

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG**

C
ASE NO: A09/2021

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

18 April 2023

NDLALA, MASINGITA RALPH

Appellant

and

THE STATE

Respondent

Neutral Citation: *Ndlala, Masingita Ralph v The State* (Case No: A09/2021) [2023] ZAGPJHC 345 (18 April 2023)

JUDGMENT

Mdalana-Mayisela J

INTRODUCTION

[1] The appellant was charged in the Protea Regional Court of the contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (rape). The state alleged that on 10 January 2015 at Soweto the appellant did unlawfully and intentionally commit an act of sexual penetration with F D, a 23 years old female by inserting his penis inside her vagina without her consent.

[2] The appellant was legally represented throughout his trial. He pleaded not guilty and tendered a plea explanation that the alleged sexual intercourse took place with the consent of the complainant. To prove its case, the state led the evidence of four witnesses, namely, the complainant, her friend Zinhle Nokulunga Intellectual Nkosi, Themba Moses Nyamende and Cowen Mabunda. The appellant testified in his defence and called one witness, Jubilet (Jay) Mabunda.

[3] On 25 May 2017 the appellant was convicted as charged. He was sentenced to 8 years' direct imprisonment. He was declared unfit to possess a firearm in terms of section 103 of Act 60 of 2000.

[4] He applied for leave to appeal against both his conviction and sentence, which was granted. He was also granted bail pending the appeal. The appeal is opposed by the respondent. The appellant also applied for condonation for the late filing of the heads of argument. The condonation application was not opposed. After considering the condonation application, we granted it.

AD CONVICTION

[5] Briefly, the grounds of appeal on conviction are as follows. Firstly, the court *a quo* erred in finding that the state proved its case against the appellant beyond reasonable doubt and rejecting the version of the appellant as not being reasonably possibly true; secondly, the court *a quo* erred in accepting the complainant's evidence as clear and satisfactory in all material respects despite material contradictions; and thirdly, the court *a quo* erred in not approaching the evidence of the complainant who was a single witness, with caution.

[6] The following material facts were common cause in the court *a quo*:

[6.1] That in the night of 9 January 2015 the appellant, complainant, Jay, Cowen and his girlfriend, Zinhle and Themba were at the pub known as Social Link in Emdeni, Soweto drinking alcohol;

[6.2] That Jay and complainant had a sexual relationship;

[6.3] That Jay and appellant were friends;

[6.4] That the appellant, complainant, Jay, Cowen and his girlfriend left Social Link pub and went to the appellant's house at Glen Ridge, Soweto, where they continued drinking alcohol;

[6.5] That Jay left the appellant's house without informing the complainant about where he was going;

[6.6] That Cowen and his girlfriend also left appellant's house leaving the appellant and complainant behind;

[6.7] That the complainant was drunk;

[6.8] That the appellant and complainant slept at appellant's house;

[6.9] That the appellant and complainant had sexual intercourse;

[6.10] That the complainant called Jay after she had sexual intercourse with appellant, but Jay did not answer her phone call;

[6.11] That after the complainant called Jay, she called Zinhle crying and reported that she had been raped by the appellant;

[6.12] That Zinhle and Themba were together when Zinhle received the complainant's phone call;

[6.13] That the complainant left the appellant's house around 4 am and walked to Shoprite complex crying;

[6.14] That Cowen found the complainant at Shoprite complex and allowed her to sit inside Jay's car that he was driving;

[6.15] That the complainant reported to Cowen that the appellant raped her;

[6.16] That Themba found the complainant inside Jay's car at Shoprite complex and she moved into his car;

[6.17] That the appellant and his two colleagues found the complainant and Themba at Shoprite complex.

[6.18] That Themba accompanied the complainant to police station to lay a charge against the appellant;

[6.19] That the following day the appellant handed himself to the police and he was arrested and detained for rape.

[7] The only material fact in dispute was whether the sexual intercourse that took place between the appellant and complainant in the night in question was by consent.

[8] I now deal with the grounds of appeal on conviction. 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 (*S v Francis 1991(1) SACR 198 (A) at 198J-199A*).

[9] The complainant was a single witness on the issue whether the sexual intercourse took place by consent. 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. Such evidence should be approached with caution and be substantially satisfactory in all material respects (*S V Sauls and Another 1981(3) SACR 172(A)*).

