

SOUTH AFRICA / JUDGMENT

Simelani v S (A44/2021) [2022] ZAMPMHC 25 (25 November 2022)

[2022] ZAMPMHC 25

COURT

Middelburg High Court, Mpumalanga

BEFORE

M T Mankge, Mtimunye

CASE / FILE NUMBER

A44/2021

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IN

THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA

DIVISION, MIDDELBURG LOCAL

Appeal

Case Number: A44/2021

REPORTABLE:

YES

OF

INTEREST TO OTHER JUDGES: NO

REVISED

25/11/2022

In

the matter between:

BONGANI

M SIMELANI

APPELLANT

And

THE

STATE

RESPONDENT

JUDGMENT

MANKGE J:

INTRODUCTION:

- [1] This appeal judgment addresses the approach taken by the trial court in accepting the State evidence on the chain of custody of the DNA buccal kit, when the SAP 13 number was not allocated on the said kit.
- [2] This judgment also probes the nature and the strength of the evidence which was used by the trial in convicting the appellant, when there is contention that the chain of custody was not intact, and a period of 16 days of safekeeping of the said kit is unaccounted for. Also whether the trial court exercised the necessary caution in convicting on the evidence of a 12-year-old, a person who is mentally disabled.
- [3] Whether with all the above the conviction of the appellant could be sustained.

THE FACTS OF THE APPEAL

- [4] The appellant appeared in the Regional Court Secunda on the charges of Rape read with the provisions of Section 51(1) of the Criminal Law Amendment Act 105 of 1997, and also on the charges of Sexual Assault. On the first charge the allegation is that he sexually penetrated a 12-year-old mentally disabled person by inserting his penis into her vagina without her consent. On the second charge is that he sexually violated the said 12-year-old, by licking her vagina with his tongue without her consent (being in contravention of Section 5 of Act 32 of 2007). As she is a minor I will for the purpose of this judgment refer to the victim only as Ms. PM.
- [5] The appellant who was legally represented pleaded not guilty to both the charges and was convicted by the court a quo of both charges. He was sentenced to Life imprisonment and 5 years' imprisonment respectively. The appellant was also declared unfit to possess a firearm in terms of section 103(1) Act 60 of 2000. The court a quo also made ancillary orders which are found on the record of the proceedings.
- [6] The record of the proceedings reveals that when the State led, the evidence of the Ms. PM the services of an intermediary was used to obtain her testimony. The State also led evidence of first report from the victim's guardian, and a few other witnesses, whose evidence I shall revert to briefly where necessary.
- [7] The section 212 of the Criminal Procedure Act 51 of 1977 chain evidence pertaining to the taking and receiving the crime kit were found to be meeting the requirements of the Act. The record further reveals that all the chain evidence was admitted on record as evidence with the exclusion of only the DNA Report, as the appellant placed same in dispute. The appellant's contention was that the person who compiled the DNA Report needed to come

and explain his conclusions. The witness from the Forensic Science Laboratory was then called, (who confirmed that the DNA result from Ms. MP matched the DNA results obtained from the reference sample (Confirmation DNA sample from the appellant)).

- [8] The appellant testified in his defence and he disputed that he raped and sexually violated Ms. PM in any manner.
- [9] The matter is before us on appeal in respect of both conviction and sentence.

ISSUES

FOR DETERMINATION

[10] Before dealing with the merits of the appeal I consider it prudent to highlight the following pertinent points, as really being the only points which require this court's consideration:

- Whether the Regional Court Secunda sitting as a court of first instance correctly convicted in the appellant who denied knowledge of raping and committing act of sexual assault on Ms. PM;
- And whether the court a quo's sentence of Life imprisonment imposed is too harsh and disproportionate to the offence that the appellant was convicted of.

