

SOUTH AFRICA / JUDGMENT

Tshokolo v S (A58/2019) [2020] ZAGPPHC 411 (21 August 2020)

[2020] ZAGPPHC 411

COURT

North Gauteng High Court, Pretoria

BEFORE

MMP Mdalana-Mayisela, LA Retief

CASE / FILE NUMBER

A58/2019

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA,

GAUTENG

DIVISION, PRETORIA

(1)

REPORTABLE:

NO

(2)

OF

INTEREST TO OTHER JUDGES: NO

(3)

REVISED:

NO

CASE NO: A58/2019

In

the matter between:

TSHOKOLO

RUBEN

Appellant

and

THE

STATE

Respondent

JUDGMENT

Mdalana-Mayisela J

1. The appellant was arraigned in the Oberholzer Regional Court on counts of housebreaking with intent to steal and theft; attempted robbery; and rape. He pleaded not guilty to all three counts and offered no plea explanation. On 17 May 2018 he was convicted on all counts. On 24 October 2018 he was sentenced to 5 years' imprisonment on each of count 1 and 2; and life imprisonment on count 3. The sentences imposed on counts 1 and 2 were ordered to run concurrently with a sentence imposed on count 3. He was sentenced to life effective term of imprisonment. He was declared unfit to possess a firearm in terms of section 103(1) of Act 60 of 2000. He was legally represented during his trial in the court a quo. He has an automatic right of appeal and he now appeals against conviction and sentence. The appeal is opposed by the respondent.
2. The details of the charges against the appellant were as follows. Firstly, he was accused of unlawfully and intentionally and with intent to steal, broke open and enter Tsepong Hostel Liquor Outlet and stole eight 375 ml bottles of Mellow Wood brandy, fourteen 750 ml bottles of Mellow Wood brandy, one litre bottle of Sprite and one box containing 10 boxes of cigarettes on 4 March 2012 and at or near Carletonville; secondly, he was accused of attempting to rob the complainant Ms N[....] M[....] on 12 April 2014 and at or near Weston area; and thirdly, he was accused of contravening the provisions of Section 3 of Criminal Law Amendment Act 32 of 2007 (Sexual Offences and Related Matters Act), in that, on the date and at or near a place mentioned in count 2 he unlawfully and intentionally committed two acts of sexual penetration with the complainant, Ms N[....] M[....] by inserting his finger and penis into her vagina without her consent.
3. The state led the evidence of ten witnesses, namely, the complainant in count 1 Mr C[....] M[....], Mr E[....] L[....], Mr W[....] M[....], W/O Pieter Oosthuizen, Sgt Dawn Basson, the complainant in counts 2 & 3 Ms N[....] M[....], Ms R[....] T[....], I/O L/C Ockert Brits, W/O Lorraine Harris-Barnes who compiled a DNA report and medical doctor Saiqa Kashif who compiled a J88 medical report. The appellant testified in his defence and called no witnesses.
4. Briefly, the grounds of appeal are as follow. Firstly, on conviction, the court a quo erred in not finding that the version of the appellant was reasonably possibly true and finding that the state proved its case against the appellant beyond reasonable doubt; the court a quo erred in accepting the state evidence as satisfactory despite material contradictions and improbabilities; and secondly, on sentence, the court a quo erred in imposing an effective sentence of life imprisonment disregarding the personal circumstances of the appellant and the rehabilitation element; and overemphasizing deterrence and retribution elements, the seriousness of the offences, the interest of society and the prevalence of the offences.

5. The appellant in his heads of argument raised a point in limine that a record of appeal is incomplete in that the first portion of the judgment is not transcribed. However, Counsel for the appellant

submitted that the record is sufficient for the purpose of determining the issues on appeal.

