

SOUTH AFRICA / JUDGMENT

Ngobeni v S (A157/23) [2024] ZAGPPHC 495 (24 May 2024)

[2024] ZAGPPHC 495

COURT

North Gauteng High Court, Pretoria

BEFORE

M. Ntanga, N.V. Khumalo

CASE / FILE NUMBER

A157/23

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IN THE HIGH COURT OF

SOUTH AFRICA

(GAUTENG DIVISION,

PRETORIA)

CASE

NO: A157/23

(1)

REPORTABLE: YES / NO

(2)

OF INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED.

DATE: 24/05/24

SIGNATURE

In

the matter between: SERGIO
 NGOBENI
 Appellant
 And
 THE
 STATE
 Respondent

JUDGMENT

NTANGA AJ:

INTRODUCTION

1. This is an appeal against the conviction and sentence of Mr. Sergio Ngobeni (“the Appellant”) by the Regional Court Division, held at Benoni on a charge of rape (“Count 1”) and for illegal entry in the Republic of South Africa with no valid documentation (Count 2”) The Appellant was sentenced to 25 years and 6 months imprisonment, respectively. The sentence in Count 1 was to run concurrently with sentence on Count 2.
2. There is no appeal with regard to the conviction and sentence on Count 2 as the Appellant pleaded guilty. The sentence imposed of 6 months runs concurrently with the sentence relating to Count 1.
3. This appeal relates to rape of a 10-year-old girl on March 17, 2018 in the Complainant’s home. The rape incident occurred during the day when the Complainant’s mother and sibling were not at home. The Appellant was the boyfriend of the Complainant’s mother at the time of the rape incident.

FACTS

AND BACKGROUND

4. In Count 1, the Appellant was charged for contravening provisions of Section 3 Read with Sections 1, 55, 56 (1), 57, 58, 59, 60, and 61 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. Rape (read with the provisions of sections 92(2), 94, 256, 257 and 261 of the Criminal Procedure Act 51 of 1977 and further read with the provisions of Section 51 and Schedule 2 of the Criminal Law Amendment Act 105 of 1997) as amended by section 33 of Act 62 of 2000 and section 36 of Act 12 of 2004 and further amended by Act 38 of 2007.

“In that on or about March 3, 2018 and at or near Emaphupheni in the Regional Division of Gauteng, the Accused did unlawfully and intentionally commit an act of sexual penetration with a female person to wit, Complainant (whose identity is concealed to protect the minor child) and who was 10 years old at the time by inserting his penis inside her vagina without her consent.”

5. He pleaded not guilty. He was legally represented for the whole duration of the trial. On his conviction he was also declared unfit to possess a firearm in terms of section 103
(1) of the Firearms Control Act 60 of 2000.
6. At the commencement of the proceedings the State invoked provisions of Part 1, Schedule II; Section 51(1)(a) of Act 105 of 1997. It is important to make the accused person aware of the consequences of Section 51(1)(a) of Act 105 of 1997[1] and be placed in a better position to appreciate sentences that may be imposed should he be found guilty. In *Thwala v the State*[2] the court clarified the legal principle in this regard.
7. Appellant argues that the Magistrate erred in finding that the State proved its case beyond reasonable doubt, alleging that the State's case was marred with improbabilities.
8. Appellant also argues that contradictions in the State's case justify his argument that the Magistrate failed to properly evaluate evidence adduced in court. With proper evaluation of evidence, the Magistrate ought to have found that the State failed to prove its case beyond reasonable doubt

and that his acquittal would have been an appropriate ruling under the circumstances.

9. The State called four witnesses in support of its case namely: -

- (i) The Complainant;
- (ii) Ms Z[...] N[...] N[...];
- (iii) Mr J[...] S[...]; and
- (iv) Ms S[...] S[...].

10. The Accused testified in person to prove his defence and did not call further witnesses.
11. The Complainant was called as a first State witness. At the time of her testimony she was 13 years old.
12. She testified that she went to the store to buy vetkoeks with her friend whom she accompanied to her place of residence and went home.
13. Upon arrival at home she found her uncle eating food. She described the uncle as the Appellant. She explained that the Appellant was her mother's boyfriend. She climbed on top of her mother's bed, subsequently the Appellant came to the same bed and he was drunk. He closed her mouth and took her clothes off. He took off her,

trouser panty and T-shirt.

