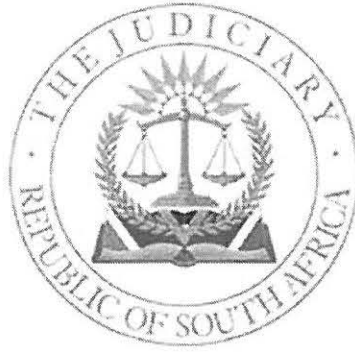




IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Appeal number: A182/2022

In the Appeal between:

STEVEN ZULU TLAKI

Appellant

and

THE STATE

Respondent

CORAM: DANISO, J *et* VAN RHYN, J

HEARD ON: 28 AUGUST 2023

JUDGMENT BY: DANISO, J

DELIVERED ON: 12 OCTOBER 2023

- [1] The appellant appeared in the Bethlehem Regional Court where he was indicted on two counts of rape in contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 read with section 51(1) of the Criminal Law Amendment Act 105 of 1997 ("the CLAA"). It was the State's case that on 06 September 2015 the appellant together with an unidentified male gang raped the complainant in count 1 more than once. She

was 17 years old at that time. Approximately three years later on 02 November 2018, the appellant raped the complainant in count 2, a child aged 12 years.

- [2] After pleading not guilty to both counts, the appellant tendered a plea explanation in relation to the first count. He denied having raped the complainant and admitted that on the said date he had sexual intercourse with her. His admission was accordingly recorded by the trial court in terms of section 220 of the Criminal Procedure Act¹ ("the CPA"). With regard to the remaining count, the appellant elected not to disclose the basis of his defence.
- [3] On 28 May 2020, the appellant was convicted on the first count based on the evidence of the complainant, the first report, Mr Simon Tshabalala and warrant officer Marius Nel. He was subsequently sentenced to 25 years' imprisonment the trial court having found substantial and compelling circumstances to deviate from the prescribed sentence of life imprisonment. A consequential order was also made as contemplated in section 103 of the Firearms Control Act.² He was acquitted in respect of count 2.
- [4] The appellant's application for leave to appeal both the conviction and sentence was dismissed by the trial court. Leave to appeal was subsequently granted by this court by way of a petition in terms of section 309C of the CPA.
- [5] The conviction is assailed on the grounds that in convicting the appellant, the trial court relied on contradictory and unreliable evidence to conclude that the State proved its case against the appellant beyond reasonable doubt. The appellant contends that there were material contradictions between the complainant's evidence and that of her first report witness Tshabalala in that, the complainant had testified that she was nearby Bossie's tavern when she met her assailants whilst Tshabalala testified that the complainant told him that she was nearby the dam in the area called Egypt when she met her assailants.

¹ Act No, 51 of 1977.

² Act No, 60 of 2000.

- [6] Regarding sentence, the appellant is aggrieved that the following factors were not taken into account by the trial court for the purpose of sentencing namely: the fact that this was not the most severe case of rape, the complainant did not sustain any physical injuries, there was no evidence of lasting emotional trauma and he was in custody since he was arrested. He contends that the sentence of 25 years' imprisonment is shockingly inappropriate. It must be reduced to a sentence of 15 years' imprisonment.
- [7] The appeal is opposed essentially on the grounds that the discrepancies between the complainant's testimony and that of her first report witness were not material. The State is not required to close every loophole available to an accused to secure a conviction. The trial court correctly evaluated the evidence proffered in its totality, it duly considered the inherent probabilities and improbabilities present in both the State's and appellant's versions and having done so, it concluded that truth was told by the complainant. Regarding sentence, it is the State's case that the sentence imposed is in accordance with the law.
- [8] The circumstances which gave rise to the appellant's conviction are as follows: immediately before the complainant was attacked she had a good time partying with her friends Relebohile, Mamello and Mathapelo at Relebohile's home. The friends then decided to go to Steve's tavern where they continued having a great time and enjoying alcoholic beverages until around 1am when the complainant decided that she had had enough and decided to head home. Her friends tried to accompany her but had to turn back when Mamello fell sick. The complainant then decided to carry on and walk home alone. On her way, next to Bossie's tavern she met two men who at first appeared to be kind to her and even offered to accompany her home but they then started to attack her. They slapped, strangled and dragged her to an open veld where they undressed her and took turns raping her more than once. After they were done raping her they robbed her of the alcohol she had in her handbag and her keys. They shoved some white powder inside her mouth and forced her to drink alcohol to wash it down. One of the men contemplated killing her but the other one reasoned that she did not know them therefore they should leave her alone. They ran off leaving

