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**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Appeal number: A81/2022

Reportable: NO

Of Interest to other Judges: NO

Circulate to Magistrates: NO

In the matter between: -

THABISO MOKOALELI

Appellant

and

THE STATE

Respondent

CORAM:

MATHEBULA, J *et* BOONZAAIER, AJ

JUDGMENT BY:

BOONZAAIER, AJ

HEARD ON:

16 JANUARY 2023

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' representatives by email, and release to SAFLII on 20 January 2023. The date and time for hand-down is deemed to be 14h00 on 20 January 2023.

INTRODUCTION

[1] This is an appeal against both conviction and sentence on a charge of contravening **Section 3 of the Sexual Offences and Related Matters Amendment Act 32 of 2007**(rape) read with the provisions of **section 51(1)** of the **Criminal Law Amendment Act 105 of 1997** in the Regional Court of the Free State Division, held in Bloemfontein.

[2] The Appellant, a 32-year- old male (at the time of the offence) pleaded not guilty to the charge and later in his defence admitted having had sexual intercourse with the complainant but contended that it was consensual.

[3] The Appellant was ultimately convicted on the testimony of the complainant and sentenced to Life Imprisonment. Appellant has a right to an automatic appeal.

[4] There are two issues to be decided *in casu*:

Firstly, whether the Court *a quo* erred in making a credibility finding in favour of the State and thereby accepting that the State proved its case beyond a reasonable doubt that Appellant raped the complainant, and secondly, whether the Court *a quo* was correct in finding that the State has proved beyond reasonable doubt that the Appellant was part of the six assailants who took turns in raping the complainant.

FACTUAL BACKGROUND

[5] The complainant (at the time of the incident a 28-year-old female) testified that she was working at the farm H[...] situated in the district of Dealesville. She knew the accused and the other five accused's (who were discharged after the closure of the State's case) as co-workers at the farm. During the evening on the 15th February 2013, the complainant was at a drinking place (shebeen) at the farm H[...]. Complainant volunteered the evidence of her drunkenness herself. She consumed two litres of ginger beer alcoholic beverage (traditional beer) that night and became moderately drunk. The Appellant and the erstwhile co-accused persons arrived and bought their own liquor and drank it. At about 12 midnight she decided to go to sleep at the house where the female employees were sleeping.

[6] On her way to this sleeping area she was suddenly grabbed from behind by six people, including the Appellant. They all raped her on the ground, taking turns. When one was raping her, the others would kneel and pinned her down to the ground. The whole incident lasted for about an hour.

[7] She was able to identify the Accused persons because it was full moon and the perpetrators also called each other by name while raping her. She screamed when they started removing her clothes but no one heard her. They covered her mouth so she could not be heard. The complainant hastened to her sleeping quarters and knocked on the door where all the females were sleeping. Susie opened the door. She reported the rape to Susie and subsequently also to the Police who arrived and arrested the six Accused persons. The complainant was taken to the hospital where she was medically examined.

[8] According to the complainant, she was never involved in a romantic relationship with the Appellant. She vehemently denied having any consensual sexual intercourse with the Appellant. She maintained that she only knows him from the farm when he started working there about two weeks before the incident.

[9] Agnes Pongo whose nickname is Susie testified that she knows the complainant well. They work together. That specific night at about one in the

morning, the complainant knocked at her door and reported to her that she was raped by six men. Susie denied any knowledge of the complainant having any love relationship with the Appellant.

[10] A photo album of the scene of the rape was handed in as **Exhibit 1**. It depicted the scene of the rape, which is basically an open space with grass on a veld. Some of the photos showed the complainant's head which had some grass on it.

[11] The DNA results were also handed in as **Exhibit A**. The Appellant was positively linked to the crime by the DNA results. The J88 medical report was handed in by agreement between the parties and accepted as evidence by the trial court, confirming that no injuries were sustained by the complainant on her private parts. The conclusion however was:

“Absence of physical and genital injuries did not exclude forceful penetration”

[12] On his own version, the Appellant later admitted having consensual sexual intercourse with the complainant. He knew the complainant for Susie knew about their love relationship because she saw him and complainant being together on many occasions. They also used to have lunch together and ate from one plate. Erstwhile Accused 1, also knew about this relationship. Appellant is adamant that he engaged in consensual sexual intercourse with the complainant the night of 15 February 2013 nearby some trees at the back of the shebeen where they had been drinking before.