- [11] If the answer to the first question is to the affirmative, only then, I will be required to proceed to the second question otherwise, if the first question is answered to the negative the exercise will end there, the appellant's appeal will stand to be upheld, which will then automatically mean that there will be no need for explore the second question.
- [12] After reading the entire record and paying particular attention to the submissions by both the appellant and the State, I am satisfied that the court a quo used the correct approach in convicting the appellant. I am of the firm view that the answer to the first question is to the affirmative. I am also of the firm view that the answer to the second question is to the negative. As a consequence, the appeal against conviction and sentence on count 1 stands to be dismissed for the reasons that follow.
- [13] I start with analysing the evidence briefly and then proceeds to the conclusion to support this court's finding on both conviction and sentence.

Conviction

[14] On conviction on the first charge; the appellant contends only two things that:

14.1 the chain of evidence is not properly proved as there is no evidence of the storage of the exhibit;

14.2 there is no evidence of exhibit being booked in the SAP 13, as the investigating officer conceded that there is no indication of SAP 13 number in his statement.

[15] They also contend that the conviction of sexual assault should also be set aside on the basis that:

15.1 the complainant never testified in her examination in chief that she was kissed;

15.2 the charge sheet described the sexual assault as follows: that the accused licked the complainant's vagina with his tongue, however the magistrate convicted the appellant for kissing the complainant on the mouth;

15.3 the court erred in accepting the evidence of the complainant that she was kissed, which is contrary to the evidence that she heard the complainant telling the police that the accused licked her vagina and the same evidence was accepted by court as true;

15.4 the court erred in rejecting the appellant's version as reasonably and possibly true.

ANALYSIS

OF THE EVIDENCE FOR THE PURPOSES OF THE ABOVE POINTS

On chain Evidence of both Ms. PM and the Appellant

- [16] The appellant is not raising any objection on the chain of custody on Ms. PM's DNA kit, but for completeness sake I deemed it necessary that I also speak to it before I deal with the one of the appellant.
- [17] The key witness for the state in the trial was Ms T Malatho, who testified that (I paraphrase her evidence) she received a sealed kit, she opened it, signed it in front of the police and the victim. Inside a secured sealed the kit she found a swab, she obtained samples from Ms. PM and thereafter she sealed the box with a serial number 10D1AE5108TF and gave a sealed box back to Warrant Officer Nathaniel Sondlana. On cross-examination this witness testified that the sample box was not tampered with.
- [18] The section 212 Affidavit by Ms Anastasia Molefe Mashishi with regard to the receiving of this kit was handed by agreement, the defence confirmed upon being asked by the presiding magistrate that they also admit the content of this affidavit.
- [19] Then on the appellant's DNA buccal kit the State is relying on the evidence of I L Malapela, who testified that he is the one who obtained a confirmation sample from the appellant on 27 February
2016. He had received a sealed kit from his commander he opened it, obtained the swabs from the appellant, and then proceeded to seal same in front of the appellant, after which the two of them including a witness signed to confirm the said process.
- [20] The affidavit pertaining to the kit from one Nakib Rahab (confirming receiving a sealed evidence bag) was also admitted by the defence. When the State was intending to hand in the affidavit from one Dereshen Chetty pertaining to the final DNA report, this was met by an objection from the defence, the basis of the objection is stated on record as follows: "it is my instruction from the accused, your worship that since he is disputing the DNA he will need your worship the person who compiled the report to come and explain, how he came

to this conclusion” . . .” Your worship it does meet the requirement, that one I cannot dispute, however the person is needed to come and explain how he came to this conclusion, hence DNA is in dispute. .”