14. The Appellant then took off his trouser and thereafter raped her. Whilst the Appellant was still busy with the rape action, a lady the complainant described as E[...]’s mother knocked on the door. The Appellant told the complainant that should she speak, he was going to do something to her that was going to injure or hurt her.

E[...]’s mother walked away when there was no response to her knock.

15. She was scared, she intended to scream but the Appellant had closed her mouth. She testified that she was injured and bleeding.
16. The Accused offered her a R10.00 note when he finished raping her. She rejected it. He promised to do anything she wants from him.
17. S[...] and J[...] arrived and knocked on the door. The Appellant covered her with a blanket or rolled her with it and pushed her to the other side of the bed. Thereafter S[...] inserted her hand on the door and tried to open it.
18. S[...] and J[...] managed to open or unlock the door and gained entry to the house. S[...] tried to take the R10.00 note and the Appellant stopped her and told her that if she continues to take it he will do to her what “he did to this person”. He said he will beat her up because the R10.00 note is not hers.
19. The Complainant went out with S[...] and J[...] and related to them what had just happened. At the time she was wearing her pants and the Accused was not wearing anything.
20. When her mother arrived she told her what happened as well. The Appellant was still in bed covering himself with a blanket.
21. The Complainant’s uncle, who was accompanied by Z[...] and B [...], arrived after he was called by her mother. Z[...] took the Appellant out of bed and beat him up. Z[...] phoned the police who did not arrive.
22. She testified that the Appellant ran away and was apprehended by Siphiso. The Accused was put in B[...]’s car and they all went to the police station together with the Complainant, where she gave a statement and was later taken to Far East Rand Hospital for medical examination.
23. Under cross-examination she disputed the Appellant’s version that she was not staying with her mother and confirmed that she stayed with her. Her version was also confirmed by J[...].
24. On being unable to run away, she testified that the window and the door had burglar proofs.
25. S[...] S[...] and J[...] S[...] testified that they found the Appellant and Complainant in the same room and it was locked. J[...] testified that he is the one who opened the door. Although the padlock was locked, the key was hanging next or under the padlock. With regard to burglar proof, S[...] testified that the door did not

have a burglar proof and this is contrary to Complainant’s evidence.

26. They both testified that they found the Complainant covered with a blanket on the side of the bed and that she was not wearing any clothes. The Appellant was in bed, not wearing anything and covered in a blanket. Although he was covered in a blanket they could still see his nakedness from the side.
27. When they arrived the Complainant was shaking and scared. She took the R10.00 note and proceeded to the kitchen with them. That is where she told them that the Appellant gave her the R10.00 note in order for her to keep quiet and that he further instructed her to share it with them so that they should also keep quiet. She then told them

that Appellant raped her.

28. Ms Ncube testified in her capacity as a professional nurse at Daveyton Main Clinic, Clinical Forensic Medicine Services under Department of Health. She has a diploma in general nursing and she works with forensic cases. She also studied for a course in forensic nursing. She testified that on March 17, 2018 they conducted gynaecological examination on the Complainant.
29. During examination they observed redness on the posterior fourchette. There was a fresh tear on the posterior fourchette which appeared as a laceration. There was also a bump and a cleft. She explained the

bump as an injury from the inside to the outside of the vagina, which can be caused by a blunt object getting in and coming out. She explained the cleft as an old injury.

30. Ms Ncube referred to her conclusion where she wrote "That the above findings are consistent with the vaginal penetration of a blunt object e.g. erected penis. Specimen was collected for forensic analysis".[3]
31. Under cross-examination she confirmed that during a bath or shower, a harsh soap can cause a scratch.
32. The Appellant's testimony in his defence was a denial of the accusation of rape. He testified that he did not see the Complainant until the day she was brought to him to make a rape allegation. He testified that on the previous night he was not at home as they were preparing for a funeral of someone he knows. After the funeral which was on March 17, 2018 he went back home. It was raining and he was wet, which was the reason for him to take off his clothes and cover himself with a blanket.
33. He took his clothes off and decided to rest. He was awoken by Z[...] who assaulted him. He decided to walk to the police station and was reprimanded by Siphiso to go back home and wait for the police there as he was injured.
34. He requested B[...] to take him to the police station and they travelled together with Complainant and her mother. On the way he requested another man known as Chabalala to accompany them.