[13] Appellant averred that the complainant was very drunk. Appellant did not contest the fact that Complainant was raped by six persons. After he consensual intercourse with the complainant he went to sleep where he was later awakened by the Police who arrested him. The Appellant further denied being involved in raping the complaint or being part of a group that raped the complainant.

[14] The Appellant gave the following reasons why the complainant may have laid these false charges:

- a) Appellant did not have any money when the complainant asked for it after having had sexual intercourse.
- b) The complainant was never satisfied with anything and used to sleep around and when Appellant reprimanded her the complainant would tell him that the organ that made her a woman was hers;
- c) The complainant said that she was quitting her job because she cannot see the reason in working, because she was working for other people;
- d) That the Appellant previously had some confrontation with Susie because she uttered words to him that he disliked and he told her not to talk to him in that manner.
- e) That Susie used to see complainant and himself when they go to work.

[15] The second defence witness, Frans Thlakwena testified that he assumed the Appellant and complainant had a love relationship even when Appellant and complainant were in Botshabelo before they started to work at H[....].

[16] Frans revealed that on the night of the incident, the complainant told another lady presumably her sister that she wanted to have some time alone with her boyfriend referring to the Appellant. Frans also saw that when they went to the tree to have sexual intercourse the complainant was carrying something like a blanket. He could see them clearly from where he was sitting at the drinking place.

[17] Frans also testified that after the sexual intercourse between the Appellant and the complainant, Susie asked the complainant where she had been and the complainant response was that she was with boyfriend. Susie was present at the place where the liquor was sold.

[18] This witness implied that the complainant was not raped at all. He was unable to account for the fact that this evidence was never put to the complainant or Susie.

GROUND OF APPEAL

[19] The fundamental question that arises on appeal in respect of conviction is whether the state had proven its case beyond a reasonable doubt. The issue in this appeal in relation to the appellant, is whether the identification of the appellant as the perpetrator of the rape, was both honest and reliable.

[20] The central thrust of the Appellant's challenge against the conviction lie against the Court *a quo*'s acceptance of a single witness testimony that was riddled with contradictions and improbabilities notwithstanding the applicable cautionary rule.

[21] The issue for determination on appeal with regards to sentence is whether the trial court exercised its discretion properly and judicially in imposing an effective term of life imprisonment. The court *a quo* erred in over emphasizing the seriousness of the offence by indicating that the complainant suffered emotionally and finding that the Appellant is a threat to society

[22] The central thrust of the Appellant's challenge against the sentence lies against the imposition of a strikingly inappropriate minimum sentence notwithstanding the presence of substantial and compelling circumstances. The Appellant is a first offender, was in custody since he was arrested and there is a possibility for future rehabilitation.

EVALUATION

[23] The Court *a quo* remarked that the complainant was an honest witness. She got confused about who raped her first. The Court *a quo* remarked that this inconsistency was probably due to the fact that it was dark and due to her drunken state. She remained however steadfast in her evidence that she was raped by six men.

[24] The Appellants initial version was that Susie knew about the relationship but he changed his version when Susie took to the witness stand. He then later testified that he assumed that Susie knew about their love relationship.

[25] The Court *a quo* regarded the Appellant's reasons why he was incriminated as afterthoughts because neither the complainant nor Susie was confronted with this crucial evidence.

[26] The Appellant essentially placed reliance on the failure of the trial court to properly apply the cautionary rule in the evaluation of the evidence of the testimony of the complainant was perforated with contradictions, inconsistencies and improbabilities.

[27] The Appellant further contended that the trial court erred in finding the contradictions and improbabilities innate in the testimony of the complainant inconsequential; it erred in finding the testimony of the complainant satisfactory because she was honest and possessed no reason to falsely implicate the appellant and it erred in finding that the second state witness corroborated the evidence of the complainant.

[28] It was the Appellant's contention that the trial court's finding on credibility was not correct and that the various contradictions and improbabilities was not considered properly. The Appellant maintained that his contradictions were not material to the extent that it rendered his version not reasonably possibly true.

[29] The Respondent supported both the conviction and sentence and contended that the trial court neither erred in its verdict nor misdirected itself in applying its discretion with regards to sentence.

