

SOUTH AFRICA / JUDGMENT

Nkadimeng v S (Appeal) (A48/2024)

[2025] ZAGPPHC 294 (12 March 2025)

[2025] ZAGPPHC 294**COURT**

North Gauteng High Court, Pretoria

BEFORE

MJ Mosopa, P Phahlane

CASE / FILE NUMBER

A48/2024

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****DIVISION, PRETORIA****Case****number: A48/2024****(1) REPORTABLE: YES/NO****(2)****OF INTEREST TO THE JUDGES: YES/NO****(3)****REVISED.****SIGNATURE:****DATE:**

12/03/2025

In

the matter between:

SYLVESTER

MPHO NKADIMENG

APPELLANT

V

THE

STATE

RESPONDENT

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JUDGMENT

MOSOPA, J

INTRODUCTION

1. The appellant was convicted of one count of Rape in contravention of section 3 of Act 32 of 2007 read with the provisions of section 51(1) of Act 105 of 1997. As a sequel of such conviction, the appellant was sentenced to life imprisonment and further an order was made that his name be recorded in the Sex offenders register because of the fact that he was convicted of a rape of a minor child, who was 10 years old at the time of the commission of the offence.
2. The appellant was legally represented during his trial matter and pleaded not guilty to the charge levelled against him. It is because of the sentence imposed that appellant has an automatic right to appeal such conviction and sentence.

BACKGROUND

3. The evidence that led to the conviction of the appellant can be summarized as follows, the complainant "KSM" (identity concealed because of the age of the complainant) was 10 years old when he was raped and 12 years old at the time of his testimony, he testified with the assistance of an intermediary in the intermediary room. He testified that on the day of the rape incident, he was coming from the soccer field, and he came across the appellant who said to him that he must go with him to his place of residence. He knew the appellant at the time, as the appellant was in a relationship with his aunt and they were all staying in the same yard but in different shacks. He did not know the reason why the appellant said he must go with him to his place of residence.
4. His mother was home at that time and his aunt was not at home as she was in the villages in Botswana and was staying there at that time. When he met with the appellant, it was starting to become dark. He further testified that the appellant forced him to drink liquor which he describes in evidence as Black Label beer and he consumed three cups, after that he felt drunk.

5. The appellant then pushed him to his bed and told him to take off his T-Shirt, which he did but he did not tell him the reason why he had to take his T-Shirt off. The appellant then undressed his trousers and underwear he then inserted his penis into his anus, he said that it was sore and that he also cried. The appellant then told him that if he screams and if he tells his mother about what happened, he will stab him with a knife. He testified that he believed the appellant when he was saying all these things to him. He could not scream as the appellant had tied a cloth around his mouth. Before the appellant penetrated his anus, he spit saliva on his hand and then smeared it on his anus. The appellant put his penis into his anus until the following morning. In the morning the appellant instructed him to put on his clothes.
6. The complainant then went to his mother's place and the appellant went to work. He then took a bath and thereafter went to school. When he came back from school, he found his mother sitting with Mahlatsi, who is his mother's friend. He was not walking properly at that time, as he was walking with his legs apart and Mahlatsi requested his mother to examine him to determine what happened to him. His mother examined him on the anus and that is when he told her that the appellant did "naughty things" on him and that he raped him, by inserting his penis into his anus.
7. His mother waited for the appellant to return from work and then she called the police and the members of the community, and the appellant was eventually arrested by the police. At the end of examination-in-chief, he was brought into the courtroom for purposes of identifying the appellant who was made to sit with other male persons inside the accused dock. He was not informed to look at the dock before identification and he identified the appellant in that dock amongst the other people that he was sitting with.
8. In cross-examination, he testified that he knew that his mother was at their home, because she came looking for him at the appellant's place and the appellant indicated to her that he wanted him to sleep over at his place and thereafter his mother left leaving him behind and went home. When his mother arrived at the appellant's shack looking for him, the appellant had not yet made him consume three cups of beer. He further testified that after the appellant inserted his penis into his anus, he did the up and down movement on him. His mother came in the morning and knocked at the appellant's shack to wake them up so that he could come home and bath before he goes to school.
9. When he arrived home his mother noticed that there was something wrong with him, but she thought that it was due to a medical operation that he underwent. At school, he could not stand up from the chair and the school called his mother and told her that he was not doing his schoolwork and that he was not right at school.

