

SOUTH AFRICA / JUDGMENT

Tema v S (A24/2023) [2024] ZALMPPHC 47 (16 May 2024)

[2024] ZALMPPHC 47

COURT

Limpopo High Court, Polokwane

BEFORE

Kganyago, Maphelela

CASE / FILE NUMBER

A24/2023

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REPUBLIC OF SOUTH
AFRICA

IN THE HIGH COURT OF
SOUTH AFRICA

LIMPOPO DIVISION,
POLOKWANE

CASE NO: A24/2023

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO THE

JUDGES: YES/NO

(3) REVISED.

DATE:

SIGNATURE:

In

the matter between:

COLLEN
LESIBA TEMA
APPELLANT
And
THE
STATE
RESPONDENT

JUDGEMENT

KGANYAGO J

- [1] The appellant was arraigned in the regional court Mokerong sitting at Mahwelereng on one count of rape of minor child who was aged 13 years at the time of the alleged incident. The appellant had pleaded not guilty to the charge and his plea explanation was that of consensual sexual intercourse. The appellant was found guilty as charged and sentenced to life imprisonment. Since the appellant has been sentence to life imprisonment by the regional court, he is having automatic right of appeal. The appellant is appealing against both conviction and sentence.
- [2] The facts of the case are briefly as follows. The first witness for the State to testify was R[...] J[...] B[...] the complaint's mother. She testified that she is employed at the US Embassy in Pretoria and the complainant is her daughter. The complainant was born on 4th April 2006. On 13th December 2019 she received a call back from one M[...]. When she returned the call, M[...] told her to back home as a matter of urgency as there was a problem with the complainant. The very same night she drove from Pretoria to Mosesetjane in Mokopane. On arrival at home she found the complainant crying. The complainant told her that she was waiting for her friend at an Indian shop when one Sello (appellant) came and told her to accompany him. She refused and the appellant slapped her 3 times on her face with open hands. She screamed and appellant told her that nobody will come to her rescue.
- [3] The appellant pulled the complainant to a secluded area next to L[...] High School where it was bushy. The appellant undressed the complainant's trouser and panty. He then caused the complainant to lie on the ground. The appellant pulled his trouser up to his knee level, took out his penis and had sexual intercourse with her or raped her. After the appellant had ejaculated he stood up and told the complainant to dress up. After some few minutes the appellant told the complainant that he was not finished with her, and he again undressed her and raped her for the second time. On the first and second occasion the appellant did not use a condom when raping the complainant.
- [4] After the complainant had narrated the incident to her, she took the complainant to the police station to go and open a case. The complainant told her that she did not give the appellant consent to have sexual intercourse with her. The complainant told the witness that appellant is a gentleman who carries firewood for people around the village using a donkey cart. Further that the appellant was in possession of a knife and was threatening to kill her with it should she scream.
- [5] The witness was cross-examined and she stated that when she returned the call back, M[...] had told her that he complainant had been raped. The witness stated that she did not observe any injuries on the knees of the complainant. The witness stated that the complainant was taken to clinic by M[...] and one Romeo the very same night she was raped.

