

SOUTH AFRICA / JUDGMENT

Sibiya v S (A121/2024) [2025] ZAGPPHC 531 (23 May 2025)

[2025] ZAGPPHC 531

COURT

North Gauteng High Court, Pretoria

BEFORE

M Mokadikoa-Chauke, E M Kubushi

CASE / FILE NUMBER

A121/2024

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

Case

Number: A121/2024

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: YES

DATE:

23 May 2025

SIGNATURE

In

the matter between: MANDLA
 DUNKU
 SIBIYA
 Appellant
 and
 THE
 STATE
 Respondent

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be ____ May 2025.

JUDGMENT

MOKADIKOA – CHAUKE, AJ

Introduction

- [1] The appellant was charged in the Regional Court sitting in Tsakane with one count of rape of a seventeen-year-old girl. The appellant was further charged with a second count of assault with intent to do grievous bodily harm. The appellant was informed that the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997 were applicable on count 1, in that the rape was committed after he assaulted the complainant with a pot.
- [2] The appellant was legally represented during the trial.
- [3] The appellant was, on 14 November 2023, convicted of rape in contravention of section 3 of the Criminal Law Amendment Act (Sexual Offences and Related Matters) 32 of 2007 (Count 1) and assault with intent to do grievous bodily harm (Count 2).
- [4] On 26 March 2024, he was sentenced to life imprisonment in respect of count 1, and 12 months imprisonment in respect of count 2. Counts 1 and 2 were ordered to run concurrently in terms of section 280(2) of the Criminal Procedure Act 51 of 1977.
- [5] The appellant has an automatic right of appeal because of the sentence of life imprisonment that was imposed.
- [6] The appellant has approached this Court on appeal against both conviction and sentence.

Testimony by the complainant

[7] The complainant, R[...] P[...] S[...], testified that on 16 March 2019, she was home alone after her mother and her friend had left. The appellant opened the door and asked her why the door was not locked as someone can come in and rape her. He ordered her to lock the door. Whilst she was trying to close the door, the appellant pushed the door and the complainant fell on the bed. The complainant was frightened and she screamed. The appellant told her that she was making noise, and he took a pot that was on the

floor and hit her with it on her face. The appellant removed her swimming costume, which she was wearing, with force, and removed his pants. The complainant tried to resist, but the appellant was stronger than her and he came between the complainant's

thighs, forcefully kissed her and then inserted his penis inside her vagina, thus raping her.

[8] After the appellant raped her, the complainant and the appellant got dressed and the appellant left the house. The complainant also left the house and ran to her friend's house, where she reported what had happened to her friend's mother. The friend's mother phoned the complainant's mother and when she arrived, the complainant also reported to her that the appellant had raped her. The police were called and when they arrived, she was taken to a medical practitioner who examined her. The complainant sustained an injury on her lip as a result of the assault with the pot.

Testimony by Ms L[...] (witness)

[9] S[...] J[...] L[...] ("Ms L[...]") testified that she knows the complainant. The complainant and her daughter are friends. During the evening of 16 March 2019, she heard someone crying outside. She went out of the house and found the complainant. She asked the complainant what was wrong, and the complainant told her that Dunku (referring to the appellant), had raped her. The complainant was pointing at a man that was running away. Ms L[...] called her brother and asked him to run after the man and bring him back, but her brother was not able to catch up with the man who was pointed out by the complainant. She blew a whistle to call members of the community. She called the complainant's mother, and the police were also called.

The State presented the following evidence in support of its case:

[10] The State handed in a J88 report by a medical officer in terms of section 220 of the Criminal Procedure Act, as well as, a Forensic DNA report, as exhibits B and C respectively. The legal representative of the appellant confirmed the correctness of both these reports; they were not in dispute. The two reports captured the following:

10.1 The J88 report, which is a gynaecological examination report, reflected the following conclusion: "physical injuries are consistent with the history of physical assault".

10.2 The Forensic DNA Report, which is the results of the semen specimen that was found on the complainant: The complainant's panty was taken for DNA testing, where a semen specimen was found and tested in comparison with the appellant's semen. The DNA result of the semen specimen that was on the complainant's panty was found to match the DNA of the appellant's semen. There was a complete match on the two samples.

Thereafter, the State closed its case. The defence commenced with its case and the appellant testified in his defence. The Pre-sentencing Report and Victim Impact Report were, also handed in by consent.

Testimony in defence by appellant

[11] The appellant, Mandla Dunku Sibiya, testified that on 16 December 2015, he met the complainant and he proposed love to her. On 16 March 2019, the complainant invited him to visit her later, which he did. The appellant testified that he arrived at the complainant's home and they started talking. The complainant told him that her mother was not around and that he should relax. He massaged her and they both enjoyed themselves. The appellant asked the complainant if she had condoms, and she said she did not. The appellant became angry and hit the complainant with a pan on her cheek, but the complainant calmed him down. He left the complainant's house and she walked with him for a short while and then turned back. The appellant could not give reasons why he attacked the complainant with the pan. The appellant further denied that he had sexual intercourse with the complainant.

After consideration of the evidence of all the witnesses, the Court a quo decided against the appellant and sentenced him to life imprisonment.

Ad Conviction

[12] On appeal, the appellant raised the following grounds:

- a. The complainant was not a reliable witness;
- b. The State failed to prove their case against the appellant beyond reasonable doubt;
- c. The version of the appellant is reasonably possibly true.

In oral argument, the appellant's counsel submitted that whatever could be said in favour of the appellant was contained in the heads of argument. As far as the conviction of rape was concerned, he could not fathom the appellant's version that he did not have sexual intercourse with the complainant whilst the Forensic DNA Report was admitted as correct.

