

SOUTH AFRICA / JUDGMENT

## S v Mahlasela; S v Rowe; S v Maseko (DR38/2023) [2023] ZAKZDHC 54 (11 August 2023) [2023] ZAKZDHC 54

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Sanders, Mossop

CASE / FILE NUMBER

DR38/2023

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IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

High Court Review: DR38/2023

In the matters between

Magistrate's Serial No: Special Review 6/23

THE STATE

and

SABELO MAHLASELA

AND

Magistrate's Serial No: Special Review 5/23

And

RICARDO ROWE

Magistrate's Serial No: Special Review 4/23

SPHELELE MASEKO

ORDER

The following orders will issue:

(a) S v Mahlasela (Special Review 6/23):

1. The conviction is hereby confirmed.
2. The sentence imposed by the learned Regional Magistrate is confirmed.

(b) S v Rowe (Special Review 5/23)

Both conviction and sentence are hereby confirmed.

(c) S v Maseko (Special Review 4/23)

The order which is set out more fully in paragraphs to 21 to 26 hereunder shall issue.

#### SPECIAL REVIEW JUDGMENT

Sanders AJ (Mossop J concurring)

#### Overview and background

[1] The following facts are common cause:

- (a) All three matters were originally before the learned Regional Court Magistrate who was sitting in the Sexual Offences Court in Pinetown.
- (b) All three matters resulted in convictions, and in all three matters non-custodial sentences were imposed.
- (c) The matters are before this Court by way of special review, initiated by the then Acting Regional Court President of KwaZulu-Natal, Ms Marks.
- (d) After her tenure ended, the review process stalled and has only revived under the present Acting Regional Court President of KwaZulu-Natal, Ms Andrews, hence the unfortunate inordinate delay in bringing the matters before this Court.
- (e) The sentences imposed by the learned Regional Magistrate did not exceed her jurisdiction.
- (f) Neither is it contended that the proceedings themselves were irregular.

#### Section 304(4) of the Criminal Procedure Act

[2] Section 304(4) of the Criminal Procedure Act 51 of 1977 (the CPA) reads:

'If in any criminal case in which a magistrate's court has imposed a sentence which is not subject to review in the ordinary course in terms of section 302 or in which a regional court has imposed any sentence, it is brought to the notice of the provincial or local division having jurisdiction or any judge thereof that the proceedings in which the sentence was imposed were not in accordance

with justice, such court or judge shall have the same powers in respect of such proceedings as if the record thereof had been laid

before such court or judge in terms of section 303 or this section.'

#### S v Mahlasela review

- [3] Mahlasela was arrested on 23 June 2019. Bail was fixed in the amount of R1 000 but remained unpaid until 20 July 2020, when he was released. His trial commenced on 7 September 2020. He was charged with sexual assault in contravention of s 5(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the Act). He pleaded not guilty to the charge that in June 2019 at the Embo Reserve near Hillcrest in the Regional Division of KwaZulu-Natal he unlawfully and intentionally committed an offence of sexual assault by violating the complainant aged seven by rubbing his penis on her vagina and by touching her private parts without her consent.
- [4] Mahlasela denied sexually assaulting the complainant and made formal admissions in terms of s 220 of the CPA, which included:
- (a) that the complainant was seven years of age at the time in question;
  - (b) the complainant was his niece; and
  - (c) he saw her on the day of the incident which gave rise to these proceedings.

#### The Trial

- [5] The salient facts are that Mahlasela is the cousin of the complainant's father. The complainant's father had allowed Mahlasela to stay with them because he had nowhere else to live. They all slept in one room, on the same bed.
- [6] After everyone had left for work Mahlasela was alone with the complainant who was asleep. She was awoken by him rubbing her shoulders. He then rubbed the complainant's vagina over her panties. He thereafter removed all her clothes including her underwear. He requested the complainant to lie on top of him; and she was then made to lie next to him and while she was on her side he rubbed his penis on her vagina.
- [7] After a while Mahlasela asked the complainant if she was tired, to which she replied that it was painful, and then he stopped. He gave the complainant his cell phone to play games and told her "not to report what had happened to anyone as her vagina is his".
- [8] Having perused the transcript of the record of proceedings before the court a quo I am satisfied that the conviction of Mahlasela is sound in law and is in accordance with justice. Therefore, the conviction stands.