- [6] The State called the complainant as its second witness. She testified that on 13th December 2019 the appellant was known to her, but she did not consent to have sexual intercourse with him. On 13th December 2019, whilst watching skeem saam soapie on TV, she phoned her friend K[...] M[...] that they should meet at 19h00 at the Indian shop. After watching the soapie the complainant went to the Indian shop to meet her friend.
- [7] On arrival at the shop she found that her friend had not yet arrived, and she waited for her. As she was waiting, the appellant arrived in the company of someone. The appellant approached the complainant, whilst the person who was in the company of the appellant passed. The appellant asked complainant of her name, and she told the appellant her name. The appellant told the complainant that he was Tshepo from Gamadiba. The appellant told the complainant that he does not know her. The complainant realised that the appellant was lying as his names were Sello Tema, and was commonly known as Sekhalo, and that the appellant normally passes the complainant homestead driving a donkey cart.
- [8] The complainant moved and crossed to the other side of the road, and the appellant followed her. The complainant moved to where there was a soccer field, and the appellant followed her. At the soccer field the appellant slapped the complainant twice on her face with open hands, produced a knife and asked her whether she had seen a ghost. The appellant again slapped the complainant and grabbed her by hand, and told her to escort him to his friend's homestead. The complainant refused, and the appellant placed a knife on the neck of the complainant. The appellant pulled the complainant by her head and they started walking. As they were walking, they passed the bushes and L[...] School. They went to a certain house which looked like it was not occupied at new stands.
- [9] On arrival at that house the appellant took the complainant's cell phone and asked her what she was going to give her in order for him to give her back her cell phone. The complainant told the appellant that she had got nothing, but that if he did not mind, she can give him her adidas black jersey she was wearing. The appellant slapped the complainant twice on her face with open hands and told her that she must not take him as a poor man. The complainant tried to break loose from the appellant who was holding her by taking off her jersey, but the appellant tripped her and she fell to the ground. The complainant stood up and the appellant again tripped her and she fell to the ground on her back.
- [10] As the complainant was on the ground, the appellant told her to take off her trouser, and she refused. The complainant tried to scream, but the appellant told her that there was no use to scream as where they were, there was no one who would hear her. The appellant again slapped the complainant with open hands, put a knife on her neck, and told her that if she does not comply with his instructions, he was going to stab her. The appellant then undressed the complainant of her trouser and panty. The appellant pulled his trouser up to his knee level, took out his penis and inserted it into the complainant's vagina, and started doing the up and down movements. The appellant did not use a condom. After a short while they both dressed up and walked away. She did not give the appellant consent to have sexual intercourse with her.

- [11] After walking for a short distance, the appellant told the complainant that he was not satisfied. The appellant caused the complainant to bend and there and then the appellant undressed the complainant of her trouser, took off his trouser and inserted his penis into the complainant's vagina for the second time and raped her. Again the appellant did not use a condom. The complainant did give the appellant permission to have sexual intercourse with her for the second time. When he was finished, they both dressed up and he handed the complainant her cell phone back and told her to leave. The complainant left and the appellant walked behind the complainant until the tarmac road. At the tarmac road the complainant went to the Indian shop, whilst the appellant proceeded straight.
- [12] At the Indian shop the complainant communicated with her sister M[...] through face-book and told her that she had been raped. Her sister told the complainant that she must wait for her. The complainant's sister came and fetched her and they proceeded to walk home. As they were walking, the complainant saw the appellant, pointed at him and told her sister that he is person who had raped her. Upon arrival at their homestead, her sister phoned their mother and explained to her what had happened to the complainant. Her mother told her sister that they should take the complainant to the clinic.
- [13] The complainant's uncle, sister and K[...] took the complainant to the clinic. At the clinic they were advised to go to the police station. They went to the police station where they opened a case. From the police station the complainant was taken to hospital where she was examined. The complainant stated that at the time of the incident she was not sexually active and did not have any relationship with the appellant.
- [14] The complainant was cross-examined and she stated that she knew the appellant's name because the appellant used to pass by her homestead and have a conversation with her sister, and her sister will call the appellant by his name. When asked why she decided to meet her friend during the night and not during the day, the complainant responded by stating that it was during school holidays. The complainant stated that she had told her sister when she left to go and meet with her friend. The complainant conceded that she did not sustain any injuries as a result of been assaulted by the appellant. The complainant had further stated that the appellant had held her with his right hand on her head and place a knife on her neck and started pulling her.
- [15] The complainant stated that she had refused to undress, and that the appellant had forcefully undressed her of her trouser and panty. She conceded that she did not attempt to run away. The complainant stated that after the appellant had finished raping her, she was bleeding from her vagina. The complainant conceded that she was known as S[...], but denied that she and the appellant knew each other. The complainant had denied that the appellant had proposed love to her and further denied that when he proposed love to her she told him that she was having a boyfriend. The complainant denied that she had accepted the appellant's love proposal. The complainant denied that she had walked together with appellant and went to his homestead where they had consensual sexual intercourse. The complainant denied that she was implicating the appellant because she was influenced to do

so.