10. The mother of KSM confirmed the love relationship that the appellant has with one of her relatives, but she described the relationship differently from what KSM described. She also confirmed that the appellant was staying with them in the same yard but in a different shack, but currently they are no longer staying at that place where the incident happened. She also confirmed that her son went to the soccer field on the day of the incident. She visited her sister that day and arrived back home at 18h00 and started to prepare food and found that her son was not present at home. She finished preparing food at approximately past 20h00 and her son had not yet arrived home. That is when she went to the appellant's place of residence to look for him. Initially, the appellant told her that her son was not there, and she then went to her sister's place to look for him and could not find him.
11. She went back to the appellant and informed him that she could not find her son and that she could not go to sleep without knowing where he was. The appellant then laughed and said to her that he would show her a miracle and he then called out the name of the complainant and he emerged. He was also laughing when he emerged, and he had a soccer ball with him and said that she nearly collapsed when she could not find her son. The appellant asked if the complainant could spend the night with him as he had already prepared food.
12. She agreed to the request but informed the appellant that the complainant will be going to school in the morning, and he said that he will also be going to work. Her son also did not have a problem spending a night at the appellant's place of residence. She saw the appellant during the day consuming liquor, but he was not intoxicated when he requested her son to spend a night with him. The following day she went to knock at the appellant's shack to wake the complainant up so that he could not be late for school. She knocked there for a long time before the appellant could hear her knock.
13. As the complainant was bathing, she noticed that as he bent down, he appeared to be feeling pain, and she thought that it was because of an operation that he underwent on his stomach. She asked him what the problem was and whether he was feeling any pain and he said no. It was raining on the day and when her son left, she could not observe how he was walking. Her son came back from school earlier than his return time as he usually arrives home between 15h00 to 15h30.
14. At that time, she was sitting outside her shack together with Mahlatsi and she observed that her son was not walking properly, he was walking with his legs apart. She asked him what was wrong and if he was having pain and he said no. She then became angry and started shouting at him. Mahlatse entered the shack with him, and she stood at the door, but she could not see them while inside the shack, but she could hear them when they were talking to each other. She could hear her son saying to Mahlatse that the appellant inserted his "thing" into his buttocks, that is when she entered the house and then pulled down her son's trousers and then started to inspect the complainant. She then saw some blood and some substance

that looked to her like "sperm", she also saw some blood coming out of the cuts.

15. She was speaking loudly and people started gathering at her place. She took Mahlatse's phone and phoned the police as her phone's battery died. The police informed her that they would wait until the appellant arrived from work. The appellant denied ever raping the complainant. The appellant was then arrested, and the police took her to the police station leaving her son behind and they only fetched him the following day. The complainant was only examined the following day of the rape incident by the police, and he was still complaining of pains. Before he was taken to the doctor, the complainant bathed first, as he took a bath the following day of the rape incident before he went to school.
16. Her son told her that when the appellant raped him, he was in possession of a knife, which he described that when you press a button, the blade comes out, he also told her about a pink towel and a piece of cloth that the appellant had. The appellant threatened him with the knife if he screamed. The appellant was wiping him off with that towel. Prior to this incident, she never encountered any problems with the appellant, and they were at a certain stage working together in the same company. Her son never spent a night at the appellant's place in the past.
17. In cross-examination, she confirmed receiving a telephone call from the complainant's school about him not doing the schoolwork but that was after the rape incident, and it is not correct that it was made on the Monday following his rape incident on Sunday night. When her son was bathing in the morning after spending the night at the appellant's place, when he bent down, he said "eish", and when she asked him if there was a problem, and he said no. After she inspected the complainant and went to the police, the complainant did not take a bath thereafter. It was put to her that the DNA results show that no semen was detected.
18. The doctor who examined the complainant and compiled a J88 medico-legal examination report, could not testify as she was suffering from a serious neurological condition, and she was no longer in service of the department. Her supervisor Dr Eales from the Department of Family Medicine, University of Pretoria in collaboration with the Gauteng Provincial Government testified on her behalf instead. The appellant through his legal representative, did not have an objection with the J88 medico-legal examination being admitted into evidence and also Dr Eales testifying pertaining to such report.
19. Dr Eales confirmed that Dr Schehle examined the complainant on 20 November 2018 and completed the J88 medico-legal examination report. That the medico-legal report on clinical findings found the presence of a fresh bruise on the right thigh meaning that the skin was still intact but there was bleeding underneath the skin which resulted in discoloration. The bruise is attributed to be as a result of blunt force trauma. The patient told the examining doctor that he bathed, washed, urinated, and changed clothing since the incident of rape.