THE LAW

[30] It is trite that the state bears the onus of proving the guilt of the accused beyond a reasonable doubt.¹ There exists no burden on the accused to prove his version or his innocence. The accused's version only has to be reasonable possibly true.²

[31] It is also accepted that a court of appeal will be extremely reticent to interfere with the credibility findings of the trial court as well as the evaluation of the oral testimony, given the better position of the trial court in hearing and appraising the evidence of the witnesses. It will however, interfere if it is convinced that the credibility findings made by the trial court are patently incorrect.³

[31] In the case of **Norman v S**⁴ the judge mentioned that

“In rape cases the most familiar scenario will be that the victim is a single witness. Therefore, it is a foreseeable and generic aspect of such cases.”

[32] It is further trite law that the evidence of a single witness must be approached and evaluated with the necessary caution.⁵ However, the exercise of such caution should and ought not to displace the exercise of common sense.⁶ All the contradictions, inconsistencies and probabilities must be weighed up to arrive at a conclusion that the State has proven its case beyond a reasonable doubt. The Appellate court in **Texeira**⁷ stressed that, in evaluating the evidence of a single witness, a final evaluation can rarely if ever, be reached without considering whether such evidence is consistent with the probabilities.

[33] The Court *a quo*, in applying the cautionary rule correctly found the evidence of the complainant to be satisfactory in all material respects. A

¹ R v Difford 1937AD 370.

² S v Sithole and Others 1999(1) SACR 585 (W); S v Van Der Meyden 1999 (2) SASV 79(W)

³ S v Mkhohle **1990 (1) SACR 92** at 100 e.

⁴ (A283/2017) [2018] ZAGJHC 131, 31 May 2018)

⁵ S v M 1992(2) SASV 188 (W) op 194 h-l; J v S All SA 1998 (2) SA 267 (A).

⁶ Sv Sauls and Others 1981(3) SA 172A 180E-G; ZAFSHC/2022/138

⁷ 1980(3) SA 755 (3) at 761

conspectus of the record reveals that the complainant indeed presented a coherent and cogent account of events. Her evidence was forthcoming and there were no attempts at evasion. She did not unnecessarily embellish even when provided with the opportunity to do so and indeed had no reason to falsely incriminate the appellant. Notwithstanding the contradiction that existed between her testimony and that of the second state witness or any omission in her testimony, the trial court correctly found it to be immaterial having regard to the totality of the evidence tendered.

[34] The complainant readily admitted to being under the influence of alcohol and considered herself to be moderately drunk. It is noteworthy that her state of sobriety was tendered by herself.

[35] Notwithstanding her state of sobriety, her narration of the incident evinced a vivid recollection of what transpired. Her observations that she was raped in an open field there was grass, is consistent with the photos taken. The photo showed grass in her hair as well that the path that she was taken leads to the house where she was returning to that night.

[36] The record of proceedings clearly reflects the consistency in the testimony of both state witnesses in that the complainant was emotional when she entered Susie's room and gave her report which was indeed corroborated by Susie

[37] Given the nature and duration of the friendship between the complainant and the Appellant, it is highly improbable that Susie would not have known of a romantic relationship between the Appellant and the complainant which spanned for almost two weeks according to the Appellant.

[38] Salient aspects of the complainant's testimony remained uncontested and were not tested. The reason why the complainant would choose that specific encounter to accuse the Appellant of rape also remained uninterrogated.

[39] The Court *a quo* correctly found that the version of the Appellant on its own and when contrasted with the testimony of his witness resonated with

contradictions and improbabilities. The court *a quo* held that the defence version not reasonably possibly true.

[40] It is also noteworthy that the Appellant's witness testified for the first time about facts which were never canvassed by Appellant himself. This was correctly found by the trial court to be both convenient and opportunistic.

[41] The Appellant's witness placed himself at the scene on the night in question. He was knowledgeable about the nature of the relationship between the Appellant and the complainant. It is astounding that the complainant was never confronted by the Appellant with such crucial evidence inimical to her allegation nor given the opportunity to refute it.

DISCUSSION

Ad Conviction

[42] The evidence of the Appellant and his witness is correctly found by the trial court to be full of contradictions and improbabilities.

[43] Having regard to the above, I am satisfied that the court *a quo* exercised the requisite caution and correctly found that there existed no evidential basis to suggest that the evidence of the complainant and her witness was untruthful and unreliable. The Appellant's version on its own and when coupled with that of his witness is riddled with contradictions, inconsistencies and improbabilities to the extent that the correctness of the credibility findings of the trial court cannot be doubted.

[44] The court *a quo* gave a carefully reasoned and deliberative judgment and was correctly persuaded with the evidence of the complainant.