- [16] By agreement between the parties the complainant's J88 was handed in as evidence without calling the doctor who had completed it to give oral evidence. In the J88 the doctor had recorded that the complainant's clothes were dirty (dust), that the complainant was crying. On conclusion section it has been recorded that no injuries seen to exclude violence behaviour, vaginal penetration and anal penetration, and that the complainant was in her menstruation period. That concluded evidence of the State evidence and it closed its case.
- [17] The appellant took the witness stand and testified under oath. He testified that he knows the complainant as they reside in the same village. Prior to the incident of the 13th December 2019 he had met the complainant at the Indian shop. The complainant was in the company of a small child and they were going to church. That is when the complainant told the appellant that her name was S[...]. The appellant asked the complainant if he can accompany them, and the complainant told the appellant that they will talk after she came back from church. The complainant told the appellant that she was having a boyfriend. The appellant told the complainant that he will respect her boyfriend. Thereafter the complainant went to church and the appellant remained at the shop.
- [18] The appellant met the complainant again the following weekend at Mahamadi's tavern. The complainant was in the company of another person known as R[...], and he did not know whether this person was the complainant's sister or aunt. That is the day the complainant accepted the appellant's love proposal. Few days passed without the two seeing each other but the appellant did not have a problem as the complainant had told him to respect her boyfriend. They met again on 13th December 2019 around 20h00. That night the appellant was at Pumelong tavern which is next to the Indian shop. As the appellant was at the tavern, he heard the complainant calling his name. The complainant told the appellant that he wanted some airtime in order to call her uncle. The appellant who was in the company of his friend told the complainant that he did not have airtime. The appellant's friend left them and went back into the tavern.
- [19] After the appellant's friend had left, the complainant asked the appellant whether he was not going to Barry's tavern. The appellant told the complainant that he was going to Barry's tavern, but that he was going to pass by his homestead first. They walked together downwards the street without any problems. As they were walking, the complainant's cell phone kept on ringing and she was not answering it. The appellant asked the complainant why she was not answering her cell phone, and she said it was her boyfriend. The appellant asked if it was her boyfriend why is she not answering and the complainant did not respond to the appellant's question. The appellant did not ask the complainant anymore questions as the complainant had told him to respect his boyfriend.
- [20] On arrival at the appellant's homestead they entered, and found that the appellant's family members were not yet asleep but were still watching some soapies. The two went to the appellant's bedroom. The appellant took some food and offered the complainant some of

them. The complainant did not accept that offer. The appellant ate his food, and after finishing, he sat with the complainant on his bed. The appellant told the complainant how much he loves her, and they started kissing each other. The appellant grabbed the complainant's t-shirt, and in turn the complainant grabbed the appellant t-shirt. The two assisted each other to undress their t-shirts. The appellant unbuttoned the complainant's skinny jean and thereafter the complainant took off her jean, whilst the appellant also took off his trouser. Thereafter they proceeded to have sexual intercourse.

