

SOUTH AFRICA / JUDGMENT

Netshishive v S (A48/2023) [2025] ZAGPJHC 515 (27 May 2025)

[2025] ZAGPJHC 515

COURT

South Gauteng High Court, Johannesburg

BEFORE

Malindi, Mia

CASE / FILE NUMBER

A48/2023

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

Case

Number: A48/2023

(1)

REPORTABLE: YES / NO

(2)

OF INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED: YES/NO

In

the matter between:

HANGWELANI

CHRISTOPER PRINCE NETSHISHIVE

Appellant

and

THE

STATE

Respondent

JUDGMENT

MALINDI, J

Introduction

[1] On 30 August 2021 the appellant was convicted of:

1.1. Count 1: Kidnapping;

1.2. Count 2: Contravention of Section 17 of the Domestic Violence Act, 116 of 1998, being the violation of a protection order; and

1.3. Count 4: Contravention of Section 3 of The Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007 read with Section 51(1) and Schedule 2 of The Criminal Law Amend Act, 105 of 1997, being rape of an adult with infliction of grievous bodily harm. He was acquitted of Count 3 and Count 5, being attempted murder and intimidation respectively.

[2] He was sentenced on 26 October 2021 to 2, 5 and 10 years imprisonment, respectively. The sentences for kidnapping and domestic violence were ordered to run concurrently with the sentence in count 4 for rape in terms of Section 280 of the Criminal Procedure Act 51 of 1977 (the CPA). The Court below found the existence of substantial and compelling circumstances in respect of the rape charge and imposed less than the stipulated minimum sentence of 15 years in Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 (CLAA).

[3] Having been refused leave to appeal his convictions only on 26 October 2021 by the Court below, the appellant was successful on petition to this Court in respect of both conviction and sentence on 3 November 2022.

[4] The petition order granting leave on sentence seems erroneous as in his petition the appellant sought leave only on convictions.[1] In his notice of appeal[2] the appellant notes an appeal on conviction only and the grounds of appeal canvass only the convictions. The heads of argument and oral submissions were only on convictions.

The grounds of appeal

[5] The grounds of appeal are set out in the notice of appeal as follows:

- a. The Learned Regional Magistrate erred that the State had proved its case beyond a reasonable doubt against the appellant;
- b. The Learned Regional Magistrate erred in finding that the appellant had kidnapped the complainant;
- c. The Learned Regional Magistrate erred in finding that the appellant contravened a protection order;

- d. The Learned Regional Magistrate erred in finding that the appellant raped the complainant;
 - e. The Learned Regional Magistrate erred in finding that the complainant gave a clear and detailed account of her experience, and that her evidence was corroborated by independent medical legal report; that the complainant's evidence was satisfactory in all material respect;
 - f. The appellant did not enjoy a fair trial due to inadequate legal representation.
- [6] In short, the appellant denies having committed the three offences and contends further that the complainant was a single witness and therefore her evidence should not have been accepted unless corroborated by objective or other evidence, especially medical evidence. Lastly, he contends that he did not have a fair trial due to inadequate legal representation.

Test on appeal

- [7] The test on appeal is whether the Court below misdirected itself or erred in material respects in its assessment of the facts or in law.[3] It is not a retrial.

Appellant's contentions

- [8] The appellant contends that:
- a. The State did not challenge the appellant's evidence that the complainant had called or invited the appellant to her place of residence. Therefore, his presence at her place could not constitute a violation of the protection order issued against him. Reliance for this proposition is placed on S v Mathlare [4] and S v Hlalatlu[5].
 - b. There were material inconsistencies between the evidence of the complainant and the objective medical evidence in the J88 report, the contents of which were not supported by the compiler thereof as she was not called as a witness. The report had merely been handed in by agreement between the parties.
 - c. Lastly, the appellant contends that he did not have a fair trial because his legal representative was inexperienced generally, especially in sexual offences matters. Reference is made to S v Mafu and Others[6]. Support for the contention that inadequate investigations and inadequate legal representation amount to an unfair trial is placed on Motsakgi v S[7].