her in the veld. She stood up, got dressed and went back to Relebohile's home where she reported the rape to Relebohile's brother, Tshabalala. It was the complainant's testimony that the men were unknown to her, she was only able to identify the appellant later at a photo identity parade.

- [9] Tshabalala corroborated the complainant's first report of the rape incident. He confirmed that the complainant arrived at his home crying and spontaneously reported that she was raped by two unknown men she had met next to the dam on her way home. An ambulance was called. The complainant was taken to the hospital thereafter a rape case was opened with the police.
- [10] A medical report (the J88) compiled by a nursing sister on 06 September 2015 was handed in by concurrence of the State and the defence as Exhibit "I". It indicated that no visible injuries were noted. The gynaecological examination revealed a fresh tear at 6 o'clock area and a between a 3 o'clock and 6 o'clock area. The injuries were consistent with forceful genital penetration.
- [11] At the conclusion of the State's evidence, the court invoked the provisions of section 186 of the CPA and called warrant officer Nel who confirmed that when the complainant reported the case she did not know the identity of the men who had raped her. The appellant was linked to the rape through deoxyribonucleic acid evidence (DNA).
- [12] Following the applicant's failed application for a discharge in terms of section 174 of the CPA, the appellant testified in his defence. He stated that the complainant was actually his girlfriend. They met earlier on the day of the incident at around 8pm at Steve's tavern. He approached her and proposed love to her. Due to the noise in the tavern they agreed to go and continue their conversation outside and this is where the complainant positively responded to his love proposal. When he asked her to prove to him that she indeed loved him she kissed him. They then decided to move to a passage situated in a more private and dark area where they engaged in consensual intercourse. When they were done, the complainant confirmed her satisfaction when he asked her whether she was satisfied sexually. He asked her for her contact numbers but

she told him that she did not have her phone with her. They then agreed that they would meet at the taverns. He left the complainant at Steve's tavern as he had to work the following day.

- [13] On the facts germane to this matter the complainant was a single witness to the rape. The learned magistrate was alive to the cautionary rule applicable under these circumstances. It is clear from the record of the proceedings that the learned magistrate's conclusion that the complainant had told the truth about the rape is premised on the fact that despite having had imbibed on alcohol the complainant was not intoxicated in that, she was able to comprehend and observe her surroundings and was later able to relay to the trial court a succinct and detailed description of not only where and how the rape occurred, but also which role was played by the respective perpetrators.
- [14] As correctly pointed out by the appellant, the learned magistrate did allude to the contradictions between the State's witnesses' evidence regarding where the complainant met her assailants and found that the contradictions were immaterial to warrant a rejection of the State's case in *toto*.
- [15] I cannot fault the trial court's conclusion in this regard because, not every discrepancy in the evidence affects the credibility of a witness. Evidence as a whole must be taken into account including the nature of the discrepancy, its importance and bearing on the matter under consideration.³ The issue of whether it was near the dam or near Bossie's tavern where the complainant met her assailants is not material for the determination of the issue namely, whether the complainant was raped by the appellant or not.
- [16] On the other side, the appellant's version was rejected essentially on the basis that it was improbable and fabricated. I also agree with this finding for the reason that, the appellant waited until the complainant left the stand to relate to the trial court minutely the details from the time he saw the complainant, how he