- [21] They did not finish having sexual intercourse as the appellant was called by his elder brother. He went to see his elder brother, and when he came back the complainant was talking on her cell phone. It looks like the person the complainant talking with on her cell phone was attacking her. The appellant waited at the door of the room for the complainant to finish with her telephonic conversation. After she had finished talking on her cell phone, the complainant started putting on her clothes saying her uncle had phoned her and is looking for her. They both dressed up and left the appellant's homestead.
- [22] As they were walking, the complainant took another direction which was not leading to her homestead, as he knew that the complainant was residing in zone [...] A[...]. When the appellant asked the complainant why she was taking that direction, the complainant told the appellant that she was having a family that reside on that street. The appellant accompanied the complainant up a shop called Corner. At that shop the appellant turned and went back to the Indian shop. At the Indian shop the appellant found that there were many people. The appellant's went to Barry's tavern and found that it was not full. Later the appellant left Barry's tavern, and as he was walking he met the complainant in the company of R[...], her brother and someone known as M[...]. The appellant greeted them, and that it was only the gentleman who responded to him. The appellant disputed the complainant's version of events.
- [23] The appellant was cross-examined and he stated that on the night of the incident he had parted ways with the complainant whilst they were still on good terms. The appellant stated that he started to have a love relationship with the complainant during November 2019 at Mahali's tavern and that their relationship was secret, and they were not seeing each other often. The appellant stated that when he came back from his brother who had interrupted his sexual intercourse with the complainant, he found the complainant shouting on her cell phone. After the conversation, the complainant told the appellant that she was talking to her uncle. The appellant stated that on that night, his brother, sister, mother and siblings did not see the complainant because they were in the house, and when he and the complainant left, his family members were still in the house.
- [24] The appellant denied that he had raped the complainant, but that it was consensual sexual intercourse. The appellant stated that he was surprised why R[...] who is her friend did not greet her that night when he met the complainant for the second time. The appellant conceded that he never asked the complainant about her age, and that he was surprised when the complainant testified that she was 13 years of age. The appellant stated that the

way the complainant conducted herself and the manner in which they spoke, suggested that she was an adult. The appellant conceded that he did not meet the complainant at the tavern, but at the Indian shop on his way to church. That concluded the evidence of the appellant and he closed his case.

[25] It is trite that the prosecution must prove its case against the appellant beyond reasonable doubt. Equally trite is the observation that in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused version is true. If the accused version is reasonably possibly true in substance, the court must decide the matter on the acceptance of that version. An accused is not compelled to testify, but once he elects to testify, what the court must determine is whether the version presented by the accused is reasonably possibly true.

[26] The correct approach to the evaluation of evidence in a criminal case was formulated in *S v Chabalala*[1] where Heher AJA said:

The trial court's approach to the case was, however, holistic, and in this it was undoubtedly right: *S v Van Aswegen* 2001 (2) SACR 97 (SCA). The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weigh heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt. The result may prove that one scrap of evidence or one defect in the case for either party (such as failure to call a material witness concerning an identity parade) was decisive but that can only be an export facto determination and a trial court and counsel should avoid the temptation to latch on to one (apparently) obvious aspect without assessing it in the context of the full picture presented in evidence..."

[27] The appellant had pleaded consensual sexual intercourse. It is trite that the requirements for consent are that (i) the consent must itself be recognised by law; (ii) it must be real consent; and (iii) it must be given by a person capable of consent. In *Mugride v S*[2] Erasmus AJA said:

"The law further requires that consent be active, and therefore mere submission is not sufficient. In Rex v Swiggelaar Murray AJA

commented as follows:

"The authorities are clear upon the point that though the consent of a woman may be gathered from her conduct, apart from her words, it is fallacious to take the absence of resistance as per se proof of consent. Submission by itself is no grant of consent, and if a man so intimidates a woman as to induce her to abandon resistance and submit to intercourse to which she is unwilling, he commits the crime of rape. All the circumstances must be taken into account to determine whether passivity is proof of implied consent or whether it is merely the abandonment of outward resistance which the woman, while persisting in her objection to

intercourse, is afraid to display or realises is useless.”

[28] The complainant at the time of the alleged incident was 13 years of age. Section 15(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act[3] provides as follows:

“(1) A person (‘A’) who commits an act of sexual penetration with a child (‘B’) who is 12 years of age or older but under the age of 16 years is, despite the consent of B to the commission of such an act, guilty of the offence of having committed an act of consensual sexual penetration with a child, unless A, at the time of the alleged commission of such an act, was

- (a) 12 years of age or older but under the age of 16 years; or
- (b) either 16 or 17 years of age and the age difference between A and B was not more than two years.”