[10] The complainant testified and her two statements made to the police were admitted as evidence. Her evidence was that after Jay left appellant's house, she felt that she was too drunk. She asked the appellant for a room to sleep. The appellant showed her a bedroom to rest. She went inside the bedroom. She took off her shoes. She did not take off her clothes. She lied on top of the blankets on the bed and fell asleep. The bedroom light was off, but the door was not closed and there was a light coming from the sitting room. She woke up when she felt that there was someone on top of her penetrating her vagina. She tried to push the person but without success. She asked the person to stop and leave but he refused. He continued to penetrate her for a while until he decided to stop and got off. He left the room to the sitting room, and at that stage she saw that it was the appellant. She was shocked and did not know what to do. She did not know whether he used a condom.

[11]. She realised that she was naked. She did not know when her clothes were taken off. She took the blanket and covered herself. The appellant came back to the bedroom. He got into the bed and lied next to her. He put his hand over her body. She removed it and got off the bed. She took a blanket, covered her body and went to sit on the couch

in the sitting room. She started crying and phoned her boyfriend Jay. There was no response. She phoned Zinhle and told her that she was raped. She also told Themba, who was with Zinhle at that time, that she was raped. Themba asked for directions to where she was. At that stage the appellant came out of the bedroom and asked why she was crying. She asked him how could he do that to her. He said it was not him but Jay who was sleeping with her. She asked him where was Jay because they were the only two in the house and naked. He did not answer. She enquired about her clothes. He fetched it from the other bedroom and gave it to her. She then got dressed. She left the house on foot around 4h00. She walked to Shoprite while giving Themba the directions on the phone.

[12] Cowen found her at Shoprite and she reported the rape incident to him. Themba also came to her at Shoprite and found her in the company of Cowen. Thereafter the appellant arrived in full police uniform together with his two colleagues in a red golf car. The appellant talked to her and asked her not to lay a charge against him. One of his colleagues also approached her and asked her not to lay a charge against the appellant. She told them that she had already decided to lay a charge. The appellant also talked to Themba outside the car. She then went to the police station in the company of Themba to lay a charge against the appellant. She denied that the said sexual intercourse took place by consent.

[13] Zinhle corroborated the evidence of the complainant that she phoned her in the early hours crying and reported that she was raped by the appellant. She also confirmed that when the complainant reported the rape, she gave the phone to Themba and the complainant also spoke to him.

[14] Themba corroborated the evidence of the complainant that in the early hours on the day in question, she called Zinhle crying and reported that she was raped by the appellant. He went to Shoprite and found the complainant in the company of Cowen.

The appellant and his colleagues arrived at Shoprite. The appellant informed him that he made a mistake and slept with the complainant without her consent. Themba accompanied Zinhle to police station to lay a charge against the appellant.

[15] Cowen is Jay's brother. He testified in court and his statement made to the police was admitted as evidence. He testified that the complainant had asked for a room to sleep at the appellant's house. When he left accompanying the woman who was with him, the complainant was already sleeping and the appellant was still at the sitting room. When he returned the appellant's car, he saw the complainant in the street. He stopped the car and asked what was happening. She did not respond. She was crying. He tried to calm her down. Thereafter he proceeded to appellant's house and found him preparing to go to work. He informed him that he met the complainant in the street and that she was crying. The appellant did not tell him why the complainant left his house and the reason that she was crying. The appellant accompanied him to his place. After the appellant left him at his house, he called the complainant and they agreed to meet at Shoprite. He went to Shoprite and met her. She reported to him that she was raped by the appellant.

[16] It is clear from the record that the court a quo approached the evidence of the complainant as a single witness on the material issue in dispute, with caution. As it appears from above, the complainant was corroborated on material respects by the other state witnesses. On the day of the incident in question she made previous consistent statements in the form of first reports of rape to Zinhle, Themba and Cowen. She laid the charge against the appellant on the same day.

[17] The appellant contended that there were material contradictions in the evidence of the complainant. I disagree with this contention. The complainant stated that she did not know the name of the appellant and his house address when the incident took place. She got those details at the police station. I believe her explanation because in her first

statement she did not mention the appellant's name. She referred to him as her boyfriend's cousin. Both the complainant and Themba testified that she did not know the appellant's address when she called Zinhle. Themba advised her to go outside and identify a building she could direct him to. In any event, the identity of the perpetrator was not in dispute. It was common cause that the sexual intercourse took place between the appellant and complainant on the day in question.

