



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE PROVINCIAL DIVISION

Case No.: A160/2022

REPORTABLE: YES/NO

OF INTEREST TO OTHER JUDGES: YES/NO

CIRCULATE TO MAGISTRATES: YES/NO

In the matter between:

SEBUTI DINTWE

Appellant

And

THE STATE

Respondent

Coram: Mhlambi, J *et* Opperman, J

Date of hearing: 29 May 2023

Delivered: The judgment was handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII on 6 June 2023. The date and time for hand-down is deemed to be 6 June 2023 at 15h00

Judgment by: Opperman, J

Summary: Appeal – rape – conviction & sentence – evaluation of evidence – appellant 19 years old at time of the offence – complainant raped more than once

JUDGMENT

INTRODUCTION

[1] The appeal came to this court against the conviction and sentence in terms of section 309(1)(a) of the Criminal Procedure Act, Act 51 of 1977; if a person was sentenced to imprisonment for life by a regional court under section 51(1) of the Criminal Law Amendment Act, Act 105 of 1997, he or she may note such an appeal without having to apply for leave in terms of section 309B.

[2] The appellant was convicted on 20 August 2020 in the regional court of rape that was alleged to have occurred on 29 September 2019 and in contravention of section 3 read with sections 1, 56(1), 56A as amended, 50(2)(a) and 50(2)(b), 57, 58, 59, 60 and 61 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, Act 32 of 2007. Sections 94, 256 and 261 of the Criminal Procedure Act, Act 51 of 1977 and section 51(1) of the Criminal Law Amendment Act 105 of 1997 also find application on the facts of this case.

[3] Following conviction and on 10 September 2020 the appellant was sentenced to life imprisonment in terms of section 51(1) of the Criminal Law Amendment Act 105 of 1997. The facts proven were that the complainant was raped more than once by the accused during the night that he held her captive.¹

[4] The grounds on which the appellant relies as to why his conviction and sentence cannot stand are briefly:²

¹ Part I Schedule 2 takes effect: "Rape as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 – (a) when committed – (i) in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice."

² Heads of argument for the appellant at paragraph 2.1.

Conviction:

- (a) The Court *a quo* erred in finding that the State proved its case beyond reasonable doubt;
- (b) the Court *a quo* erred in finding that the State witnesses gave evidence in a satisfactory manner;
- (c) the Court *a quo* erred in not properly analysing the evidence of the State witnesses;
- (d) the Court *a quo* erred in rejecting the version of the appellant as not being reasonably possibly true.

Sentence:

- (a) The effective term of life imprisonment is shockingly inappropriate and induces a sense of shock;
- (b) the Court *a quo* did not take into account the personal circumstances of the Appellant;
- (c) the Court *a quo* over-emphasized the seriousness of the offence, the interests of society and the deterrent effect of the sentence;
- (d) the Court *a quo* erred in finding that there were no substantial and compelling circumstances for it to deviate from the imposition of the minimum sentence of life imprisonment.

CONVICTION

[5] The general principles according to which a court of appeal should consider the conviction in a criminal case are:³

- (a) The court of appeal must bear in mind that the trial court saw the witnesses in person and could assess their demeanour.
- (b) If there was no misdirection of facts by the trial court, the point of departure is that its conclusion was correct.
- (c) The court of appeal will only reject the trial court's assessment of the evidence if it is convinced that the assessment is wrong.
- (d) If the court is in doubt, the trial court's judgment must remain in place.⁴
- (e) Courts of appeal have greater liberty to disturb findings of a court *a quo* when dealing with inferences and probabilities.⁵
- (f) The court of appeal does not zealously look for points upon which to contradict the trial court's conclusions, and the fact that something has not been mentioned does not necessarily mean that it has been overlooked.
- (g) The court of appeal's doubts about the trial court's correctness on the facts are insufficient to set aside the decision.⁶
- (h) Nevertheless, it is the duty of the court of appeal to reject the conclusion of the trial court on a factual question if the appeal court is convinced that that conclusion is wrong. In *Protea Assurance Co Ltd v Casey*

³ Kruger, A, Criminal Law, *Hiemstra's Criminal Procedure*, Chapter 30 Reviews and Appeals in cases of Criminal Proceedings in Lower Courts, 309 Appeal from lower court by person convicted, Last Updated: February 2023 - SI 16, <https://www.mylexisnexis.co.za/Index.aspx> on 1 June 2023. *R v Dhlumayo* 1948 (2) SA 677 (A).

⁴ *S v Robinson* 1968 (1) SA 666 (A) at 675H.