35. He disputed offering Complainant a R10.00 note, he testified that he did not give her any money.
36. During appeal proceedings, Appellant's Counsel argued that if he was drunk as it was alleged, then he was incapable of committing the rape.
37. The State argued that Appellant's submission should not be accepted as he was able to give full account of what happened on the day, save for denying the rape incident.
38. This argument by the Appellant is not plausible, he appears to have a full recollection of everything that happened except for the rape incident. His mind seems to go into a complete blackout when it comes to the rape incident whilst he is able to give full account of everything else.

FINDINGS OF THE COURT A QUO

39. In finding the Appellant guilty of the rape, the court a quo found that:
 - 39.1 the cautionary rules in terms of section 208 were applied because the Complainant is a single witness in so far as the occurrence of the offence is concerned;
 - 39.2 the contradictions between the evidence of S[...] and J[...] were not detrimental to the State's case;
 - 39.3 to say that the Appellant was walking to the police station because he was injured by Z[...] and brought back by Siphiso did not make sense to the court; and
 - 39.4 confirmed the cautionary rules in terms of section 208 and that the victim told the truth.

ISSUES

TO BE DECIDED

40. On appeal this court is called upon to determine the correctness of the findings of the court a quo, that is, whether the State discharged its onus and proved its case beyond reasonable doubt.
41. Further this court is called upon to determine whether the sentence imposed by the court a quo is appropriate or excessive when taking into account the personal circumstances of the Accused, mitigating factors and period in custody before finalisation of the trial.

APPLICABLE LAW

42. Section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 provides that:

“(3)...

Any person ('A') who unlawfully and intentionally commits an act of sexual penetration with a complainant ('B'),

without the consent of B, is guilty of the offence of rape”.

43. It is common cause that when the rape offence occurred, the Complainant was 10 years old. There is no evidence indicating that the Appellant was not aware that the Complainant was under the age of 12 years. He was a father figure in the Complainant's home.
44. Unlawfulness cuts across all criminal offences, whilst it may be argued that there are instances where penetration may have been lawful, for instance, exercise of medical duty by a medical practitioner, for the purposes of this case it is not necessary to elaborate on those instances as this will not apply.
45. Section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act[4] specifically refers to intention to commit an act of sexual penetration. This has to be established to prove the case of rape against the accused person.

APPLICATION OF LAW TO FACTS AND EVALUATION OF EVIDENCE

46. There are contradictions on the evidence of witnesses on behalf of the State. Complainant testified that the Appellant locked the door and put the key in his pocket. Secondly, she testified that the door had burglar proofs. This evidence was disputed by J[...] who testified that the door was partially locked and he inserted his hand to open it as the key was hanging or under the padlock. S[...] also disputed that there was a burglar proof at the door. Lastly, the Complainant testified that she was wearing pants when S[...] and J[...] arrived. On the contrary, they testified that she was not wearing clothes.
47. What then needs to be determined is whether these contradictions are material and fatal to the State's case.
48. In *S v Govender and Another*[5] the Court cited the dictum of the Supreme Court Appeal[6] as follows:

“The juridical approach to contradictions between two witnesses and contradictions between the versions of the same witness (such as, inter alia, between her or his viva voce evidence and a previous statement) is, in principle (even if not in degree), identical. Indeed, in neither case is the aim to prove which of the versions is correct, but to satisfy oneself that the witness could err, either because of a defective recollection or because of dishonesty. The mere fact that it is evident that there are self-contradictions must be approached with caution by a court. Firstly, it must be carefully determined what the witnesses actually meant to say on each occasion, in order to determine whether there is an actual contradiction and what is the precise nature thereof.

...

Secondly, it must be kept in mind that not every error by a witness and not every contradiction or deviation affects the credibility of a witness. Thirdly, the contradictory versions must be considered and evaluated on a holistic basis.

Lastly, there is a final task of a trial Judge, namely to weigh up the previous statement against the viva voce evidence, to consider all the evidence and to decide whether it is reliable or not and to decide whether the truth has been told, despite any shortcomings”.

