

SOUTH AFRICA / JUDGMENT

Thue v S (Appeal) (CA 29/2023) [2025] ZANWHC 42 (26 February 2025)

[2025] ZANWHC 42

COURT

North West High Court, Mafikeng

BEFORE

Reid, Mfenyana

CASE / FILE NUMBER

CA 29/2023

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

IN

THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION,

MAHIKENG

CASE NUMBER: CA29/2023

Reportable: YES/NO

Circulate to Judges:

YES/NO

Circulate to Magistrates:

YES/NO

Circulate to Regional

Magistrates YES/NO

In the matter between: -

TEBOGO

BENJAMIN THUE

Appellant

and

THE

STATE

Respondent

Coram:

Reid J et

Mfenyana J

Delivered:

This judgment was handed down electronically by circulation to the parties' representatives via email. The date for hand-down is deemed to be 26 February 2025.

ORDER

(i)

The appeal against conviction and sentence is dismissed.

JUDGMENT

MFENYANA J

- [1] The appellant was convicted by the Regional Court in Taung on 27 January 2021 on a charge of rape in terms of section 3 of the Sexual Offences and Related Matters Act[1] (read with the provisions of section 51(1) and Part 1 of Schedule 2 of the Criminal Law Amendment Act (CLAA)[2]. On 31 August 2022 he was sentenced to 20 years imprisonment.
- [2] He now appeals against both his conviction and sentence.
- [3] At the request of the parties, the appeal was disposed of on paper without the hearing of oral submissions, in accordance with section 19(a) of the Superior Courts Act[3].
- [4] In the notice of appeal, the appellant sets out various grounds of appeal. Essentially, he avers with regard to his conviction that the court a quo misdirected itself in convicting him on the evidence of a single witness (the complainant), and in finding that the complainant was a credible and reliable witness. He further avers that the complainant's evidence is riddled with material contradictions and inconsistencies, relating inter alia to whether or not the complainant consented to sexual intercourse with the appellant, and the circumstances relating to how the offence was committed.
- [5] The appellant further contends that the court a quo ignored the J88 which shows no obvious perineal tear or bruise, thus corroborating the appellant's version that there was no sexual penetration on the day in question.
- [6] It further appears from the notice of appeal that the appellant's stance that the acts alleged by the complainant did not occur, and that even if they did, the complainant participated actively in them.
- [7] It is further the appellant's contention that the court a quo misdirected itself in drawing a negative inference from the appellant's failure to testify, when the available evidence did not establish the elements of the offence. He further avers that there is no duty on him to provide an explanation why the complainant would falsely implicate him, and why she would attempt to take her own life as he has a constitutional right to remain silent.
- [8] In respect of sentence, the appellant contends that the court a quo misdirected itself in finding that the State had proved two separate incidents of rape and consequently convicting the appellant

of rape with aggravating circumstances (that the victim was raped more than once by the appellant) as provided for in section 51(1) and Part 1 of Schedule 2 of the CLAA, which carries a minimum sentence of life imprisonment. In this regard, the appellant contends that the evidence before the court does not suggest that the appellant's conduct is sufficient to constitute two separate acts of rape, as there was no appreciable length of time between the acts of rape.

[9] Finally, the appellant avers that the sentence of 20 years is inappropriate, harsh, excessive, and invokes a sense of shock as the appellant is a first offender and should have been sentenced to imprisonment of not less than 10 years under Part III of Schedule 2 of the CLAA.

[10] In the heads of argument filed on behalf of the appellant, it is contended that despite the lack of objective corroboration, the trial court relied on the decision in Hammond[4] that a report of rape supports consistency which demonstrates credibility. It is further contended that the justification provided

by the trial court for accepting the inadequacies in the complainant's evidence were wrong, and that even though it made

reference to the cautionary rule, there is no indication that it found any evidence to corroborate the complainant's version. In so doing, the trial court paid lip service to the cautionary rule and accepted the evidence of the complainant without corroboration,

further contends the appellant.

[11] The appellant points out various contradictions and improbabilities in the evidence of the complainant, which he avers should not have been overlooked by the trial court. These relate to the complainant's version relating to whether or not she offered any resistance to the appellant; how she was undressed by the appellant, and when the appellant made a stop at the tuckshop to buy her snacks.

[12] Ultimately, the appellant contends that his conviction and sentence should be set aside.

[13] In opposing the appeal, the respondent contends that an accused person may be convicted on the evidence of a single competent witness, and that the trial court was satisfied with the evidence of the complainant and found her to be a credible witness. As to the discrepancies in the complainant's evidence, the respondent submits that discrepancies between a witness's evidence and their statement do not affect the credibility of their evidence, and thus the trial court did not err in its finding.