[18] Furthermore, there was no material contradiction between the evidence of Zinhle and the complainant regarding the complainant's evidence that she made her first report to Zinhle and Themba. Zinhle, confirmed during her cross-examination that around 4h00 the complainant called her crying, saying that she had been raped by Jay's friend, and that she must come fetch her. Zinhle handed her phone to Themba and asked him to locate her. Themba talked to the complainant on the phone and thereafter went to Shoprite to fetch her. He corroborated their evidence that the complainant talked to him and Zinhle in that morning.

[19] I agree with the finding of the court a quo that the complainant was a competent witness, her evidence was clear and satisfactory in all material respects. The court a quo made a credibility finding that the complainant, Zinhle and Themba were honest and credible witnesses. It found that Cowen could not remember most of the material aspects. I find no reason to interfere with the credibility finding made by the court a quo. It should be noted that Cowen is Jay's brother, and Jay turned against the complainant and supported the appellant, his cousin during the trial.

[20] I now deal with the appellant's version. It is trite that the state must prove its case beyond a reasonable doubt and that if an appellant's version is reasonably possibly true, he is entitled to his acquittal. He testified that in the night in question after they arrived at his house, they continued drinking alcohol until the early hours of the morning. Jay left his house to go buy beers. Cowan also left taking the woman who was in his

company home. He remained in the house with the complainant. They were both tired. Around 2h00 they went to his bedroom where they kissed, engaged in sexual intercourse twice and slept. In the morning around 4h30 he woke up to boil water as his geyser was not functioning. Thereafter he went to the bedroom to wake the complainant. She informed him that he should not forget to prepare the R500.00 for her to do her hair because she was attending a party where the dress code was all white at Freedom Park. He informed her that he did not have money at that time but he will give it to her. She kept quiet. He left her in the bedroom, dressing up and he went to the bathroom to take a bath.

[21] After bathing, Cowen came back to his house and said that he met the complainant along the road walking alone. They then proceeded to look for her in the street. They did not find her. He then accompanied Cowen to his house. He went back to his house to put on his uniform. Thereafter he went to fetch his colleagues. On the way he received a call from Cowen that the complainant was at Shoprite in Glen Ridge. Cowen also informed him that the complainant was going to open a case against him. He then took a U-turn and went back to Glen Ridge Shoprite. On arrival he spoke to Cowen who confirmed that it was the complainant who told him about opening a case. At that stage the complainant was inside Themba's car. He approached the complainant and asked if what Cowen told him was true. She did not answer. He then left them at Shoprite and went to his work place.

[22] During his cross-examination he testified that he was in a relationship with the complainant for about three months and they had sexual intercourse for the first time in the night in question. He disputed the version that was put by his legal representative to the complainant that she always complained that he always slept with her, but he never gave her money. He said that the complainant never asked for money and never complained about it before the night in question.

[23] He contradicted his evidence in chief by denying that he spoke to the complainant at Shoprite asking her if what Cowen told him was true. He said he did not speak to the complainant at Shoprite because she was on her phone and he left. He denied that his colleague spoke to the complainant asking her not to open a case against him.

[24] He fabricated his version during his cross-examination and mentioned for the first time that the complainant called him when she was at the police station, informing him that she was laying a charge against him. This version was not put to the complainant.

[25] In my view his version that the complainant left his house around 4h30 because he told her that he did not have money at that time and promised to give it to her was a fabrication. The complainant disputed this version. I find it improbable that the complainant as a young woman would risk her safety at that time of the day and walk in the street alone crying because of R500.00 which he alleged he promised her.

[26] Further, the appellant testified that he and complainant went to sleep in his bedroom after Cowen and his company left his house. Cowen corroborated the complainant's version that she went to sleep after she indicated that she was tired and she was offered one of the bedrooms. Cowen left the house after the complainant went to sleep, leaving the appellant alone in the sitting room. I find that the appellant fabricated his version.

[27] The complainant testified that Jay was her boyfriend. He was the first person she called after the rape, but there was no response. Jay described the relationship between them as a sexual relationship. The appellant did not dispute that there was a relationship between Jay and complainant during his cross-examination. Zinhle and Themba referred to Jay as the complainant's boyfriend. I accept the complainant's version that Jay was her boyfriend, and not the appellant. The complainant testified that

after the rape, the appellant said it was Jay that slept with her. This version clearly shows that the appellant took an advantage of an intoxicated woman.

