

SOUTH AFRICA / JUDGMENT

Salman and Another v S - Appeal (CA&R 69/2021) [2023] ZAECMHC 59 (14 November 2023)

[2023] ZAECMHC 59

COURT

Eastern Cape High Court, Mthatha

BEFORE

Rugunanan, Monakali

CASE / FILE NUMBER

CA&R 69/2021

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION, MTHATHA)

CASE

NO. CA&R 69/2021

In

the matter between:

SIPHESIHLE

SALMAN

FIRST

APPELLANT

SITHEMBELE

MDLETYE

SECOND

APPELLANT

and

THE

STATE

RESPONDENT

JUDGMENT

Rugunanan J

- [1] On 15 April 2021, the two appellants were arraigned in the Regional Court, Mount Fletcher on counts involving ‘kidnapping’, ‘rape’, and ‘common assault’, respectively counts 1, 2, and 3 in respect of the complainant [M] [T] a 50 year old female. The offences are alleged to have been committed on 2 February 2019. On count 1 it is alleged that the complainant was kidnapped when she was pulled into an unused flat or structure. The charge on count 2 alleged that each appellant inserted his penis into the complainant’s vagina, and was framed in accordance with section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the ‘Sexual Offences Act’) read with the provisions of section 51(1) and Schedule 2 of the Criminal Law Amendment Act 105 of 1997. As to count 3 the allegation is that the complainant was assaulted when she was strangled.
- [2] Initially, the first appellant pleaded not guilty to all three counts but changed his plea to one of guilty for each of them. The second appellant pleaded guilty to all three counts. The appellants’ legal representative confirmed that the guilty pleas accorded with her instructions, in particular the change of plea by the first appellant. Written statements in terms of section 112(2) of the Criminal Procedure Act 51 of 1977 were read into the record. Following their convictions the appellants were each sentenced to 5 years’ imprisonment on count 1, life imprisonment on count 2, and 12 months’ imprisonment on count
3. The sentences on counts 1 and 3 were ordered to run concurrently with the sentence on count 2.
- [3] The plea and sentencing proceedings were concluded on 15 April 2021.

The grounds of appeal and content of the written statements

- [4] The appellants appeal against their convictions on each count. The grounds of appeal are directed at their pleas of guilty and at the charge sheet.
- [5] As against the pleas of guilty the appellants assert that the written statements do not aver the intention to commit the offences as one of the elements of each of the offences, nor do their statements admit penetration as an element of the alleged rape on count 2. In addition it is asserted that the written statements offer no indication that each appellant was in his sound and sober senses or that he was informed of his right to remain silent.
- [6] Referring to the charge sheet, and specifically count 3, the appellants’ complaint is that no allegation is made that they acted in the furtherance or execution of a common purpose.
- [7] In the aggregate the appellants contend that their right to a fair trial under section 35(3) of the Constitution was violated.
- [8] The issues to be decided are:

- (a) Whether the written statements point at intention and penetration;
- (b) Whether the appellants were in their sound and sober senses (I presume this to be an assertion that they did not make their statements freely and voluntarily); and
- (c) Whether their fair trial rights were infringed.

The purpose of section 112(2)

- [9] Section 112 of the Criminal Procedure Act dispenses with the need to call witnesses but does not dispense with the need for the court to be fully informed how the alleged offence had been committed.[1] Subsection (2) of section 112 provides thus:

‘If an accused or his legal adviser hands a written statement by the accused into court, in which the accused sets out the facts which he admits and on which he has pleaded guilty, the court may, in lieu of questioning the accused under subsection (1)(b), convict the accused on the strength of such statement and sentence him as provided in the said subsection if the court is satisfied that the accused is guilty of the offence to which he has pleaded guilty: Provided that the court may in its discretion put any question to the accused in order to clarify any matter raised in the statement.’

- [10] Section 112(2) was designed to avoid the necessity for calling evidence in cases where it is clear that the accused understands all the elements of the charge against him and admits all of them. The Supreme Court of Appeal, however, in *S v Moya* pointed out that section 112(2) must not be read in isolation: it must be read in conjunction with subsection 112(1). Subsection (b) of section 112(1) enjoins the court to:

‘[Q]uestion the accused with reference to the alleged facts of the case in order to ascertain whether he or she admits the allegations in the charge’.

