

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: AR 510/2019

In the matter between:

SIBONISO MTHOKOZISI PATRICK MHLONGO

Appellant

and

THE STATE

Respondent

ORDER

The appeal against all four convictions and sentences is dismissed.

This appeal was, in terms of s 19(a) of the Superior Courts Act 10 of 2013, and with the agreement of the parties, disposed of without the hearing of oral argument. The judgment was handed down by electronic transmission to the parties' legal representatives and by placing the signed judgment in the court file on 03 February 2022.

JUDGMENT

Delivered on: 03 February 2022

Ploos van Amstel J (Hiralall AJ concurring)

[1] The appellant was found guilty in a regional court on charges of kidnapping, rape (two counts) and assault. He was sentenced to eight years' imprisonment for the kidnapping, imprisonment for life on the first count of rape, 10 years' imprisonment on the second count of rape and 30 days' imprisonment for the assault. By operation of law the sentences on counts one, three and four run concurrently with the sentence of life imprisonment on count two.

[2] The appellant had an automatic right of appeal in respect of the conviction and sentence of life imprisonment on count two, and was granted leave to appeal by

the trial court in respect of the convictions and sentences on counts one, three and four.

[3] The facts found by the trial court to have been proved were briefly as follows. The complainant was walking home from church in Umlazi, on the evening of 31 July 2015, when she and a friend came across three men. They were then only two houses away from the complainant's house. One of the men, who turned out to be the appellant, stood in front of her and asked how many times he had told her that she had to be his girlfriend. She told him that she did not know him. He said she was going to go home with him. She responded that she could not do that as she did not know him. He pushed her and she fell. He pulled her up, showed her a firearm which was under his shirt and said he would shoot her if she did not obey his instructions. He put his arm round her neck and said they were going to his house.

[4] On the way the appellant asked what her name was, and she gave him a false name. He asked where she lived and she pointed out an incorrect house. Along the way the appellant hit her with an open hand, and said it was because she had not noticed that his shoe laces were untied. She tied them and he said she would be a good wife to him.

[5] After a few stops to talk to the appellant's brother and his cousin, and a brief visit to a tavern, they arrived at the appellant's room. They all entered, namely the appellant, his brother, his cousin and the complainant. The three men proceeded to take drugs.

[6] The other two later left. The appellant closed the door and secured it from the inside with a spade and a plank, and pushed the bed against it. By then the complainant was crying. He put her on the bed, undressed her by force and raped her. He told her not to pretend that she had not done it before. He did not use a condom.

[7] The appellant fell asleep. He woke up later. He tried to kiss her, and when he touched her realised she had put her underwear back on. He removed it and raped her again. She was crying and he kept on hitting her in the face and telling her to be quiet. He again did not use a condom.

[8] The following morning the appellant took the complainant to a shop, where they bought something to eat. He took her back to his room. He removed her skirt

and raped her for the third time. By now she was crying hysterically. She pleaded with him to be allowed to go home. He ordered her to first clean the room and make the bed, which she did.

[9] The appellant took the complainant outside and they boarded a taxi. He insisted that he wanted to see where she lived. She cried when they reached her home and could hardly speak to her grandmother. She eventually managed to say she had been kidnapped and raped. Her grandmother told the complainant's brothers to go find the man who had done this, but he had disappeared.

[10] The complainant was taken to the hospital on the same day. She was seen by a doctor, and interviewed by a police officer at the hospital. She later pointed the appellant's room out to the police, and he was subsequently arrested.

[11] Samples that were taken from the complainant's vagina by the examining doctor were later found to match a saliva sample which had been taken from the appellant after his arrest.

[12] The appellant's version was that he had been in a relationship with the complainant and that she had accompanied him to his home voluntarily. He confirmed that they stopped to talk to his brother and cousin and that they all went to his room, where they drank alcohol and smoked. He said he and the complainant shared a bed but he did not remember whether or not they had sex. He denied that he kept her there against her will or that he had raped her. He suggested that she accused him falsely because his sisters had put her up to it because they wanted him to go back to prison. Not only had the complainant never met his sisters, but the obvious question is why his girlfriend would have wanted him to go back to prison.

[13] The magistrate found the complainant to have been a credible and reliable witness, and the appellant a poor witness. I agree with these findings. In any event, in the absence of a demonstrable and material misdirection on the part of the trial court its findings of fact are presumed to be correct, unless the court on appeal is convinced that they are clearly wrong. See *S v Hadebe and Others* 1997 (2) SACR 641 (SCA) 645e.

[14] There were no misdirections in the judgment, and my view is that there is no basis for interfering with the magistrate's findings. The appeal against the convictions can therefore not succeed.

[15] The complainant's ordeal at the hands of the appellant has had a devastating effect on her. There was the threat to shoot her if she did not comply with his instructions. There was the anxiety associated with not being able to go home as she was held prisoner by him. He slapped her several times when she cried while he raped her. There was the humiliation of having to make his bed and clean his room after he had raped her three times. He did not use a condom and she experienced anxiety afterwards about the risk of HIV-AIDS, and had to take medicine to counter a possible infection. She battled to sleep for about four months and could not concentrate at school. Her relationship with her family members was affected and she cried a lot. She insisted on being accompanied when she took a taxi, and even when she went outside to hang her washing up. She constantly worried about what people would think of her, and was too embarrassed to go to church. She no longer trusted male persons and did not see chance to be in a relationship.

[16] The appellant showed no remorse. He had the audacity to claim that he was in a relationship with the complainant, after he had humiliated her beyond what any woman should have to endure. He had previous convictions for the same offences, namely kidnapping, assault and rape, and was out on parole when he committed the offences with which we are concerned.

[17] It seems plain to me that the appellant is a danger to society and I see no basis for thinking that he is a good candidate for rehabilitation. He was 30 years old at the time of the incident, and there is nothing in his personal circumstances which can remotely constitute substantial and compelling circumstances which can justify the imposition of a sentence other than the prescribed minimum. That sentence is, in terms of s 51(1) of the Criminal Law Amendment Act 105 of 1997, imprisonment for life.

[18] I see no basis for interfering with any of the sentences imposed by the magistrate. They appear to me to be entirely appropriate.

[19] The appeal against all four convictions and sentences is dismissed.

Ploos van Amstel J

Hiralall AJ

Appearances:

For the Appellant	:	T P Pillay
Instructed by	:	Legal Aid South Africa
	:	Durban
For the Respondent	:	K Shah
Instructed by	:	Director of Public Prosecutions
	:	Durban
Date Judgment Reserved	:	28 January 2022
Date of Judgment	:	03 February 2022