³ *S v Francis* **1991 (1) SACR 198** (A) at 204 c-e; *R v Dhlumayo and Another* **1948 (2) SA 677** (A) at 706; *S v Oosthuizen* 1982 (3) SA 571 (T) at page 576 para G-H.

approached her and spoke to her. He detailed their intimate conversation which led to them going outside the tavern to continue with their talk, the complainant kissing him to prove her love for him and voluntarily had sexual intercourse with him. He also mentioned that he was such a gentleman that after the sexual encounter he even asked the complainant if she was satisfied and she confirmed that she was indeed satisfied. Bizarrely, in both his direct evidence and under cross-examination the appellant was also adamant that although the complainant was in the company of her friends sitting at a table inside the tavern, her friends did not see him.

[17] It is trite that a party who intends to lead evidence to contradict an opposing witness, should first cross-examine the witness upon the facts which he intends to prove in contradiction, so as to give the witness an opportunity for explanation. Similarly, if the court is to be asked to disbelieve a witness, that witness should be cross-examined upon the matter which it will be alleged to make her case unworthy of credit. It is highly irregular to let a witness' evidence go unchallenged in cross-examination and afterwards relate a variant version. While there is no obligation on an accused person to prove his innocence, where he provides a version of his defence it must be reasonably and possibly true to obtain an acquittal. The appellant's version did not pass muster to the extent that the ineluctable conclusion is that his defence of consensual intercourse was an afterthought merely fabricated to explain his DNA on the complainant's vaginal swabs.

[18] The trial court painstakingly weighed up all the elements which pointed towards the guilt of the appellant against all those which are indicative of his innocence. It took proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so came to the conclusion that the balance weighed so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt. I am thus satisfied that the correct approach to the evaluation of evidence as articulated in *S v Chabalala*⁴ was

⁴ **2003 (1) SACR 134** (SCA) paragraph 15.

properly applied in rejecting the appellant's version as false beyond a reasonable doubt.

- [19] There is also no merit in the appellant's complaint about the appropriateness of the sentence. In the trial court, it was common cause that the offence that the appellant was convicted of due to it being a gang rape and the complainant was also raped more than once, the applicable sentence was that of life imprisonment.
- [20] The record of the proceedings reveals that the appellant's personal circumstances namely that: he was 30 years old, unmarried with no children, he was self-employed and earned R2500.00 per month and that he was a first offender who spent a year and five months in custody awaiting trial were taken into account for the purpose of sentencing and also as substantial and compelling reasons to deviate from the applicable sentence of life imprisonment.
- [21] The fact that the complainant had no physical injuries does not make the crime less heinous, rape leaves the victims with life-long emotional and psychological scars which do not heal easily as compared to physical scars. This was clearly evident from the demeanour of the complainant in court. The mental anguish was still apparent when she testified as a result the court had to adjourn to allow her some time to compose herself.⁵
- [22] Having regard to the degrading nature and brutality of the offence the appellant was convicted of including the prevailing aggravating factors namely that: the complainant was assaulted, strangled, threatened with death during the rape and also denigrated in court by being labelled as the appellant's girlfriend who had also consented to the degradation of her dignity in imposing a lesser sentence than the prescribed sentence the appellant was shown mercy. There is no basis to interfere with the sentence, it reflects the gravity of the crime and it also speaks to the plight of the victims and the society at large.

⁵ Record page 0161 at line 15 to 22.

[23] In the result, I would make the following order:

Order

- (1) The appeal against both conviction and sentence is dismissed.

I concur

The Honourable Justice [REDACTED]
 2023-10-12 N.S. DANISO, J
 N.S. Daniso [REDACTED]
 [REDACTED]
 VAN RHYN, J

On behalf of appellant:

Instructed by:

Mr. PL van der Merwe

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On behalf of respondent:

Instructed by:

Adv DW Bontes

The Director of Public
 Prosecutions

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