[29] It is common cause that the appellant at the time of the alleged incident was 25 years of age. It was not the appellant case that he was deceived by the complainant’s appearance and the way she was behaving that he thought that she was an adult. It was only towards the end of cross-examination by the State when it was put to him that the complainant at no stage gave an impression to him that she was an adult, the appellant responded by stating that the manner in which the complainant conducted herself, and the manner in which she spoke, suggested that she was an adult. This was an answer which was extracted from the appellant by the State during cross-examination and was not the basis of his defence. It was never put to the complainant that her appearance had deceived the appellant to give her an opportunity to respond to that. The court a quo which had an opportunity to physically observe the complainant had found that the complainant had a tiny body, and any reasonable person who wanted to engage into a love relationship with her would have asked her age. In my view, this was just an afterthought by the appellant and had no probative value. The complainant was still a child who was not capable of giving consent. On this point alone, the appellant in terms of section 15(1) of the Criminal (Sexual Offences and Related Matters) Amendment Act is guilty of the offence of having committed an act of consensual sexual penetration with a child below the age of 16 years.

[30] The appellant had testified that when he entered his homestead on the night of the incident, he was with complainant and his family members were not yet asleep and were still watching soapies. Thereafter the appellant took food which he had offered to the complainant, but does not state where he got that food from. Under cross-examination the appellant stated that his family members did not see the complainant when he entered the homestead and when they left the homestead, but that they were aware that there was someone inside house. It was not explained how the family members became aware that there was someone inside the house whom they did not see when she entered the house.

[31] The appellant did not testify as when did his brother became aware that he was in his room, but all of a sudden his brother had called him from outside his room. When the appellant was outside his room with his brother, he heard the complainant talking and shouting on

her cell phone, and that his brother could hear the complainant shouting on her phone. Surprisingly the appellant's brother who had not seen the complainant entering their homestead is not surprised and ask the appellant as to who was shouting in the appellant's room. The appellant brother just talked to the appellant and after they finished with their conversation just left without finding out as to who was the stranger their house. That I find to be improbable.

- [32] The evidence of the complainant as to what had happened that night even though was that of a single witness, was clear and satisfactory. She did not contradict herself and also did not crack under extensive cross-examination by the defence counsel. The court a quo had found that the complainant was penetrated more than once, did not voluntarily submit to sexual intercourse, was induced by being assaulted with open hands and threatened with a knife. Further that it was not true that the appellant had consensual sexual intercourse once at the appellant's homestead. The court a quo found that the appellant had fabricated his evidence, and had testified that he used to see the complainant at the tavern but could not tell what she was doing at the tavern.
- [33] The court a quo in rejecting the appellant's version had made credibility findings against him. The appellant in this appeal has not demonstrated that the court a quo was wrong on the credibility and factual findings which it had made against him. It is in exceptional cases where a court of appeal will interfere with the trial's court evaluation of evidence as the trial court had the advantage of seeing, hearing and appraising a witness. (See *S v Francis*[4]). The appellant in the case at hand has failed to convince this court on adequate grounds that the court a quo was wrong in accepting the evidence of the State witnesses.
- [34] The appellant has testified that the complainant might have been influenced by the person she was talking with over the phone to falsely implicate him without substantiating that. Under cross-examination the appellant stated that other people might have said something to the complainant which he does not know what they said to falsely implicate him. The appellant is merely on a fishing expedition as he had no defence at all. The court a quo can therefore not be faulted in its evaluation of the evidence presented before it. The appeal against conviction stands to fail.
- [35] Turning to sentence, it is trite that sentencing is the prerogative of the trial court, and should not lightly be interfered with. At appeal in which interference with the sentence will be justified is when it is found that the trial court has misdirected itself in some respect or if the sentence imposed was so disturbingly disproportionate that no reasonable court would have imposed it. The test is not whether the trial court was wrong, but whether it exercised its discretion properly. (See *S v Romer*[5]).