20. On anal examination, it was found that there was redness on the skin around the orifice. This can be caused by multiple things like poor hygiene, some infection, trauma etc. A tear was noted at 1 o'clock which is a sign of a high suspicion of trauma in that area. It is a kind of a specific injury that they observe in sexual assault case, because the buttocks need to be opened in order to injure that area. Swelling or thickening of rim of the opening of the anus was noted

and the doctor attributed that to sexual assault that happens over a long time with repeated trauma. The doctor noted no funneling which also signals repeated penetration. A discharge was noted but not specified. No digital examination was conducted which is commonly done to adults and not children, being the insertion of a finger into the rectal canal. No active bleeding was found on anal examination.

21. The doctor excluded the possibility of the injury to be caused by constipation as the injury was not in the inside of the rectal canal but on the outside of the rectal canal.

APPELLANT'S CASE

22. The appellant testified that on the day of the rape incident, he spent almost the entire day consuming alcohol and at approximately 18h00 the clouds started to gather, and he thought about his laundry which he left on the washing line. He found the complainant in the yard and when he entered his house, the complainant also entered. He consumed alcohol that he brought but denied forcing the complainant to consume alcohol. He confirmed that the complainant's

mother came looking for him and he told her that he was not there and on the second occasion, he told her that he was inside the house.

23. The complainant told his mother that he was going to sleep at the appellant's place and his mother asked the appellant if her son was going to sleep at his place and he said yes. They then all went to sleep and the following day in the morning he went to his workplace. He also confirmed that the complainant's mother woke him up so that he could go to school and for the fact that he overslept. When he arrived back from home, the community members started asking him questions about the complainant and started to assault him and he was eventually arrested by the police. He denied ever penetrating the complainant on his anus with his penis.

ANALYSIS

AND APPLICABLE LEGAL PRINCIPLE

24. In *Rex v Dhlumayo* 1948 (2) SA 677 (A) at 705 the court when dealing with the appeal court's powers stated that;

"Ordinarily the appellant in a criminal appeal has to satisfy the appellate court that the verdict was wrong, at least to the extent that the trial court should have had a reasonable doubt as to his guilt...

Where there has been no misdirection on fact by the trial Judge, the presumption is that his conclusion is correct; the appellate court will only reverse it where it is convinced that it is wrong."

25. From the above, it is clear that the court of appeal powers are circumscribed, only to the extent when the trial court has misdirected itself in its factual findings. This is so because the trial court has advantages, which the appeal judges do not have in seeing and hearing witness being steeped in the atmosphere of the trial. Not only has the trial court the opportunity of observing the demeanor, but also their appearances and whole personality. (see *Rex v Dhlumayo* (supra)).

26. In *S v Chabalala* 2003 (1) SACR 134 (SCA) at 140 A - B, the court when dealing with the approach to be adopted on appeal, stated that;

"The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt. The result may prove that one scrap of evidence or one defect in the case for either party (such as the failure to call a material witness concerning an identity parade) was decisive but that can only be an ex post facto determination and a trial court (and counsel) should avoid the temptation to latch on to one (apparently) obvious aspect without assessing it in the context of the full picture presented in evidence."