- [21] On cross-examination of this witness, it is noted that only the following was put to the witness: “The accused does not dispute that you took these buccal samples but he is surprised to see the new investigating officer being you appointed in this case, because you previously handled his case where he was acquitted, and you use to harass him in the case where he is acquitted. You even alluded to him that you wanted to see him dead, and you were even reprimanded by one presiding officer, that is my instruction”
- [22] The record reveals that this was denied by the witness in the following manner: “I totally disagree with your statement. I cannot even recall at the incident whereby I actually harass the accused person, and I cannot even recall the incident whereby after the accused person being released from or acquitted on the 2012 matter ever actually came in contact with him. Since he was acquitted your worship, I have never ever met him”
- [23] The appellant’s contention on this appeal is that “the respondent did not prove the chain evidence regarding the forensic samples that was taken. In particular, the respondent did not prove what happened to the DNA buccal kit that was taken by Ms Malapela from the appellant. Their argument is that from the time that it was taken until it was delivered to the forensic science laboratory a period of 16 days lapsed and is uncounted for. They argue further that there is no evidence nor any proof of where it was stored as there was no SAP 13 number allocated to the kit.
- [24] Against this contention, is the evidence of police officer IL Malapela to the effect that after sealing the kit of the appellant’s buccal swabs with a seal reference number [....] he is also the one who book it out and took same to the Forensic Science Laboratory.
- [25] The evidence of Ms Nakib Rahab was also clear that she received a sealed evidence bag with the same reference number, she handed the bag in its sealed form to the analyst Warrant officer Chetty. Chetty’s finding was that Ms PM’s DNA matched the DNA found in reference number [....] (the appellant’s buccal swabs).
- [26] Of importance from the above depiction is that the appellant’s kit was at all material times sealed (with the same reference number) until the time it was analysed by the analyst. The evidence tendered by the State during trial confirm this much.
- [27] The defence is, in my considered view, just clutching at straws on this point; the appeal therefore cannot succeed without any solid reason. To demonstrate the fact that the defence was indeed grasping at straws on this point I now single-out this particular engagement between the witness and the defence counsel during cross-examination, it continued in this manner only (Between the appellant’s counsel and police officer IL Malapela):

Q: So he believes that the samples or the DNA could have been manipulated in anyway, also looking at the relationship between you and him on the matter?

A: That is not correct, your worship;

Q: Because when called to come and testify his defence is he did not have – he did not rape or have any sexual contact or sexual intercourse with the victim?

A: But your worship in response to the question the reference letter⁴ from the Forensic Laboratory stated very clear that the donor on the 2012 case, matter was also actually involved on the 2015 incident. However, by the time I actually received the letter the accused person was actually a free man by then. Then even the Forensic Science analyst in Pretoria, they have never actually had any contact with the accused. What they did they only receive the sample. They do not even know the donor in person. They received almost every parcel from the one who actually deliver the parcel at their front desk. There is no any other way they can actually tamper or manipulate or do anything on the said exhibit.”

Q: . . .then what did you do with the exhibit in this case?

A: Then after I sealed the evidence plastic bag, I booked it into the SAP 13.

Q: You booked it yourself?

A: Yes

Q: In this case do you still remember the SAP 13 number?

A: The SAP 13 number is actually not written on the front page of the docket. It is not there.

Q: . . . Do you remember who then booked it out of the SAP 13 it it was booked out to Pretoria?

A: . . .”The buccal kit was taken to the forensic laboratory by myself.

Q: When was it?

A: 16 March 2016

Q: . . .” so you are saying in all your statements there is no mention of a SAP 13?

A: That is correct.

[28] The above summary relates to the evidence that served before the trial court on the appellant’s buccal swabs. The magistrate in his judgment substantiates his reasons for his finding on this point, and in my view his finding in this aspect cannot be faulted

[29] It is clear from the defence contention that they only take issue with the 16 days when the appellants' DNA buccal kit profile was kept unidentified by only the SAP 13 number assigned to it, however the record reveals that same was sealed with a reference number which remained the same until the end. This in my view is a clear indication that this being their only contention on the chain of custody that their contention is unsustainable, if they even failed to dispute amongst others the following during the trial proceedings:

29.1 the samples were sealed at all material times;

29.2 the respective samples were properly taken and safeguarded until they were tested in the laboratory; (they only contended non-allocation of SAP 13 number, the defence did not contend that the samples were not safeguarded);

29.3 the proper functioning of the machines and equipment used to produce the results;

29.4 the interpretation of result by officer Chetty.

