

SOUTH AFRICA / JUDGMENT

# Ramalefeng v S (A46/2021) [2023] ZAMPMHC 19 (26 May 2023)

[2023] ZAMPMHC 19

## COURT

Middelburg High Court, Mpumalanga

## BEFORE

Mankge, Langa

## CASE / FILE NUMBER

A46/2021

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## Source record

IN THE HIGH COURT OF  
SOUTH AFRICA  
MPUMALANGA DIVISION,  
MIDDELBURG LOCAL SEAT

Appeal Case Number: A46/2021

Lower Court number: SH079/2017  
(1) REPORTABLE: NO

## DATE:

SIGNATURE: In

the matter between: KHOTSO  
RAMALEFENG  
APPELLANT  
And  
THE  
STATE  
RESPONDENT

## JUDGMENT

Mankge J:

### Introduction

- [1] On 19 May 2021 the appellant was convicted of 7 out of 8 counts that he had been initially charged with. On count number 8 relating to Immigration Act 13 of 2002 the appellant was acquitted. He was convicted of one count of Kidnapping, four counts of Rape, one count of Assault with intent to do grievous bodily harm and one count of Housebreaking with intent to rob and robbery with aggravating circumstances.
- [2] The State's allegation on the kidnapping charge was that he forcefully took the complainant from her friends' place and took her to his home, and on the same date he raped the complainant 4 times.
- [3] On the assault the state alleged in the charge sheet that the appellant hit the above-mentioned complainant's associate with a certain object, and the victim lost consciousness as a results of the assault.
- [4] Lastly on a charge of housebreaking the allegations in the charge sheet are that the appellant broke and entered the house which all the complainants were occupying on the night in question and robbed the owner of the items mentioned in count 7.

Facts before the court a quo

- [5] The facts that led to the conviction are briefly that the appellant and another unidentified male broke and entered the house of complainant in count 7. Upon entering the house in question the appellant and his associate struck Mr. Ndlela (the complainant in the assault charge) with an object on his head, and as a result he lost consciousness. They further robbed the occupants of the house of various items which including a pair of Adidas sneakers. The complainant in count 7, (Luyanda), eventually managed to escape to seek help, leaving the complainant in rape charges (Ms. Mtjali) and the complainant in assault charges behind and in the company of the intruders.
- [6] During this ordeal the complainant in the rape charges, (Ms. Mtjali), who hid herself underneath the bed during the break-in, was ordered by the intruders to come out from under the bed. The person who ordered her was identified as the appellant. The appellant thereafter took her to his place without her consent and he kept her there overnight against her will.

The evidence

- [7] The evidence before the trial court established that whilst the appellant was keeping Ms. Mtjali in his house, he continuously had sexual intercourse with her without her consent. The evidence further established that this happened 4 times during that night.
- [8] The evidence in respect of the kidnapping charge is also based on the above evident facts that Ms. Mtjali was taken and kept without her consent by the appellant, a person that she was seeing for the first time on the night in question.
- [9] According to the evidence, the place where she was taken from was dark inside, but the appellant's associate used a cellphone light to illuminate the room. When they were outside that room there was a high mast light which was facing at the direction of the place in question. The Apollo light enabled Ms. Mtjali to see and identify the appellant as they were leaving the place.
- [10] The only witness throughout the trial who managed to identify the appellant was Ms. Mtjali, and throughout her testimony she continuously called the appellant by his name "Khotso".
- [11] The evidence on the four counts of rape, is that the appellant is the one and the only person who had sexual intercourse with Ms. Mtjali without her consent, and that this happened on the same night that she was kidnapped. Ms. Mtjali's testimony was that the appellant raped her without using a condom, and that he would rape her, after ejaculating he would sleep and wake up again after some time and repeat the process of raping her, the process was repeated four times. The appellant would ejaculate and sleep before raping her again.
- [12] The evidence on count 7 is that during the break-in, Mr. Mbilini's (the complainant on housebreaking charge) items were taken. One of the items that were stolen was later identified by the complainant as his Adidas sneakers.
- [13] The evidence also established that subsequent to the appellant's arrest buccal swabs were taken from him by the police. The said swabs and the crime kit examination conducted on the complainant were forwarded to forensic science laboratory. Both samples were analyzed and the appellant was linked to the rape after his DNA was found in the sample that was taken from the complainant.
- [14] The appellant's evidence in the court a quo was a bare denial.

