

SOUTH AFRICA / JUDGMENT

Nyathi and Another v S (A133/2020)

[2024] ZAGPPHC 121 (6 February 2024)

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COURT

North Gauteng High Court, Pretoria

BEFORE

L Coetzee, Van der Westhuizen

CASE / FILE NUMBER

A133/2020

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IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA

Appeal Case Number:

A133/2020

(1)

REPORTABLE: YES/NO

(2)

OF INTEREST TO OTHERS JUDGES: YES/NO

(3)

REVISED

SIGNATURE

DATE:

2024-02-6

In the matter between : PROFESSOR
ARNOLD NYATHI
1ST APPELLANT
NKOSIYAZI
MLALAZI
2ND APPELLANT
and
THE
STATE
RESPONDENT

JUDGMENT

COETZEE AJ (Van der Westhuizen, J concurring)

INTRODUCTION:

[1] The First and Second Appellant's, who were legally represented during trial proceedings, were convicted on two counts of rape, robbery with aggravating circumstances, and contravening the provisions of section 49(1)(a) of the Immigration Act 13 of 2002, as both the First and Second Appellant were illegally in the country. The Appellants were sentenced by the Pretoria Regional Court on 28 November 2019 to life in prisonment on two counts of rape, respectively, 15 years imprisonment for robbery with aggravating

circumstances and one year imprisonment, wholly suspended for five years on condition that the accused is not found guilty again of contravening section 49(1)(a) of at 13 of 2000 committed during the time suspension, for count 4.

[2] The Appellants are now exercising their right to an automatic appeal in terms of section 309 of the Criminal Procedure Act.[1]

[3] The charges and conviction of the Appellants stem from an incident at a local tavern at or near in Pretoria when the First and Second Appellants unlawfully and intentionally committed an act of sexual penetration with the complainant, T[...] B[...], 34 years old. In the furtherance of a common purpose of assaulting her, they also took an amount of R210.00 from her in aggravating circumstances, being that a fire arm was wielded during the incident.

ISSUES

TO BE DETERMINED:

[4] The issues to be determined are the following:

[4.1] Whether the First Appellant was reliably identified as one of the perpetrators who committed the rape based on the evidence of a single witness.

[4.2] Regarding the Second Appellant, the key matter for adjudication is the credibility of his claim that he was not a willing participant in the events of the rape and the robbery and that he acted under duress when having sexual intercourse with the complainant.

[4.3] Whether the trial court erred in finding that there were no substantial and compelling circumstances to deviate from the prescribed minimum sentences.

CONVICTION:

[5] The State led the evidence of the complainant, who testified that the incident occurred at a local tavern at or near Olievenhoutbosch in Pretoria, where she was selling chips. In the early hours of the 11th of October 2014, at about 23:30, a group of 12 to 14 armed individuals entered the tavern, ordered everyone to lie down, and proceeded to search the patrons for money and valuables, including the complainant. At one point, the complainant was searched and then taken from the tavern by two armed individuals. The complainant identified these individuals as the First and Second Appellant. She asserted that the First Appellant handed a firearm to the Second Appellant, who then brandished the firearm while the First Appellant raped her. Subsequently, the First appellant took control of the firearm, while the Second

Appellant raped her. The complainant testified that she had R210 in her pants that were taken from her when she was searched in the tavern. She further testified that on the 26th of March 2015, she participated in an identification parade and was able to identify the First and Second Appellants. She pointed out the First Appellant due to a small scar below his right eye, and she recognized the Second Appellant as the youngest amount the robbers. She stated that even though the incident occurred at night, she concentrated on the Appellants' faces during their interaction, and she believed she could accurately describe them if asked.

[6] The evidence of Meromokoti Frank Sithleko, a member of the South African Police Services with the rank of Warrant Officer, confirmed that on the 22nd of October 2014, while on duty, the complainant approached him and indicated that she could identify the person who had raped her by a mark on the right side of his face. Subsequently, he approached the identified individual, arrested him, and took him to the police station. On the same day, the complainant was also taken to the police station, and she identified the arrested person as the First Appellant.

[7] Captain Regina Makhura, who is stationed at the forensic lab in the South African Police Service, indicated that they discovered the DNA of the Second Appellant in the swab taken from the complainant. She clarified that DNA is found exclusively in sperm and not in semen and also confirmed that not all semen contains sperm.

[8] The last witness of the state, Matsobane Edward Sebothoma, also a member of the South African Police Service, confirmed that he accompanied the complainant to Tembisa on the 22nd of October 2014 where the complainant pointed out the Second Appellant and he was subsequently arrested.

