

SOUTH AFRICA / JUDGMENT

Phori v S (A30/2022) [2024] ZALMPPHC 26 (13 March 2024)

[2024] ZALMPPHC 26

COURT

Limpopo High Court, Polokwane

BEFORE

Semanya, Manzini

CASE / FILE NUMBER

A30/2022

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA;

LIMPOPO

DIVISION; POLOKWANE.

CASE NO: A30/2022

(1)

REPORTABLE: YES

(2)

(2)

OF INTEREST TO THE JUDGES: YES

(3)

REVISED.

DATE:

13 March 2024

DJP SEMENYA

SIGNATURE:

In

the matter between: DONALD
SOPHONIA PHORI : APPELLANT
And
THE
STATE
: RESPONDENT

JUDGMENT

HEARD ON: 24 NOVEMBER 2023

CORAM: SEMENYA AJP AND MANZINI AJ

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email and publication and release to SAFLII. The date and time for hand-down is deemed to be 13 March 2024 at 16:00.

SEMENYA AJP:

[1] The appellant was convicted in the Sekhukhune Regional Court on two counts of rape in contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (Sexual Offences Act). He was sentenced to life imprisonment in accordance with the provisions of section 51 (1) of the Criminal Law Amendment Act 105 of 1997 (Act 105 of 1997). The appeal is against both conviction and sentence imposed by the trial court.

[2] The evidence that led to the conviction of the appellant is as follows:

The complainant testified that on the 26 July 2008, she and her cousin, E[...], went to a certain house at Ga-Moloyi to see people who had returned from the circumcision school (initiates). Those initiates did not stay long at that house as they had to go to the appellant's sister's house which is situated at Mogalakwena for celebrations. The appellant, whom the complainant and her sister were seeing for the first time, was among those who were travelling with the initiates. The complainant and her sister decided to join the group and to go and celebrate the return of the initiates at Mogalakwena.

[3] At about 19:00 she, Portia and Oscar decided to go to a tavern where drinks were sold. She realised that the appellant was walking behind them on their way to that place. When the complainant saw that none of them was buying cooldrink, she suggested that they should return to the appellant's sister's house. As they were leaving the tavern, the appellant followed them and told Portia and Oscar to go away. Portia stopped at a distance and told the complainant to go and sleep with them at a certain house. The complainant refused because there was no older person at that place and also because she wanted to go back to the place that she had visited.

- [4] Instead of proceeding back to the party, the appellant grabbed her hand and dragged her to the mountain and threatened to kill her if she screams. He looked angry as he was swearing at her. Upon their arrival at the mountain, the appellant ordered her to undress. He strangled her when she refused to do so. She only undressed her pants when she was beginning to find it difficult to breathe. The appellant throttled her again to force her to take off her panties as well, which she ultimately did. He continued to throttle her for the third time and forced her to lie down. He climbed on top of her and throttled her again when she refused to open her legs. He then proceeded to rape her.
- [5] After the act of sexual penetration they stood up, put on their clothes and walked away for a short distance. The complainant tripped and she fell on top a thorny tree and injured herself in an attempt to run away. The appellant caught up with her and ordered her to undress again. She refused. He throttled her again and forced her to undress. He raped her for the second time at that spot.
- [6] The two proceeded back to the appellant's sister's house where they found the appellant's wife and the complainant's

cousin sleeping in the same room. They joined them. In the morning, the appellant's wife saw the scratches on her body.

She wanted to know about the cause of those scratches. The complainant told her that her husband raped her. The appellant's

wife proceeded to where the appellant was seated and confronted him about the information she received from the complainant. She

overheard the appellant's wife telling him that she had warned him to desist from continuing with his deeds. Elsie was within

earshot when she was reporting to the appellant's wife.

- [7] The complainant was cross-examined at length by the appellant's legal representative. She denied that she refused to leave with Portia because she had agreed with the appellant that they will go to the mountain to have sexual intercourse. She also denied that it is for the same reason that she did not scream when the appellant was raping her. She maintained that she did not do so because the appellant had threatened to kill her. When it was put to her that to show that she was in a love relationship with the appellant, the two took photos closely together at the appellant's sister's place, she stated that there was a time when the guests were asked to shoot photographs with the initiates. She joined the others but she denied that she was intimately closer to the appellant as suggested.
- [8] Dr Nomsa Jaqueline Mogasetse examined the complainant at St Ritas hospital a day after the date of the incident. She recorded her observations on medical report commonly known as form J88 which was admitted as evidence. She noted that the complainant had abrasions on her spine, on her left arm posteriorly as well as superficial abrasions on the left leg

anteriorly and below her knee. The complainant told her that her last consensual sexual intercourse was in May that year. Her hymen was not intact. There was a foul smell coming from her genitalia. When asked for her opinion with regard to the absence of injuries on the complainant's genitals, the doctor stated that absence of injuries on the complainant's genitals do not necessarily exclude rape.

