

SOUTH AFRICA / JUDGMENT

Siliga v S (A32/2022) [2024]

ZALMPPHC 126 (13 August 2024)

[2024] ZALMPPHC 126

COURT

Limpopo High Court, Polokwane

BEFORE

T.C. Tshidada, S. Nemutandani

CASE / FILE NUMBER

A32/2022

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IN

THE HIGH COURT OF SOUTH AFRICA

LIMPOPO

LOCAL DIVISION, THOHOYANDOU

CASE NO: A32/2022

(1)

REPORTABLE: YES/NO

(2)

OF INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED.

DATE: 12/8/2024

SIGNATURE:

In the matter between:

MURENDENI
SILIGA
APPELLANT
and
THE
STATE
RESPONDENT

JUDGMENT**TSHIDADA J**

- [1] Appellant exercised his right to automatic appeal by invoking the provision of Section 309 (10)(a)(b), and challenged his conviction on one count of rape wherein he was alleged to have contravened the provisions of Section 3 read with Section 1, 50, 55, 56(1), 56A, 57, 58, 59, 60 and 61 of the Criminal Procedure Act[1], also read with Section 51(1) and Schedule 2 of the Criminal Law Amendment Act[2]. Consequent to the aforesaid conviction, he was sentenced to life imprisonment by the Sibasa Regional Court.
- [2] State alleged that on or about the 6 September 2017 at or near Muledani in the Regional Division of Limpopo, the appellant did unlawfully and intentionally commit an act of sexual penetration with the complainant one, R[...] R[...], an 18-year-old female at the time, by inserting his penis in her vagina and had sexual intercourse with her without her consent.
- [3] Appellant was represented by Mr M.B Maake from Legal Aid Thohoyandou at both trial proceedings and on appeal.
- [4] Appellant contests both his conviction and sentence on the following grounds.
- [5] Ad Conviction
- (a) That the trial court erred in finding that the guilt of the appellant was proven beyond a reasonable doubt.
- (b) That the court erred when it rejected the appellant's version that he was threatened, instructed and forced to have sexual intercourse with the complainant by his former co-accused.
- (c) Court erred in rejecting his version that the reason he provided accommodation where the complainant was sexually violated was influenced by the fear he had of his former co-accused.
- (d) Court erred in dismissing the fact that the reason why the complainant could or did not hear when he was instructed to have sexual intercourse with her was due to the loud noise that came from the television which was on at the time.
- (e) Trial court erred by not considering that the State failed to prove that the appellant acted in common purpose with the co-accused when the complainant was sexually violated because he was not aware at the time that the complainant was going to be raped at any give point.
- (f) Lastly, that the court erred in not finding that the appellant's version was reasonable possibly true that his former co-accused forced him to rape the complainant and that he complied with the instruction to rape the complainant out of fear.

Ad Sentence

[6] That the trial court erred in failing to consider the appellant's personal and mitigating factors before he was sentenced to life, in that he was only 18 years old at the time of the commission of the offence. As a result, there are good and reasonable prospects for him to be rehabilitated. Lastly, that the imprisonment sentence imposed

on him was harsh and disproportionate to induce a sense of shock to an offender of his calibre.

[7] The correct approach to determine the guilt of an accused is set out in *S v Chabalala*.^[3] See also *S v Mofokeng*.^[4]

[8] In the contrary *Zulman JA* as he then was held in *S v V*^[5], thus:

"it is trite that there is no obligation upon an accused person, where the State bears the onus to convince the court. If his version is reasonably possibly true, he is entitled to his acquitted although his explanation is improbable. A court is not entitled to convict unless it is satisfied not only that the explanation is improbable but that beyond reasonable doubt it is false."

SUMMARY OF EVIDENCE

[9] The State adduced oral evidence of the complainant, her mother I[...] R[...] and complainant's then boyfriend Takalani Tshovhote. It is their evidence that is relevant and significant for the purposes of this appeal, not limited to the evidence of the applicant and partly that of his then co-accused.

[10] Complainant testified during trial through an intermediary that on the day in question, she was walking in the company of her boyfriend to riverside section to attend extra study lessons when both of them were accosted by the appellants' co-accused who immediately threatened to assault and/or kill them before ordering her boyfriend to go away and leave him with the complainant.