- [11] Although a written statement is intended to be accepted as a substitute for questioning by the court in terms of section 112(1), it must clearly achieve the same purpose – namely, to satisfy the court that the accused admits the facts of the case which underlie the criminal charge.[2]
- [12] Put another way, a written statement under section 112(2) should contain factual averments that ‘adequately support’ a conviction on the charge.[3] ‘Adequate support’ means nothing more than the admission of facts which leave the court in no reasonable doubt that the accused person has committed the offence on which they stand charged. Those facts must address both the accused person’s acts and their state of mind.[4]
- [13] Questioning therefore has a twofold purpose: firstly, to establish the factual basis for the plea of guilty and, secondly, to establish the legal basis for such plea. In the first phase of the enquiry, the admissions made may not be added to by other means such as a process of inferential reasoning. The second phase of the enquiry amounts essentially to a conclusion of law based on the admissions. From the admissions the court must conclude whether the legal requirements for the commission of the offence have been met. They are the questions

of unlawfulness, actus reus and mens rea. These are conclusions of law. If the court is satisfied that the admissions adequately cover all these elements of the offence, the court is entitled to convict the accused on the charge to which he pleaded guilty[5]

[14] Accordingly, the questions and answers must at least cover all the essential elements of the offence for which an accused has been charged and which the State, in the absence of a plea of guilty, would have been required to prove[6]. It is aptly stated in *S v Mshengu*[7] that:

‘Section 112 (2) requires that the statement must set out the facts which he admits and on which he has pleaded guilty. Legal conclusions will not suffice. The presiding officer can only convict if he or she is satisfied that the accused is indeed guilty of the offence to which a guilty plea has been tendered. If not, the provisions of [section] 113 must be invoked. The statement tendered by the appellant in this matter must be examined against the above backdrop.’

[15] Quoted in relevant part, the statement by each of the appellants, is reproduced below.

[16] The first appellant’s narrative states (all sic):

I, the undersigned Siphesihle Salman make the following statement.

‘1. I am accused person in this matter also aware of the charges preferred against me.

2. I plead guilty to all counts of Assault Common, Kidnapping and Rape. I also plead to the counts freely out of my own free will.

3. I confirm that on the 2nd day of February 2019 I was coming from a local tavern. I was in company of my co-accused Sithembile Mdletye.

4. I came across [M] [T]. I called her. She refused. I forced her strangled her. I took her to an abandoned flat structure. She refused. I ... engaged in sexual intercourse with her without her consent. I was the first one to engage in sexual intercourse. Then No. 2 engaged. I admit my conduct was not justified and I am also remorseful for what I did.’

[17] The second appellant’s statement is composed as follows(all sic):

I the undersigned Sithembile Mdletye make the following statement.

‘1. I am accused person in the matter. Also aware of the charges preferred against me.

2. I plead guilty to all counts, that is Assault Common, Kidnapping and Rape. I plead guilty without being influenced.

3. I wish to state as follows. On the 2nd day of February 2019 I was coming from a local tavern. I was in the company of Siphesihle Salman.

4. We came across [M] [T]. We stopped her told her to go to an abandoned structure and dragged her, hold her on neck she complied and further engaged in sexual intercourse with her without her consent. I had sexual intercourse after No. 1 had finished. I admit my conduct was not justified. I am also remorseful for what I did.’

The nature of the offences

[18] By definition assault consists in (a) the unlawful and intentional application of force to the person of another, or (b) the inspiring

of a belief in the other person that force is immediately to be applied to him or her.[8]

[19] Kidnapping consists in the unlawful and intentional deprivation of the liberty of movement of a person. The essential elements of the offence are

(a) unlawfulness; (b) deprivation of liberty or of custody; (c) of a person; and (d) intention.[9]

[20] Rape, in terms of section 3 of the Sexual Offences Act is defined as:

Any person ('A') who unlawfully and intentionally commits an act of sexual penetration with a complainant ('B'),

without the consent of B, is guilty of the offence of rape.[10]

[21] 'Intention' is an element of each of these offences. It is manifest when a person commits an act[11]:

'(a) while his will is directed towards the commission of the act or the causing of the result.

(a) in the knowledge of

(i) the existence of the circumstances mentioned in the definitional elements of the relevant crime, and

(ii) in the knowledge of the unlawfulness of the act.'

The procedural context of the plea proceedings in the trial court

[22] The appellants were legally represented by Ms Mzamo and participated in the proceedings with the assistance of an interpreter.

[23] At the commencement of the proceedings all three charges were put to them. The record reflects the following engagement by the presiding magistrate. Unavoidably, it is necessary to quote this in full.

