

SOUTH AFRICA / JUDGMENT

S v Mjoli (SS44/2020) [2021] ZAGPJHC 44 (3 February 2021) [2021] ZAGPJHC 44

COURT

South Gauteng High Court, Johannesburg

BEFORE

Mabesele

CASE / FILE NUMBER

SS44/2020

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES : YES / NO

(3) REVISED

DATE:3/2/2021

CASE NO: SS44/2020

DATE: 2020.11.30

In the matter between

THE STATE

and

VUSI CYRIL MJOLI

J U D G M E N T

MABESELE, J:

The accused stands trial on charges of kidnapping; assault with intent to cause grievous bodily harm; rape; murder and defeating the administration of justice. The charges of rape and murder are each read with section 51(1) and Part 1 of Schedule 2 of Act 105 of 1997.

The accused pleaded not guilty to counts 1,2 and 3 and pleaded guilty to counts 4 and 5. He did not offer plea explanation in respect of counts 1,2 and 3. With regard to counts 4 and 5 a written statement which was prepared by the counsel for the accused, in terms of section 112 of Act 51 of 1977, was read into the record and interpreted to the accused in the language that he understands. The statement is marked exhibit 'A'. After I had questioned the accused with reference to the alleged facts of the case in order to ascertain whether he admits the allegations in the charges which he has pleaded guilty, I was of the view that the accused's plea of guilty in respect of count 4(murder) cannot stand in that the accused did not admit that he foresaw the possibility of his conduct of beating the deceased with fists and kicking her with booted feet all over the body resulting in the death of the deceased.

The state too, did not accept the statement in so far as it relates to count 4 and wanted to present evidence to prove premeditation. As a result, a plea of not guilty to murder was entered in respect of this count. With regard to count 5 the accused was found guilty as charged in that after he had killed the deceased he locked her body inside his room for a period of three days so that the body could not be discovered while he was preparing to dig a hole to place the body of the deceased therein. The

accused admitted, inter alia, the cause of the deceased's death, being the blunt force chest trauma, according to the medico-legal post-mortem examination report and that the deceased did not sustain any injuries except the ones inflicted by him. The report is marked EXHIBIT 'B'.

The state called five witnesses. Constable Lefuno Motaung testified that on the 9th January 2018 the deceased came to Moroka Police Station where she was stationed and lodged a complaint to her. After she had opened the docket the deceased made a statement and confirmed the contents thereof. After the deceased had signed the statement, she commissioned same. Thereafter, she forwarded the docket to the Johannesburg Central Police Station because the offence alleged to have been committed fell within the jurisdiction of that police station. Since the deceased died before she testified the state made an application for the admission of the statement of the deceased as evidence in terms of Act 45 of 1988. The application was initially opposed but counsel for the accused subsequently withdrew his opposition and argued that it would be in the interests of justice that the statement be admitted.

The statement was accordingly admitted and read into the record. It is marked EXHIBIT 'D'. The statement relates to counts 1 to 3. The deceased states in the statement that on the 8th January at about 18:30, she was walking along Bree Street in Johannesburg when the accused (ex-boyfriend) alighted from the taxi

in which there were two male persons and grabbed her and pulled her into the taxi. She screamed for help and no one came to her assistance. The taxi drove to the accused's house at 1452, Umkhomazi Street, Senoane.

Upon arrival at the house the accused pulled her inside and the taxi drove off. While they were inside the house the accused took her into the bedroom, grabbed her by hair and slapped her twice and kicked her on the face. Thereafter, the accused instructed her to sleep on the floor and take off her clothes. After she had done that the accused undressed himself and inserted his penis inside her vagina and had sexual intercourse with her without her consent. She spent the whole night of the 8th January 2018 at the accused's house.

On the 9th January 2018 at about 14:00 the accused left the house and she managed to run to the Moroka Police Station and reported the matter to the police.

Mrs Motlalepule Kopakae is in the employ of the SAPS. She is stationed at the Johannesburg Central Police Station. She is the investigating officer. Around the 9th January 2018 she was allocated a docket which was received from Moroka Police Station. Inside the docket was the statement of the deceased. After she had read the statement she drove to the deceased's place of residence. Upon arrival she found the deceased home. She noticed visible injuries on her face. After she had interviewed the deceased she took her to the Baragwanath Hospital for examination. After she and the deceased had arrived back home she took the statement of the deceased's mother.