[45] The evidence of the second defence witness constituted a poor attempt to salvage the Appellant from the consequences of his actions I am satisfied that

the court *a quo* correctly rejected the version of the Appellant as false beyond a reasonable doubt.

[46] It is apparent from the evaluation of the evidence presented that the trial court was indeed alive to the fact that this was single witness testimony in respect of the rape and was alert to the danger's attendant thereto. The record indeed shows that the evidence of the complainant was properly considered and that the cautionary rule was properly applied in the appraisal of her evidence as a single witness.

[47] The weight of the evidence in this matter was in my view, properly considered by the court *a quo*. The state of sobriety of the complainant, assist the court in assessing the objective circumstances attending the observation by the complainant of the identity of her attackers were considered, hence the acquittal of the other five Accused persons.

Ad Sentence:

[48] The Appellant contended that the approach of the trial court was unbalanced and the requisite factors for consideration in the determination of sentence, namely the personal circumstances of the appellant, the nature and gravity of the offence committed, the interests of the community as well the prevalence of the crime were incorrectly approached. According to him, the trial court over emphasized the aggravating factor namely the seriousness of the offence with little or no consideration to the mitigating factors. He further contended that several of the mitigating factors advanced were not properly considered including his period of incarceration awaiting trial, the absence of any serious physical injuries or any lasting emotional trauma sustained by the complainant and that alcohol played a role in the commission of the crime.

[49] The Appellant further contended that all circumstances advanced should have persuaded the court to find the existence of substantial and compelling circumstances that would have enabled the trial court to deviate from the imposition of the prescribed minimum sentence of a life sentence. Accordingly,

the trial court erred in finding that there were no substantial and compelling circumstances present to deviate from the minimum sentence.

[50] The Respondent argued that no misdirection occurred as contended by the Appellant and that the sentence imposed by the trial court on the appellant met all the sentencing demands of the time and no appellate interference was warranted. The State further argued the mitigating factors tendered for consideration did not constitute substantial and compelling circumstances.

[51] The cardinal principle governing an appeal against sentence is that punishment of an offender is pre-eminently a matter for the discretion of the trial court. It is well established that interference by the appellate court is warranted only if the discretion of the trial court was not judicially and properly exercised or if there exists a marked disparity between the sentence imposed by the trial court and the sentence that the court of appeal would have imposed had it been the trial court⁸.

[52] The test to be applied in every appeal against sentence is whether the sentence is vitiated by irregularity or misdirection or disturbing inappropriateness.⁹ This was seamlessly captured in **S v Malgas** ¹⁰ which articulated the principle as follows:

“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 the exercise of that discretion, an appellate court is off course entitled to consider the question of sentence afresh. In doing so, it assesses the 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.

⁸ S v Rabie 1975 (4) SA 855 (A) at 857 D-F;

⁹ S v Makondo 2002(1) SA at 431E-F (SCA); see also S v Mothibe 1977(3) SA 823 (A) 830 D.

¹⁰ 2001(1) SACR 469(A) at 478d-e

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 appellate court would have imposed had it been the trial court is so marked that it can be 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 only do so where the difference is so substantial that it attracts epithets of the kind I have mentioned."

[53] The trial court record shows a proper consideration of the individual circumstances of the case in the light of the renowned triad of factors relevant to sentence. The personal circumstances at the disposal of the trial court included the following, namely, that the appellant was 32 years old at the time of the commission of the offence, he was a first offender, he was married and had two minor children, he was in employment at the farm H[...] as a general worker and earned an income of R850 every fortnight. In the determination of an appropriate sentence, the trial court also considered the period of incarceration awaiting trial, the nature of the injuries sustained by the complainant and that alcohol played a role in the commission of the offence.

[54] It is trite law that the sentence of an accused person must be balanced between the interest of society, the nature, seriousness and the prevalence of the offence and the personal circumstances of the accused.¹¹ The seriousness of the crime that the appellant has been convicted of was given prominence in **S v S 1995 (1) SASV 50 (ZS)** on 61 d.

"The essence of the crime is an assault on the bodily integrity of a woman's femininity. If it is a function of the criminal law to protect members

¹¹ S v Banda and Others 1991(2) SA (BGD) on 355 A.

of society from those who would employ illegal means to prey on those less able to defend themselves, then rape is rightly regarded as a crime of the utmost gravity”

[55] In **S v Ncheche**¹² the court expounded upon the gravity of the offence as follows:

“Rape is an appalling and utterly outrageous crime, gaining nothing of any worth for the perpetrator and inflicting terrible and horrific suffering and outrage on the victim and her family. It threatens every woman, and particularly the poor and the vulnerable. In our country, it occurs far too frequently and is currently aggravated by the grave risk of the transmission of Aids. A woman’s body is sacrosanct and anyone who violates it does so at his peril and our Legislature, and the community at large correctly expect our courts to punish rapists severely.”