#### Grounds for this appeal

- [15] The Appellant is appealing his conviction and sentence and he ask this court to consider:
- Whether the court correctly evaluated the evidence relating to identity of the appellant in line with the applicable case law;
  - Whether the court a quo correctly evaluated the contradictions contained in the first report as the evidence by the complainant herself;
  - Whether the court correctly accepted the DNA results despite break in the chain of custody;

- Whether the procedure followed by Mr. Booysen at the forensic science laboratory was just and according to the prescribed law;
- Whether the court was correct in sentencing the appellant effective to life imprisonment without appraising the appellant.

### Discussion

- [16] On the evidence of the identity of the appellant, the record reveals that when the trial court considered the evidence of identification, it cautioned itself in an in-depth and impressive manner. The court a quo first appreciated and articulated the fact that the witness has been found to be a credible witness (as it found in the case of the complainant in rape charges and the witness Luyanda her boyfriend), does not automatically mean that such witnesses' identification evidence can safely be accepted.
- [17] The trial court went further to accept the evidence of identification of the appellant, by Ms. Mtjali (who is the only witness who unambiguously committed to the identification evidence and the only witness who later identified the appellant to the police upon his arrest). The court, in accepting her evidence, highlighted that she had ample opportunity to observe the appellant when they were waiting for the bus in the morning. The court further highlighted the identification features of the appellant that Ms. Mtjali placed on record, and from that developed its satisfaction on the evidence of the identification of the appellant by this witness.
- [18] In my view the above conclusions by the court trial court, coupled with its finding on the forensic evidence, purge any criticism by the appellant of the identification evidence. The trial court explains this in the following terms "any doubt, any possibility of a mistake regarding identification on the part of the witnesses is excluded by any doubt by her forensic evidence which places the DNA of the accused \*in the sample that was taken from the victim later that same day". I respectfully agree with this well-reasoned conclusion by the trial court as the DNA evidence obviously also linked the appellant to the rape charges.
- [19] The trial court on identification also alerted itself (correctly so in my view) to the caution given by the Appellate Division in *S v Mthetwa*[1]. I am however also of a mind to mention the following which I find befitting and really concluding on this point of identification evidence. The Appellate Division in *S v Pretorius & Another*[2] also stated that, it is generally accepted that evidence of identification based on witnesses' recollection of person appearance is dangerously unreliable unless approached with due caution.
- [20] As I have mentioned above, the trial court exercised caution when considering the evidence of identification of the appellant. I am therefore satisfied that the court a quo correctly appraised and accepted this evidence. Accordingly, the ground of appeal based on the identity of the appellant stands to fail on the basis of the above alone.

[21] On the evidence of contradictions contained in the first report, the so called ‘first report’ evidence is found on the testimony of the complainant’s boyfriend (Luyanda). This witness testified that the complainant reported to him that she was raped by the appellant, whom he found standing together with her in the morning after. The defence wanted to paint a picture that there were contradictions between the evidence of the boyfriend and that of Ms. Mtjali. I find that, this contention is not only misleading but it is mischievous. When one considers the evidence of these two witnesses there was a time during the cross-examination where the boyfriend was caused to agree that the complainant was not telling the truth, mainly on her evidence about the intruder’s faces having been covered.

[22] I say it is mischievous because what the defence was painting during the cross-examination of the boyfriend was actually not what the complainant stated during her evidence. The complainant on this evidence stated categorically that, the other ‘unidentified male’ is the one who was wearing a balaclava and a hoodie and the appellant was not wearing anything to cover his face. However, the question was put to the complainant’s boyfriend in the following manner:

*“She told this court that on that particular day those people when they entered they were not wearing anything to cover their faces? Yourself you told us about balaclava, so she was not telling the truth? The witness answered by stating “Yes”.*

This was clearly misleading then, as it is misleading even now in the appeal proceedings, hence the mischievous pronouncement above.