- [9] E[...] M[...], the complainant's cousin, confirmed that she was with the complainant on the date of the incident and that they went together to Mogalakwena. She saw the complainant leaving with Portia and Oscar. She remained behind and later went to sleep in the same room with the appellant's wife. The appellant and the complainant returned during the course of the night and found them sleeping. In the morning the appellant's wife came to where she and the complainant were seated and asked her about what she had been up to did the previous night. The complainant cried and said the appellant dragged her to the bush the previous night and raped her there. The appellant's wife yelled at the appellant saying she is leaving him because it was not the first time for him to do that. She stated that she could see that the complainant was injured and bleeding from her legs and elbows.
- [10] At the close of the State case the appellant testified and confirmed that he was at a party at his sister's place on the date of the incident. His version is that he and the complainant agreed to be in a love relationship from that day. They also agreed that they will engage in an act of sexual intercourse so that she can convince him that she loves him. Late in the afternoon the complainant, Portia and Oscar decided to go and buy soft drinks at a certain tavern. Oscar came to him and said the complainant says he, the appellant, should go with them to the shop. They proceeded to Maphanga's place where he bought liquor that he shared with the complainant and Portia, with the complainant sitting on his lap at all times.
- [11] When they were about to leave, he told the complainant that they cannot go and sleep at his mother's house because he is married. He further told her that they cannot go and sleep at his sister's house where there was a party because his wife was also at the party. They agreed to go to a mountain where they engaged in acts of sexual intercourse. Portia and Oscar walked with them but decided to go back to Maphanga's place before they could reach the mountain. He testified that the two acts of sexual penetration took place with the complainant's consent.
- [12] According to the appellant, the complainant freely and voluntarily walked with him to the mountain. He neither, throttled her, dragged her nor threatened to kill her. In support of his version, the appellant stated that they came across ten boys on their way back to his sister's place and the complainant could have alerted them if it was true that she was raped. Upon their arrival there they slept in the same room with his wife and E[...]. He heard for the first time in court that his wife confronted the complainant in the morning.
- [13] It appears from the judgment of the trial court that the appellant called Oscar as his witness, although his evidence is missing from the transcribed record. According to the summary of the evidence of the trial court, Oscar testified that the appellant and the complainant were in

a love relationship because he saw them talking. He also saw the complainant sitting on the appellant's lap during photo shooting. He confirmed the appellant's version that it is the complainant who sent him to go and call the appellant so that he can accompany them to the tavern. He also confirmed that the complainant refused to go and sleep at Portia's place when the latter invited her because she preferred to go back to the ceremony with the appellant.

- [14] Counsel for the appellant submitted heads of argument in which he criticises the manner in which the judgment of the trial court is written. He contends that the regional magistrate simply repeated the evidence before him without evaluating it as required. He further argues that the learned regional magistrate applied the cautionary rule incorrectly with regard to single evidence of the complainant. I agree with counsel for the appellant that the judgment is poorly written and further that the regional magistrate appears to have a poor command of the English language.
- [15] It appears from the record of the proceedings in the trial court that the learned regional magistrate was of the view that courts are required to be "very [very] careful" in their application of the cautionary rule. This statement loses sight of the importance of the well-established principle of precedent. In *S v Sauls and Others*[1], the court stated that what is expected of the trial court is to weigh the evidence of a single witness, to consider its merits and demerits and to decide whether the testimony is trustworthy and that, despite the shortcomings, defects or contradictions in the witness' testimony, is satisfied that the truth has been told. In *S v Artman and Another*[2] the court said 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." It follows from these cases that it is not a requirement, as the trial court has stated, that the court has to be "very very careful" in its evaluation of the evidence of a single witness. Counsel for the appellant's submission that the trial court erroneously applied the test has merit.
- [16] Counsel for the appellant argues further that the trial court failed to appreciate that the burden of proof was on the State and that the appellant had no duty to prove his innocence. Counsel's contention arises from a passage in the judgment of the trial court where the following was stated:

"Keeping in mind that the burden of proof is on the State, the Court has to make sure that the truth comes out in the totality of the evidence."

Counsel for the appellant argued that the implication of the words used by the trial court is that an accused person is required to assist the State in proving its case against him.

[17] I fail to find any justification in the criticism levelled against the statement made by the trial court as quoted above. This statement is simply a shortened version of the principle laid down in *S v van der Meyden*[3] where it was stated that:

“The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the

logical corollary is that he must be acquitted if it is reasonable possible that he might be innocent. The process of reasoning which is appropriate to the application of the test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none must be simply ignored.”

Although the trial court did not use the exact words as they were used in *Meyden* above, there can be no interpretation other than that the court meant that it must consider the evidence presented before it by the State and by the appellant in order to arrive at a conclusion as to whether the appellant is guilty or innocent.