- [9] The First Appellant testified in his own defense. He attempted to refute the charges by providing an alibi, claiming that he was with his pregnant girlfriend at the time of the incident on the 11th of October 2014. He acknowledged the presence of a scar on his face, which he has had since the 16th of June 2013. Moreover, he confirmed that he is acquainted with the Second Appellant as they reside in the same yard. It must be noted that when the First Appellant was arrested, he never mentioned or made any statement regarding his alibi. He closed his case without calling any witnesses.
- [10] The Second Appellant admitted to engaging in sexual intercourse with the complainant. He claimed that three individuals, armed with firearms, coerced him into this act. One of these individuals, Bongani, was involved in coercion but he tragically took his own life in 2018. The Second Appellant did not provide any details regarding the other individuals involved in the alleged coercion. Similarly, he also never mentioned the alleged coercion when he was arrested and furthermore, he chose not to provide any plea explanation.
- [11] Over the years, our courts have emphasised the principles which should guide a court of appeal in an appeal purely on facts. These were articulated by the Appellate Division in *R v Dhlumayo & Another*[2] when it held that:

"The trial court has advantages which the appellate court cannot have - in seeing and hearing the witnesses and in being steeped in the atmosphere of the trial. Not only has the trial court had the opportunity of observing their demeanour, but also their appearance and whole personality. This should never be overlooked. The mere fact that the trial court has not commented on the demeanour of the witnesses can hardly ever place the appeal court in as good a position as it was. Even in drawing inferences the trial court may be in a better position than the appellate court, in that it may be more able to estimate what is probable or improbable in relation to the particular people whom it has observed at the trial... The appellate court should not seek anxiously to discover reasons adverse to the conclusions of the trial court.... Where the appellate court is constrained to decide the case purely on the record, the question of onus becomes all-important. In order to succeed, the appellant has to satisfy an appellate court

that there has been 'some miscarriage of justice or violation of some principle of law or procedure'.

- [12] It is trite law that a court of appeal will not interfere with the trial court's decision unless it finds that the trial court misdirected itself in regard to its findings or the law. To succeed on appeal, the Appellants need to convince this court on adequate grounds that the trial court misdirected itself in accepting the evidence of the State and rejecting their version as not being reasonably possibly true. In the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong.[3]
- [13] In order to determine whether the accused's version is reasonably possibly true, the Supreme Court of Appeal in *S v Trainor*[4] stated that:

“A Conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence, as maybe found to be false. Independently verifiable evidence, if any should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable, the quality of that evidence must be of necessity, be evaluated, as must corroborative

evidence, if any. Evidence of course, must be evaluated against the onus of any particular issue or in respect of the case in its entirety”.

- [14] Thus, in assessing whether the trial court was correct in its determination, the evidence presented by the State must be weighed against that of the First and Second Appellant, to ascertain if their version could be deemed reasonably possibly true. Importantly, this assessment cannot occur in isolation; instead, the court must consider the entirety of the evidence before arriving at a decision.
- [15] The trial court, considering the evidence of a single witness, determined that the complainant left a strong impression. Her testimony was satisfactory, and she responded to all questions posed by both the state and the defence. The trial court was convinced that she came to court with the intention of being truthful and indeed demonstrated this during her testimony. She was further very specific with her evidence. As a result, the court deemed her a credible witness and accepted her evidence. Section 208 of the Criminal Procedure Act 51 of 1977 states clearly that “an accused person may be convicted of any offence on the single evidence of any competent witness”. The trial court, being mindful of the cautionary rule, deemed the complainant’s evidence satisfactory in all respects. It is evident from the record that the trial court diligently evaluated the evidence before it and referenced various case law dealing with the evidence of a single witness.
- [16] On the other hand, the court concluded that neither the First nor the Second Appellant left a favorable impression.
- [17] When assessing the evidence, the contradictions among the various witnesses must also be considered. In the trial there were conflicting accounts regarding the circumstances of the First Appellant’s arrest. The complainant stated that she was not involved in the First Appellant’s arrest and only identified him at the police station after he was arrested. However, Warrant Officer Sithleko provided a detailed account of how the complainant flagged him down while he was on patrol to point out the First Appellant, after which he was arrested. Furthermore, the complainant also provided different accounts regarding the source of light present at the time of the incident. Initially, she testified that there was light coming from the toilet, the landlord’s house, and neighboring houses. These lights would have emanated from inside these structures. However, it later transpired that the lights in the toilets were off. Concerning the landlord’s house, she could not confirm whether the curtains were open as the windows were situated too high for her to see. It was

eventually revealed that the windows were small and would not have allowed much light to escape.

- [18] After considering the entirety of the evidence before the court, the contradictions mentioned above are inconsequential. It is important to bear in mind that there has been a passing of approximately two years from the time of the incident to when the evidence was presented in court.
- [19] After having read the transcript and carefully considering all the circumstances of this case, I find no fault with the trial court's assessment of the witnesses' evidence. The trial court had the advantage of observing the witnesses' evidence. The trial court had the advantage of observing the witnesses testify and their reactions during cross-examination, an advantage not available to this court as a court of appeal. In the absence of any misdirection by the trial court, this court declines to interfere with its findings.