⁵ *Minister of Safety and Security v Craig* 2011 (1) SACR 469 (SCA) at paragraph [58].

⁶ *Kunz v Swart* 1924 AD 618 at 655 and *Taljaard v Sentrale Raad* 1974 (2) SA 450 (A).

1970 (2) SA 643 (A) at 648E it was warned that the advantages the trial court enjoys should not be overemphasised, otherwise the appellant's chances on appeal would be illusory.

(i) It is not only the finding which must be considered but also, and especially, the trial court's reasons. Therefore, such reasons ought to be properly formulated and mentioned in the trial court's judgment.⁷

(j) When the trial court did commit a misdirection in relation to the facts, the court of appeal is at liberty to disregard the trial court's factual findings, depending on the nature of the misdirection and the circumstances of the case, and to reach its own conclusion. In *S v Tshoko* 1988 (1) SA 139 (A) at 142F–143A, however, the court pointed out that, even when the trial court errs in relation to the burden of proof, its credibility findings are still important in so far as they are not affected by the misdirection.

(k) The burden of proof plays a very important part. In an ordinary criminal case this means that doubt of the court of appeal results in the acquittal of the accused.

(l) If the trial court committed a misdirection on a point of law, the court of appeal has to determine whether the evidence nevertheless establishes beyond reasonable doubt, whether the accused is guilty. A point of law can thus be decided in favour of an accused and the conviction nevertheless upheld.⁸

[6] The court *a quo* acted with judicial wisdom when adjudicating the testimony of the complainant. The detail and simplicity of her evidence stands out. It is of the nature that cannot be fabricated.

⁷ *S v Nkosi* 1993 (1) SACR 709 (A) at 711e–g.

⁸ *S v Bernardus* 1965 (3) SA 287 (A) at 299F.

[7] The court *a quo* gave due regard to the vulnerability of the complainant at the time of the incident without tolerating material contradictions or improbabilities. The complainant was exposed to the psychological stress and trauma that resulted from the exposure to a sexual offence that are private and intimate and embarrassing.

[8] The court found objective corroboration in the probabilities of the case and the evidence of the sister of the complainant and the medical legal report that depicted the injuries sustained by the complainant. It is not the injuries to be sustained during consensual intercourse.

[9] She was cautious and careful when she measured the evidence of the witnesses and reminded herself that the State carries the onus of proof beyond reasonable doubt.

[10] The probabilities are against the defence of the appellant. It must be noted that the accused elected not to call any witnesses; not even the brother⁹ or the friends he referred to in his testimony that could have corroborated his evidence.

[11] Advocate Tunzi for the State, in her heads of argument, gave an effective and convincing summary in support of the manner in which the presiding magistrate navigated her judgment. She referred to the judgments of *S v Francis* 1991 (1) SACR 198 (A) at 204 C-D, *S v Sithole and Others* 1999 (1) SACR 585 (W) at 590 F, *S v Sauls* 1981 (3) SA 172 (A) at 180 e-g and *S v Chabalala* 2003 (1) SACR 134 (SCA) at 139 I – J and observed as follows:

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5.1 This finding is supported by the following material parts of the evidence viewed cumulatively by the regional court Magistrate in her judgement:

5.1.1 The complainant was an honest and credible witness.

⁹ Heads of argument for the appellant: “3.2.2. It is improbable that Appellant would rape Complainant at Extension 8 in the presence of his brother in the house and the brother did not do anything to rescue the Complainant;”

5.1.2 In giving her evidence she was calm and coherent and her evidence finds corroboration in parts of the accused own version.¹⁰

5.1.3 The complainant testified that the accused was an unknown person to her. She indicated that she could only identify him with his clothing and sutures on his head. The identification of the accused is confirmed by the accused placing himself in her company and admitting to having had sexual intercourse with her.¹¹

5.1.4 The complainant's sister also provided consistency in her version with regards to the complainant's emotional state and the condition of her clothing when she arrived at her place.¹²

5.1.5 She did not change her evidence during cross examination.¹³

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6.1 The trial court was correct in finding that Ms Mosoeu, complainant's sister was an honest and a credible witness. Her evidence did not only prove consistency from the complainant, but also corroborated the complainant's version that she was sober at the time of the incident as she observed that the complainant appeared to be sober at the time she arrived at her place.¹⁴

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7.1 The Appellant admitted having had sexual intercourse with the complainant but contend that the intercourse was consensual.

7.2 His version does not make sense and the trial court correctly found it to be improbable and rejected it as false.

¹⁰ Record: page 95 at lines 13 to 15.

¹¹ Record: page 95 at lines 15 to 21.