[30] The presiding magistrate dealt extensively with the referencing of the samples by officer Malapela. Also the fact that Malapela took the swabs from the appellant, kept them safe, booked same out, and transported it for analysis in Pretoria. The court in analysing this evidence even found why the case law that the defence used to argue this point is distinguishable from the appellant's case. The trial court's conclusion on this point cannot be faulted; it is well-reasoned and properly qualified.

[31] In any event the record of the proceedings reveals that Malapela denied a number of times during his cross-examination that, the DNA buccal kit was tampered with. Malapela even went to an extent of exonerating even the Forensic science analyst in this regard he states as follows under cross-examination "There is no any other way the laboratory can actually tamper or even manipulate or do anything of some sort on the said exhibit".

[32] Based on the said findings by the presiding magistrate, I am also of the view that the chain of evidence relating to collecting, sealing, safekeeping, sending and receipt by the forensic laboratory for analysis ruled out any tampering or substantial alterations of the evidence. Accordingly, the appeal on the ground must fail.

[33] The same however cannot be said with count 2: on this count the complainant's evidence in chief and in cross-examination was that the appellant did not do anything to her except to insert his penis in his vagina. I respectfully agree with the appellant's contention that the trial court erred in finding the appellant guilty on the second count which was that the appellant "sexually assaulted the complainant 'by licking her vagina with his tongue'. There was no evidence that was tendered to support this allegation. Whether the victim was kissed on the mouth was not the case that the appellant was called to respond to, on this reason alone the conviction on count 2 must be set aside as there was a clear misdirection by the trial court.

[34] I highlight this particular evidence as it appears on record:

Q: You said he inserted hi thin inside your thing, is that correct, his penis inside your vagina, that is what you showed us?

A: Yes, he put his thing into mine

Q: Did he do any other thing to you on your vagina?

A: There was not anything else he did

Q: Did he kiss you?

A: Yes, he kissed me

Q: Where?

A: (Interpreter): The witness is pointing to inside her mouth your worship

Q: And in your vagina except for inserting his thing, did he do anything else on your vagina?

A: Yes there is something he did

Q: What did he do?

A: He only put his thing inside, nothing else.

[35] When the State prosecutor attempted another bite of the cherry on this point, the answer appeared to be same as before. The question proceeded in the following manner:

Q: Now the first thing that happened after he told you to undress whilst you were in the shack and you are lying down, what was the first thing he did?

A: When we got to the shack we undress, after we undress he lay on top of me and then he put his thing into me

Q: Okay, after he put his thing into you and got on top of you did he do anything else with any part of his body on your vagina?

A: No, there is not

[36] Then that ended the leading on this point, as the State stated 'No further questions'. The above summary is the gist of the evidence that served before the trial court on charge number 2.

[37] The defence on cross-examination did not even bother to ask a question pertaining to the second count, based on the victim's answers to the State Prosecutor, it would seem this was the only sensible approach to take from the defence side.