SENTENCING:

- [20] On behalf of the First Appellant it was argued that the trial court misdirected in failing to find significant and compelling reasons to depart from the minimum prescribed sentence of life imprisonment. The First Appellant, aged 25 at the time of sentencing, became a father while in prison. His relationship with the child's mother ended following his arrest. He had a challenging upbringing and came to South Africa from Zimbabwe in pursuit of a better life. Furthermore, he had no prior criminal record. It was contended that the absence of physical injuries to the complainant and the potential for rehabilitation constituted significant and compelling factors to deviate from the prescribed minimum sentence.
- [21] On behalf of the Second Appellant it was argued that he was 23 years old when sentenced, having been 18 at the time of the offences. He was unmarried and without children, similarly, coming to South Africa in pursuit of a better life due to challenging circumstances in Zimbabwe. Also, a first-time offender, it was contended that substantial and compelling factors existed, including his youth, as corroborated by the complainant's testimony regarding his comparatively youthful age within the group, suggesting potential influence from others. Moreover, his clean record and extended time spent in custody awaiting trial, approximately five years, were emphasized as deserving consideration as significant circumstances.
- [22] Counsel on behalf of the State contended that the trial court duly considered the factors normally considered for the purposes of sentence. Furthermore, it was asserted that no significant and compelling reasons were presented to warrant deviation from the prescribed minimum sentence. Counsel emphasized that there is only one potential mitigating factor, the extended period of five years awaiting trial. Counsel, however, contended that the delay was not attributable to the fault of the State.
- [23] In the matter of *S v Malgas*[5] the following was emphasised:

“If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.”

- [24] It is evident from the Malgas matter that the court should not lightly impose a sentence lower than the prescribed minimum sentence. In line with the criteria outline in Malgas, it is apparent that a comprehensive analysis of the mitigating and aggravating factors is essential to determine the presence of substantial and compelling circumstances.
- [25] With regard to the First Appellant, I find no significant and compelling circumstances in either his personal background or the potential for rehabilitation. I do not consider the lack of physical injuries to the complainant as a mitigation factor. The nature for the First Appellant’s crime, in my assessment, is callous and likely to inflict lasting emotional harm upon her, despite the absence of physical injuries.
- [26] As for the Second Appellant, I similarly find no substantial and compelling circumstances. Merely being of a young age is not adequate to be considered a mitigating factor. Additionally, the Second Appellant appears to have no remorse for his actions.
- [27] The only further consideration is the prolonged duration of the First and Appellant’s time spent awaiting trial, which was approximately 5 years. It is undeniable that this prolonged period is excessive in waiting for a matter to reach conclusion. It appears from the record, that all parties, including the First and Second Appellant, contributed to the delay. The trial was postponed a number of times, particularly due to the intended testimony for the First Appellant’s alibi witness, which ultimately did not materialize. The Second Appellant also added to the delay by providing conflicting instructions to his attorney, notably concerning his guilty plea on count 4 and subsequently his section 220 admissions. Furthermore, it appears that the Second Appellant also changed legal representation multiple times, leading to further postponements.
- [28] Based on the aforementioned circumstances, the court finds no reason to antedate the sentences of the First and Second Appellant, as provided for in section 282 of the Criminal Procedure Act, 51 of
1977. On consideration of the sentences imposed, the court finds that there was no misdirection on the part of the trial court.

The sentences were also not disturbingly inappropriate given the circumstances. As such, the appeal against the sentence is unsuccessful.

As a result, the following order is made:

ORDER:

The appeal of both the First and Second Appellant on conviction and sentence is dismissed.

L. COETZEE

ACTING JUDGE OF THE HIGH COURT

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be the 6th of February 2024.

APPEARANCES:

On behalf of Appellants: Mr. H.L. Alberts Instructed by: Pretoria Justice Centre On behalf of Respondent: Adv MM Shivuri Instructed by: The Director of Public Prosecutions Date of Hearing: 26 October 2023

Judgment

handed down: 06 February 2024

[1] Section 309(1) provides that if that person was sentenced to life imprisonment by the Regional Court under section 51(1) of the Criminal Law Amendment Act, 1997 (Act 105 of 1997), he or she may note such an appeal without having to apply for leave in terms of section 309-B.

[1] Section

309(1) provides that if that person was sentenced to life imprisonment by the Regional Court under section 51(1) of the Criminal Law Amendment Act, 1997 (Act 105 of 1997), he or she may note such an appeal without having to apply for leave in terms of section 309-B.

[2] 1948 (2) SA 677 (A) at 705-706.

[3] S v Hadebe and Others 1997 (2) SACR 641 (SCA) at 645 e-f. See also: S v Monyane and Others 2008 (1) SACR 543 (SCA) at par. 15; S v Francis 1991 (1) SACR 198 (A) at 204e.

[4] 2003 (1) SACR 35 (SCA) at par. 8.

[5] 2001 (1) SACR 469 (SCA).

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