[23] I therefore find that on the pertinent issue of rape of Ms. Mtjali by the appellant there were no contradictions on ‘first report’ evidence whatsoever. The appellant wants this court to conclude that there was a misdirection when they know there is none. I can find no fault with the trial court’s finding on the evidence as between Ms. Mtjali and the first report’s (Luyanda). This point also stands to fail.

[24] On the DNA evidence and Booysen’s evidence, the court correctly analyzed the qualification of the police who took appellant’s buccal swabs and also correctly considered that the evidence reached forensic science laboratory intact. The serial numbers were stuck-on by Dr Malibane who also recorded the particulars of the person to whom he handed over the crime kit after he completed the entire exercise and sealed everything.

[25] The trial court in its judgment sieved-out all the points that were raised by the defence on DNA evidence, and further highlighted what it ruled-out as important in the overall scheme of things on the DNA and Booysen’s evidence. The court was satisfied and concluded from this exercise that, the exhibits were sealed; it also considered where and when they were sealed; and that they were eventually received in its intact form by Forensic Science Laboratory.

- [26] The dissimilarity in the serial numbers were also explained in the court's judgement, after the court considered the evidence of Booysen (the witness from Forensic Science Laboratory) who clarified the reason for the difference in serial numbers, indicating that they end with numbers /16 and /17 because this actually indicate that they had been registered on laboratory system in year 2016 and 2017. He also stated that the reason for this is that the exhibits were received towards the end of year 2016, so they could only process the other exhibit only at the beginning of year 2017. According to Booysen's evidence that was the only reason why the seal numbers would differ at the end of each number.
- [27] The trial court also considered that the evidence from forensic science laboratory witness was that neither of the exhibits had a broken seal or seal had been tempered with in any way. Also emphasizing that, this is the very same reason the exhibits were accepted at the laboratory otherwise they would have been rejected if the seals were broken or tempered with in any way.
- [28] The court further accepted evidence of analysis of the DNA having considered all the above which were raised by the defence, and also what the appellant is now raising as one of his key ground why the appeal should succeed. The court a quo in considering this argument mentioned, in my view correctly so, that the State successfully proved what it needed to prove to wit:
- "Sample taken from someone, it was sealed with specific seal number and same sealed exhibit was received by the forensic science laboratory". . . "Even if 50 people had handled it in between it is not necessary for all those witnesses to be called".*
- [29] I therefore find that the trial court correctly found that any doubt and any possibility of a mistake regarding identification of the appellant is laid to rest by the forensic evidence which positively links the appellant's DNA sample with that one which was taken from the complainant.
- [30] The trial court also considered that, the appellant gave only evidence of a bare denial despite all the allegations against him. The court also correctly considered the totality of the evidence, including the bare denial by the appellant and further asked itself the following pertinent question: can it still be said the accused's evidence is reasonably possibly true. The court finally rejected the appellant's evidence as a fabrication. I respectfully agree. The evidence against the appellant was overwhelming.
- [31] The argument about the charges not put to the accused as statutory charges. Since the accused was informed of the applicable statutory provisions at the first opportune time by the court a quo that eventually convicted and sentenced him, (as it is established on the record attached) the argument that the charge was improper is tantamount to elevating form over substance.

[32] I find the argument inconceivable in light of a clear evidence that the provisions of the act were brought to the attention of the accused. The question to be asked under these circumstances should be, if the accused person is made aware that the charges against him falls under the provisions of Act 105 of 1997 and the provisions are explained to his understanding, what then would be of prejudice to him if the charges are read in its basic form of what the charges mean and refer to. There is clearly, no prejudice to the accused person. I will revert to this point again, when I deal with sentence hereunder.

