

SOUTH AFRICA / JUDGMENT

Tshemego v S (CA30/2023) [2024]

ZANWHC 308 (19 December 2024)

[2024] ZANWHC 308

COURT

North West High Court, Mafikeng

BEFORE

Reddy, Motsatsi

CASE / FILE NUMBER

CA30/2023

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION –

MAHIKENG

Case No: CA30/2023

Regional Magistrate's

Case No: RCA13/2018

Reportable: NO

Circulate to Judges:

NO

Circulate to

Magistrates: NO

Circulate to Regional

Magistrates: NO

In the matter between: -

BOPHELO MACDONALD

TSHEMEGO

APPELLANT

AND

THE

STATE

RESPONDENT

CORAM:	REDDY J & MOTSATSI AJ
	DATE OF HEARING: 19 JUNE 2024
set aside and replaced with the following:	Judgment is handed down electronically by distribution to the parties' legal representatives by e-mail. The date that the judgment is deemed to be handed down is 19 December 2024 at 10h00.
	ORDER The appeal against conviction is upheld. The order of the court a quo is
	“Counts 2 to 4; and counts 6 to 8: Acquitted (duplication of convictions). Counts 1 and 5: Guilty: contravening section 3 of Act 32 of 2007 read with section 51(1) and Part I of Schedule 2 (rape more than once and the infliction of grievous bodily harm)”
	The appeal against sentence on counts 2 to 4 and 6 to 8 is upheld. The sentence of the court a quo on counts 2 to 4 and 6 to 8 is set aside. The sentence of life imprisonment on counts 1 and 5 is confirmed.

JUDGMENT

REDDY J

Introduction

- [1] This appeal formed part of a second special appeals project, designated by the Judge President of the Division.
- [2] Acting Judge Motsatsi assigned as the scribe by the Judge President penned a draft judgment for my consideration. Having considered the draft, I raised several concerns with Acting Judge Motsatsi, who agreed with my contentions. In consultation with Acting Judge Motsatsi, it was agreed that I pen the judgment, which appears in its present form. The latter also explains the delay in the penning of the judgment.
- [3] The appeal is before this Court by virtue of the automatic right to appeal the conviction and sentence, which derived from section 309(1)(a) of Act 51 of 1977 ('the CPA'). The appeal was disposed of in terms of section 19(1)(a) of the Superior Courts Act 10 of 2013.

- [4] The appellant was charged in the Regional Court at Mmabatho ('the court a quo'), with eight (8) counts of contravening section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 ('the SORMA') read with the sections 1, 50, 55, 56(1), 56A, 57, 58, 59, 60, and 61, further read with the provisions of Section 94, 256 and 261 of the CPA, further read with section 51(1) of the Criminal Law Amendment Act 105 of 1997 ('the CLAA'). The state averred that the appellant unlawfully and intentionally committed repeated acts of sexual penetration with both victims by inserting his penis into their vaginas without their consent and by further inflicting grievous bodily harm on them.
- [5] The appellant duly represented pleaded not guilty to all counts and elected to remain silent as evinced in section 35(3)(h) of the Constitution of the Republic of South Africa, 1996. During the trial, the appellant raised consent as a ground of justification, negating unlawfulness. On 03 October 2019 preceding a full-blown trial, the appellant was convicted on all counts. On 22 January 2020, the court a quo found that there existed no substantial and compelling circumstances that warranted a deviation from the mandatory sentence of life imprisonment. Resultantly, the appellant was sentenced to eight life terms for the eight counts he was convicted of. In terms of section 280 of the CPA, the court a quo ordered the sentences on counts 2 to 8 run concurrently with the sentence on count 1. It is trite that the order of concurrency is superfluous in terms of section 39(2)(a)(i) of the Correctional Services Act 111 of 1998 which provides that any additional sentence of life imprisonment automatically runs concurrently with the first life sentence.

Grounds of appeal against conviction

- [6] The appellant assails the convictions on four grounds. First, it is contended that the court a quo misdirected itself in finding that the state had proved the case against the appellant beyond a reasonable doubt. Second, the court a quo had erred in not finding that the victims had consented to engage in sexual intercourse with the appellant. Third, the material contradictions in the state case more pertinently in respect of the victims were not properly evaluated and assessed. Fourth, the court a quo failed to make a pronouncement that the actions of the appellant constituted a singular intent.

The background facts

- [7] On 05 May 2012 GPJ and KPL were sleeping together in the same bed. At about 4h00AM, KPL heard a noise coming from the apparent falling of a bath basin. KPL woke up intending to investigate. When she was about to get off her bed, she noticed a silhouette of a person standing next to her bed. KPL screamed which caused GPJ to wake. When GPJ became aware of the presence of appellant in the room she also screamed. The appellant was naked with his face covered. The

appellant threatened KPL & GPJ that he would kill them by stabbing them. The instrument that was to be used to this end was

unknown.

