

SOUTH AFRICA / JUDGMENT

Nkosi v S (A400/2019) [2020] ZAGPPHC 655 (6 November 2020)

[2020] ZAGPPHC 655

COURT

North Gauteng High Court, Pretoria

BEFORE

Mokose, Lenyai

CASE / FILE NUMBER

A400/2019

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

REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

(1)

REPORTABLE:

NO

(2)

OF

INTEREST TO OTHER JUDGES: NO

(3)

REVISED

6

November 2020

CASE NO: A400/2019

In

the matter between: MADODA
 STEVEN
 NKOSI
 Appellant
 And
 THE
 STATE
 Respondent

JUDGMENT

MOKOSE J

- [1] The appellant was charged in the Regional Division of Gauteng sitting at Duduza with multiple counts of rape in contravention of Section 3 of Act 32 of 2007 read with the provisions of Section 51 of Act 105 of 1997 and one count of kidnapping. The appellant pleaded not guilty but was found guilty of multiple acts of rape and one count of kidnapping.
- [2] The appellant was sentenced to life imprisonment on the rape count and 5 years' imprisonment for kidnapping which sentence was ordered to run concurrently with the sentence in respect of rape. Furthermore, the appellant was declared unfit to possess a firearm.
- [3] On an automatic right of appeal in terms of Section 10 of the Judicial Matters Amendment Act 42 of 2013, the appellant appealed against both conviction and sentence. The appellant appealed on the grounds that the State failed to prove beyond a reasonable doubt that the complainant was raped by the appellant. The appellant furthermore submits that the Magistrate misdirected himself in finding that the appellant raped the complainant multiple times in that the State had failed to prove that in every subsequent act of penetration, the first and/or initial act of rape had been completed by the appellant and that the latter formulate d a new intention to rape the complainant again.
- [4] The charges arise from an incident on the morning of 5 November 2017 when the appellant encountered the complainant. Ms F[....] G[....] K[....] walking alone in the Street, on her way home. The complainant's evidence is that the appellant asked her why she was crying and offered to walk her home. She explained that she had argued with her brother and decided to go back home. As they walked, the appellant hit her with a blow that caused her to fall to the ground. The appellant then pulled her pants down and inserted his penis into her vagina without her consent.
- [5] A J88 form was handed in to court and its contents were admitted by the defendant in terms of Section 220 of the CPA.
- [6] The appellant submits that the State failed to prove that the appellant raped the complainant multiple times on the grounds that:

- (i) the evidence of the complainant on the number of rapes or penetrations is improbable;
 - (ii) it is improbable that the doctor who examined the complainant would have noticed serious injuries if she was assaulted as described in the evidence;
 - (iii) it is improbable that the appellant would repeatedly rape the complainant in the areas in which alleges in the open and in the middle of a residential area with motor vehicles passing by;
 - (iv) the complainant contradicted herself that she was raped by the appellant; and
 - (v) the complainant was not sober at the time of the incident which negatively affected her recollection of incident.
- [7] The appellant's case is that he found the complainant at Pinky's Tavern, crying. He asked her what the problem was to which she explained that she had been in an argument with her brother, whom he knew. He promised to speak to her brother. They then left the tavern together and went to his grandmother's house where Nkosana Zwane and Andrea Keni were sleeping. He testified that he went to the toilet and left the complainant sitting on the bed. He testified further that he had consensual sexual intercourse with the complainant in the presence of Nkosana Zwane and Andrea Keni.
- [8] The appellant testified further that in the morning, the complainant requested him to assault her brother but he refused to carry out such assault. In cross-examination, he persisted that the sexual intercourse was consensual.
- [9] It is trite law that the onus of proof rests with the State to prove the guilt of an accused beyond reasonable doubt. It is not for the appellant to rebut an inference of guilt by providing an explanation. If the appellant's version is only reasonably possibly true he would be entitled to be acquitted. The Court a quo referred to the matter of *Shackle v S*[1] where the court said the following:

"The court does not have to be convinced that every detail of an accused's version is true, if the accused's version is reasonably possibly true, in substance, the Court must decide the matter on acceptance of that version. Of course it is permissible to test the accused's version against the inherent probabilities; but it cannot be rejected merely because it is improbable.

It can only be rejected on the basis of inherent probabilities if it can be said that it will be so improbable that it cannot be reasonably possibly true,"

[10] Heher AJA in the matter of *S v Chabalala*[2] said:

"The correct approach is to weigh up all the elements which points 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 to the accused's guilt. The result may prove that one scrap of evidence or one defect in the case for either party (such as failure to call a material witness concerning an

Identity parade} was decisive but that can only be on an ex post facto determination and a trial court (and counsel} should avoid the temptation to latch onto one (apparently) obvious aspect without assessing it in the context of the full picture in evidence."

[11] The complainant's evidence called for a cautionary approach as a single witness in some aspects of the alleged rape. Guidelines were enunciated in the matter of *s v Sauls*[3] where the court said:

"There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of a single witness...the trial judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether despite the fact that there are shortcomings or defects or contradictions in his testimony, he is satisfied that the truth has been told. The cautionary rule may be a guide to a right decision but it does not mean that the appeal should succeed if any criticism, however slender, of the witnesses' evidence were well founded....It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense."

[12] The appellant testified in his own defence and called no witnesses. He submitted that the court a quo had no reason to reject his version which is reasonably possibly true and as such, is entitled to an acquittal. The appellant was of the view that the Magistrate misdirected himself in finding that he had raped the complainant multiple times as the State had failed to prove that in every subsequent act of penetration, the initial act of rape was completed and that a new intention to rape had been formulated.