[13] The Forensic DNA Report puts to bed the appellant's appeal. The report is proof beyond reasonable doubt that the appellant raped the complainant. Besides the bare denial, the appellant could not provide any explanation as to how his semen ended up on the complainant's panties, if, as he alleges, he did not have sexual intercourse with her. There is, therefore, no need for this Court to go into the evidence. Besides, the Court a quo made

credibility findings in relation to all the State's witnesses. It found the witnesses to be credible, reliable, and truthful, and cannot be faulted in that regard. The Court a quo was correct in its guilty finding on the charge of rape.

Ad Sentence

[14] In trying to convince the court to temper with the sentence imposed by the Court a quo, counsel for the appellant orally argued that the fact that the complainant suffered only the injury to her lip, which was caused by the pan that the appellant used to hit her, should count in the appellant's favour as no excessive force was used during the commission of the offence. The appellant's counsel, however, ended up conceding that the trauma that the complainant suffered as a result of the rape should count as injury suffered by the complainant. Counsel could not take the argument any further and requested the court to consider the argument raised in the appellant's heads of argument.

[15] Relying on the judgment in *S v Vilakazi*,^[1] where it was found that:

"It is clear from the terms in which the test was framed in *Malgas* and endorsed in *Dodo* that it is incumbent upon a court in every case, before it imposes a prescribed sentence, to assess, upon a consideration of all

circumstances of the particular case, whether the prescribed sentence is indeed proportionate to the particular offence"

it was argued on behalf of the appellant, in the heads of argument, that the sentence of life imprisonment is shocking and inappropriate. The argument was further that the sentence, in the circumstances of this case, is out of proportion with the facts of the case and that the Court a quo clearly over emphasized the interests of the complainant and that of the community.

[16] The Court was, furthermore, referred to the judgment in *S v GN* [2] whereat Du Plessis J, held as follows

"In *S v Malgas* (par

25) Marais JA pointed out that s 51 of the Act 'has limited but not eliminated the courts' discretion in imposing sentence'. It follows that, where the Act prescribes a minimum sentence, the courts must still seek to differentiate between sentences in accordance with the dictates of justice."

[17] The State, in turn, argued that the sentence is appropriate and should not be reconsidered.

[18] Sentencing is a matter pre-eminently for the discretion of the Court a quo. The court hearing the appeal should be careful not to erode that discretion and would be justified to interfere only if the trial court's discretion was not judicially and properly exercised, which would be the case if the sentence imposed is vitiated by irregularity or misdirection or is disturbingly inappropriate.^[3]

[19] A sentence of life imprisonment is prescribed for rape where the victim is assaulted with the intention to do grievous bodily harm, and it can only be deviated from if the court finds substantial and compelling circumstances warranting the imposition of a lesser

sentence.[4]

[20] The Court a quo, correctly, found no substantial and compelling circumstances that would have compelled it to deviate from the prescribed minimum sentence. It found so, having taken the appellant's personal circumstances into account as against the gravity of the offence and the interests of society. The appellant's personal circumstances were overwhelmed by the other factors.

[21] It is trite, violence against women and children is prevalent in this country. The offence of rape is, also, grievous in nature and is aggravated by the fact that the complainant, in this instance, was raped inside the sanctity of her own home where she was supposed to feel most safe and protected. She was traumatised. In the Victim Impact Report, the complainant states: "after I have been raped, I changed a lot because I felt like I lost purpose of living, what's worse I have lost my dignity after the rape." This profoundly indicates the trauma that the complainant continues to suffer.

[22] In *S v Kearns*,^[5] it was held:

"A rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological harm in the process. Rape is not merely a physical assault; it is often destructive of the whole personality of the victim. A murderer

destroys the physical of his victim, a rapist degrades the very soul of the helpless female. The physical scar may heal, but the mental scar will always remain. When a woman is ravished, what is not merely physical injury, but the deep sense of some deathless shame. It is a violation with violence of the private person of a woman. This constitutes an outrage by all means. By the very nature of the offence, it is an obnoxious act of the highest order."

[23] The appellant is, in addition, not a first time offender. He was convicted of malicious injury to property in 2013, which involved an element of violence. This is indicative of his character. In *S v Malgas*,^[6] it was held that

"the specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative

hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances."

[24] In our view, the arguments raised by counsel for the appellant on sentence are unmeritorious, and we find no material misdirection on the finding of the Court a quo on the sentence imposed. It is in line with a proper exercise of judicial discretion on any sentencing court in the position of the Court a quo.

[25] The sentence imposed by the Court a quo is appropriate under the circumstances.

[26] Consequently, I propose the following order:

1. The appeal is dismissed.
2. The conviction and sentence on count 1 is confirmed.
3. The conviction and sentence on count 2 is confirmed.
4. The appellant's name is to be put in a registrar of sexual offenders.

M MOKADIKOA-CHAUKE

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

I agree and it is so ordered

E M KUBUSHI

JUDGE OF THE HIGH COURT

Date of hearing: 05 March 2025

Date of Judgment: ____ May 2025

APPEARANCES

For the Appellant: Adv L Augustyn Instructed by: Legal Aid For the Respondent: Adv Masekoameng Instructed by Director of Public Prosecutions

[1] 2009

(1) SACR 552 (SCA) at par 15.

[2] 2010

(1) SACR 93 (T) at para 12. See also *S v Mahomotsa* 2002 (2) SACR 435 (SCA) and *S v Nkomo* 2007 (2) SACR 198 (SCA).

[3] *S v Rabie* 1975 (4) SA 855 (A).

[4] Section 51 of the Criminal Law Amendment Act 105 of 1997.

[5] 2009

(2) SACR 684 (GSJ) at para 15.

[6] 2001

(1) SACR 469 (SCA) at para 9 d

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