Counsel for the respondent has not

dealt with this point in limine in his heads of argument. In *S v Chabedi* 2005 (1) SACR 415 SCA the Supreme Court of Appeal held that the requirement is that the record must be adequate for a proper consideration of the appeal, not that it must be perfectly reconstructed. What is adequate is a question which cannot be answered in the abstract. Every case must be decided on its own merits, with particular reference to the nature of the defects and the nature of issues to be decided on appeal. In the present appeal what is missing in the record is the summary by the magistrate of the evidence of four state witnesses. The evidence of all ten state witnesses is recorded. The evaluation of the evidence of all ten state witnesses and the findings of the magistrate are recorded. We have read the record and we are satisfied that it is adequate for the purpose of considering this appeal.

AD CONVICTION

6. The appellant is appealing against conviction on all three counts. In *S v Francis* 1991(1) SACR 198 (A) at 198J-199A the Court held that:

‘The powers of a court of appeal to interfere with the findings of fact of a trial court are limited. In the absence of any misdirection the trial court’s conclusions including its acceptance of a witness’ evidence is presumed to be correct. In order to succeed on appeal, the appellant must therefore convince the court of appeal on adequate grounds that the trial court was wrong in accepting the witness’ evidence – a reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage which a trial court has of seeing, hearing and appraising a witness, it is only in exceptional circumstances that the court of appeal will be entitled to interfere with a trial court’s evaluation of oral testimony.’

7. I first deal with the conviction on count 1. The state alleged that the appellant committed a housebreaking with intent to steal and theft of the items mentioned in paragraph 2 above. The undisputed testimony of Mr M[...] was that in the night of 3 March 2012 he left the Liquor Outlet premises (“the premises”) windows and doors closed and switched on the alarm. The following day early in the morning he received a telephone call informing him that there was a burglary at the premises. He went to the premises and when he arrived he observed that the razor wires on the fence were cut and the burglar gate and garage door were removed. He further observed that the items mentioned in paragraph 2 above were stolen. It was put to him that the appellant and his brother visited the premises during the period 2009 to 2014 and that the appellant knew nothing about the offence in question. He testified that he did not know the identity of the perpetrator and he also did not know the appellant and his brother.

8. Warrant Officer Louwrens testified that on 4 March 2012 at 10H50 he received a complaint of burglary at the premises and he attended to the scene. He found that one of the windows of the premises was broken ("the broken window"). It was explained to him by Mr M[...] that the broken window was not normally accessible to any member of the public or any client that would come to the premises to buy alcohol. He noticed what he perceived to be a blood droplet on the outer side, at the sharp edge of the broken window. He lifted and collected the blood by means of a cotton swab, sealed it in a forensic bag with a serial number FSC 1209078 and later he handed it to the Forensic Science Laboratory. He testified that the spot on the broken window where he collected the blood was 2 metres high from the ground. 2 metres height exceeded the average height of a normal person. He believed that the blood dropped on the sharp edge of the window after it was broken. It was put to W/O Louwrens by the appellant's counsel that the appellant knew nothing about the offence in question, and further that from 2009 to 2014 he might have visited the premises together with his brother and that 'his prints might have handled, or touched on or leaned' on the broken window. He disputed the appellant's version and stated that he is 1,9 metres tall and he had to reach upwards in order to lift and collect the blood. He does not know the height of the appellant but even for someone of his height who is rather tall it would not be possible to touch or lean on it while standing in a normal position. It was further put to him that the investigating officer was fabricating the evidence against the appellant because he refused to give the I/O information about the offence in question. He testified that during his investigation in the premises he did not find anything that alarmed him or raised any red flags with the blood droplet maybe not being consistent with the position that he found it.
9. Sergeant Mongalane was the first investigating officer in this case. He was at the premises when W/O Louwrens arrived. He corroborated the evidence of W/O Louwrens on where the blood droplet was lifted and collected. He testified that the place where the blood droplet was found was high and he had to climb on something to be able to reach it and that it was in a private area not generally accessible to the public. He further stated that to gain access to that area before the burglary was committed someone had to unlock the gate and the security door. He also corroborated the evidence of Mr M[...] on the property that was damaged in gaining access to the premises and the stolen items. It was put to him that the Investigating officer L/C Brits fabricated the evidence against the appellant. He stated that L/C Brits was not present at the premises in the morning when the blood was lifted and collected. He testified that he did not know the identity of the perpetrator.
10. Warrant Officer Oosthuizen testified that he obtained a buccal sample consisting of swabs from the appellant's mouth in Court holding cells on 11 February 2015. The appellant at that time was appearing in court under Carletonville CAS no 215/8/2014 not related to the matter before us. He explained that when they arrest a suspect for Schedule 8 offence they are required to obtain a buccal sample. The buccal sample was sealed under serial number 11DBAF0147 and the FSL bag is PA 4000286431K. It was sent to Pretoria Forensic Science Laboratory. L/C Brits did not have access to the buccal sample. It was put to W/O Oosthuizen that the appellant did not dispute the procedure followed by him in obtaining the buccal