Background

- [9] The appellant's version is short and uncomplicated. He avers that he went to the complainant's place on her invitation after she indicated her intention to withdraw the charge of violating the protection order she had opened against him. He alleges that she lured him under the pretext that he was going to sign withdrawal papers of the breach of the protection order. Upon arrival she begged him to take her back. He realised that the complainant had a plan to have him arrested if he refused to take her back in when he saw a

Quantum Kombi that was driven by one of the complainant's brothers stopped at the gate of the place where

he was staying. He then ran to the police station with the intention to report the incident.

- [10] In other words, the appellant contends that the complainant and her brother set up a trap whereby he would be lured to the complainant's place. Injuries would be inflicted on the complainant and be attributed to him. He would be arrested, charged and convicted accordingly as his presence at the complainant's place would have been established.
- [11] The complainant had laid charges against him for the violation of the protection order as a result of which he was out on bail on the date of the incident. Despite the bail condition that he not call her, or make any contact with her until the case is finalised he went to her place on 18 November 2021 on the alleged basis of signing papers for the charges to be withdrawn.

Evidence of the state

- [12] The State tendered the evidence of the complainant and of a police officer who had a short encounter with the appellant; and of a medical report (J88) that was handed up by agreement and without having to call the compiler.
- [13] The complainant testified that on 18 November 2019 at approximately 19:30 to 20:00 she was at her place of residence and had just finished bathing. She had gone outside to throw out the bath water and was on her way back to her shack when she suddenly saw the appellant at the door to her shack. The appellant grabbed her and threw her on the floor. He took his and her shoelaces and tied her feet and hands, stuck socks in her mouth and took a razor blade from her clothes drawer and cut her chest across her left breast. He took a screwdriver and inserted it into her vagina and asked her to perform oral sex on him and ejaculated inside her mouth.
- [14] The appellant tortured her by taking a plastic bag and covered her face with it. He also ordered her to write a suicidal note. While this was happening, her brother arrived and threatened to break the door open when she did not open the door to him despite he and some neighbours had noticed that there were people inside. The appellant panicked and opened the door for her brother and left the shack as her brother was asking him what was happening. She explained to her brother what the appellant had done and thereafter he accompanied her to the police station to report the incident.
- [15] The second state witness, Constable Kwena Miriam Manamela, testified that she is a member of the South African Police Service. She testified that on 19 November 2019 whilst at the police station the appellant arrived and he informed her that he wanted to report his girlfriend. Before Cst Manamela could gather what the complaint was about the appellant received a call and went outside. She waited for him for a short period of time. She then went outside to look for him and could not find him.

- [16] Shortly thereafter the complainant arrived and informed her of the rape incident. She testified that the complainant was confused and upset. She was in her night gown which had blood stains on it and was wearing no shoes when she arrived at the police station.
- [17] The complainant reported that the appellant cut her with a razor blade on her breasts. Cst Manamela saw the cut on the complainant's breast.
- [18] A medical report was handed in by consent and confirms physical injuries on the complainant, but no injuries are noted on the genital area. It further noted that the absence of injuries does not exclude sexual assault. It states that the complainant had suffered:
- a. a 5 cm laceration on the left breast which cut across her nipple;
 - b. bruises on her neck;
 - c. abrasions below the left knee.
- [19] The conclusion is that these injuries are consistent with physical assault.
- [20] No genital injuries were recorded.

Evidence of the Appellant

- [21] The appellant testified that the complainant called him at about 15:00 and asked him to come to her place in order to sign certain documents in order for her to withdraw the case against him. When he arrived, he reminded her that she has a protection order against him at which point she insisted that he comes in.
- [22] The appellant paints a picture of a seductive woman who met him in her nightgown at the gate, offered him a sit on the sofa and she sat on the bed as she begged him to take her back and that she was prepared to withdraw the order of domestic violence against him. He rejected her suggestion because she had kept her Human Immunodeficiency Virus (HIV) status as a secret from him and she infected him with HIV. She told him that she will do anything in her power to get him back[8], and that if he does not agree one of them will end up being six feet under.[9]
- [23] The appellant alleges that the complainant instituted a protection order action against him in order to stop him from taking all the stuff he had bought (and was at her place) when he ended their relationship in 2019.[10]
- [24] The appellant testified that everything was fine until he left the complainant's place after her brother had arrived after about one and a half hours. When he was about to enter his gate another of the complainant's brothers, Velaphi, arrived in a Kombi with a group of people. The vehicle was already at the gate of the premises where he lives. If this were to be believed,