- [8] The appellant proceeded to rape GPJ and thereafter went over KPL and raped her. At all times the appellant was stabbing them with an unknown sharp object. The appellant raped both victims interchangeably repeatedly while stabbing and piercing them with a sharp object. This constituted eight (8) counts of rape in the view of the state.
- [9] KPL convinced the appellant that she had to prepare for school to which the appellant acquiesced. KPL managed to flee, leaving GPJ and the appellant behind. At the third house from her residence KPL reported the matter to Mr Pogisego Daniel Matlhoafela ('Matlhoafela'). In the company KPL, Matlhoafela ran to where the appellant and GPJ were. Other residents followed. Upon their arrival they entered the house and switched on the lights. The appellant was having sexual intercourse with GPJ. KPL then escorted GPJ out. The appellant attempted to escape through the window that he entered but Matlhoafela circumvented this. The appellant however fled via the door naked into the nearby bushes, leaving behind his shoes, outside the window that he had entered. The appellant also left behind his trouser and identity document. The evidence of GPJ corroborated the material evidence of KPL. Significantly, both victims confirmed that they had been raped repeatedly.
- [10] The state submitted into evidence two reports on the medico-legal examination by a medical expert conducted on the victims' dated 05 May 2012. This was on same date of the incident. This report documented gynaecological examinations on both victims' and recorded bruising of urethral orifices, consistent with recent vaginal penetration and the use of force. Further, the reports both record multiple lacerations, abrasions and bruises over the victims' upper backs and frontal parts of their bodies with KPL having sustained further injuries on her upper leg.
- [11] The appellant testified that he was in a relationship with KPL. On the day in question, he entered through the window as per the request of KPL. He then discovered that KPL was in the company of GPJ. To make short shrift on the matter, the appellant had consensual sexual intercourse with GPJ and KPL. The appellant averred that on the entry of Matlhoafela, who was in the company of another individual, and he was assaulted.

The onus in a criminal trial

- [12] It is commonplace that the State bears the onus of establishing the guilt of the appellant beyond reasonable doubt and the corollary is that the appellant is entitled to be acquitted if there is a reasonable possibility that he might be innocent (See R v Difford 1937 AD 370 at 373, 383). In S v van Aswegen 2001

- (2) SACR 97 (SCA), the Supreme Court of Appeal (SCA) held:

"In assessing whether the Appellants are guilty, it goes without saying that the State must prove its case beyond reasonable doubt. If the case reaches a stage where the Appellants has a duty to answer the state testimony, accordingly the Appellants must provide evidence that is reasonably possible to be true, the mere fact that their testimony is unlikely is not enough to reject it. It must be so unlikely to be false beyond reasonable doubt".

[13] In *S v Hadebe and Others* 1998

(1) SACR 422 (SCA) at 426f-h the SCA said the following:

“The question for determination is whether, in light of all the evidence adduced at the trial, the guilt of the appellants was established beyond a reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubt about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgence approach is appropriate when evaluating evidence. Far from it there is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees”.

[14] In *S v Chabalala* 2003 (1) SACR 134 (SCA) at 139 i-140a, the SCA held:

“A court must take into account the ‘mosaic of proof’ and the probabilities emerging from the case as a whole in determining whether the accuser’s version was reasonable possible true. It is trite law that a trial court must “weigh up all the elements which points 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 weighs so heavily in favour of the State as to exclude any reasonable doubt about the accuser’s guilt”.

The test on appeal against conviction

[15] It is trite that a Court of appeal will be hesitant to interfere with the factual findings and evaluation of the evidence by the court a quo and will only interfere where the court a quo materially misdirects itself insofar as its factual and credibility findings are concerned. *R v Dhlumayo and another* 1948 (2) SA 677 (A), *S v Francis* 1991 (1) SACR 198 (A) para 198j -199a. *S v Hadebe and others* 1997

(2) SACR 641(SCA) para 645e-f, *Sithole v S* (A105/2021) [2024] ZAGPPHC 39 (18 January 2024) para19.

Discussion (conviction)

[16] The evidence against the appellant was overwhelmingly. Resultantly it was correctly rejected as false by the court a quo. The factual finding that the appellant raped the victims repeatedly (more than once) is unassailable. The further factual finding by the court a quo that the appellant pierced the victims ‘with an unknown object which caused injuries to their bodies’ is similarly unassailable.

[17] The order of the court a quo in convicting the appellant of eight counts of contravening section 3 of SORMA, however, constitutes a serious misdirection, which resulted in a resultant misdirection on sentence.