On 11th January 2018 she received a complete report of the medico-legal post-mortem examination compiled by the doctors at the Baragwanath Hospital.

The clinical findings are recorded as follows. (i) Bruise around left eye. (ii) Bruise around right eye. (iii) Laceration above right eye. which is 4cm deep. (v) laceration, side of left eye, which is 2cm deep. (vi) Laceration in the inner cheek (left) which is 2cm deep. (vii) Laceration in the inner cheek (right) which is 1cm deep. (ix) Bruise on the right shoulder. Bruise on the upper arm. (x) Abrasion on the right elbow.

Abrasion on the left ankle. Genital penetration was not excluded. The medico- legal examination report is marked EXHIBIT 'F'.

The witness testified that after she had gathered all the necessary information, including the name and address of the accused, she did not arrest the accused. Instead, she later phoned the deceased and advised her that she was attending a course in Cape Town for two weeks and that the deceased should trace the accused and as soon as she had found him she should phone the police and ask them to arrest him.

On her return from Cape Town she again visited the deceased. The accused had not yet been arrested. She testified that the purpose of her visit was to ask the deceased to accompany her to the accused's place of residence and to point out the accused to her. To her surprise, she said, the deceased informed her that she was withdrawing the charges against the accused because she was scared that the accused would kill her if he is admitted to bail and said further that the

accused is a friend of the police officers in Soweto. After she became aware that the deceased had already made up her mind to withdraw the charges against

the accused she took the statement from the deceased wherein she confirmed her decision to withdraw the charges against the accused

and informed the deceased that the docket would be taken to the senior public prosecutor for the decision. She subsequently

took the docket to a junior prosecutor who took the decision not to prosecute. The statement made by the deceased is marked EXHIBIT 'E'.

The witness testified during cross-examination that she has been in the police force for a period of 10 years. She testified that after the deceased had withdrawn the charges against the accused she had never asked that charges against the accused be re-instated. On this issue counsel for the state pointed out to the Court that the prosecution took the decision to reinstate the charges against the accused because the prosecutor who took the decision not to prosecute the accused had no authority to do so because he was junior.

Since the accused killed the deceased in 2020 (two years after the deceased had laid charges of assault and rape against the accused) the witness was asked during cross-examination why did she not arrest the accused in January 2018 after she had gathered all the necessary information before she went to Cape Town. Her response was that she could not obtain the statement of the accused's mother timeously as the person to whom the first report was made. This is contrary to her evidence in chief wherein she stated that she had already obtained the statement of the accused's mother before she left for Cape Town. In addition, the deceased mentioned in her statement marked EXHIBIT 'D' (which was read by the witness before she visited the deceased for the first time) that on the 9th January 2018 the deceased escaped from the accused's house and ran straight to the Moroka Police Station to lay charges against the accused. Therefore, it is clear that the witness was aware that the first report was not made to the deceased's mother. When she was asked to explain how and why should the deceased again contact the police and request them to arrest the accused despite the fact that the matter was already in the hands of the police, she responded that the deceased could have easily phoned 10111 and ask for help. The witness testified that before she left for Cape Town she left the docket with her superior and asked him to take care of the matter in her absence. However, she failed to explain why would she then phone the deceased and ask her to trace the accused and phone the police for help as soon as she had found him, instead of informing the deceased that the matter was taken care of by her superior during her absence. The witness failed to explain also why would she take the docket to the junior prosecutor for the decision instead of same being taken to the senior public prosecutor through the office of her superior.

Dr Malerato Ramela confirmed the contents of the medico- legal post-mortem examination report which she compiled in relation to the death of the deceased.

She confirmed that the deceased died as a result of the blunt force chest trauma caused by the injuries sustained by the deceased which included broken ribs.

She testified that an excessive force was applied on the ribs of the deceased in order to break them. She said that due to the broken ribs the deceased experienced difficulty in breathing. Mrs Ruth Mtaki is the mother of the deceased. She testified that the deceased died at the age of 40 and left behind a 20-year-old boy. The boy has been under the care of his father since birth. The deceased was never married. The witness testified that the accused assaulted the deceased on numerous occasions but the deceased refused to part ways with him. She last saw the deceased in 2019. She was informed about her death by the police in 2020.