'Court: Before you plead to the charges against you, I am asking from you that the rape which are charged with it is read with the provisions of section 51 (1) of the Criminal Law Amendment Act 105 of 1997, should you be convicted you will be sentenced in terms of the prescribed minimum sentence prescribed in the Act, which is life imprisonment, and the court may deviate from that prescribed minimum sentence, if there are substantial and compelling circumstances justifying deviation from the prescribed sentence. Yes [S]tate, before they respond to your charge sheet in terms of the annexure charge sheet is just section 51 (1)... [inaudible] what is it?

Prosecutor: On the rape case?

Court: Yes.

Prosecutor: It is section 51(1).

Court: Yes, the reason for...

Prosecutor: It is because, Your Worship, in this matter there are two accused in this matter, who raped the complainant.

Court: Okay.

Prosecutor: Both of them.

Court: So, you amend they acted in furtherance of common purposes of gang rape.

Prosecutor: Yes, Your Worship.

Court: Okay, thank you. The reason for this sentence is because it is alleged that you acted in furtherance of common purpose and you were, you committed the offence as a gang rape. Do you understand?

Interpreter: Yes.

...

Court: Then how do you plead with the charge against you?

Accused 1: Not guilty, Your Worship...

Accused 2: Guilty, Your Worship.

Court: Yes, Ms Mzamo.

Ms Mzamo: As the court pleases, Your Worship, in respect of accused one, Your Worship, the plea is not in accordance with my instructions and in respect with number 2, the plea is in accordance with my instructions, and, Your Worship, it is my application, if possible, to separate trials and proceed with number 2.

Court: No, when you say it is not according to your instructions, why do you not take the instructions again from the accused.

Ms Mzamo: As the court pleases, Your Worship, if the court may allow me.

Court: Yes

Ms Mzamo: Thank you, Your Worship, all of a sudden, Your Worship, the accused person is changing plea, maintaining that he had consensual intercourse with the complainant, and Your Worship, on that basis I will request, Your Worship, that separation of trials be conducted and proceed with number 2.

Court: Yes, from the accused number 1?

Accused 1: He is changing now, Your Worship, pleading guilty.

Court: Sir, I just want this in record, that you pleaded not guilty, and the defence addressed the court that you, the plea is not according to the instructions given to her, and further takes instructions from you. The defence came again saying that you plead consensual intercourse, again the interpreter interpreted that the trial should be separated and proceed the matter with accused 2 and you are going to try later, again you changed saying that now, you are pleading guilty. Is that the position? So, do not delay us, there are so many cases, please. Is that what you are saying now that you are pleading guilty?

Accused 1: Yes, Your Worship.

[Ms Mzamo]: As the court pleases, Your Worship, both pleas are indeed in accordance with my instructions, Your Worship, and statements have been prepared on their behalf.'

[24] After the written statement of each appellant was read into the record, the magistrate's interaction with the appellants' legal representative and the appellants themselves, reveals the following:

'Court: Before the accused must inform the contents of the statement, there is this question of kidnapping, how did the complainant go to that structure, because they say that in the statement, she refused, and that again in respect of count 2, number 3, the assault common, how did it happen, it is not in the statements.

Ms Mzamo: As the court pleases, Your Worship. Regarding kidnapping, Your Worship, the[y] forcefully dragged to that structure.

Court: So, you will amend the statements.

Ms Mzamo: Regarding kidnapping, Your Worship, they hold him on the neck, that is strangling, Your Worship. Can I amend, Your Worship?

Court: Yes, and again even to the count of rape, they had sexual intercourse, it is not clear who started and then who followed?

Ms Mzamo: Number 1 started, Your Worship.

Court: Yes, it must appear on the statement, who started and then after he finished and then what happened?

Ms Mzamo: As the court pleases, Your Worship. Thank you, Your Worship, duly amended can I read the amended portions?

Ms Mzamo: Paragraph 4, reads as follows for number 1.

"I came across [M] [T] and called she, refused, I held her and strangled her, I told her to go an abandoned structure, an abandoned flat structure, then I had sexual intercourse with her, without her consent, I was the first one to engage in sexual intercourse, and number 2 also engaged sexual intercourse."

That is all regarding number 1. Coming to number 2, the amended portion reads as follows,

“We came across [M] [T], we stopped her, told her to go to an abandoned structure, she refused, we dragged her, she complied and we further engaged in sexual intercourse with her, without her consent. I had sexual intercourse after number 1 had finished. I admit my conduct was not justified and I am also remorseful for what I did.”

That is all.

Court: Thank you. Please stand up, accused 1. Do you confirm the contents of the statement?

Accused 1: Confirmed, Your Worship.

Court: Yes, Accused 2, do you confirm?

Accused 2: Yes, Your Worship, it is but it is missing, because I am not the one who called the complainant.