¹² Record: page 95 at lines 23 to 25.

¹³ Record: page 96 at lines 1 to 21 and page 97 at lines 1 to 4.

¹⁴ Record: page 90 at lines 4 to 12.

- The appellant wanted the court to believe that the complainant was the one who pestered him inside the tavern to the point that he agreed to leave with her.
- At the time they were unknown to each other but he testified that he met her briefly on the street earlier that day.
- The appellant indicated that at the time they left the tavern he did not know where the complainant was taking him to and yet the complainant took him to his brother's place in Extension 8 where the incident occurred.
- Furthermore, the appellant indicated that the complainant was not injured at all even when they parted ways in the morning, she was still uninjured. If this was the case, why was a statement put then to the complainant that she got injured during her altercation with a gentleman before she approached the accused.

SENTENCE

[12] The act of rape is in itself a serious injury; it injures the body, the integrity, the privacy, the sense of security and the soul of the victim. An act of rape without "additional injuries" or less severe injuries does not compound into compelling and substantial circumstances. Section 51(3)(aA)(ii) of the Criminal Law Amendment Act 105 of 1997 makes it patently clear that this fact cannot be used as compelling and substantial to cause a deviation from the prescribed minimum sentences.

(3)(a): If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence: Provided that if a regional court imposes such a lesser sentence in respect of an offence referred to Part 1 of

Schedule 2, it shall have jurisdiction to impose a term of imprisonment for a period not exceeding 30 years.

(aA) When imposing a sentence in respect of the offence of rape the following shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence:

- (i) The complainant's previous sexual history;
- (ii) an apparent lack of physical injury to the complainant;
- (iii) an accused person's cultural or religious beliefs about rape; or
- (iv) any relationship between the accused person and the complainant prior to the offence being committed.

[13] The balancing of the factors by the court *a quo* was in accordance with the law and the inquiry into the existence of compelling and substantial factors proper. As Terblance¹⁵ noted:

It is regularly stated that balance is an important consideration in sentencing. Balance, in this context, has been said to mean that the trial court should consider all the relevant facts, factors and circumstances evenly, and strive for the attainment of all the purposes of punishment.

As long as balance is understood in these terms there is little objection to its use. This is not, however, balance in the ordinary sense of the word. The seriousness of the crime may totally outweigh the mitigating factors and the personal factors of the offender. This cannot amount to balance, since the scales would be heavily weighed against the offender. It would therefore be more accurate to state, as in *S v De Kock*, that the three factors of

¹⁵ A Guide to Sentencing in South Africa, Last Updated: 2016 - Third Edition at Chapter 6 at 5, <https://www.mylexisnexis.co.za/Index.aspx> on 18 January 2021.

the *Zinn* triad have to be considered in conjunction with one another and that each should be *afforded a certain weight* depending on the facts of the case.

[14] The vital substance of an effective sentence is that if the court can impose a sentence with the real potential to prevent future crime and serve the community the same, such sentence will be in the interests of society.

- a) Retribution is significant in every sentence.
- b) The punishment should fit the crime. This is related to the retributive aspect of punishment.
- c) The punishment should fit the criminal as well.
- d) The sentence must serve the society. The demands of the time are important. Presiding officers should take cognizance of the times in which sentencing takes place. It takes place in reaction to a crime committed in the reality of the present, not of the past or the future. The prevailing crime situation in South Africa demands consistent and strict sentencing in an attempt to curb the onslaught against the people. The scourge of rape in South Africa is directive of the nature of the sentences. *However, the demands of the times should not be equated to the demands of society, especially not the demands of uninformed members of society.*¹⁶ A civilized society reflects more; there are other factors such as the individualization of sentences and compassion or mercy towards the perpetrator.
- e) “[Mercy] has nothing in common with maudlin sympathy for the appellant. While recognizing that fair punishment may sometimes have to be robust, mercy is a balanced and humane quality of thought which tempers one’s approach when considering the basic factors of letting the punishment

¹⁶ *A Guide to Sentencing in South Africa*, Last Updated: 2016 - Third Edition at Chapter 6, <https://www.mylexisnexis.co.za/Index.aspx> on 18 January 2021.

fit the criminal as well as the crime and being fair to society”.¹⁷ An appropriate sentence is not reduced in order to make provision for mercy.

f) Remorse dictates mercy. The perpetrator must have perception of his deeds. Remorse can only be genuine if the appellant declared it with sincerity. The appellant *in casu* showed no remorse at all. He denied culpability, he put all the witnesses through the trauma of a trial and never explained to the court that he is; or even if he is, why he is remorseful.

