



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Not Reportable
Case no: 422/2021

In the matter between:

J[...] M[...]

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *J M v The State* (Case no 422/2021) [2022] ZASCA 112 (15 July 2022)

Coram: DAMBUZA, MOLEMELA, SCHIPPERS and NICHOLLS JJA and PHATSHOANE AJA

Heard: 03 May 2022

Delivered: 15 July 2022

Summary: Appeal against refusal by high court to grant leave to appeal – against conviction and sentence by magistrate’s court – Supreme Court of Appeal has no jurisdiction to consider appeal directly from a lower court – matter remitted to high court to hear appeal against conviction and sentence.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Ndita and Mantame JJ sitting as court of appeal):

- 1 The appeal is upheld.
- 2 The order of the high court dismissing the appellant's application for leave to appeal is set aside and substituted with the following:
'The appellant is granted leave to appeal to the Western Cape Division of the High Court, Cape Town, against his conviction and sentence in the Parow Regional Court.'

JUDGMENT

Phatshoane AJA (Dambuza, Molemela, Schippers and Nicholls JJA concurring):

[1] The appellant, Mr J[...] M[...], 32 years' old, stood trial in the Regional Court, Parow, on four charges, namely, rape (count 1), sexual assault (count 2), attempt to commit a sexual offence (count 3) and exposure of his genital organs (count 4). The State contended that on 22 September 2018, the appellant unlawfully and intentionally inserted his fingers inside the vagina of the 23-year old Ms BM, the complainant; he touched her breasts and vagina without her consent; attempted to put his penis inside her vagina; and displayed his genitalia to her. He pleaded not guilty to all the charges. Pursuant to his trial, a guilty verdict was returned on all the counts. The appellant was sentenced as follows: on count 1, ten years' imprisonment; on count 2, two years; on count 3, four years; and on count 4, one year. The sentences on counts 2, 3, and 4 were ordered to run concurrently with the

sentence on count 1. Therefore, he had to serve an effective term of 10 years' imprisonment.

[2] An application to the regional court for leave to appeal to the Western Cape Division of the High Court, Cape Town (the high court) was refused. The appellant's petition to the high court in terms of s 309C of the Criminal Procedure Act 51 of 1977 (the CPA) was similarly unsuccessful. With special leave of this Court, he is before us on appeal against the high court's refusal of the petition.

[3] The appellant and the State submitted extensive heads of argument concerning the merits of the appeal. However, this Court has no authority to consider the merits of the conviction and sentence.¹ The guiding principles on appeals of this nature are well-established.² Section 309(1)(a) of the CPA makes it plain that no appeal shall lie directly from a lower court to this Court. The appeal must be heard by the high court having jurisdiction. The legal position was restated in *S v Matshona* as follows:

'The appeal of an accused convicted in a regional court lies to the high court under s 309(1) (a), although leave to appeal is required either from the trial court under s 309B or, if such leave is refused, from the high court pursuant to an application made by way of a petition addressed to the Judge President under s 309C(2) and dealt with in chambers. In the event of this petition succeeding, the accused may prosecute the appeal to the high court. But, if it is refused, the refusal constitutes a "judgment or order" or a "ruling" of a high court as envisaged in s 20(1) and s 21(1) of the Supreme Court Act 59 of 1959, against which an appeal lies to this court on leave obtained either from the high court which refused the petition or, should such leave be refused, from this court by way of petition.'³

[4] The ambit of this appeal is thus circumscribed. It concerns solely the question whether leave to appeal should have been granted by the high court. The applicable test is whether there is a reasonable prospect of success in the impending appeal against the conviction and sentence, rather than whether the appeal against the conviction and sentence ought to succeed or not.⁴

¹ *Tonkin v S* [2013] ZASCA 179; 2014 (1) SACR 583 (SCA) para 6.

² See *Khoasasa v S* 2003 (1) SACR 123 (SCA); [2002] 4 All SA 635 (SCA); *Tonkin v S* [2013] ZASCA 179; 2014 (1) SACR 583 (SCA) paras 2-3; *Radebe v S* [2016] ZASCA 172; 2017 (1) SACR 619 (SCA); *Khumalo v S* [2022] ZASCA 39.

³ *S v Matshona* [2008] ZASCA 58; 2013 (2) SACR 126 (SCA) para 4.

⁴ *Ibid* para 8.