[14] The complainant's evidence was that of a single witness. As such, the cautionary rule applicable to evaluation of single witness evidence was applicable and taken into consideration by the Magistrate who carefully evaluated the body of evidence before the court and found that the complainant was a reliable witness. Furthermore, Nthabeleng Andrea Keni, the State witness, corroborated the complainant's version that what happened at the house on the arrival of the appellant and the complainant was not consensual.

[15] I am of the view that there were no material contradictions in the evidence of the State. The evidence of the State witnesses corroborated that of the complainant. In consideration of all the evidence, it is evident that the appellant's submissions were clearly false and fabricated and clearly evidence that the court could not rely upon. In view of the evidence presented, this court is of the view that it will not interfere with the credibility findings of the court a quo and accordingly dismisses the appeal against the conviction.

[16] The J88 was presented to court and admitted into evidence. The medical history was reported therein as "rape many times by unknown male without a condom....". The findings and conclusion were "soft tissue injuries consistent with the history given above with signs of strangulation". The appellant admitted having sexual intercourse with the complainant but said it was consensual. These facts are not uncommon in rape cases. The question often posed is whether the several acts should count for one or more convictions of rape.

- [17] It is trite that each case must be evaluated and judged on its own facts. As a general rule, the more closely connected the separate acts of penetration are in terms of time and place, the less likely a court will find that a series of separate rapes has occurred. Where an accused has ejaculated and has withdrawn his penis from the complainant but again penetrates her, it was inferred that the accused formed another intention to rape the accused, even if the second rape took place soon after the first and in the same place.[4]
- [18] I am satisfied that the appellant raped the complainant. The question is whether the court a quo correctly convicted the appellant of multiple rapes. In evidence the complainant testified to five instances when the appellant raped her and at different places and different times. I am satisfied that they were different acts of rape with different intent to rape. Accordingly, I am of the view that the Magistrate did not misdirect himself in respect of the repeated acts of rape. The appeal on conviction therefore falls to be dismissed.
- [19] The appellant also appeals against the sentence imposed by the court a quo. The ground of appeal against sentence is premised on the court a quo's failure to find substantial and compelling circumstances to deviate from the mandatory sentence of life imprisonment.
- [20] It is trite law that sentence is pre-eminently at the discretion of the trial court. The court of appeal may Interfere with the sentencing discretion of the trial court if such discretion had not been judicially exercised. The test which has been enunciated in numerous cases is whether the sentence Imposed by the trial court is shockingly inappropriate or was violated by misdirection. The trial court considers for the purposes of sentence, the following :
- (i) The seriousness of the case,
 - (ii) The personal circumstances of the Appellant;
 - (iii) The interests of society.
- [21] The provisions of Section 51(1) of Act 105 read with Part 1 of Schedule 2 of the Criminal Law Amendment Act 51 of 1977 were explained to the Appellant prior to him pleading to the charges. The section states that an offender shall be sentenced to imprisonment as per the minimum sentence unless there are compelling and substantial reasons to deviate from the prescribed minimum sentence. The specified sentences are not to be departed from for flimsy reasons and must be respected at all times.

S v Matyityi[5]

- [22] There is no definition of what constitutes compelling and substantial reasons. The court must consider all the facts of the case In determining whether compelling and substantial circumstances exist. To arrive at an equitable sentence, this court is enjoined to weigh the personal circumstances of the accused against the aggravating factors, In particular, the Interests of the society, the prevalence of the crime, and its nature and serio usness.

[23] In mitigation of sentence, the following personal circumstances of the appellant were placed before the court a quo:

- (i) he was a first offender aged 26 years;
- (ii) he was single with two minor children aged 9 and 11 years' old respectively;
- (iii) he dropped out of school at Grade 11 having fared poorly academically;
- (iv) he had spent 11 months in custody awaiting trial.

[24] Given the seriousness of the crime as well as the mitigating circumstances which were taken into consideration by the Magistrate In the court a quo, I am of the opinion that the Magistrate did not err in sentencing the Appellant. There were no substantial and compelling reasons to sentence the Appellant to a lesser sentence than that prescribed by the provisions of Section 51(1) of Act 105 read with Part 1 of Schedule 2 of the Criminal law Amendment Act 51 of 1977 nor is there any evidence of the discretion of the Magistrate having been incorrectly exercised .

ORDER

[25] In the premises, the following order is made:

- (i) the appeal against the conviction is dismissed;
- (ii) the appeal against sentence is accordingly dismissed.

Judge of the High Court of

South Africa

Gauteng Division, Pretoria

I agree and is so ordered

LENYAI AJ

Acting Judge of the High Court

of South Africa

Gauteng Division,

Pretoria

For the Appellant:

Adv JL Kgokane instructed by

Legal Aid South Africa

For the State:

Adv L Williams instructed by

The Office of the Director of Public Prosecutions

Date of hearing: 7 October 2020

Date of judgement: 6 November 2020

[1] 2001(1) SACR 279 (SCA) at 288 E - F

[2] 2003 (1) SACR 134 (SCA) at page 140 A-B

[3] 1981 (3) SA In (A

[4] S v Blaauw 1999 (2) SACR 295 (W) at 299 C - D and 300 C - D

[5] 2011 (1) SACR 40 (SCA) at page 53 E - F

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/ZAGPPHC/2020/655.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/nkosi-v-s-unknown-topic-agpphc-2020>

Prepared on 9 October 2026 · Esheria