Court: So, you confirmed that you had sexual intercourse with the complainant?

Accused 2: Yes, Your Worship.

Court: You went along with the complainant to that abandon structure?

Court: Yes, Madam.

Ms Mzamo: Your Worship, the defence is applying to hand in the statement Your Worship.

Court: Yes, the statement for accused 1, is marked Exhibit A. For accused 2, it is Exhibit B.’

Ms Mzamo: As the court pleases.

Court: Do you accept the statement and the plea of the accused?

Prosecutor: State accepts the pleas Your Worship.’

Assessment

[25] The line of questioning by the magistrate and the contents of each appellant’s written statement are discordant. The statements in support of the pleas of guilty are more important for what they do not say rather than what they actually convey. Despite questioning by the magistrate, the appellants’ statements are substantially defective and the magistrate’s blanket acceptance thereof was irregular.

[26] On the count of kidnapping, neither of the appellants admitted that he intended to deprive the complainant of her liberty. And as for the assault, neither of the statements indicate an express admission that the appellants deliberately and/or consciously applied force to the person of the complainant.

[27] More significantly, on the count of rape there are two aspects of fundamental concern. The first arises from the omission in the charge sheet to specifically identify the applicable provisions of Part I of Schedule 2 of the Criminal Law Amendment Act. The legislation (i.e. section 51(1)) obliges a regional court or a high court to sentence a person convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life. This sentence is competent once the offender has been convicted of rape as contemplated in section 3 of the Sexual Offences Act in specified circumstances, inter alia:

‘(a) when committed –

(i) in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice;

(ii) by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy.’

[28] The charge sheet in the record does not indicate whether (i) or (ii) is applicable. It was only during the pleading stage that the prosecutor announced that the State relied on common purpose (i.e. (ii)). This is a material element for activating the minimum sentence provisions and which ought to have been disclosed in the charge well before the appellants were required to plead.

[29] The essence of the doctrine of common purpose is that if two or more people act together for the purpose of committing a crime, the conduct of each of them to achieve that purpose is imputed to the others.[12] The liability requirements for a common purpose fall into two categories. The first arises where there is a prior agreement, express or implied, to commit a common offence. In the second category, there is no prior agreement or none is proven. The liability arises from an active association and participation in a common criminal design with the requisite blameworthy state of mind.[13]

[30] The legal requirements for establishing a common purpose are by no means an oversimplification. Disclosure in the charge sheet at the onset of the trial would have properly informed the appellants of the case relied upon by the State and enabled them to have prepared their respective cases accordingly. The pleas of guilty offer no indication of what the common purpose entailed, nor is there any indication from the magistrate’s questions if she ascertained that the appellants engendered an appreciation and

understanding of what a common purpose meant and that they intended to act in accordance therewith.

[31] Turning to the second issue arising from the count of rape. This is located in the written statement of each appellant where he admits ‘sexual intercourse’ with the complainant. The charge sheet discloses that the act of sexual penetration which each appellant is alleged to have committed is that he inserted his penis into the complainant’s vagina. There is no explicit admission thereof in either of the written statements. The phrase ‘sexual intercourse’ is not defined in the Sexual Offences Act. The Act speaks of ‘sexual act’, ‘sexual

offence’, ‘sexual penetration’, ‘sexually penetrates’ and ‘sexual violation’. There is an overlap between these terms, but in limited respects others are mutually exclusive.

- [32] Absent an express admission by each appellant that he inserted his penis into the complainant’s vagina, it was incumbent upon the magistrate to have sought clarification from each appellant as to whether ‘sexual intercourse’ was a form of conduct that fell within the scope of any of the aforementioned terms as defined in the Act.
- [33] The trial magistrate erred by not questioning the appellants at all as regards the aforementioned issues. The magistrate misdirected herself in not properly considering the appellants’ section 112(2) statements as compared to the charge sheet and the elements of each of the alleged offences.
- [34] These shortcomings in the magistrate’s compliance with the terms of section 112 are defects or irregularities that resulted in a failure of justice.
- [35] The consequence is that the appellants did not have a fair trial.
- [36] Where there is no indication that the appellants understood the charges against them in relation to what they professed to have admitted in their guilty pleas, one would have obvious difficulty in concluding that their statements were made freely and voluntarily in the absence of undue influence.[14]
- [37] The result is that their fair trial rights guaranteed in section 35(3) of the Constitution were disregarded. This,
- ‘... includes the right to be treated fairly during plea proceedings in terms of the provisions of section 112(1)(b), when an accused has elected to waive his or her right to remain silent, and the fairness of such proceedings should consequently be safeguarded by the magistrate who presides over them’.[15]
- [38] Clearly, there were insufficient facts on record to sustain the convictions for each appellant. [16] The magistrate erred in uncritically accepting the pleas of guilty – at the very least she ought to have noted a plea of ‘not guilty’ in terms of section 113 of the Criminal Procedure Act in lieu of questioning.