- [38] Really from the above it is clear that there is no evidence none whatsoever that the appellant licked the Ms PM's vagina, as alleged in the charge sheet. The presiding magistrate did concede in his judgement that Ms PM never testified to this. He even goes further to highlight that this is something Ms PM also told Professor Weiss, the psychiatrist, he supports this by stating ("That says the complainant's version is not consistent but reliable").
- [39] The magistrate however goes on in his judgment to find the appellant guilty on count 2 and he states as follows as he finds him guilty on this count: "Although there is no evidence that indicate that the complainant's vagina was licked. There is clear evidence and the accepted evidence from the complainant is that the person who raped her also kisses her in the mouth. This is clearly an act of sexual violation as described in Section 1 of Act 32 of 2007".
- [40] The record reveals that not even the testimony of the witness Ms J Matsane (First report evidence) is speaking to this fact. This witness only under cross-examination she stated that "She did not say that to me, but mentioned that to the police, that the said person licked her vagina". Also in the evidence of a Professional Nurse T Malatho who testified that she obtained history from the victim this fact also does not arise in her testimony. The record established further that even the evidence of the police officer IL Malapela did not speak to these allegations at all.
- [41] I am mindful of the provisions of Section 88 of the Criminal Procedure Act 51 of 1977 that it allows a defect in the charge to be cured by evidence. However, in this matter there was no evidence presented to satisfy the section.
- [42] The presiding magistrate was correct that section 1 of Act 32 of 2007 makes this an offence, however the fact remains the following; if the appellant was not charged with specified and particularised factual allegation, the consequences of this can be that, he was caused to prepare for trial on a different factual allegation. I do not find this to be consistent with his right in terms of section of the Constitution.
- [43] If the approach by the trial court is in conflict with the accused person's rights, then this decision by the presiding magistrate demonstrate a material misdirection which in my considered view calls for this court to interfere with such a decision.
- [44] It is trite that the appellant as he was being accused had a constitutional right in terms of Section 35(3) of the Constitution (Right to a fair trial, which includes the right –(a) to be informed of the charge with sufficient detail to answer it"
- [45] The above is an essential component of the right to a fair trial, especially because it also becomes important in the accused's person preparation for his defence in the trial which might follow afterwards. "Steytler, NC Constitutional Criminal Procedure

(1998) at 226-7” state the following which I find in keeping with this point, “, , the effective preparation of a defence it enables an accused, . . . what evidence to gather and how to challenge the incriminating evidence and prepare a line of defence. Once furnished, the prosecution cannot deviate from the charge during the trial for it sets the framework of the trial”

[46] My view is that the same cautioning that the above gives to the prosecution, should also apply to the trial court, as in my humbly view it all comes down to one thing and one thing only that the appellant must be informed of the charge against him with sufficient detail, and in this case the factual allegation contrasted the evidence of the State immeasurably. The charge sheet alleged something else and the evidence spoke to a different thing all together.

[47] In this regard I proceed to refer to *S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 644e-f where the court held:

“... in the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong”.

[48] I have expounded above that, I find the magistrate’s finding on count 2 not to be supported by any evidence from the State or at all, on the basis of this and in line with the Supreme Court of Appeal guidance in *S v Hadebe* his decision on count 2 stands to be set aside.

On credibility finding of a single witness

[49] As far as the credibility finding that is made in respect of a single witness, the Supreme Court of Appeal held in *S v Pretorius* 2014

(2) SACR 315 (SCA) at para 30: “It is a time-honoured principle that once a trial court has made credibility findings, an appeal court should be deferential and slow to interfere therewith unless it is convinced on a conspectus of the evidence that the trial court was clearly wrong”.

[50] The trial court assessed the evidence of Ms. PM with (to put in trial court’s words), “with double caution” the trial court having highlighted the need of this approach in its judgment it also emphasized that “it was because she was single witness and also a child”, the trial court went further to explain that the said evidence was corroborated and ultimately concluded that she was a credible witness. This is also found to be proper, in my considered view there is no misdirection none whatsoever, the trial court analysed this even-handed.

[51] On the basis of the above, I am of the view that the finding of the court a quo on the credibility finding of Ms. PM at the extent at which it did cannot be faulted. The entire record of the proceedings reveals that trial court did not misdirect itself in any manner in its observation and finding.