[18] The serious misdirection by court the quo on conviction is best illustrated with reference to what this Court said in *Ntandani v S* (CA61/23) [2024] ZANWHC 243 (18 September 2024), in respect of multiple counts of rape:

‘[9] It is indisputable that the appellant had committed more than one act of sexual penetration on MMM, within the purview of section 51(1) read with Part I of Schedule 2 of the CLAA. The prosecutor elected to charge the appellant with two separate counts of rape. As part of our legal landscape, the National Prosecuting Authority is enjoined with an unfettered discretion on the charges to be preferred against an

accused. The prosecutorial discretion on the constitution of the charges is the domain of the National Prosecuting Authority. It is akin to the delivery of a verdict which is the exclusive territory of the court. It is, however, the duty of a court to prevent a duplication of convictions brought about by an impermissible splitting of charges by the prosecution.

[10] In *Lesang Samuel Modise v S*, Case No: CA 44/2021, NWHC, delivered on 07 March 2022, the Full Bench postulated as follows:

‘[15] The formulation of the charge by the State in respect of counts 2 and 3 and the terminology used by the court a quo in sentencing the appellant on counts 2 and 3, is problematic. The court a quo found that counts 2 and 3 emanate from the same incident and ordered that the two counts be taken as one for sentence. The appellant should not have been charged separately on counts 2 and 3, but with one count of rape. In *S v Maxabaniso* 2015

(2) SACR 553 (ECP), an analogous matter to the present appeal, which are apposite, Plasket J said the following:

‘[4] The issues that arise for determination are: (a) Whether the appellant was adequately warned of the applicable provisions of the Criminal Law Amendment Act 105 of 1997 relating to the relevant applicable prescribed minimum sentence; (b) whether he ought to have been charged with two counts of rape, rather than one count; (c) whether the evidence establishes that he raped the complainant more than once; and (d) whether the magistrate misdirected himself in respect of the sentence he imposed.

The charge: One count of rape or two?

...

[20] It was argued by Mr Renaud, who appeared for the appellant, that he was charged with one count of rape and that the state, if it wanted the sentence of life imprisonment to apply, ought to have charged him with two counts of rape.

- [21] I am aware of cases in which an accused has been charged with more than one count of rape involving the same victim. *S v M* and *S v Senyolo* are cases in point. In both cases the accused had raped the same victim once on two different occasions, a few months apart in the former, and 15 days apart in the latter. Both accused were charged with two counts of rape and, in both, the court held that a prescribed sentence of life imprisonment applied because the accused had raped the same victim more than once. In *S v M Satchwell J* sentenced the accused to 'one term of life imprisonment in respect of both counts one and two'. In *S v Senyolo*, however, Van Eeden AJ, having found substantial and compelling circumstances to be present, set aside the sentence of life imprisonment imposed by the trial court and replaced it with a sentence of 10 years' imprisonment in respect of each count.
- [24] There are occasions when a person accused of raping a victim more than once in the course of a single encounter is charged with more than one count of rape. It appears to be practice in this division, however, to charge such an accused with one count of rape. In my view, in the normal course, that is the correct way to charge such an accused. It avoids potential difficulties highlighted by the sentences imposed in *S v M* and *S v Senyolo*, namely whether (in the absence of other factors dealt with in part 1 of sch 2) each count attracts a potential life sentence, or whether the first rape attracts a 10-year minimum sentence while the second attracts a life sentence, or whether both counts have to be taken together for purposes of sentence.
- [25] In my view the legislature envisaged an accused being charged with one count of rape if, in the course of his encounter with his victim, he penetrates her more than once. The repeated penetration of his victim is what aggravates the perpetration of the rape and renders him liable for life imprisonment in respect of his entire course of conduct: it is, in other words, the multiple acts of penetration that attract the life sentence, as would be the case in a so-called gang rape. One does not require item (a)(i) to meet the concern that when an accused rapes the same victim twice with the acts of penetration separated by, say, a week, he may be deserving of a sentence of life imprisonment (for at least the second rape): Even when the prescribed minimum sentence for a rape is 10 years' imprisonment, courts have common-law powers to impose harsher sentences, including life imprisonment, if that is called for in the circumstances."

(my emphasis)

- [11] As was alluded to in *Modise and Maxabaniso*, the present appeal demonstrates the conundrum that an appellate court is faced with when an accused is charged with two counts rather than one count, in circumstances where the victim was raped more than once. The Regional Magistrate took counts 2 and 3 together for the purposes of sentence and imposed life imprisonment.
- [12] In *DPP, Free State v Mashune* (675/17) [2018] ZASCA 60 (18 May 2018), Rogers AJA, in albeit in a different context, but equally applicable in the present appeal, postulated as follows:

“[10] Strictly speaking, each count in the present case involved two distinct offences, namely (a) housebreaking with intent to commit rape; and

(b) rape (S v Zamisa 1990

(1) SACR 22 (N) at 23d-e.) However, since the indictment was framed as if each housebreaking and the ensuing rape constituted a single offence, and since the contrary was not argued, I shall approach the case as if the respondent was convicted of two offences, not four. This is what the court a quo did.”