[18] Counsel for the appellant argues that the trial court erred in finding that the evidence of the complainant is reliable, trustworthy

and credible. Counsel contends that the complainant failed to inform the doctor that the appellant throttled her on more than one

occasion. Further that the doctor did not observe any visible injuries on the complainant's neck. The complainant testified

that she did not sustain visible injuries on the neck, she only felt pain. She further said that she did not think of telling the doctor about the pain because she was still confused. It follows that there is no way the doctor could have seen injuries on the neck, as there was none to see. The only injuries seen by the doctor were those that she has noted on form J88. I find that the submissions made by counsel for the appellant that the trial court ought to have found that the complainant was lying on the aspect to be without merit.

[19] Counsel for the appellant contends that the court should have drawn an adverse inference out of the complainant's failure to tell the ten boys that they came across about her plight. The explanation furnished by the complainant is that she was already told that she will be killed if she makes people aware of the situation she was in. Not only that, the appellant had already raped her at that time. A negative inference cannot be drawn out of the fact that she believed that her life was in danger. A reasonable 16 years old faced with similar circumstances would have behaved in the same way.

[20] Counsel for the appellant contends that the trial court should have rejected the version of the complainant because she failed to report to her sister upon her arrival back to the appellant's sister's place. The version of the complainant and that of E[...] is that they were slipping in the same room with the appellant's wife. She further stated that the appellant arrived shortly thereafter and slept with them in the same room. It cannot be said that the threat of harm was remote at that stage. In any event, section 59 of the Sexual Offences Act provides that no adverse inference should be drawn out of the delay in reporting the offence.

[21] The argument that the complainant lied about the rape because the wife was swearing at her is without justification. The evidence

presented before the court by the complainant is that the wife saw the injuries on her and wanted to know what had happened. The

complainant burst into tears and reported that she was raped by the appellant. The question was not why did she engage in acts of sexual penetration with the appellant. The contention that she lied is not supported by any evidence other than the appellant's version. The evidence is that the wife shouted at the appellant saying she has reprimanded him from doing this thing again. The evidence that the wife shouted at the appellant is corroborated by E[...].

[22] The State did not call Portia and Oscar as witnesses. Based on the principle in *S v Teixeira*[4], counsel for the appellant argues that the trial court erred in failing to draw an adverse inference against the State for failing to call these two witnesses. Any prudent prosecutor would not risk the State case by calling a witness who is closely related to the appellant. The evidence before court is that the appellant started to drag the complainant only after they had parted with Portia and Oscar. It is common cause that the complainant is a single witness. This is so in that Oscar and Portia did not witness the dragging and the rape. They could not have taken the State's version further on that aspect. A further common cause evidence is that the appellant, Portia and Oscar were seeing the complainant for the first time on that date. There were many other people at the appellant's sister's house because of the party. The evidence of Oscar that the appellant and the complainant were in a love relationship, simply because he saw them talking to each other and despite the fact that he was seeing her for the first time on that date, leaves much to be desired. A conclusion that a reasonable court can arrive at is that he connived with the appellant to create a false story.

[23] I have agreed with counsel for the appellant that the judgment of the trial court is not well written. However, I find that the evidence presented before that court, with its strengths and weaknesses, points to the guilt of the appellant. The State is not required to close every avenue of escape which may be said to be open to the accused. All it is required to do is to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, will conclude that there exists no reasonable doubt that an accused has committed the crime charged- *R v Mlambo*[5].

[24] The appellant raised consent as a defence. I find that the trial court correctly rejected his version and the defence raised. He testified that met the complainant for the first time on that date. He was 29 and the complainant was 16 years old. The evidence is that they met by coincidence at a place where the initiates were first taken to. The presence of injuries on the body of the complainant is consistent with her unwillingness to engage in acts of sexual intercourse with the appellant. It is highly improbable that the complainant would have willingly subjected herself to an act that inflicted the injuries that she sustained on the date of the incident.

[25] In *S v Blaauw*[6] the court stated that mere and repeated acts of penetration cannot, without more, be equated to repeated and separate acts of rape. In this case the evidence is that the appellant penetrated the complainant for the first time when they arrived at the mountain. He stopped and they put on their clothes. They walked for a short distance. The complainant tripped and fell to the ground. The

appellant penetrated her for the second time. I am satisfied that these are two separate acts of rape. The evidence proves that there were two separate acts of sexual penetration. A conviction on both counts is found to be in order. In line with *R v Dhlumayo*[7] I find no reason to interfere with the trial court's factual findings. The trial court's factual finding is correct. The conviction shall stand.