27. It is common cause that before the complainant could meet with the appellant on the day of the incident of rape, there was nothing wrong with him and that will include the time when the complainant's mother found him at the appellant's place. It is also common cause that both appellant and the complainant slept on the same bed that night of the

incident. Also, that when his mother woke him and the appellant up in the morning, she did not realise that there was a problem with him. The complainant did not make any report of being sexually assaulted by the appellant to his mother, until he returned from school earlier than the usual time the following day of the rape incident.

28. In the morning as the complainant was taking a bath, when he bent down he showed signs of feeling pains and he also even said "eish". Still at this stage, he did not make any report to his mother even though his mother asked him whether he was fine to which he responded with a "yes". The mother thought that the signs that her

son demonstrated was because of the two groin operations that he underwent.

29. It is only after the complainant returned from school walking with his legs apart that, with the assistance of Mahlatse, he mentioned that he was raped by the appellant. The complainant confirmed the presence of Mahlatse when he returned from school. Despite walking with difficulty when asked what his problem was, he answered by saying that he was fine. This can be attributed to a number of aspects at the time when he was raped. he was threatened with a knife and was told not tell her mother about the incident.
30. What is critical is the fact that without the name of the appellant suggested to him, he said that it was the appellant who raped him. There was no animosity between the appellant and the complainant as well as the mother. We are alive to the fact that there was a stage when the complainant's mother was angry and shouted at him, but there was evidence that can suggest that such conduct influenced the complainant to falsely implicate the appellant. The appellant in addition to that, was in a love relationship with a family member of the complainant and he was also staying in the same yard though in different shacks. The two shacks were situated very close to each other. Even when the community members were assaulting the appellant because of allegations made against him, the mother still intervened and assisted the appellant and take him to her shack.

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31. The complainant is a single witness to the rape incident. Section 60 of Act 32 of 2007 declares irrational and outlaws the fact that the evidence of the child in sexual offences matters be treated with caution and makes the following provisions;

"[60] Notwithstanding any other law, a court may not treat the evidence of a complainant in criminal proceedings involving the alleged commission of a sexual offence pending before that court, with caution, on account of the nature of the offence"

However, this does not suggest that the evidence of the child witness must be accepted with less scrutiny placed to such evidence.

32. Having said the above, section 208 of Act 51 of 1977 also needs to be mentioned as it provides as follows;

"[208] An accused may be convicted of any offence on the single evidence of any competent witness, the reliability of the complainant's witness and its competency also need to be looked at."

33. Criticism was levelled on the fact that the medico-legal report (J88) does not corroborate the evidence of the mother of the complainant that when she examined the complainant, she saw a substance which looks like "sperms" and also that she saw blood on the complainant's buttocks. This is despite the conclusive conclusion of the doctor who examined the complainant that he was raped as she noted blunt force trauma which can be caused by the penis, corroborating the complainant's evidence that the appellant penetrated him anally.

34. No "sperms" were noted on examination, but no specified discharge was noted. A tear at 1 o'clock on anal examination was noted by the doctor. The complainant bathed on the morning after returning from the appellant's place and changed his clothes. It is common that despite the mother of the complainant reporting the rape to the police, he was only taken to the doctor the following day, his mother was given an instruction that he need not bath until taken to the doctor for examination. There is nothing to gainsay that the complainant's mother acted contrary to that instruction or the complainant himself.
35. Taking into account the above, it would have been highly impossible for the doctor to have noted blood and "sperms" on examination, however, the doctor corroborated the complainant's mother when she said that she saw cuts on the anus of the complainant as the doctor noted tear at 1 o'clock. It is for the above that it is found that the criticism levelled lacks merit and should be rejected.
36. In his testimony the complainant testified that the appellant sexually penetrated him the whole night without sleeping. This I find to be improbable, but sight should not be lost of the fact that we are dealing with the evidence of a complainant witness who was 12 years old when he testified and 10 years old when he was sexually penetrated. This sound to be an exaggeration but it is not in our considered view material to vitiate the state's case. Uncontested evidence is that the appellant would wake up early which would lead to the complainant's mother waking the complainant up. The appellant on his version, states that he overslept which is quite strange considering the fact that he went to bed while the complainant was playing games on his phone. The incident might have prolonged until late in the night which slightly confirms the version of the complainant that it was for a prolonged time but not the whole night.
37. The trial court did not misdirect itself when convicting the appellant of rape of the complainant and it cannot be faulted. There is nothing to suggest that the evidence of the child cannot be relied on. Items which were apparently used by the appellant in committing the rape act were found but because of the police ineptness those exhibits could not be secured to court and used as evidence against the appellant. The complainant did not contradict himself despite being subjected to vigorous cross-examination, this evidence was to a large extent corroborated by his mother.