sample. Sergeant Basson testified that she assisted W/O Oosthuizen in obtaining the buccal sample from the appellant. She corroborated him on the procedure that was followed until the sample was sent to Pretoria Forensic Laboratory.

11. Warrant Officer Harris-Barnes employed at Forensic Science Laboratory in Pretoria testified that she received properly sealed samples with serial numbers FSC 1209078 and 11DBAF0147 for DNA analysis. She stated that the DNA result obtained from swab A which was received in evidence bag with serial number FSC 1209078 matched the DNA result of the reference sample marked Tshokolo with serial number 11DBAF0147. The DNA analysis procedure and results were not disputed by the appellant.
12. Lieutenant Colonel Brits testified that he is a Branch Commander and the investigating officer of this case. He disputed the version of the appellant that he framed him for this case. He testified that he did not know the appellant before the commission of these offences and that he met him for the first time on 11 January 2015 when he was arrested. He was not involved in obtaining the DNA samples. He did not have a reason to fabricate the evidence against the appellant because there was strong evidence against him.
13. Counsel for the appellant submitted that the only issue to be considered on count 1 was whether the appellant's explanation on the presence of his blood at the premises was reasonably possibly true. He submitted that the appeal should succeed on count
 1. That the court should accept the explanation by the appellant that he touched a window while leaning or balancing himself outside the bar after his hand was injured at the premises during a separate incident as being reasonably possibly true. This explanation was not put to the relevant state witnesses. The appellant blamed his attorney for failure to put this explanation to relevant state witnesses and said his attorney told him to keep quiet. The court a quo found that the appellant's explanation on how his blood dropped on the sharp edge of a broken window was a fabrication and highly improbable and could not be reasonably possibly true. It also rejected the appellant's version that he was framed on this case by L/C Brits because L/C Brits did not know the appellant when the blood droplet was lifted and collected from the premises. He met the appellant for the first time on 11 January 2015 when he was arrested on another case. The appellant confirmed during cross-examination that he started knowing L/C Brits in 2015.
14. I agree with the findings of a court a quo that the appellant's explanation on the presence of his blood at the premises was a fabrication and highly improbable. The state witnesses testified that the place where the blood was found was a private area with a gate and a security door protecting the window. The sharp edge of a broken window where the blood was found was 2 metres high and exceeded an average height of a normal person. The appellant confirmed during cross-examination that he is of an average height. There was no evidence tendered that he climbed on something when he allegedly touched the window with his injured hand. W/O Louwrens testified that he is 1.9 metres tall and he had to stretch upwards to be able to reach the sharp edge of a broken window to lift and collect the blood.

Sergeant Mongalane testified that he is of an average height and that he would have to climb on something in order to reach a place where the blood droplet was found. Furthermore, W/O Louwrens testified that the blood could only drop on the sharp edge of the window after it was broken. The appellant's explanation could not be reasonably possibly true.