it would seem that the complainant had already put in place her threat that if he does not reconcile with her one of the two of them would end up six feet under. The plan that the appellant would be the one ending up six feet under was therefore made in the short span of time from when the threat was made and when he was about to reach his place. This is improbable.

[25] When he realised this threat to his life he ran to the police station to lay a charge but the officer that he met did not pay attention to him and he went outside to call his brother and sister to alert them of the Quantum Kombi at his yard. This police officer was Cst Manamela.

[26] When it was put to him that this version was not put to the police officer who testified he blamed the fact that she was wearing a Covid-19 mask when she testified and therefore could not tell if she was the same person. When it was put to him that she gave evidence pertinent to him arriving at the police station and going out to make a call, he started clutching at straws.[11] The appellant was at sixes and sevens on other material issues under cross-examination. To say that he did not fare well is an

understatement. He was shown to be a liar and mendacious. His version was rightly rejected as not reasonably possibly true.

Analysis

[27] Despite this, the State still bore the burden of proof beyond reasonable doubt.

[28] The Learned Magistrate found that the appellant had tied the hands and feet of the complainant, locked her in her shack thereby depriving her of freedom of movement and detained her there[12]. The complainant's evidence is that this was done against her will and that the appellant did this in order to secure a withdrawal

of the charges she had laid against him for breach of the protection order. The appellant's conduct fits the common law crime of kidnapping which is "the unlawful, intentional deprivation of a person's freedom of movement." [13] It was held in *S v Mellors* [14] that the duration of the deprivation of liberty or restraining a person may have a bearing on whether there was intention to kidnap.

The appellant has denied ever restraining the complainant as she has testified. In the absence of an explanation why he deprived the complainant of her freedom of movement, the only conclusion is that he did so intentionally with the objective of coercing her to withdraw charges. He was correctly found guilty of kidnapping.

[29] The interim order was confirmed on 7 October 2019 in appellant's presence and he did not oppose it. The appellant spent a long time in evidence trying to say that the order was confirmed in his absence. This lie was exposed in cross-examination and he conceded that he was in Court. His denials and lies kept on being exposed.

- [30] It was submitted on behalf of the appellant that the State had conceded that the appellant went to the complaint's place on invitation by her. This is not so because what the State said in cross-examination was that even if it were so that she had called him he should not have listened to her but followed the order.[15]
- [31] The appellant made an improbable statement or assertion that the complainant had self-injured in order to keep him.[16] Asked how she would do this in order to win him back when it would result in him going to jail for a long time he gave some gobbledygook explanation including that she wanted to ruin his life and that of his children who relied on him. He alleged further that she was jealous of seeing him with another lady recently. This was not put to the complainant either.
- [32] The submission that the complainant self-injured is not borne out by the evidence. For example, the bruises on her neck are consistent with her evidence that the appellant grabbed her by her neck and that the belt of her night gown was tied around her neck while the appellant was threatening to hang her from the rafters. The abrasions on her knee are consistent with her evidence of being thrown onto the floor and landing on her knees.
- [33] It is submitted on behalf of the appellant that it is improbable that the acts of sexual violation by oral masturbation (blowjob) and vaginal penetration with a screwdriver could take place considering that first, the evidence of the complainant is that her socks were stuffed in her mouth and secondly, that her legs were tied together with shoelaces, respectively. It is submitted that there could therefore not have been any ejaculation inside her mouth and no vaginal penetration with a screwdriver if her legs were tied together.
- [34] As to oral sex forced onto the complainant, none of the parties asked the question whether it was done with the socks still in the mouth and bandage tied over her mouth respectively. Logic says that the socks and bandage were removed when the appellant inserted his penis in her mouth.
- [35] The submission that it is improbable that the complainant was vaginally penetrated with a screwdriver is also not based on established facts. Neither party asked how her legs were tied up. If it was at her ankles, then she could be penetrated as she testified. If it was the thighs above the knees, it would be near impossible. No basis was laid for the alleged improbability.
- [36] That there are no genital injuries is no evidence that she was not vaginally penetrated with a screwdriver. It is a neutral factor. It was not explored which end of the screw driver was inserted. The probabilities are that it was the handle part that was inserted. There is no evidence whether it was done with force. The complainant's evidence was clear on this aspect. Her evidence tilts the scale in her favour.