49. In *S v Artman and Another*[7] the court stated that:

“There is a cautionary rule of practice, in regard to the testimony of accomplices, complainants in sexual cases, and young children in terms of which trial courts must:

- (a) Warn themselves of the dangers inherent in their evidence.
 - (b) Require some safeguard reducing the risk of wrong conviction. The safeguard need not consist of corroboration, but if corroboration is relied upon as the safeguard, it must go the length of implicating the accused in the commission of the crime.”
50. In dealing with acceptance of single witness testimony the court in *S v Artman and Another* followed the case of *R v Mokoena*[8] and stated that “what is required is that her testimony should be clear and satisfactory in all material respects”. [9]
51. Further in *S v Artman and Another*[10] the court stated that “while there is always a need for caution in such cases, the ultimate requirement is proof beyond reasonable doubt; and courts must guard against their reasoning tending to become stifled by formalism. In other words, the exercise of caution must not be allowed to displace the exercise of common sense.”

52. In *Woji v Santam Insurance*[11] the court stated that:

“Trustworthiness, as is pointed out by Wigmore in his Code of Evidence para 568 at 128, depends on factors such as the child’s power of observation, his power of recollection, and his power of narration on the specific matter to be testified...His capacity of observation will depend on whether he appears “intelligent enough to observe”. Whether he has the capacity of recollection will depend again on whether he has sufficient years of discretion “to remember what occurs” while the capacity of narration or communication raises the question whether the child has “the capacity to understand the question put, and to frame and express intelligent answers”.[12]

53. In *Maila v S*[13] the court followed the *Woji* judgment and stated that:

*“This court has, since *Woji*, cautioned against what is now commonly known as the double cautionary rule. It has stated that the double*

cautionary rule should not be used to disadvantage a child witness on that basis alone. The evidence of a child witness must be considered as a whole, taking into account all the evidence. This means that, at the end of the case, the single child witness's evidence, tested through (in most cases, rigorous) cross-examination, should be 'trustworthy'. This is dependent on whether the child witness could narrate their story and communicate appropriately, could answer questions posed and then frame and express intelligent answers.

Furthermore, the child witness's evidence must not have changed dramatically, the essence of their allegations should stand.

Once this is the case, a court is bound to accept the evidence as satisfactory in all respects."

54. The question that needs to be answered is whether the court a quo did exercise its judicial discretion properly in so far as single witness testimony adduced by the Complainant.
55. Notwithstanding contradictions in the evidence of the Complainant, it is my view that her evidence and other State witnesses was, precise, consistent and carried a degree of honesty and truth. Complainant's

evidence therefore should not be dismissed but instead, sufficient weight should be attached to her testimony and it should be accepted where truth can be clearly determined and/or identified.

56. The Complainant clearly and satisfactorily gave account of how the rape incident occurred. She testified with regard to the hurting and bleeding she endured. The findings of the professional nurse who conducted gynaecological examination in relation to bump and lacerations that were identified are consistent with Complainant's version.
57. In *R v K* 1958 (3) SA 420 (AD) the court found that the Crown's (State) difficulty was that the complainant was obviously untruthful and it was impossible to say beyond reasonable doubt whether in her condition she possessed sufficient understanding to be able to consent to intercourse, or whether she was able to and did convey her consent to the appellant in such a way as to lead him to think that she was mentally fit to consent.[14] The court concluded that unsatisfactory as the Appellant's evidence was and deplorable as was his conduct on his own admissions,

the Crown failed to prove that he was guilty of rape.[15]

58. In this matter the Complainant and other State witnesses provided testimony which proves beyond reasonable doubt that the Appellant committed rape offence against the Complainant.

59. The evidence led on behalf of the State proved beyond reasonable doubt existence of necessary elements of rape in that there is confirmation of penetration by the evidence of the professional nurse who identified redness, fresh tear laceration in the posterior fouchette and two lacerations in the perineum area. Redness on the fossa navicularis, bump which is consistent with the vaginal penetration and a cleft at 6 o'clock. The fresh tear, laceration and bump corroborate Complainant's evidence that she was hurt and bleeding.
60. It is trite that the appeal court will not interfere with a court a quo's decision unless it finds that the trial court has misdirected itself on the facts and the law.[16]
61. The court a quo adopted a correct approach in its assessment of the evidence and has clearly applied cautionary rules to the Complainant's evidence who testified as a single witness in giving account of how the rape incident occurred. The court a quo was satisfied with the Complainant's evidence notwithstanding her age and the fact that she is a single witness. The court a quo was also satisfied with the coherency of her evidence with regard to what the Appellant did to her.
62. The court a quo found that contradictions were minor and not detrimental to the State's case. I agree with the court a quo's finding that the contradictions in the evidence of State witnesses