15. The court a quo made credibility findings against the appellant that he did not leave a good impression. It found that all the state witnesses that testified on count 1 left a good impression. They only testified regarding their personal knowledge of the incident or how they were involved in the investigation of the crimes. They did not falsely implicate the appellant. Their evidence was reliable and could be believed. There was no evidence showing that the exhibits were tempered with. The court a quo accepted the evidence of the state witnesses and the DNA results. I find nothing wrong in the findings of the court a quo on count 1. It correctly convicted the appellant on this count. In the premises the appeal against conviction on this count should fail.
16. I now deal with the appeal against conviction on count 2, attempted robbery and count 3, rape. It is common cause that these offences were committed against the complainant, Ms M[...]. The issue in dispute is the identity of the perpetrators. The complainant testified that on 12 April 2014, in Bekkersdal at night she walked passed two unknown men next to the tavern on her way to Church. She then heard the footsteps behind her. One of the unknown men hit her on the shoulder and she fell on the ground. She was so scared that she urinated herself. The other one lifted her from the ground and took her schoolbag demanding money and cell phone. She told them that she did not have a phone or money. The one who hit her on the shoulder searched her body all over. When he was searching her waist she advised him not to touch further because she urinated herself. He inserted his hand through the skirt, leggings and panty and inserted his finger inside her vagina heedless of her advice. This penetration occurred without her consent. Thereafter she was instructed to walk with them downwards. They reached a dumping site with damaged precast walls. They went to the other side of the precast walls. The one who inserted his finger inside her vagina ordered her to undress and grab the wall with her hands. After undressing herself, they heard voices of people coming from behind the walls, he then ordered her to lie down on a dry area of a dumping site. He raped her by inserting his penis inside her vagina while she was lying on her back. When he finished he wiped his penis with her leggings. This penetration also occurred without her consent. During the second penetration the one who took her schoolbag was hiding behind the precast walls. He came back after the second penetration and handed back her schoolbag. Thereafter the perpetrators disappeared. While she was walking from the scene of rape crying, she met five unknown men who accompanied her to Church. On arrival at Church she met the witness Ms T[...] who then accompanied her to the police station and clinic. She could not identify the two men who committed these offences.

17. The appellant was linked to these offences by DNA evidence. The procedure followed by W/O Oosthuizen and Dr Kashiff in obtaining the samples, analysis of the samples and the DNA results were not disputed by the appellant. The appellant denied any involvement in the commission of these offences. When he was asked to furnish an explanation for DNA results, he testified that he did not remember raping anybody. He further testified that possibly he had consensual intercourse with the complainant, but he realised that he saw the complainant for the first time in court when she was giving her testimony. The appellant failed to furnish a true explanation why there was a DNA match between the buccal sample obtained from him by W/O Oosthuizen and the sample obtained by Dr Kashiff from the complainant. The appellant in his notice of appeal is challenging the conviction on these counts on the grounds that there were contradictions and improbabilities in the evidence of the state witnesses. Counsel for the appellant could not argue the grounds of appeal for the appellant and he submitted that he had no submissions regarding the conviction on these offences.
18. The complainant was a single witness with regard to where and how these offences were committed. Section 208 of the Criminal Procedure Act 51 of 1977 provides that an accused may be convicted of any offence on the single evidence of any competent witness. The court a quo made the credibility findings on the relevant state witnesses similar to those that were made in the evaluation of the evidence on count 1. It further found that the complainant was an honest and reliable witness and she did not falsely implicate the appellant. In my view the credibility findings made by the court a quo were correct. The complainant did not exaggerate her evidence. She told the truth that she did not have a phone and money and no items were forcefully taken from her by the appellant. She was clear in her testimony that she did not consent to sexual intercourse with the unknown male person. The evidence of Ms T[...] that the complainant was crying, wet and not wearing shoes when she arrived at Church accompanied by five unknown male persons corroborated her version that non-consensual sexual intercourse occurred. There were no contradictions and improbabilities in the evidence of the relevant state witnesses. Counsel for the appellant correctly submitted that there were no issues to be argued on appeal regarding the conviction on these counts.
19. The court a quo correctly applied the test that the state must prove its case against the appellant beyond reasonable doubt. The identification of the appellant as a perpetrator has been proved beyond reasonable by way of a deoxyribonucleic acid (DNA) evidence. Each person possesses a unique generic code and 46 chromosomes which hold the code are made up of the chemical DNA – a sequence among the genes in the DNA of each person repeatedly occurs along the length of the DNA molecule and all copies of these are unique to an individual, with the sole exception of identical twins (S V Orrie and another 2004 (3) SA 584 C at para 17). The DNA test if done correctly is accepted as proof of identity beyond reasonable doubt. The appellant is not disputing the samples,