Appeal on the Sentence

- [52] The appellant Mr. Simelani did not adduce any evidence in mitigation of sentence but only made submissions on the factors to be taken into account when sentence is considered. Likewise, the State also did not lead any evidence in aggravation of sentence but made submissions from the bar.
- [53] The record of the proceedings establishes that the court a quo in sentencing Mr Simelani (rightly so in my view), considered the appellant's personal circumstances, the seriousness of the offence as well as the interest of the society (The triad See *S v Zinn* 1969(2) SA 537 (A) at 540G.) It is also established from the record that the principles as set out in *Malgas* (supra) were considered by the court in the sentencing of the appellant.
- [54] The court a quo presented a well-reasoned judgment which led to its conclusion that the substantial and compelling circumstances have not been shown. This assessment and finding in my view cannot be faulted; the trial court did not misdirect itself on facts and on the law in coming to this conclusion. I am of the view that this court is not justified to interfere with the trial court's discretion on sentence.
- [55] The notion 'substantial and compelling' circumstances have not been defined in the legislation. What is important to note is that a departure from the prescribed sentence need to be justified by a court after having regard to the weight of all the relevant factors cumulatively. This, without doubt makes it improper for any court to deviate from the minimum sentence purely for flimsy or inadequate

reasons.

- [56] The court in *Malgas* at para 25 went further and recognized that "It is they (presiding officers) who are to judge whether or not the circumstances of any particular case are such as to justify a departure. However, in doing so, they are to respect, and not to pay lip service to, the legislature's view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of the specified kind are committed".
- [57] The record of the proceedings establishes further that the trial court was alive to the warning of deviating from the prescribed minimum sentence for mere flimsy reasons as stated in *Malgas*.
- [58] The appellant's submissions before sentence were in my view as minimal as they appear in the record of the proceeding. The only standout mitigating factors are that the appellant has three minor children that he was providing for, and that he was the first offender only. It is opportunistic for the appellant to now argue on appeal that the court misdirected itself in finding that his personal circumstances do not constitute substantial and compelling circumstances.
- [59] It is so that for the circumstances to qualify as substantial and compelling, they need not be 'exceptional' in the sense that they are seldom encountered or rare, nor are they limited to those which diminish the moral guilt of the offender (*S v Pillay* 2018 (2) SACR 192 (KZD) [10].

[60] I am in respectful agreement with the trial court in its finding that the personal circumstances of the appellant, even if cumulatively taken into account do not carry sufficient weight to tip the scale in his favor and to command for departure.

[61] I am accordingly satisfied that even though there is a discretion to deviate under section 51(3)(a) of the CLAA, the court a quo correctly did not find it justifiable to deviate from the imposition of the prescribed sentence under the circumstances. I am of the firm view that if it did, that would have been equivalent to doing so for “flimsy” reasons taking into account the

facts presented before it for sentence purposes. The trial court clearly considered the circumstances placed on record by Mr. Simelani, scant as they were, and correctly found them not to be justifying departure. The merits of this particular case called for the strict compliance with the Minimum Sentence.

[62] In *S v Rabie* 1975 (4) SA 855 (AD) at 862 G-H the court stated “... punishment should fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to the circumstances.” I am also in respectful agreement with the trial court’s conclusion particularly in the light of the category of crime that the appellant was convicted of. Furthermore, the personal circumstances of the appellant taking into account the type of offence and the circumstances under which it was committed should cause the appellants personal circumstances to recede into the background. As stated by the Supreme Court of Appeal in *S v Vilakazi* 2009

(1) SACR 552 (SCA), “In respect of serious crimes the personal circumstances of the offender recede into the background once it becomes clear that the crime is deserving of a substantial period of imprisonment, whether the accused is married or single, whether he has two children or three, whether or not he is employed, are themselves largely immaterial to what the period should be.”

[63] Taking all the above into consideration, I am of the view that the court a quo sentenced the appellant correctly and there was no irregularity and/or misdirection in the sentencing of the appellant. The appeal on sentence therefore must fail.

ORDER:

[64] For the above reasons the following order is proposed:

1. The appeal on conviction on count 1 (Rape) is dismissed.
2. The appeal on conviction on count 2 (Sexual Assault) is upheld
3. The sentence imposed by the trial court on count 1 (Rape) is confirmed.
4. The sentence imposed by trial court on count 2 (Sexual Assault) is set aside.

M.T Mankge

Judge of the High Court

I agree.

Mtimunye J

Acting Judge of Mpumalanga

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