[13] There is clearly an impermissible splitting of charges. The effect of any prejudice was ameliorated by the Regional Magistrate imposing a cumulative life sentence on counts 2 and 3. It, however, remains a salutary practice as evinced in Modise and Maxabaniso, that in circumstances analogous to the present matter, that the prosecution avoids an impermissible splitting of charges, and that judicial officers remain alive to avoiding a consequent duplication of convictions.’

[19] The conviction of the appellant on the eight (8) counts of contravening section 3 of SORMA undoubtedly impugns the principle of duplication of convictions. The appellant should have been convicted on counts 1 and 5, of two (2) counts of contravening section 3 of SORMA read with section 51(1) and Part I of Schedule 2 of the CLAA, which provides the following jurisdictional facts:

“Rape -

(a) when committed -

(i) in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice:..

(c) Involving the infliction of grievous bodily harm.”

[20] The appellant should have been acquitted on counts 2 to 4 and 6 to 8. To this extent, the appeal against conviction on counts 2 to 4 and 6 to 8 is upheld.

Appeal against sentence

[21] It follows axiomatically that the life terms imposed on counts 2 to 4 and 6 to 8 stand to be set aside. The only question is whether life imprisonment imposed on counts 1 and 5 by the court a quo is assailable on appeal. The approach to an appeal against sentence was set out in S v Malgas 2001

(2) SA 1222 (SCA) at para 12 as follows:

“The mental process in which courts engage when considering questions of sentence depends upon the task at hand. Subject of course to any limitations imposed by legislation or binding judicial precedent, a trial court will consider the particular circumstances of the case in the light of the well-known triad of factors relevant to sentence and impose what it considers to be a just and appropriate sentence. A court

exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate court is at large. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as “shocking”, “startling” or “disturbingly inappropriate”. It must be emphasised that in the latter situation the appellate court is not at large in the sense in which it is at large in the

former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned. No such limitation exists in the former situation.”

[22] Sentencing is about attaining a balance. This necessitates a consideration of the personal circumstances of the appellant the interests of society, and to consider not only 'the objective gravity of the offence but also the impact of the crime on the victim'. S v Chapman [1997] ZASCA 45; 1997 (3) SA 341 (SCA) para 3, S v Matyityi (2010) 2 All SA 424 (SCA) para 17.

[23] Critical to the attainment of a balanced sentence founded on the triad the objectives of sentencing which include retribution, deterrence, prevention and rehabilitation must be factored in. S v M (Centre for Child Law as Amicus Curiae) [2007] ZACC 18; 2007

(2) SACR 539 (CC) para 109.

[24] The personal circumstances of the appellant were placed before the court a quo through a pre-sentence report and the address by the appellant's legal representative. It serves no purpose to regurgitate same. The appellant after having broken into the home of the victims raped each of them repeatedly. Rape is a malevolent and persistent evil within our society. The SCA describes it as 'repulsive', and explains its impact as 'a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim'. This Court notes that rape violates not only the victim's physical integrity, but also their emotional and psychological well-being, and can cause life-long trauma. S v Vilikazi 2009

(1) SACR 552 (SCA) para 1. S v Chapman [1997] ZASCA 45; 1997

(3) SA 341 (SCA) para 3. S v Matyityi [2010] 2 All SA 424 (SCA) para 10.

[25] In S v Vilikazi 2009 (1) SACR 552 (SCA) para 58, the following was held:

'Once it becomes clear that the: crime is deserving of a substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be and those seem to me to be the kind of flimsy grounds that Malgas said should be avoided. But they are nonetheless relevant in another respect. A material consideration is whether the accused can be expected to offend again.'

[26] This is a textbook example of an instance where the appellant's personal circumstances recede to the background. In my view the imposition of the prescribed sentence of life imprisonment on each of counts 1 and 5 by the court a quo does not lead to an injustice on the appellant. The court a quo was therefore correct in finding that there are no substantial and compelling circumstances on an examination of the aggravating and mitigating features which justify a departure from the minimum sentence of life imprisonment.

[27] The appeal against sentence is upheld to the extent that the conviction on counts 2 to 4 and 6 to 8 have been set aside.

Order

[28] In the premises, the following order is made:

1. The appeal against conviction is upheld.
2. The order of the court a quo is set aside and replaced with the following:
3. The appeal against sentence on counts 2 to 4 and 6 to 8 is upheld.
4. The sentence of the court a quo on counts 2 to 4 and 6 to 8 is set aside.
5. The sentence of life imprisonment on counts 1 and 5 is confirmed.

A REDDY

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

I agree.

N MOTSATSI

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

APPEARANCES

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