[5] The answer to that question is predicated on the factual matrix underpinning the charges to which I now turn. The primary issue in dispute is whether the sexual acts referred to in the charges against the appellant were consensual. On this issue, two mutually destructive versions were presented before the trial court. The appellant is married to the complainant's cousin, Ms L[...] M[...], with whom she is very close. She regarded the appellant as her brother. The complainant regularly visited the couple and did so on the weekend of 21-24 September 2018. On Saturday, 22 September 2018, while Ms M[...] was at work, the appellant and the complainant smoked cannabis. She said that it made her relax. She was lying on a couch in the lounge.

[6] The complainant said that the appellant, who sat on the opposite couch, made odd facial gestures: licking his lips and winking at her. She laughed this off as she thought it was silly. The appellant asked if he could sit next to her and also asked her to massage his shoulder. She studied sports science at school and had massaged his back before. He also had massaged her shoulders before. This time, she refused to massage him. He then offered to massage her instead. She agreed. He sat on the edge of the couch next to her and asked her to lie face-down on her stomach, which she did. He lifted her hooded sweatshirt and asked if he could undo her brassiere. She agreed. He massaged her bare back and she was relaxed. In the process, his hands slipped onto the sides of her breast and under it. She disapproved of this and immediately asked him what he was doing, but he laughed.

[7] She turned to face the back of the couch. He went to lie behind her. She again asked what he was doing but he repeatedly said, 'it is fine'. He untied her pants' drawstrings and lowered the pants, just above her knees. She was not wearing any underwear. The appellant inserted his two fingers into her vagina. She told him to stop numerous times and pushed him away with her elbow. He resisted and held onto the back of the couch. She did not give him permission to insert his fingers as he did. The appellant stood up and went to the kitchen.

[8] While he was in the kitchen, a neighbour, Aunt Avril, knocked on the door and the appellant had a brief discussion with her through the security door. The

complainant pulled her pants up and lay facing the back of the couch in shock. Soon afterwards, the appellant returned to the couch and very aggressively turned the complainant on her back and got on top of her. He used his knees in order to force open her legs. He asked her if he could penetrate her vagina with his penis. She loudly refused and repeatedly asked him to stop. He untied her pants' drawstrings and lowered her pants again just above her knees. He once more attempted to put his fingers inside her vagina but she fought him off by wiggling her legs. He stood up and briefly went to the kitchen. He returned and asked the complainant if they were still cousins, and whether she was still willing to help him with his maths. She told him to leave her alone. Ms M[...], the appellant's wife, called and spoke to both of them. The complainant did not report the incident to Ms M[...] because she was in shock (what she described as 'autopilot' mode). After the call, the complainant observed that the appellant had exposed his genitalia a few centimetres close to her head. He looked at her laughing.

[9] On the Monday morning following the weekend of the incident, the complainant reported to Mr F[...] V[...] (Mr V[...]), her cousin, whom she had requested to pick her up from the couple's home, that the appellant attempted 'to force himself' on her. On their way home, Mr V[...] said that the complainant burst into tears. That afternoon she forwarded a text message to Ms M[...] informing her that her husband had done 'unimaginable things to her'. She did not elaborate on this. Two days later, the complainant reported the incident to her sister. Subsequently, the alleged offensive acts were made known to the family and reported at Pinelands Police Station.

[10] The appellant denied that he had raped the complainant. In respect of the fondling of her breast and private parts, he explained that she was a willing participant. He denied that he attempted to rape her or that he had exposed his genitalia. He also took issue with the complainant's demeanour following the alleged offensive acts which, he argued, was an indication that the acts were consensual and accorded with his version. It was not disputed that in the afternoon of Saturday 22 September 2018, following the return of Ms M[...] from work, the complainant acted normally. She, accompanied by Ms M[...], went to a neighbour to blow-dry her hair and interacted with those around her. Later that evening she had supper with

the appellant and Ms M[...], and spent time with Ms M[...] in the couples' bedroom. The next day she, together with the couple, visited Ms M[...]’s parents where they had lunch and played dominoes. Thereafter they attended a party, where Ms M[...] says she saw the complainant dancing with one of their friends. On their way to this party, the trio drove past the area where the complainant lived but she did not ask to be dropped-off at home.