[37] An assessment of the evidence as a whole, and having “weigh(ed) up all the elements which point towards the guilt of the accused against all that those which are indicative of his innocence ...”[17], the court below came to the conclusion that the balance “weighs so heavily in favour of the State as to exclude any reasonable doubt as to the accused’s guilt”.

[38] The Learned Magistrate considered the legal principles as to the burden of proof[18] and to the approach in evaluating the evidence in its totality.[19] She was also conscious of the various dicta that the State has to prove its case beyond reasonable doubt even if the accused’s

version is found to be false.[20]

[39] The Learned Magistrate made factual and credibility findings[21] and convicted the appellant. These findings cannot be interfered with unless in exceptional circumstances, they are found to be wrong; or are as a result of misdirections or errors. This was stated in *R v Dhlumayo*[22] as follows:

“3. The trial court has the advantages, which the appeal judges do not have, in seeing and hearing the witness and being steeped in the atmosphere of the trial. Not only has the trial court the opportunity of observing their demeanour, but also their appearances and whole personality. This should not be overlooked.

4. Consequently the appellate court is very reluctant to upset the findings of the trial Judge.
5. The mere fact that the trial Judge has not commented on the demeanor of the witnesses can hardly ever place the appeal court in as good of a position as he was.
6. Even in drawing inferences the trial judge may be in a better position than the appellate court, in that he may be more able to estimate what is probable or improbable in relation to the particular people whom he has observed at the trial.
7. Sometimes, however, the appellate court may be in as good a position as the trial Judge to draw inferences, where they are either drawn from admitted facts or from facts as found by him.
8. Where there has been no misdirection of facts by the trial Judge, the presumption is that his conclusion is correct; the appellate court will only reverse its way it is convinced that it is wrong.
9. In such a case, if the appellate court is merely left in doubt as to the correctness of the conclusion, then it will uphold it.
10. There may be a misdirection on the facts by the trial judge where the reasons are either on their face unsatisfactory or where the record shows them to be such; there may be such a misdirection also where, though the reasons as far as they go are satisfactory, he is shown to have overlooked other facts or probabilities.

11. The appellate court is then at large to disregard his findings on fact even though based on credibility, in whole or in part according to the nature of the misdirection and the circumstances of the particular space, and so come to its own conclusion on the matter.
 12. The appeals court should not seek anxiously to discover reasons adverse to the conclusions of the trial Judge. No judgments can ever be perfect and all-embracing and it does not necessarily follow that, because something has not been mentioned, therefore it has not been considered.”
- [40] As stated above, the Learned Magistrate did not misdirect herself as to the issues of law either.
- [41] The appellant criticises the Court below for its alleged failure to assess the version of the appellant and rejecting it merely on the basis that the Learned Magistrate found it strange that the appellant would run to the police after inflicting bodily harm on the complainant. [23] This criticism is not borne out by what is contained in the judgment. The improbabilities of the appellant’s evidence and his lack of credibility are dealt with extensively in the judgment and as set out in this judgment.
- [42] It is further clear that the Learned Magistrate properly convicted the appellant for the violation of the protection order. The summary of the complainant’s evidence makes it clear that the Learned Magistrate rejected the appellant’s claim that he went to the home of the complainant by invitation. She finally states that the appellant’s evidence is to be rejected wherever it is contradicted by the State witnesses. This is a rejection of the appellant’s fanciful claim that the complainant called him to her home in order to beg him that they reconcile. He had the necessary intention as an element of the offence of contravention of a domestic violence protection order.[24]
- [43] The ground of appeal regarding inadequate representation should be rejected outright. The accused’s version was placed before the State witnesses and he proceeded to contradict it in material respects. When the shoe pinched under cross-examination, he embellished his evidence to his detriment. There was no avenue for the accused’s legal representative to shake the complainant’s version. The complainant was consistent, clear in all material respects, and emerged unscathed under cross-examination. This was not as a consequence of inadequacy of his legal representative.