- [36] The appellant was charged with rape falling under section 51(1) Part I of Schedule 2 of the Criminal Law Amendment Act[6] (CLAA) in that the complainant was a child under the age of 16 years and also raped more once. Ordinarily the trial court was compelled to impose life imprisonment unless it finds that substantial and compelling circumstances exists which justify the deviation from the prescribed minimum sentences.
- [37] In DPP Gauteng Division, Pretoria v Tsotetsi[7] Coppin AJA said:
- “As held in Malgas, confirmed in S v Dodo and explained in S v Vilakazi, even though ‘substantial and compelling factors need not be exceptional they must be truly convincing reasons, or weighty justification’ for deviating from the prescribed sentence. The minimum sentence is not to be deviated from lightly and should ordinarily be imposed”.*
- [38] A presentence report was prepared by the probation officer regarding the appellant. The appellant’s mitigating factors as per the presentence report are that he was raised by both his parents and grew up in a big family that takes care of each other. The appellant was working with his late father’s donkey carts to make an income for the family. The appellant has been an obedient child who adhered to the family rules. The appellant is not married and does not have a child of his own. The appellant is a good and caring person. The appellant dropped out of school in grade 10 as he was struggling with his studies and not progressing. The appellant is a first-time offender and had no history of violence.
- [39] The aggravating factors recorded are that the appellant has raped a minor and he is not remorseful, and does not take the responsibility for the offence he had committed. In the victim impact statement the complainant had stated that she had been affected very badly by being raped. She could not eat properly because whenever she was about to eat she will remember everything, even the smell that will make her nauseous. Ever since she was raped she gets heavy periods and very painful periods pains. She had lost confidence, courage and self-esteem. She is scared to be alone and sometimes when alone she gets panic attacks and becomes anxious. Her parents had taken her to a phycologist to express her feelings in order to overcome what she is going through. She still gets the flash back of the incident whenever at school they raise a topic about rape.
- [40] The appellant has been convicted of a serious offence. Rape is a serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. Courts are under a duty to send a clear message to the accused, to other potential rapists and the community that they are there and determined to protect the equality and freedom of all women and children, and that they will not show mercy to those who seek to invade those rights (See S v Chapman[8]).
- [41] The appellant did not show any slightest remorse and he continued to deny the offence despite the overwhelming evidence against him, but it is his right to do so. The complainant in this matter was a minor child whose interest and protection are paramount within society. The complainant despite being a child below the age of 16 was raped more than once by the appellant. Courts are enjoined to emphasise this by the sentences it imposes for

offences against children, the community's disgust in and repulsion of this type of behaviour. (See *S v Mugridge* above).

[42] The appellant's counsel was unable to identify any misdirection by the court a quo or a factor that indicates that the court a quo did not exercise its discretion judicially. What the appellant had presented as substantial and compelling circumstances are in my view not truly convincing reasons or weighty justification for deviating from the prescribed minimum sentence. The aggravating

factors far outweigh the mitigating factors. The court a quo will therefore not be faulted for having found that there were no substantial and compelling circumstances justifying a deviation from the prescribed minimum sentence. It follows that the appeal on sentence stands to fail.

[43] In the result the following order is made

43.1 The appeal against both conviction and sentence is dismissed.

JUDGE OF THE HIGH COURT OF SOUTH AFRICA, LIMPOPO DIVISION, POLOKWANE

I AGREE

MAPHELELA AJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH

AFRICA, LIMPOPO DIVISION, POLOKWANE

APPEARANCES:

Counsel for the appellant : MP Legodi Instructed by : Legal Aid Polokwane
Counsel for the respondent : Adv R Mulaudzi Instructed by : Office of DPP Polokwane
Date heard : 22nd March 2024
Electronically circulated on : 16th May 2024

[1] 2003

(1) SACR 134 (SCA) at para 15

[2] [2013] ZASCA 43; 2013 (2) SACR 111 (SCA) (28 March 2013) at para 40

[3] 32 of 2007

[4] 1991

(1) SACR 198 (A)

[5] 2011

(2) SACR 153 (SCA) at paras 22 and 23

[6] 105 of 1997

[7] 2017

(2) SACR 233 (SCA) at para 27

[8]

[1997] ZASCA 45; 1997

(3) SA 341 (SCA)

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