[28] I find that the following facts were inconsistent with the alleged consensual sexual intercourse. The complainant slept on top of the blankets with her clothes on. When she woke up she found that she was naked and her clothes were not in the bedroom she slept in. Her clothes were fetched by the appellant from the other bedroom. When she woke up and realized that someone was penetrating her, she tried to push the person away, but she had no strength. She told the person to stop and leave her. When she saw that it was an appellant who penetrated her, she became shocked and did not know what to do because she never expected something like that from him. She asked the appellant how could he do such a thing to her. She left the bedroom and went to sit in the sitting room. She called her friends crying, asking to be fetched from the appellant's house. She walked on foot alone in the street around 4h00 or 4h30 crying. The appellant and his colleague asked the complainant not to open a case against him. The appellant informed Themba that he made a mistake and had sexual intercourse with the complainant without her consent.

[29] In conclusion, I find that the appellant had a sexual intercourse with the complainant without her consent. The state proved its case against the appellant beyond a reasonable doubt. The court a quo correctly rejected the version of the appellant as not being reasonably possibly true. The grounds of appeal against conviction are without merit and must fail.

AD SENTENCE

[30] The appellant contended that the sentence of 8 years' direct imprisonment imposed by the court a quo induces a sense of shock and is excessive in light of the fact that no

physical violence was inflicted on the complainant and she did not sustain any injuries. Further, the appellants contended that alcohol played a role in the commission of the offence and that the court a quo disregarded intoxication as a mitigating factor.

[31] It is trite that sentencing is pre-eminently a matter for the discretion of the trial court. The test for interference with the sentence imposed by the trial court is not whether or not the appeal court would have imposed another form of punishment, but rather whether the trial court exercised its discretion properly and reasonably when it imposed the sentence. The appeal court will interfere where the imposed sentence is vitiated by an irregularity, misdirection or where there is a striking disparity between the sentence and that which the appeal court would have imposed had it been the trial court or it induces a sense of shock (*S v Kgosimore 1999 (2) SACR 238 SCA*; *S v Obisi 2005(2) SACR 350 (WLD)*; *S v De Jager 1965 (2) SA 616 (A) at 628*; *S v Sadler 2000 (1) SACR 331 (SCA)*).

[32] The appellant had been convicted of a serious crime. The fact that the complainant did not sustain physical injuries does not make the offence less serious. Rape is regarded by society as one of the most heinous crimes. A rapist does not murder his victim – he murders her self-respect and destroys her feeling of physical and mental integrity and security. His monstrous deed often haunts his victim and subjects her to mental torment for the rest of her life – a fate often worse than a loss of life (*S v C 1996-(2) SACR 181 (C)*).

[33] The appellant took advantage of an intoxicated woman. He abused the trust the complainant had on him as her boyfriend's friend. He was a police officer and his duties were the protection of the members of society and prevention of crime. He failed the complainant and society. The incident of rape has affected the complainant permanently. She informed the social worker that she feels less of a woman and that she was very disturbed by the evidence of the appellant in court when he said that she

wanted to sell her body for R500.00. The social worker opined that she has signs of a post-traumatic stress disorder as a result of this incident.

[34] In imposing a sentence the court a quo took into account the appellant's personal circumstances, seriousness of the offence and interest of society. It also applied an element of mercy. The appellant was 33 years old at that time, single, with one child and was employed as a police officer. He is a first offender. He lost his employment after his arrest. The court a quo also took into account that the appellant was intoxicated and that to a large extent, alcohol played a role in the commission of the offence. It also took into account that the complainant did not sustain physical injuries, and that the appellant showed remorse.

[35] In conclusion, I find that the court a quo exercised its discretion judicially when it imposed the sentence. I do not find any misdirection in the exercise of its discretion. The sentence does not induce a sense of shock. In my view the imposed sentence is just and appropriate in the circumstances, and does not require any further scrutiny. The grounds of appeal against sentence are without substance and must fail.

ORDER

1. I accordingly make the following order:

1.1 The appeal against conviction and sentence is dismissed.

MMP Mdalana-Mayisela

Judge of the High Court
Gauteng Division

I agree:

P Johnson
Acting Judge of the High Court
Gauteng Division

Date of judgment (delivered electronically): 18 April 2023

Counsel for Appellant: Adv L Musekwa

Instructed by: Legal Aid SA

Counsel for the State: Adv MPD Mothibe

Instructed by: National Prosecuting Authority