DNA analysis and DNA test results. His version that he does not remember raping anybody or the alleged possible consensual sexual

intercourse with the complainant is highly improbable and could not be reasonably possibly true.

20. The court a quo correctly evaluated the evidence in totality. The judgment is properly reasoned and the findings are correct. There is no material

misdirection by the court a quo in its findings. The appellant was correctly convicted on counts 2 and

3. Accordingly the appeal against conviction on these counts must fail.

AD SENTENCE

21. The appellant in his notice of appeal contends that an effective sentence of 5 years plus life imprisonment is harsh and inappropriate. This contention is not correct because the court a quo ordered the sentences imposed on counts 1 and 2 to run concurrently with the sentence imposed on count 3. The effective sentence is life imprisonment. The appellant further contends that the court a quo erred by not fully considering his personal circumstances and the rehabilitation element of sentencing.

22. The court a quo in convicting the appellant accepted the state evidence that the complainant was penetrated twice by the appellant by using a finger

and a penis. It took into account that for this type of rape where there is more than one penetration, the minimum sentencing

regime in terms of s51(1) of the Act prescribes life imprisonment. The court is mandated to impose a prescribed life sentence in this type of offence unless it finds that there are substantial and compelling circumstances which justify a departure from imposing a life sentence. In *S v Malgas* 2001(2) SACR 459 (SCA) the Supreme Court of Appeal held that in analysing whether the circumstances of any particular case call for a departure from the prescribed sentences, the court is required to regard the prescribed sentences as being generally appropriate for the crimes of the kind specified and enjoined not to depart from them unless they are satisfied that there is weighty justification for doing so. A departure must be justified by reference to circumstances which can be seen to be substantial and compelling as contrasted with circumstances of little significance or debatable validity or which reflect a purely personal preference unlikely to be shared by many.

23. In *S v Vilakazi* 2009 (1) SACR 552 at para 58 the Supreme Court of Appeal regarding what constitutes substantial and compelling circumstances held as follows:

“In cases of serious crime the personal circumstances of the offender by themselves, will necessarily recede into the background. Once it becomes clear that the crime deserves of a substantial period of imprisonment the question whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves immaterial to what that period should be, and those seem to me to be the kind of ‘flimsy’ grounds Malgas said should be avoided. But they are nonetheless relevant in another aspect. A material consideration is whether the accused can be expected to offend again.”

24. The court a quo considered the personal circumstances of the appellant to establish if they were substantial and compelling justifying a departure from the prescribed life imprisonment. They are as follow: he was 28 years old, he is married, he has one child, he passed grade 8 at school, he has a previous conviction and he spent approximately 2 years 4 months in prison awaiting trial. The court a quo found that these personal circumstances were not substantial and compelling. Counsel for the appellant submitted that the court a quo misdirected itself by finding that these personal circumstances were not substantial and compelling. I am not persuaded by this submission. These personal circumstances cumulatively considered, I find them to be the kind of “flimsy” grounds stated in Vilakazi case. Furthermore, awaiting trial on its own does not provide a substantial and compelling circumstance that justifies the imposition of a lesser sentence than any prescribed minimum sentence called for by the law. In *S v Dlamini* 2014(1) SACR 530 at 537 at para 18 the Court held that:

“The fact that he spent two years in prison awaiting trial does not mean that the sentencing court (or the Court of appeal) should now impose another sentence lesser than life imprisonment. For the trial court (or Court of Appeal) to be able to properly compute a lesser sentence than life imprisonment it will have to take parole legislation and policies into account to determine how long a sentence of life imprisonment would effectively be, before it can be adjusted downward. That is, however the domain of the executive, and courts

should be wary to tread on the terrain of other arms of government in order to preserve the separation of powers doctrine...”

25. I find the following factors to be aggravating. The appellant did not show remorse. He maintained his innocence throughout the proceedings in the court a quo. He accused the innocent investigating officer for framing him for these offences. After he was convicted, he informed the social worker during the preparation of a probation report that the complainant in counts 2 and 3 was a sex worker whom he met at a drinking place, maybe he did not pay her enough money that was the reason she was falsely implicating him in the commission of rape. This statement is insulting the complainant considering that she was on her way to Church when she was raped by the appellant. He informed the social worker that he used to buy sex from multiple ladies at the tavern whereby he would engage in sexual intercourse with them in the tavern toilets or go with them to his room. He further informed her that he would not apologise for something he didn't do. The social worker found him to be a dishonest person who withheld important information about his background. He also lied that he owned a tuckshop whereas in actual fact he was a street vendor selling oranges. It is clear from the probation officer's report that the appellant does not acknowledge responsibility for his crimes and the prospects of rehabilitation are nil.
26. In *S v Banda and others* 1991 (2) SA 352 (B) at 355A-B Friedman J stated the approach in determining an appropriate sentence as follows:

‘The elements of the triad contain an equilibrium and a tension. A Court should, when determining sentence, strive to accomplish and arrive at a judicious counterbalance between these elements in order that one element is not unduly accentuated at the expense of and to the exclusion of others. This is not merely a formula, nor a judicial incantation, the mere stating whereof satisfies the requirements. What is necessary is that the Court shall consider, and try to balance evenly, the nature and circumstances of the offence, the characteristics of the offender and his circumstances and the impact of crime on the community, its welfare and concern. This conception as expounded by the Courts is sound and is incompatible with anything less.’

27. The appellant contended that the court a quo overemphasized the elements of retribution and deterrence, the prevalence and seriousness of the offences and the interest of society. In *S v Chapman* [1997] ZASCA 45; 1997 (3) SA 341 at 344I’J it was stated that ‘rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of a victim.’ The appellant and his friend attacked a defenceless woman who was on her way to Church. The complainant was so scared that she urinated herself. She was so traumatised that after this incident she left Gauteng Province and went to live in Cape Town. She has a chronic medical condition and is treated as an outpatient in a hospital in Cape Town. In *S v Lister*

(1993) 4 ALL SA 669 (A) Nienaber JA remarked as follows: ‘..to focus on the well-being of the accused at the expense of the aims of sentencing, such as the interest of the community is to distort the process and to produce, in all likelihood a warped sentence.’ The court a quo took into account all the elements of sentencing in considering the appropriate sentences. It did not overemphasize any element. It adopted a balanced approach in exercising its discretion in sentencing the appellant. I do not find any misdirection in the

consideration of the appropriate sentence by the court a quo. The effective sentence of life imprisonment in the circumstances of this case is appropriate. The appeal on sentence must fail.

28. I accordingly make the following order:

28.1 The appeal against conviction and sentence is dismissed.

MMP Mdalana-Mayisela

Judge of the High Court

Gauteng Division

I agree:

LA Retief

Acting Judge of the High Court

Gauteng Division

Date of judgment (electronically): 21

August 2020

Counsel for Appellant: Adv LA Van Wyk

Instructed by: Legal

Aid SA

Counsel for the State: Adv A Roos

Instructed by: National Prosecuting Authority

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