Mr Dumisani Dlamini knew both the accused and the deceased. He had known the accused before he was involved in an affair with the deceased. Mr Dlamini testified that in February 2020 in the early hours, the deceased came to his house carrying her belongings and told him that the accused assaulted her and was seeking for accommodation. He accommodated the deceased in his house for a period of a week. Towards the end of that week the accused came to his house and was looking for the deceased. The accused was not in a fighting mood and did not show any aggressive behaviour. It was on these grounds that he asked the accused and the deceased to resolve their problems privately in the house. He left them in the house and went to a nearby shopping centre. On his return home he found both the accused and the deceased laughing and in a happy mood. They both left the house and went to the deceased's place of residence. Approximately five days after they had left his house he learnt about the deceased's death.

Mr Vusi Dlamini is a close friend of the accused. He knew the deceased. His testimony is that on a certain Wednesday in February 2020 Simphiwe came to his place of residence and informed him that the accused wanted to meet both of them. Shortly thereafter the accused arrived and said he wanted to talk to them. When they enquired from the accused why he wanted to talk to them the accused told them that he found out the whereabouts of the deceased and asked them to accompany him to Dumisani's

place where the deceased was accommodated. He and Simphiwe agreed to accompany him to the said house. Upon arrival he and Simphiwe remained outside the premises of the house. The accused went inside the house and came back alone. When they enquired from him about the deceased he told them that the people inside the house did not allow the deceased to get out of the house. When they enquired about his plan he told them that he would go back into the house and come back with the deceased.

As the accused went back into the house he and Simphiwe walked to his place of residence. Shortly after he had arrived home the accused and deceased joined them and suggested to them that they should all go to Pick 'n Pay to buy liquor. After they had bought liquor they went to the accused's place of residence. While they were drinking, the deceased proposed

to the accused that she should go back to Dumisani's house. Since the accused was not in favour of the proposal both the accused and deceased started arguing with each other to the extent that the accused hit the deceased with a fist on the face and asked them not to interfere in his affairs with the deceased. He and Simphiwe left the house and went to his place of residence. Later in the afternoon of the same day he and Simphiwe went back to the accused's place of residence. Upon arrival at the house they found the accused kicking the deceased all over the body while she lay on the floor. They then asked the accused to stop assaulting the deceased and asked the deceased to sit on the sofa. He noticed bruises on the face of the deceased. After the situation had calmed down they drank liquor again, including the deceased. Thereafter he and Simphiwe left the accused and the deceased in the house and went home.

Three days thereafter the accused came to him and told him that he killed the deceased. He did not tell him when did he kill her. After the state had closed its case counsel for the accused indicated that the accused would take the stand and testify in respect of counts 1, 2 and 3 only and will stand by his 112 statement which relates to count 4.

Regard should be had that this 112 statement was altered to a 'not guilty' plea with regard to count 4 and a plea of guilty was entered in respect of count 5. The issue with count 4 related to *dolus eventualis* which was not accepted by the state. During cross-examination of the accused his defence counsel argued that since the accused did not testify in respect of count 4 counsel for the state was not entitled to cross-examine the accused in respect of this count.

This argument was not persuasive in that once the accused and or witness takes the stand he or she is expected to answer questions arising from the cross-examination for as long as the questions are relevant to the matter before the Court. At any rate nothing significant came out of the cross-examination of the accused in respect of count 4 except for the accused denying that Vusi Dlamini was not present when he assaulted the deceased. As far as counts 1, 2 and 3 are concerned the accused denied that he committed those offences alleged against him.

The accused closed his case without calling witnesses. It is trite law that the onus rests on the state to prove the guilt of the accused beyond reasonable doubt in order to secure a conviction. On the other hand, the accused is entitled to an acquittal if his or her evidence is reasonably possibly true.

With regard to counts 1, 2 and 3 the state relies on the statement of the deceased marked EXHIBIT 'D' wherein, the deceased alleged that the accused kidnapped, assaulted and raped her, as well as J88 marked EXHIBIT 'F'. J88 reveals multiple injuries on the body of the deceased.

The clinical findings did not exclude the possibility of genital penetration. With regard to count 4 the evidence of Messrs Dumisani Dlamini and Vusi Dlamini is relied on for securing a conviction for premeditated murder.

The first issue to be determined in respect of counts 1, 2 and 3 which was raised by counsel for the accused is whether the state has the authority to prosecute the accused two years after the complaint or charges were withdrawn by the deceased against the accused. It was argued that

since these three counts were withdrawn and the deceased and the accused stayed together thereafter, the state had no authority to initiate the proceedings against the accused in respect of counts 1, 2 and 3. In contrast, counsel for the state argued that although it is common cause that the deceased withdrew the charges against the accused such withdrawal was not voluntary and for this reason the state was of the firm view that justice would have been served if the accused is prosecuted. Regard being had that the police officer who was assigned to investigate the matter was negligent in the performance of her duties.

