Another [1948] 2 All SA 566 (A); 1984(2) SA 677
- [2] S v Van der Meyden 1991(1) SACR 447 (W)
- [3] Paginated page 644 line number 8-12 of the Judgment of the trial court.
- [4] (126/2014)
- [2014] ZASCA 215 (01 December 2014)
- [5] 2014
- (2) SACR 314 (SCA) para 30:
- 

**Source & reproduction note**

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE        <https://www.saflii.org/za/cases/ZAMPMBHC/2023/9.html>

CASE PAGE                <https://chat.esheria.ai/case-law/south-africa/ndlovu-v-s-unknown-topic-ampmbhc-2023>

Prepared on 11 October 2026 · Esheria