SENTENCE

38. In *S v Boggards* 2013 (1) SACR 1 (CC) at para 41, the Constitutional court when reaffirming the principle that sentencing ordinarily is within the discretion of the trial court, stated that;

"An appellate court's power to interfere with sentences imposed by courts below is circumscribed. It can only do so where there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it."

39. The trial court enumerated the appellant's personal circumstances as follows;

39.1. That when the appellant was arrested, he was 29 years of age and at the time of sentence he was 31 years old,

39.2. He has been in custody awaiting finalisation of his trial matter for two and half years as bail was denied,

39.3. He is not married but is the father of two children aged five and two years old respectively,

39.4. He grew up without a father figure in his life and was raised by his mother on her own. His father is unknown to him and,

39.5. He obtained grade 12 in 2014. and he has been temporarily employed since that time.

40. Also, in the pre-sentence report used in favour of the appellant, the following is enumerated;

40.1. That he is the third born from a family of five children and was raised by his maternal grandmother as his mother was employed and only come home during month end.

40.2. The appellant's children are born of different mothers, and

40.3. The appellant does not take responsibility of the offence and does not acknowledge guilt or remorse.

41. The pre-sentencing report compiled on behalf of the complainant indicates that since the incident he has developed deviant and violent behaviours towards his siblings. He also assaults his younger siblings, the conduct that he did not display before the rape incident. This aspect was confirmed by the complainant's mother, which necessitated her to change the school of the complainant he was attending. He does not longer trust male persons. The complainant suffered both physical and psychologically because of the offence. He was left traumatised after the incident and has difficulty in sleeping due to the nightmares that he experiences. He could no longer concentrate at school and his schoolwork was affected as he has lost interest in doing his schoolwork.

42. In imposing sentence, the trial court did not find the period the appellant spent in custody awaiting finalisation of his trial matter consisting substantial and circumstantial circumstances. Also, the fact that he is a first offender.

43. It is trite that the period spent in custody is not itself a factor constituting substantial and compelling circumstances, but it must be cumulatively taken into consideration with other factors as it was in our view, correctly stated in *S v Ngcobo* 2018 (1) SACR 479 (SCA) were the following was stated:

"The test was not whether on its own that period of detention constituted a substantial and compelling circumstance, but whether the effective sentence proposed was proportionate to the crime or crimes committed; whether the sentence in all the circumstances, including the period spent in detention prior to conviction and sentencing, was a just one."

Furthermore;

"The period in detention pre-sentencing is but one of the factors that should be taken into account in determining whether the effective period of imprisonment to be imposed is justified."

44. The complainant suffered abuse at the hands of the person who was supposed to have protected him at a young age in his life. The complainant had trust on the appellant and his mother, hence when the request was made by the appellant that he sleeps at his place, they did not object to such. Despite the trial court's pronouncements on his guilt, the appellant refused to take responsibility of his actions and denied raping the complainant. This is indicative of the fact that the appellant is not a suitable candidate for rehabilitation. In the result the trial court cannot be faulted on its findings and the sentence need not be interfered with.

ORDER

45. In the result, the following order is made;

1. Appeal against both conviction and sentence is hereby refused.

MJ MOSOPA

JUDGE OF THE HIGH COURT,

PRETORIA

I agree

P PHAHLANE

APPEARANCES:

FOR THE APPELLANT : MS MMP MASETE

INSTRUCTED BY

: LEGAL-AID SOUTH AFRICA

FOR THE RESPONDENT : ADVOCATE GJC MARITZ

INSTRUCTED BY

: THE DIRECTOR OF PUBLIC PROSECUTIONS

Date of Hearing: 21 January 2025

Date of Judgment:

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