[14] Regarding the appellant's criticism in respect of the trial court's acceptance of the complainant's version that she never consented to sexual intercourse with the appellant, the respondent submits that it is not sufficient for the appellant to aver that the complainant submitted to sexual intercourse, as what is required is active consent and not mere submission. The respondent argues that the complainant never testified to having consented to sexual intercourse with the appellant.

[15] The respondent argues that issues relating to how the complainant was undressed by the appellant are irrelevant to the elements of the offence of rape, and the court a quo applied all the applicable rules in evaluating the evidence before it. Thus, the appellant's contentions relating to the contradictions in the complainant's evidence in relation to how the appellant undressed her are equally irrelevant.

[16] In its judgment, the court a quo considered the discrepancies in the complainant's viva voce evidence and the written statement she made to the police. Relying on the decision of the Appellate Division in *S v Mkohle*[5], the court concluded that 'contradictions per se do not lead to the rejection of a witness's evidence'. It is clear from a reading of the record that the court a quo was acutely aware of the dangers in the evidence of a single witness in a sexual offence complaint and approached the complainant's

evidence with circumspection.

[17] The trial court warned against compartmentalizing the evidence and examining the defence or state case in isolation. It further noted that the only evidence placed before it was that of the state witnesses together with admissions made by the appellant in terms of section 220 of the Criminal Procedure Act.

[18] In *R v Makanjuola*, *R v Easton*[6] the sentiments expressed by Lord Taylor CJ in the Court of Appeal of England and Wales mirror the approach followed in our jurisdiction in the democratic dispensation, where Olivier JA noted that the cautionary rule as it applies in sexual offences should not be

interpreted to stereotype complainants in sexual assault cases as particularly unreliable. "... (t)he burden is on the State to prove the guilt of an accused beyond reasonable doubt – no more and no less... "[7] which where the cautionary rule mirrors the sentiments in our jurisdiction

[19] In my view, the trial court meticulously dealt with what was put to the complainant by the defence and concluded that on the basis of the evidence before it, the complainant stood to gain nothing from falsely implicating the appellant, and in attempting to take her own life. The trial court accepted the complainant's evidence that she complied with everything that the appellant told her to do because she was scared. I do not understand the appellant's case to be that the complainant was in fact not scared. That in my view does not detract from the fact that the complainant did not consent to sexual intercourse with the appellant.

[20] What can be discerned from the judgment of the court a quo is that discrepancies and errors in a witness's statement are not fatal to the complainant's case. What is required is for the trial court to ascertain the witness's intention by considering the evidence holistically, within the context of the whole statement. No criticism can be levelled at the court a quo in this regard.

[21] Concerning the absence of physical injuries, it is trite that the absence of injuries is not an indication that the rape did not occur. In any event, there is no merit to the criticism that the court a quo did not consider the J88. In imposing sentence, the court a quo considered the J88 as specifically pointed out on behalf of the

appellant.

[22] If regard is had to the foregoing, it follows that there is no merit to the appeal against conviction.

[23] The principles relating to the powers of the court of appeal with regard to sentencing need no restating. Suffice it to state that a court of appeal can only interfere with the sentence imposed by a trial court in the event of a material misdirection. In *Bogaards*[8] v S the Constitutional Court decreed that a court of appeal can only interfere with a sentence imposed by a lower court if there has been an ‘irregularity that results in a failure of justice’.

[24] In *S v Barnard*[9] it was stated as follows:

“The issue is therefore whether the trial Court exercised its discretion properly and judicially in imposing a sentence of 5 years’

direct imprisonment. It is trite that sentence is a matter best left to the discretion of the sentencing Court. A court sitting on appeal on sentence should always guard against eroding the trial Court’s discretion in this regard and should interfere only where the discretion was not exercised judicially and properly. A misdirection that would justify interference by an appeal Court should not be trivial but should be of such a nature, degree or seriousness that it shows that the Court did not exercise its discretion at all or exercised it improperly or unreasonably.”

[25] In *S v Kgosi*[10], Scott JA said the following with regard to an appeal court’s powers to interfere with sentence:

“It is trite law that sentence is a matter for the discretion of the court burdened with the task of imposing the sentence. Various tests have been formulated as to when a Court of appeal may interfere. These include whether the reasoning of the trial court is vitiated by misdirection or whether the sentence imposed can be said to be startlingly inappropriate or to induce a sense of shock or whether there is a striking disparity between the sentence imposed and the sentence the Court of appeal would have imposed. All these formulations, however, are aimed at determining the same thing: viz whether there was a proper and reasonable exercise of the discretion bestowed upon the court imposing sentence. In the ultimate analysis this is the true inquiry. ... Either the discretion was properly and reasonably exercised or it was not. If it was, a Court of appeal has no power to interfere; if it was not, it is free to do so.”