[11] The appellant testified that he had a rotator cuff injury and requested the complainant to massage him. She had asked him to massage her first. The complainant lay on her tummy on the couch and the appellant sat beside her. He massaged her shoulders and moved his hands to her ribs. He enquired of the complainant whether she was enjoying the massage. She responded positively and arched her body. He massaged the sides of her breasts. He did this on top of her clothes. He told her that her brassiere was in the way and asked if could undo it. She agreed. He carried on massaging her breasts. He gained the impression that she was enjoying the massage.

[12] While this was happening, the appellant received a telephone call from the complainant’s mother. She wanted to speak to the complainant, whose phone was switched off. She spoke to her mother. He then grabbed his crotch on top of his clothes and signalled to her to end the call, which she did. She turned her body and lay on her back. He sat next to her and put his hand on her knee. They looked at each other and drew their heads closer. He kissed her neck, touched and rubbed her vagina on top of her clothes and slipped his hands inside her pants. He fondled her clitoris and put his finger into her vagina. She was aroused and moaned. While he was caressing the complainant’s private parts she ordered him to stop which he immediately did and in an expletive, asked ‘what they had done’. The complainant replied that Ms M[...] would never talk to her again. The appellant denied that he had exposed his penis to the complainant. Following this sexual encounter, they went about their weekend activities as if nothing happened.

[13] The trial court set out, at length, the evidence adduced by the State and that of the appellant in its judgment. The court found that the complainant was an impressive witness who gave her evidence in a clear and satisfactory manner and

therefore was convincing. As for the appellant, the court was of the view that he did not make a favourable impression and that his version changed, regard being had to what was put to the complainant and his evidence in court.

[14] The trial court further found, based on the close family ties between the parties, that the complainant had no reason to falsely implicate the appellant and that her explanation for the delay in reporting the offences, was plausible. It was 'highly improbable', the court said, that the complainant would lie about the incident because she had nothing to gain, except to lose a very close friendship. The court then concluded, 'after considering the totality of the evidence and the probabilities, I am convinced that [the complainant's] version is not only credible but also reliable. There is no reasonable possibility that the accused's exculpatory version can be true'. The court rejected the appellant's version as untruthful where it differed from that of the complainant.

[15] The only question is whether the appellant has established a reasonable prospect of success on appeal. In *Smith v S* the test was formulated as follows:

'What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.'⁵

[16] In broad terms, it is contended that the trial court committed primarily the following misdirections. First, there was a lack of a proper holistic analysis of the evidence, in particular the version presented by the State, upon which the onus rested to prove the appellant's guilt beyond reasonable doubt. The court merely recited the common cause facts and those in dispute, repeated the complainant's version of events and stated what had not been put by the defence to the complainant. The shortcomings in the complainant's evidence were not considered,

⁵ *Smith v S* [2011] ZASCA 15; 2012 (1) SACR 567 (SCA) para 7.

despite the court acknowledging that there is no duty on an accused to convince the court of the truth of his explanation.⁶

[17] Secondly, although the trial court stated that the complainant was a single witness, whose evidence had to be approached with caution to determine whether it was not only credible but also reliable, its evaluation of the evidence showed that it did not do so. The corroboration upon which the court relied upon was insufficient.

[18] Thirdly, the appellant had challenged the veracity of the complainant's evidence in a number of respects, concerning the incidents that had taken place, which the trial court had not considered.

[19] Finally, the trial court did not take proper account of the inherent strengths and weaknesses of the parties' respective cases; neither did it objectively evaluate the evidence against all the probabilities and improbabilities on both sides in order to reach a fair outcome.

[20] I am of the view that the alleged shortcomings in the analysis of the evidence adduced, could result in a court of appeal reasonably arriving at a different conclusion than that of the trial court.

[21] On the residual question of sentence, there exists a reasonable prospect that another court on appeal might consider the statutory minimum sentence imposed to be disproportionate to the crime, the criminal and legitimate needs of society.

[22] In the result, the appeal succeeds and the appellant is granted leave to appeal to the high court against both his conviction and the sentence. I make the following order:

- 1 The appeal is upheld.
- 2 The order of the high court dismissing the appellant's application for leave to appeal is set aside and substituted with the following:

⁶ S v V 2000 (1) SACR 453 (SCA) at 455A-C.

'The appellant is granted leave to appeal to the Western Cape Division of the High Court, Cape Town, against his conviction and sentence in the Parow Regional Court.'

M V PHATSHOANE
ACTING JUDGE OF APPEAL

Appearances

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