#### Sentence

- [9] Mahlasela is a first offender with no other cases pending against him. He was 41 years of age. He has five minor children and childcare grants are paid in respect of each of them. He suffers from tuberculosis as well as a chronic medical condition which he elected not to disclose.
- [10] The defence requested a wholly suspended sentence. Mahlasela was prepared to compensate the complainant's family with an amount of R1 000. He had already spent 13 months in custody before bail was paid.
- [11] The complainant was seven years of age when the incident occurred. Mahlasela was in a position of trust. No victim impact statement was placed before the court a quo. No information regarding the psychological wellbeing of the complainant was placed before the court a quo.
- [12] The sentence imposed was:
- '2.1 Five (5) years Imprisonment wholly suspended for Three (3) years on condition that:-
1. That the accused is not convicted of Contravening Section 5 (1) of Act 32 of 2007
  - Sexual Violation committed during the period of suspension.
  2. That the accused compensate THENJISWA SIKASA ABAMBO (0[...]) the amount of Two Thousand Rand (R2000,00) on or before the 30 October 2020. PAYMENT TO BE MADE VIA Clerk of the Court, Pinetown.'

#### Case law

- [13] I can do no better than paraphrase the remarks made by Nkosi J in *S v Banda*, a review judgment delivered on 3 April 2021, under PMB case number DR09/2021 where the learned Judge said in essence:

'The sentence is so disturbingly inappropriate that it is likely to cause indignation with large portions of society, it trivializes the crime in circumstances where the perpetrator is the very person entrusted with the care of the child.'

#### Ruling

- [14] Having taken all the relevant factors into account I find as follows:
- (a) The conviction is found to be in accordance with justice and is hereby confirmed.
  - (b) The sentence is also confirmed.
  - (c) The confirmation of the sentence herein should not be construed to mean that I am in agreement with the sentence that the learned Magistrate imposed. Had I been the court a quo I would have imposed a

custodial sentence, which in my view would have been in the interests of justice.

Order

[15] Accordingly both the conviction and sentence are hereby confirmed.

S v Rowe review

Factual matrix

[16] Rowe was 20 years of age at the time of the incident in question. He pleaded guilty on 21 October 2020 and was sentenced on the same day for contravening s 5 (1) of the Act as follows:

'2.1 Three (03) months imprisonment wholly suspended for Three (3) Years on condition: -

1. That the accused is not convicted of Contravening Section 5  
(1) of Act 32 of 2007 - Sexual Assault.
2. That the Accused compensate Ms H.T. BUTHELEZI (0[...]) the amount of One Thousand Rand o(R1000,00) on or before the 30 November 2020. PAYMENT TO BE MADE VIA Clerk of the court, PINETOWN.'

[17] The statement made in terms of s 112(2) of the CPA reveals that the complainant was ten years of age at the time of the incident. Rowe called the complainant into the room that he shared with another man. The complainant entered the room and said "she knew what she was inside for". Rowe pushed the complainant into a lying position on the bed and kissed her, inserting his tongue into her mouth in an intimate exchange. They were interrupted when the complainant's uncle

entered the room. Rowe and the complainant left the room together.

[18] The court a quo's judgment has not been located and it is not before this court.

Findings

[19] After considering the facts mentioned above I find that the sentence imposed is not shockingly inappropriate. It is trite and well settled law that the approach as far as sentence is concerned, is that this court will not interfere with the sentence of the

court a quo simply because this court would have imposed a different sentence. It is only where the sentence imposed induces a sense of shock, either as a result of harshness, or leniency on the part of the court a quo that this court is entitled to interfere.

[20] Both conviction and sentence by the learned Regional Magistrate are hereby confirmed.

S v Maseko review

[21] The documents before this court in relation to this matter are seriously and sadly lacking in content. Hence the following order is made:

- (a) Insofar as the record before me is incomplete the full record shall be reconstructed.
- (b) The reconstruction in to be done in accordance with the guidelines set out in *S v Leslie* 2000 (1) SACR 347 (W); *S v Zondi* 2003 (2) SACR 227 (W); and *S v Zenzile* 2009 (2) SACR 407 (WCC).
- [22] If necessary, the use of secondary evidence as well as the use of an alternative stenographer to reconstruct the record may be employed.
- [23] The reconstruction of the record shall be finalized before the special review is enrolled and is to be certified as complete by the attorney who appeared for the accused prior to that occurring.
- [24] The presiding Regional Magistrate, the Registrar of the Regional Court, the accused's legal representative at the time as well as the Public Prosecutor who dealt with the trial are directed to furnish affidavits which are to be handed to the Registrar of the Regional Court and which shall accompany the reconstructed record, setting out precisely what steps were taken to reconstruct the record.
- [25] In the event of the record not being capable of reconstruction, it is directed that the presiding Regional Magistrate, the Registrar of the Regional Court, the Public Prosecutor and the legal representative indicate in the aforesaid affidavits the reason(s) why the record could not be reconstructed.
- [26] Copies of the reconstructed record as well as copies of the affidavits referred to in paragraphs 24 and 25 above are to be furnished to the Registrar of the High Court, Durban, the Director of Public Prosecutions, Pietermaritzburg and to the legal representative of the accused before the special review is enrolled.

SANDERS AJ

I agree

MOSSOP J

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