are immaterial for determination of Appellant's guilt. The Appellant's argument of motive was not sustained taking into account the succinctness of evidence by the State witnesses including the Complainant. The Complainant's evidence was adduced honestly and with a clear recollection of how the rape incident occurred.

63. The court a quo correctly rejected Appellant's evidence that he could not remember anything and that he just came and slept until he was waken by Zinto. Also that he was just walking and going to the

police station because of injuries he sustained from the beating by Z[...] when Sisipho reprimanded him to go back to the house.

Furthermore, the Appellant's evidence that he requested B[...] to transport him to the police station was correctly rejected. This evidence is illogical and improbable, it cannot be sustained.

64. The court a quo correctly rejected his version and found him guilty on the charge of rape.
65. On sentencing the court a quo considered the Appellant's personal, mitigating factors including time he spent in custody prior to finalization of his trial. The court a quo applied the sentencing principles set out in *S v Malgas*. [17] In my view it is aggravating that the Appellant was a boyfriend to the Complainant's mother, he betrayed the role of a father that he was to the Complainant.

66. Complainant trusted the Appellant to love and protect her. She is not referring to the Appellant as a stranger that she would fear that he may harm her, which explains the reason that she was comfortable to be in the same room with him and climb on the bed.

FINDINGS

67. I am satisfied that the court a quo correctly found the State to have proved the guilt of Appellant beyond reasonable doubt. The Appellant was correctly convicted.
68. The court a quo during sentencing exercised its discretion properly and judicially. The sentence of twenty -five (25) years imprisonment is appropriate under the circumstances. It is correctly indicative of the gravity of the offence and accommodates the interests of the Complainant and society.
69. I therefore make the following order:
1. The appeal against conviction and sentence is dismissed.

M. NTANGA

Acting Judge of the High Court

I agree:

N.V. KHUMALO

Judge of the High Court

APPEARANCES:

For the Appellant: Mr. M.B. Kgagara Instructed by: The Legal AID South Africa Pretoria Justice Centre For The State: Adv. D. Molokomme Instructed by: Director of Public Prosecutions, Pretoria

- [1] Criminal Law Amendment Act 105 of 1997.
- [2] Thwala v the State [2018] ZACC 34.
- [3] Record, pp 64.
- [4] Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 Of 2007.
- [5] S v Govender and Another[5] 2006 (1) SACR 332 (E).
- [6] S v Mafaladisha and Another 2003 (1) SACR 583 (SCA). See also R V Mokoena 1932 OPD 79 at 80. "...the uncorroborated evidence of a single competent and credible witness is no doubt declared to be sufficient for a conviction by s 284 of Act 31 of 1917, but in my opinion that section should only be relied on where the evidence of the single witness is clear and satisfactory in every material respect. See also R V Abdoorham 1954 (3) SA 163 (N). S V T 1958 (2) SA 676 (A). S V Souls and Others 1981 (3) SA 172 (A). See also See Stellenbosch Farmers' Winery Group and Another v Martell et Cie and Others 200 3 (1) SA 11 (SCA). To

come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities.

- [7] S v Artman and Another 1968 (3) SA 339 (AD).
- [8] See note 6 Supra.
- [9] S v Artman and Another 1968 (3) SA 339 (AD).
- [10] S v Artman and Another 1968 (3) SA 339 (AD).
- [11] Woji v Santam Insurance 1981 SA 1020 (A).
- [12] Woji v Santam Insurance 1981 SA 1020 (A).
- [13] Maila v S (429/2022) [2023] ZASCA 3 (23 January 2023).
- [14] In R v K 1958 (3) SA 420 (AD).
- [15] In R v K 1958 (3) SA 420 (AD).
- [16] See AM & Another v MEC Health, Western Cape 2021 (3) SA 337 (SCA).
- [17] S v Malgas 2002 (1) SACR 469 SCA.

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