The deceased withdrew charges against the accused in 2018 because she was scared that the accused would kill her should he discover that she laid charges against him. The statement which she made to the police reads:

“I am an African female with ID 8002010593083, 38 years old. I am residing at 5945, Tshabalala Street, Orlando East. I am unemployed. My cellphone number is 0825566805. I am the complainant in the above case of rape. I cannot carry on with the case because I know that the suspect in this case once he can get bail he will hunt me and kill me. I know him very well he is evil and I am so scared of him. He is my ex-boyfriend and he used to beat me every now and then. So, I am scared of my life. That is all”.

It is clear from the statement that the complaint was withdrawn out of the extreme fear of death. One may add that another possible contributory factor to the withdrawal of the complainant was the unpleasant task which was given to the deceased by the investigating officer to trace the accused on her own and made sure that the accused got arrested. The conduct of the investigating officer is unacceptable, regrettable and amounts to dereliction of duty. The police officers are expected to serve the public diligently and investigate the cases brought to them without considering the status of the person or persons who lay a charge or charges at the police stations. In short, the police must treat the rich and the poor equally. In doing so the police will win the confidence of the public so that the poor, particularly the vulnerable women who are subjected to abuse in this country, will not hesitate to report cases of gender based violence and abuse to the police.

For all these reasons the interests of justice demands that the accused be prosecuted for counts 1, 2 and 3. Justice must not only be done but must be seen to be done. The copy of this judgment will be forwarded to the IPID. The statement marked EXHIBIT ‘D’ which relates to counts 1, 2 and 3 reads:

“I, Dimpho Olifant, state under oath in English. I am an African female with ID 8002010593083, 37 years old. I am residing at 5945, Tshabalala Street, Orlando East. I am unemployed. My cellphone number is 0825566805. On Monday, 2018.01.08 at about 18:30. I was walking alone on Bree Street next to Bree Taxi Rank, Johannesburg when an unknown taxi yellow and white in colour came next to me. And I saw my ex-boyfriend Vusi Mjoli of 1452, Umkhomazi Street, Senoane off load himself on the taxi and inside that taxi there were two unknown black males. But I can be able to point them if I see them again. Vusi came to me and told me that I think I am clever and started to grab me inside that yellow and white taxi and closed the door and the driver drove off his taxi to house number 1452, Umkhomazi Street, Senoane. I was screaming for help. On arrival at Senoane, Vusi started to grab me

again with my hair saying that no one was going to help me. The taxi left with two unknown black males. Vusi forced me to enter his bedroom. Inside his bedroom he slapped me twice and kicked me on my face with his leg and he was using physical force on my body. Vusi told me to undress my black skirt and I was not wearing underwear and he told me to sleep on the floor facing up and he then undressed himself, his navy jean and his underwear and told me to open my legs and Vusi put his penis inside my vagina without my consent and without using a condom, he raped me once. After he

raped me, he slept and I spent the whole night there and he even took my cell phone, mobile 0626676340, Cell C valued at R400. On 2018.01.09 at about 14:00, Vusi left the house and I managed to run away to report the matter at the police station. Suspect is known as Vusi Mjoli of 1452, Umkhomazi Street, Senoane. I did not give anyone permission to kidnap and rape me. So, I request further investigation”.

It is clear from the statement that the crimes of kidnapping, assault with intent to cause grievous bodily harm and rape were committed.

And therefore, a conviction may follow on the basis of this statement (See section 208 of act 51 of 1977).

However, the contents of this statement should be scrutinised with greatest care. Regard being had that the contents were not tested. It is for this reason that an argument was raised on behalf of the accused that since the contents of the statement which were denied by the accused are not corroborated by any other evidence the statement alone does not suffice to call for conviction of the accused. This argument is incorrect in that the J88 revealed injuries which were sustained by the deceased all over the body. Genital penetration was not excluded. The report recorded that:

“The physical injuries consistent with history provided by patient both in time and nature”.

The report recorded the history provided by the deceased as follows:

“37 years female states that on 09.01.2020 at 18:00 she was grabbed by a known male into a vehicle in town and taken to his home in Soweto where he beat her repeatedly with fists and kicked her until she was bleeding. The male then took off all her clothes and made her sleep on the floor. He then proceeded to have sexual intercourse with her”.