[56] The interest of the community was properly enunciated **S v Chapman** ¹³

“Woman in South Africa are entitled to protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquility of their homes without fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives. The courts are under a duty to send a clear message to other potential rapists and to the community. We are determined to protect the equality, dignity and freedom of all women and we shall show no mercy to those who seek to invade those rights.”

[57] The trial court further considered the prevalence of the crime in the imposition of a more severe sentence for purposes of deterrence.

¹² 2005(2) SACR 386 (W)

¹³ 1997(2) SASV 3 (A) on 5 c-e:

[58] The evidence of the second defence witness constituted a poor attempt to salvage the Appellant from the consequences of his actions.

[59] With regards to the incarceration awaiting trial, the Appellant has spent two and a half -years in prison awaiting trial. It was submitted that the accused persons are entitled to credit for this pre-trial incarceration. I would ordinarily agree that the least that I should do is give the accused persons credit for the period of their pre-trial incarceration. However, it seems to me that, where, as in this case, the ordinary statutory penalty is life imprisonment, the law does not recognise that pre-trial incarceration is, in itself, a substantial and compelling circumstance, or a basis on which to reduce the non-parole period that attaches to the penalty.¹⁴

[60] The Supreme Court of Appeal has stated, definitively, that pre-conviction period of imprisonment is not, on its own, a substantial and compelling circumstance for the purposes of the Criminal Law Amendment Act.¹⁵

[61] In as far as the aggravating factors are concerned, the trial court correctly took these factors into account and rightly so and imposed what it considered to be a just and appropriate sentence. It correctly too cognisance of the fact that the appellant abused the trust that the complainant had in him while she was under the influence of alcohol. It also noted that in persisting with his claim of innocence, the appellant wasted the opportunity to show remorse for his actions. The Appellant and his witness tried to make a mockery of the complainant as if she was a woman of loose morals. This total lack of remorse impacts negatively on his prospects for rehabilitation.

[62] It is also correct that a court hearing an appeal in which the minimum sentence legislation has application does not possess the proverbial clean slate on which to scribble its preferred sentence. The sentencing discretion of the trial court is indeed circumscribed by law. It is further required that the finding of

¹⁴ S v Norman Makgopa and Others SS 87/2021[delivered 18/7/22]

¹⁵ 2018 (1) SACR 479 (SCA).

substantial and compelling circumstances must be able to stand scrutiny and not be based on the whim of the presiding officer.¹⁶

[63] The charge of rape for which the Appellant has been convicted of clearly falls within the ambit of section 51 of the minimum sentence legislation. The minimum prescribed sentence for such offences is a life sentence even for a first offender unless the court found that substantial and compelling circumstances existed justifying a departure. Notwithstanding the personal and mitigating factors tendered for consideration, the prescribed minimum sentence, was in the totality of the circumstances encountered here the only fair and just sentence. The trial court correctly found that there were no substantial and compelling circumstances present. I am of the view that the manner in which the complainant was taken advantage of and the inhumane and degrading treatment she was subjected to under the circumstances cannot justify a deviation from the imposition of the applicable minimum sentence.

[64] Having said that, I am content that the trial court did not err or misdirect itself in any manner. Nor does there exist a disparity between the sentence imposed by the court *a quo* and the one which this court would have imposed if it were the court *a quo*. Hence there exists no reason that warrants tampering with the sentence imposed by the court *a quo*.

ORDER

[65] In the result, I propose the following order:

- 1) The appeal against both conviction and sentence is dismissed.
- 2) The conviction and sentence imposed by the Regional Court on the appellant are confirmed.

¹⁶ S v Matyiti 2011(1) SACR 40 (SCA).

AS BOONZAAIER, AJ

I concur, and it so ordered

MA MATHEBULA, J

For the Appellant:

Adv. VC ABRAHAMS
Bloemfontein Local Office

Instructed by:

Bloemfontein Justice Centre
32nd floor St Andrews Street
BLOEMFONTEIN

For the Respondent:

Adv. S TUNZI
Counsel for the Respondent
Director of Public Prosecutions
Waterfall Building
BLOEMFONTEIN