g) The main purposes of punishment are deterrent, preventive, reformatory and retributive.

h) One should guard against allowing the heinousness of the crime to exclude all other relevant considerations. What is needed is a balanced and judicial assessment of all the factors. The most severe sentence is not necessarily the most appropriate.

i) A sentence will only be regarded as shockingly harsh and inappropriate when it lies on appeal if it is in contradiction with the judgement of Rumpff, JA in *S v Anderson* 1964 (3) SA 494 (A) at 495 wherein he captured the essence of the duty and power of a court on appeal concisely and precise:

Over the years our Courts of appeal have attempted to set out various principles by which they seek to be guided when they are asked to alter a sentence imposed by the trial court. These include the following: the sentence will not be altered unless it is held that no reasonable man ought to have imposed such a sentence, or that the sentence is out of all proportion to the gravity or magnitude of the offence, or that the sentence induces a sense of shock or outrage, or that the sentence is grossly excessive or inadequate, or that there was an improper exercise of his discretion by the trial Judge, or that the interests of

¹⁷ *S v Rabie* 1975 (4) SA 855 (A) at 862 and *S v de Jager and Another* 1965 (2) SA 616 (A) at 628 – 629.

justice require it. Some of the cases in which these principles are mentioned are referred to in the judgment of SELKE, J., in *Rex v Zulu and Others*, 1951 (1) SA 489 (N) at p. 490.

A Court that interferes with a sentence imposed by a lower court, itself exercises a discretion when it imposes a new sentence and there cannot, therefore, be a ready-made test in the strict sense of the word. Nor is it advisable to attempt to lay down a general rule as to when the Court's discretion to alter a sentence will be exercised, see *Rex v Sandig*, 1937 AD 296 and *Rex v Ramanka*, 1949 (1) SA 417 (AD). The decisions clearly indicate that a Court of appeal will not alter a determination arrived at by the exercise of a discretionary power merely because it would have exercised that discretion differently. *There must be more than that. The Court of appeal, after careful consideration of all the relevant circumstances as to the nature of the offence committed and the person of the accused, will determine what it thinks the proper sentence ought to be, and if the difference between that sentence and the sentence actually imposed is so great that the inference can be made that the trial court acted unreasonably, and therefore improperly, the Court of appeal will alter the sentence. If there is not that degree of difference the sentence will not be interfered with.*" (Accentuation added)

[15] Substantial and compelling circumstances are not the average day to day factors in an appellant's life. There must be more. The appellant was 19 years of age at the time of the commission of the alleged offence, he is not married, he is not employed, his highest standard of education is Grade 10, he is a first offender, he was in custody for six (6) months before paying bail and he was residing with his mother and his siblings.

[16] I align myself with the statement by Justice Bosielo and as was concurred with by Brand JA, Heher JA, Malan JA and Pillay JA in *S v PB* 2013 (2) SACR 533 SCA at paragraphs [19] and [20]:

[20] What then is the correct approach by a court on appeal against a sentence imposed in terms of the Act? Can the appellate court interfere with such a sentence imposed by the trial court's exercising its discretion properly, simply because it is not the sentence which it would have imposed or that it finds shocking? *The approach to an appeal on sentence imposed in terms of the Act should, in my view, be different to an approach to other sentences imposed under the ordinary sentencing regime. This, in my view, is so because the minimum sentences to be imposed are ordained by the Act. They cannot be departed from lightly or for flimsy reasons. It follows therefore that a proper enquiry on appeal is whether the facts which were considered by the sentencing court are substantial and compelling, or not.* (Emphasis added)

[17] “For circumstances to qualify as substantial and compelling, they need not be ‘exceptional’ in the sense that they are seldom encountered or rare, nor are they limited to those which diminish the moral guilt of the offender.”¹⁸

[18] The minimum sentence promulgated by the Legislator to serve the interest of the community and the victim tips the scale against the appellant and his age. Rape is a serious offence, the appellant abducted the complainant and forced her into submission, he raped her more than once and showed no remorse whatsoever. The Victim Impact Statement depicts the trauma of the complainant and her family that still prevails. He made her out to be the cause of the incident.

[19] The above directs that the appeal must fail in its totality.

[20] ORDER

The appeal against the conviction and sentence is denied.

M. OPPERMAN, J

¹⁸ *S v Pillay* 2018 (2) SACR 192 (KZD) at paragraph 10 as quoted by Mdhluli ST, *What are substantial and compelling circumstances in terms of s 51(3)(a) of the Criminal Law Amendment Act?*, March 1st, 2021, De Rebus in 2021 (March) DR 7.

I concur

J.J. MHLAMBI, J

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