[11] Former co-accused then dragged the complainant into the bushes ordered her to take off her clothes and forced her to lie on the ground on her back and then had sexual intercourse with her without her approval and consent, worse without using protection whilst she was busy crying helplessly without any rescue whatsoever.

[12] Soon thereafter the co-accused got up and dressed up. He then forcefully took the complainant's phone and dialed the appellant to inform him that he was with a person, clearly referring to the complainant. It is common cause that the appellant shortly thereafter arrived at the scene with an unknown young man and then started talking to the co-accused.

[13] Complainant testified that the appellant instructed her to follow him with the other two males following her from behind up until she was escorted into appellant's room at his residence. Co-accused again threatened and raped the complainant during the appellant and the young boy's temporary absence whilst they had gone out to buy cigarette. Upon the two's return they started smoking and conversing without complainant hearing their conversation. Appellant then walked the young man away. When he returned, he found the co-accused still on top busy raping the complainant all over again.

- [14] She testified that appellant immediately told co-accused that he also wanted to have sexual intercourse with her.
- [15] Appellant is said to have undressed himself and ordered the complainant to lie on the bed again, got on top of her and started having sexual intercourse with her twice without her consent whilst she was crying inconsolably, yet he ordered her to keep quiet. She testified that no one forced the appellant to rape her. He according to her voluntarily indicated or informed the co-accused that he as well wanted to have sexual intercourse with the complainant.
- [16] Complainant further testified that after the two had released her early hours of the following morning, she immediately telephoned her mother who had already left for work to return back home. She also called her boyfriend and reported to both of them everything that transpired and befallen her at the hands of the appellant and his friend.
- [17] Complainant denied under cross-examination that the appellant was before raping her threatened with a knife by the co-accused, mainly because according to her there was no knife at the scene, neither was she ever threatened with any before she was sexually violated by the two. In her version there was no force or threats she observed being exerted on the appellant to rape her by anyone.
- [18] The complainant's mother corroborated her evidence to those extent it related to her, significantly reiterated the report narrated to her by the complainant. She indicated that she made countless phone calls in vain trying to trace the complainant on the evening of her ordeal.
- [19] Complainant's boyfriend also confirmed how he and the complainant were first accosted by appellant's co-accused, how he was chased away before the complainant was forcefully dragged into the bushes away from him until the following day when he received a phone call from the complainant informing him what transpired to her after they were forcefully separated.
- [20] Appellant confirmed complainant's evidence from the moment he joined his co-accused at the bushes until their arrival at his shack, save for denying that he voluntarily and freely engaged in sexual intercourse with her but for he was coerced, threatened and forced at knife point by his former co-accused to have sexual intercourse with the complainant without her consent. He further denied acting in furtherance of common purpose with co-accused when complainant was sexually violated by the two of them.
- [21] In the main the appellant did not deny having sexual intercourse with the complainant without her consent. He however contends that he did so under duress, an aspect which was vehemently denied by the complainant and his co-accused.

- [22] Co-accused testified that there is no way he would have allowed the appellant or granted him permission to have sexual intercourse with the complainant, because his defense was that the complainant was in fact his girlfriend at that time.
- [23] This court is therefore enjoined to determine whether on the totality of evidence which was before the trial court, is there a possibility or evidence that indicates and prove that the appellant was indeed compelled to sexually violate the complainant against her will.
- [24] Evidently, complainant was a single witness to testify on the actual incident of her sexual nightmare inside the appellant's shack.
- [25] Section 208 of the Criminal Procedure Act[6] provides that an accused person may be convicted of any offence on the single evidence of any competent witness.
- [26] In *S v Webber*[7] the court held that:
- "A conviction is possible on the evidence of a single witness. Such witness must be credible, and the evidence should be approached with caution. Due consideration should be given to factors which affirms and factors which detract from the credibility of the witness. The probative value of the evidence of a single witness should also not be equated with that of several witnesses."*
- [27] The appellate court emphasized the significant considerations of the credibility of a single witness in *S v Saul and Others*.[8]
- [28] The totality of evidence demonstrate that violence and threat was used to capture the complainant from the moment she was removed from the company and comfort of her boyfriend and during her gang rape by the appellant in the company of his friend. Their conduct was completely contrary to any form of consensual sexual intercourse they allegedly engaged on with the complainant.
- [29] Least said about the appellant's alleged undue threats and duress arguably instilled on him before raping the complainant. Evidence denotes that no thread of evidence positively supports his version. Worse on his defense is the fact that his own friend denied ever forcing, threatening or allowing him to have sexual intercourse with the complainant.
- [30] When regard is held to the evidence a quo, the only possible inference that could be drawn consistent with all the proven facts, is that the appellant freely and voluntarily indicated his intention to have sexual intercourse with the complainant at least on two occasion, unfortunately without her prior consent.
- [31] In my view, all the state witnesses were impressive, credible and reliable to the extent that they corroborated the complainant's version of events in all material respects. Their evidence was satisfactory and was correctly accepted by the court a quo as reasonably possibly true.