Conclusion

- [44] The Learned Magistrate considered the evidence as a whole and applied the law to the facts of this case in concluding that the appellant be convicted of the three counts as charged. She properly found that the complainant was credible whereas the appellant was woefully lacking in this regard.

- [45] In view of the authorities regarding the power or authority of a Court of Appeal to interfere with the factual findings of the trier of facts, this Court finds itself bound thereby unless the Court below misdirected itself in regard thereto. The Court does not find any misdirection in the application of the law either. It follows that there are no grounds to set aside the conviction. The issue of sentence was not addressed on the papers or in oral submissions.
- [46] For these reasons the appeal with regard to conviction falls to be dismissed and therefore upholding the judgment of the Court below. As stated in paragraph 4 above, the appellant sought leave to appeal only the convictions and we therefore confined ourselves to the issue of conviction.

Order

[47] The following order is made:

1. The appeal in respect of conviction is dismissed.

MALINDI J

JUDGE OF THE HIGH COURT

JOHANNESBURG

I agree,

MIA J

For the Appellant: M M Hlatshawayo

Instructed by: Mbele Attorneys

For the Respondent: R M Kau

Instructed by: Director of Public Prosecutions

Date of hearing: 12 August 2024

Date of judgment: 27 May 2025

[1] Petition: CaseLines 006.1-11, para 20; Petition Order: CaseLines 006.2-1.

[2] Notice of appeal: CaseLines 008-1.

[3] R v Dhlumayo 1948 (2) SA 677 (A); S v Monyane and Others 2008 (1) SACR 543 (SCA) at [15]

[4] 2000 (2) SACR 515 (SCA) at [9].

[5] (Case No EC057/2005) (decided on 21 June 2005) [2005] ZAECHC 27 at [16].

[6] 2008 (2) SACR 653 (W).

[7] (Case No 2013/A50343) [2014] ZAGPJHC 260 (14/10/2014) at [5], [67].

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- [8] Record: CaseLines 003-72.
- [9] Record: CaseLines 003-86 to 003-87.
- [10] Record: CaseLines 003-77 to 003-78.
- [11] Record: CaseLines 003-88 to 003-93.
- [12] Judgment: At page 289, lines 5-9, Caselines 003-140
- [13] Ntuli and Another v S (Case No.2858/2017) [2021] ZAGPPHC 149 (10 March 2021)
- [14] 1990(1) SACR 347 (W) at 350i-351c
- [15] Record: CaseLines 003-79 lines 12 – 15.
- [16] Record: CaseLines 003-97 to 003-98.
- [17] S v Chabalala 2003
- (1) SACR 134 (SCA) at [15].
- [18] S v Jackson
- (1) SACR 270 (SCA); S v Ntsele 1998
- (2) SACR 178 (SCA).
- [19] S v Van der Meyden 1999
- (1) SACR 447 (W) at 450; S v Chabalala supra
- [20] S v Jackson 1998 (1) SACR 470 (SCA); S v Schackell 2001 (4) SACR 279 (SCA) ; S v Monyane and Others 2008 (1) SACR 543 (SCA) at [15]
- [21] Record: CaseLines 003-140 to 003-141.
- [22] R v Dhlumayo 1948(2) SA 677 (A) at 705-706; See also S v Pistorius 2014 (2) SACR 315 (SCA) at 30.
- [23] Appellants heads of argument: CaseLines 003-139 lines 5 to 8.
- [24] S v Hlalatlu (Case No EC057/2005) (21 June 2005) at [16].

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