#### On sentence

[33] Regarding sentence the appellant contends in this appeal that the court a quo was wrong in sentencing him to Life imprisonment without appraising him of the applicable sentence at the commencement of the trial. The appellant further asks this court to be guided by the principles that punishment is pre-eminently a matter for the discretion of the trial court and that sentence should only be altered if the discretion has not been judicially and properly exercised. I respectfully agree with the appellant's submission on this point.

[34] I have traversed on this point above when I was dealing with appeal on conviction. I however, also need to highlight the following which was recorded by the court on the proceedings of 28 March 2017. The court a quo recorded "Minimum sentence provisions explained and understood". The underlined portion is pertinent in addressing the only point that is being raised as the only issue on sentence. There is no reason tendered by the appellant why the appeal court should doubt the underlined portion, more so, as same was not challenged before the trial court, and it is not challenged before this court. Therefore, in the absence of any evidence to the contrary, this court of appeal is bound to accept what the record demonstrates, which is that, the explanation on the relevant provisions of the Act were explained and understood by the appellant.

[35] It must further be mentioned that the record of the proceedings further establishes that the indictment contains the provision of the Criminal Law Amendment Act 105 of 1997 with specific reference to count number 2 right up until count number 5, (The Rape charges).

[36] In light of the above-mentioned, can it be said the failure to appraise the appellant just before he pleads to the charges, amounts to his constitutional right to a fair trial been violated at the sentencing level. I am of the view that the mention of the word "understood" as highlighted above bring about this answer to be negative.

[37] The Constitutional Court in *M T v S; A S B v S; September v S*[3] at para 40 stated the following which I find appropriate in this part of the appeal,

*"It is indeed desirable that the charge sheet refers to the relevant penal provision of the Minimum Sentences Act. This should not, however, be understood as an absolute rule. Each case must be judged on its particular facts. Where there is no mention of the applicability of the Minimum Sentences Act in the charge sheet or in the record of the proceedings, a diligent examination of the circumstances of the case must be undertaken in order to determine whether that omission amounts to unfairness in trial. This is so because even though there may be no such mention, examination of the individual*

*circumstances of a matter may very well reveal sufficient indication that the accused's section 35 (3) right to a fair trial was not in fact infringed".*

- [38] In the case of the appellant before us, the record demonstrates that the applicable minimum sentence was mentioned in both the charge sheet and in the record of the proceedings when the explanation of the applicability of the Act was explained and understood by the appellant. Therefore, the appellant's contention that the trial court sentenced the appellant without appraising him of the minimum sentence applicable in his case should be rejected. I am doubtful that this reasoning holds good.
- [39] The court a quo in sentencing the appellant did not find any compelling and substantial circumstances, and proceeded to combine count 2-5 for the purposes of sentence and sentenced the appellant to Life imprisonment. The trial court properly considered the relevant circumstances of the appellant before arriving at a sentence that it found to be appropriate. Its reasoning and findings cannot be faulted. Therefore, the appeal on sentence should also be dismissed.

## Conclusion

- [40] I have found that each of the challenges brought by the appellant are without merit and should therefore fail. There is no fault or misdirection on the part of the trial court on all the points that were raised by the appellant for the purposes of this appeal, both on conviction and on sentence. The trial court correctly found that the state successfully discharged its burden of proof, and as mentioned above, that the point raised by the appellant on sentence is one of form and not of substance, even the form itself, clearly is the one without foundation in light of what I stated found at para 34, 35 and 38 above.

- [41] In the result the following order is made:

The appeal against conviction and sentence is dismissed.

MT Mankge

Judge of the High Court

Middelburg

I agree

MBG LANGA

JUDGE OF THE HIGH COURT

DATE OF HEARING:

28 April 2023

DATE OF

**JUDGMENT:**

26 May 2023

Appearances:

For the Appellant: Ms NO Mthethwa, Legal Aid South Africa, Nelspruit Justice C, Mpumalanga For  
the Respondent: Advocate D Rowles, DPP's Office, Middelburg, Mpumalanga.

[1] [2020] ZAFSHC 200

[2] 1991

(2) SACR 601 (A)

[3] [2018] ZACC 27; 2018 (2) SACR 592 CC

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Prepared on 9 October 2026 · Esheria