[26] The appellant’s contention that the sentencing regime applicable to him is Schedule III of Part 2 is solely premised on his insistence that there was no significant time lapse between the appellant inserting his finger and inserting his penis in the complainant’s vagina, which according to him constitutes one incident. What this reveals is that the appellant does not dispute that there was more than one sexual act. What he takes issue with is the length of

time between the sexual acts. The question in my view, is whether the requisite intention is the same for each of the sexual acts committed by the appellant. The answer is a resounding ‘No’.

- [27] Placing reliance on *S v Willemse*[11] Ms Ntsala, counsel for the respondent, submitted that each act must involve a distinct thought process during which the appellant decided to rape the complainant in a different manner than that initially done. I agree. When the appellant inserted his finger in the complainant’s vagina, it cannot be said that everything that followed thereafter was in fulfilment of that act. It is an offence on its own. It constitutes rape. So does the insertion of his penis. When he decided to insert his penis, he embarked on a new venture and therefore committed another offence. Again, this constitutes rape. Put differently, inserting a finger does not involve the insertion of his penis and vice versa.
- [28] The question is which of the acts should be ignored as the appellant seems to suggest. None can be ignored. Had he stopped after inserting his finger in the complainant’s vagina, he would have made himself guilty of a single offence. By continuing to insert his penis, he committed a second offence. The court a quo correctly convicted the appellant of rape with aggravating circumstances in line with the provisions of section 51(1) and Part 1 of Schedule 2 of the Criminal Law Amendment Act (CLAA)[12].and sentenced him accordingly.
- [29] The trial court found that there were substantial and compelling circumstances justifying a departure from the prescribed minimum sentence. It took into account that the appellant was 42 years old, unmarried and had two minor children. It further considered that he was assisting both his minor children and their mother financially as their mother was unemployed. He was employed as a miner, earning a monthly salary of R10 875.00. The court also noted that the appellant had no previous convictions.
- [30] The court a quo was also invited to consider the fact that the complainant suffered no physical injuries as a substantial and compelling factor. I understand this to mean that there was no violence directed at the complainant. Relying on *Zinn*[13] took into consideration the fact that the appellant did not merely leave the complainant destitute at the scene of the incident and drove her back to where she stayed. It found that this counted in the appellant’s favour as the complainant did not know where she was. Taken cumulatively with his personal circumstances, the court found that these factors constituted substantial and compelling circumstances and deviated from the prescribed sentence of life imprisonment.
- [31] As stated in *S v Kekana*[14] when considering an appropriate sentence, ‘the lodestar remains the enduring triad’ — the crime, the offender and the interest of society, as enunciated in *S v Zinn*[15].
- [32] The trial court meticulously dealt with this in imposing sentence, as it appears from the record. The averment by the appellant that the sentence imposed is disproportionate overlooks this fact.

[33] In light of the prevailing circumstances of this case, which there is no reason to interfere with the sentence imposed by the court a quo.

Order

[34] In the result the following order is made:

S MFENYANA

JUDGE OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG

I agree

FMM REID

APPEARANCES

For the appellant H. C. Du Plessis Instructed by Legal Aid South Africa Tel 018 381 5096 Email henniedup85@gmail.com For the respondent D W Ntsala Instructed by DPP, Mmabatho Tel 018 381 9081 Email dintsala@npa.gov.za Date reserved 19 April 2024 Date of judgment 26 February 2025

[1] Act 32 of 2007.

[2] Act 105 of 1997 as amended.

[3] Act 10 of 2013.

[4] 2004

(2) SACR 303 (SCA).

[5] 1990

(1) SACR 95 (A).

[6] [1995] 3 All ER 730 (CA).

[7] S v J 1998 (2) SA 984 (SCA) at 1009 F – G.

[8] (CCT 120/11) [2012] ZACC 23; 2012 (12) BCLR 1261 (CC); 2013 (1) SACR 1 (CC).

[9] (469/2002)

[2003] ZASCA 63; 2004 (1) SACR 191 (SCA) (30 May 2003) at para 9.

[10] 1999

(2) SACR 238 (SCA) at para 10.

[11] 2011

(2) SACR 531 (ECG).

[12] Act 105 of 1997 as amended.

[13] 1969

(2) SA 537 (A).

[14] 2019

(1) SACR 1 (SCA).

[15] Zinn at 540G.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZANWHC/2025/42.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/thue-v-s-unknown-topic-anwhc-2025--6a3ea5203b1caa912981692c>

Prepared on 9 October 2026 · Esheria