- [32] In contrast, the appellant's version as from the moment he was invited by his friend to come join him and further providing accommodation where the complainant was to be sexually harassed the entire night and his participation in the sexually orgy is clearly indicative of someone who freely co-operated and participated in the complainant sacrifice mercilessly so until they decided to free her the following morning.
- [33] His version in my view was correctly rejected as improbable for it remains not to be reasonably possibly true.
- [34] The State successfully adduced evidence that proved the appellant's guilt beyond reasonable doubt that he unlawfully, intentionally, freely and voluntarily committed an act of sexual intercourse with the complainant without her consent.
- [35] As a result, this court finds no lawful basis to interfere with the conviction of the appellant by the trial court due no errors or misdirection on either the facts or law that this court was able to find and establish from the trial court proceedings.
- [36] This court neither found any misdirection or errors committed by the trial court when it imposed a prescribed minimum sentence in terms of the Act as envisaged on Section 51(1) of Schedule 2 of the Criminal Law Amendment Act *supra*.
- [37] Our courts have consistently characterized the crime of rape as a repulsive crime, which is a humiliating, degrading and brutal invasion of personal privacy.
- [38] The complainant was 18 years old when she was gang raped by the appellant and the former co-accused who were both teenagers aged 18 and 19 respectively.
- [39] The complainant will in no doubt live with the memory of a painful, brutal and undignified experience of the violation of her privacy by the two gentlemen who are also members of the community she hails from.
- [40] I can only reiterate what the appellate court stated in *DPP Kwazulu Natal v Ngcobo and Others*[9], that courts are expected to dispense justice. This kind of lawlessness has regrettably become prevalent in our communities. Courts are therefore on daily basis expected to send out clear messages that such behavior shall be met with full force and effect of the law. The Legislature is concerned with the outrage so should we be.
- [41] I agree with the trial court that the aggravating circumstances in *casu* far outweigh the personal and mitigating factors presented by the appellant to the court to justify imposition of a lesser sentence on him, instead of the imposed sentence of life imprisonment. See in this regard *S v Malgas*. [10]
- [42] Equally, appellant failed to make out a case to compel this court to upset the sentence already imposed on him. The sentencing discretion vested with the trial court was in my view judicially exercised in the circumstances.
- [43] Consequently, the following order is granted.

[43.1] The appeal on both conviction and sentence is hereby dismissed.

T.C. TSHIDADA

JUDGE OF THE HIGH COURT

LIMPOPO DIVISION, THOHOYANDOU

I, agree

S. NEMUTANDANI

ACTING JUDGE OF THE HIGH COURT

LIMPOPO DIVISION, THOHOYANDOU

Appearances:

For the Appellant:

Mr M B Maake

Legal Aid SA (Thohoyandou)

For the Respondent:

Adv Nekhambele

NDPP (Thohoyandou)

Date of hearing:

25 February 2024

Judgement

delivered on: 13 August 2024

[1] 51 of 1977

[2] 105 of 1997

[3] 2003 (1) SACR 134 (SAC) AT 139 i-j to 140a

[4] 2015 ZA FSHC 13 (5 February 2015)

[5] 2000 (1) SACR 453 (SCA)

[6] 51 at 1977

[7] 1971 (3) SA 574 (A)

[8] 1991 (3) SA 172 (A)

[9] 2009 (4) ALL SA 295 SCA at Para 26

[10]

[2001] 3 ALL SA 220 (A)

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