Conclusion

- [39] In summary, the boxes are ticked in favour of each appellant with regard to the issues identified for determination.
- [40] The magistrate failed to determine whether each appellant admitted all the allegations in the charge sheet and whether they each properly understood all the elements of the offences in question.

[41] In convicting the appellants as she did, the magistrate drew factual and legal conclusions by embarking on a process of inferential reasoning that was materially flawed and at odds with the guiding principles set out in the resources that are referenced in this

judgment.

[42] The appellants' pleas of guilty are certainly not models of good draughtsmanship – they leave much to be desired. It would also appear that the appellant's legal representative did not have an appreciation or understanding of the elements of the offences in question. And it appears as if the prosecutor also did not apply his/her mind when he/she accepted the pleas of guilty.

[43] In the circumstances I am persuaded that the written statements were inherently flawed and that each statement substantially lacked admissions or averments required to sustain proper convictions.

[44] These shortcomings rendered the statements materially inadequate and the appellants' pleas of guilty highly questionable.

[45] It is readily acknowledged that magistrates' courts labour under an extremely heavy caseload. That, however, should not be allowed to excuse inadequacies in written statements tendered under section 112(2) of the Criminal Procedure Act.

[46] Moreover, there is no reason why an accused's legal representative should not prepare a proper statement. In promoting access to justice and in recognition of the right to a fair trial, practitioners have a duty to acquaint themselves fully with the law on the subject if they are to provide competent representation for needy clients, and not leave it to others to rectify deficiencies, if there are any. In particular, it should not be left for a busy magistrate to have to do so and, later on, for the High Court.[17]

[47] In the circumstances, I propose the following order:

1. The appeal succeeds in toto.
2. The conviction and sentence for each appellant on each count is set aside.
3. The plea of guilty in terms of section 112(2) of the Criminal Procedure Act 51 of 1977 (the Act) for each appellant stands and their case is remitted to the trial court.
4. The presiding regional court magistrate is directed to reconsider the guilty plea of each appellant by complying with the provisions of section 112(1)(b) of the Act in accordance with the guidelines set out in this judgment.
5. The provisions of section 113 of the Act must be applied in the event that the presiding magistrate is not satisfied that the appellants intend to admit guilt or are legally guilty.
6. This order shall be executed without unreasonable delay.

M S RUGUNANAN

JUDGE OF THE HIGH COURT

I agree.

L F MONAKALI

ACTING JUDGE OF THE HIGH COURT

Appearances: For the Appellant: X Babane, Legal Aid South Africa, Mthatha (Ref: X Babane) Tel: 083 993 4702. For the Respondent: S Mfihlo, Office of the Director of Public Prosecutions, Mthatha, Tel 047- 501 2697; Cell 083 515 9280. Date heard: 01 November 2023 Date delivered: 14 November 2023

[1] S v Moya 2004

(2) SACR 257 (WLD) at 260d.

[2] S v Moya supra at 260h.

[3] S v Shiburi 2018

(2) SACR 485 (SCA) para 19.

[4] S v Moyo [2022] ZAGPJHC 250 para 6.

[5] S v Negondeni [2015] ZASCA 132 para 10. In Negondeni the accused's admissions of fact made in a s 112(2) statement and in response to judicial questioning were, on appeal, considered

inadequate to have justified a conviction of murder).

[6] S v Mkhize 1978

(1) SA 264 (N) at 267E.

[7] S v Mshengu 2009

(2) SACR 316 (SCA) at 319b-c.

[8] Burchell, Principles of Criminal Law, Juta 5th Ed at 589 and 591.

[9] Burchell op cit at 659-660.

[10] Burchell op cit at 610, see also section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

[11] C R Snyman, Criminal Law, LexisNexis 6th Ed at 176.

[12] Jacobs and Others v The State [2018] ZACC 4 para 128.

[13] S v Mgedezi 1989

(1) SA 687 (A) at 705I-706B and S v Mahlangu and Another [2012] ZAGPJHC 114.

[14] S v Moyo supra para 15.

[15] S v Fransman & another 2018 (2) SACR 250 (WCC) para 12.

[16] S v Moyo supra para 15.

[17] S v Moya supra at 26c.

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