[26] The appeal court's approach to sentence imposed by the trial court in terms of Act 105 of 1997 as been laid down as follows in *S v PB*[8]:

“[20] What then is the correct approach by a court on appeal against a sentence imposed in terms of the Act? Can the appellate court

interfere with such a sentence imposed by the trial court's exercising its discretion properly, simply because it is not the sentence which it would have imposed or that it finds shocking? The approach to an appeal on sentence imposed in terms of the Act should,

in my view, be different to an approach to other sentences imposed under the ordinary sentencing regime. This, in my view, is so because the minimum sentences to be imposed are ordained by the Act. They cannot be departed from lightly or for flimsy reasons. It follows therefore that a proper enquiry on appeal is whether the facts which were considered by the sentencing court are substantial and compelling or not”

On sentence, the appellant was convicted on an offence that attracts a prescribed minimum sentence of life imprisonment. The offence he was found guilty on falls under Part I of Schedule 2 of the Criminal Law Amendment Act. The evidence proved that he penetrated the complainant more than once. The trial court found that there are no substantial and compelling circumstances that justify imposition of a lesser sentence as envisaged in section 51(3) of this Act. The court had regard to the pre-sentence report presented before it and found that there is sufficient facts before it that justify the sentence of life imprisonment.

- [27] The misdirection on the part of the trial court with regard to the basis for imposing a sentence of life imprisonment cannot be ignored. The court relied on the previous conviction of assault as it appears on SAP 69's. The court regarded this as crucial to the determination of sentence. It appears from the record that the appellant denied this previous conviction. The State sought and was granted a postponement in that it wanted to prove it. However, on the next sitting the prosecutor informed the court that the State no longer intend to lead any evidence to prove the previous conviction. The appellant was to be regarded as a first-time offender. The court repeated on more than one occasion that the previous conviction shows that the appellant is a violent person. This constitutes a misdirection.
- [28] The court further found that the minimum sentence of life imprisonment is applicable in that the appellant raped a person who
- was 16 years of age. As at the date of sentence, that is in 2011, this sentence could be imposed when the victim was below the age of 16 years. The complainant was already 16 years of age when she was raped. Section 51(1) was not applicable due to the complainant's
- age. The court considered the evidence that the complainant is crying whenever she thinks about the offence and that the complainant
- 'apparently sustained injuries as an aggravating factor. I do agree with the court in that regard. The court concluded that there are no substantial and compelling circumstances that justify imposition of a lesser sentence.
- [29] The impact of rape on the victims of such crimes has been succinctly stated in *S v Vilakazi*[9]. Rape is indeed a repulsive crime. It is humiliating and degrading. It also constitutes an invasion of another person's privacy. The court nonetheless took cognisance of the principle laid down in *S v Rabie*[10], as restated in *S v Dodo*[11] that sentence must always be proportionate to the facts of a particular case.
- [30] The fact that the trial court was persuaded to impose the prescribed sentence by wrong facts cannot be ignored. This fact, in my view, constitutes sufficient ground upon which this court, as an appeal court, may interfere with the sentence imposed by that court. In determining the sentence afresh, this court will take into consideration that the appellant was 13 years older than the complainant as at the date of the incident. He penetrated the complainant more than once and cause injuries on her body. I take cognisance of the dictum in *S v Malgas*[12] that where there is deviation from the prescribed minimum sentence, the lesser sentence to be impose must show that the offence has been singled out as one where a heavier sentence is befitting.
- [31] In the result the following order is made:
- i. The conviction on the 2 counts of rape is confirmed;
 - ii. The sentence of life imprisonment is set aside to be replaced by the following:

The appellant is sentenced to 22 years' imprisonment in respect of each count

The sentence is antedated to the 3 March 2011;

iii. In terms of section 280 of the Criminal Procedure Act, it is ordered that the two sentences shall run concurrently.

MV SEMENYA

ACTING JUDGE PRESIDENT OF THE HIGH COURT LIMPOPO DIVISION: POLOKWANE

I agree

LM MANZINI

ACTING JUDGE OF THE HIGH COURT

LIMPOPO DIVISION: POLOKWANE

APPEARANCE:

For the Appellant: Adv. PJC Kriel

Instructed by: BDK Attorneys

For the respondent: Adv. M. Mohale

Instructed by: DPP; Polokwane

Date of hearing: 24 November 2023

Date of delivery: 13 March 2024

[1] 1981 (3) SA 172 (A)

[2] 1968 (3) SA 339 (a) at 341

[3] 1999(2) 79 (W)

[4] 1980 (3) SA 755 (A)

[5] 1957 4 SA 727 A

[6] 1999 (2) SACR 295 (W)

[7] 1948(2) SA 677 (A)

[8] 2013(2) SACR 533 (SCA)

[9] 2009(1) SACR 552 (SCA)

[10] 1975(4) SA 855 (A)

[11] 2001(3) SA 382 (CC)

[12] 2001(1) SACR 469 (SCA)

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