The statement of the deceased marked EXHIBIT ‘D’ and corroborated by J88 undoubtedly call for conviction of the accused in respect of counts 1, 2 and 3. The accused’s version of bare denial in respect of these counts is rejected as not being reasonably possibly true.

It is common cause that in February 2020 the accused killed the deceased by hitting her with fists and kicked her with booted feet all over her body after he had fetched the deceased from Dumisani Dlamini’s house. The undisputed evidence of Dumisani Dlamini is that the deceased came to his house carrying her belongings and asked him to accommodate her because she had ran away

from the accused after he had assaulted her. According to Dlamini the deceased spent almost a week indoors because she feared

that the accused might see her.

On the last day the accused visited his place and was looking for the deceased. After the accused had assured him that there was peace between the deceased and him he released the deceased. When the accused and

deceased reached the accused's place of residence they were joined by Simphiwe and Vusi Dlamini, according to Dlamini.

After some time Simphiwe and Vusi left the house and deceased in the house. When they came back later in the afternoon of the same day on which the deceased was fetched from Dlamini's house, Vusi found the deceased lay on the floor inside the house and the accused busy kicking her all over the body.

Although it is not known when exactly the deceased died, it is common cause that she died inside the house as a result of the injuries inflicted on her body by the accused. The question is whether the conduct of the accused was intentional or not?

Snyman CR (Criminal Law page 177) defines the term intention as the will to commit the act or cause the result set out in the definitional elements of the crime in the knowledge of the circumstances rendering such act or result unlawful. There are three forms of intention. For the purpose of this judgment only two forms of intention are relevant. These are direct intention and *dolus eventualis*. Direct intention comprises a person's directing his will towards achieving the prohibited result or towards performing the prohibited act.

In *dolus eventualis* the commission of the unlawful act or the causing of the unlawful result is not the person's main aim but:

- a. He subjectively foresees that striving towards his main aim the unlawful act may be committed or the unlawful result may be caused and,
- b. He reconciles himself to this possibility.

The evidence is that the deceased ran away from the accused's house after the accused had assaulted her. She took her belongings along with her, clearly with the intention not to return to the accused's house. The accused searched for her and found her at the Dlamini's house where she had hidden herself.

After the accused had assured Dlamini that he had made peace with the deceased, Dlamini released the deceased into the hands of the accused. Later that day the accused assaulted the deceased severely thereby caused her death. The medical doctor

who examined the body of the deceased after her death described severe injuries which resulted in the death of the deceased, as

multiple rib fractures. The doctor testified that the manner in which the ribs were fractured suggest that the maximum amount of force was used repeatedly on the body of the deceased and had resulted in the deceased experiencing difficulty in breathing and had died due to blunt force chest trauma.

Since the deceased was assaulted severely on the same day that she was fetched from where she was hiding after the initial assault and with no intention to return to the accused's house since she had taken her belongings, there is no doubt that the accused fetched the deceased from Dlamini's house with the intention to kill her, taking into account the maximum force he applied when he repeatedly kicked the deceased on her ribs to an extent that the deceased was unable to breathe easily. In his 112 statement, the accused corroborate the evidence of the doctor that the deceased experienced difficulty in breathing due to the assault.

After the death of the deceased the accused concealed

her body. He misled Dlamini to believe that he had made peace with the deceased so that Dlamini should release the deceased.

Therefore, the accused is guilty of murder, read with section 51(1) of act 105 of 1997.

I am grateful to Advocate Dube for her dedication to her work as a state advocate. Although she has recently been promoted to the rank of advocates from the lower courts she is undoubtedly capable of rising to the occasion. The same gratitude goes to Advocate Machovani for the accused. He was able to identify issues in dispute and concentrated on those issues only. Both these counsel assisted the Court to easily follow issues in dispute. The following order is made:

1. The accused is guilty on counts 1, 2, 3, 4 and 5 as charged.
2. A copy of this judgment should be forwarded to the Independent Police Investigative Directorate to consider the evidence of the police officer Kopakae and how the evidence was evaluated.

.....

MABESELE, J

JUDGE OF THE HIGH COURT

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/ZAGPJHC/2021/44.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/s-v-mjoli-unknown-topic-agpjhc-2021>

Prepared on 9 October 2026 · Esheria