

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

Case No.: CA&R24/2022

Date of hearing: 23 August 2023

Judgment delivered on: 14 September 2023

In the matter between:

SIFUNDO MSUTU

APPELLANT

And

THE STATE

RESPONDENT

REPORTABLE: YES

OF INTEREST TO OTHER JUDGES: YES

REVISED

JUDGMENT

MTSHABE AJ:

INTRODUCTION

[1] The appellant, (Sifundo Msutu), was convicted of rape and sentenced to 10 years imprisonment. He has appealed against his conviction and sentence.

[2] As he was a first offender the court *a quo* was obliged to sentence him to a minimum of ten (10) years' imprisonment in terms of section 51(2) of the Criminal

Law Amendment Act, (Act 105 of 1997), unless the court finds that there are compelling and substantial reasons to deviate from the prescribed minimum sentence.

[3] At all the relevant times, the appellant was legally represented in the court below. Leave to appeal was granted by the court *a quo against* both conviction and sentence.

[4] The grounds of appeal as listed in the notice of appeal are that the court *a quo* erred in the following respects:

4.1 in not applying the requisite caution during his evaluation of the evidence of the first witness for the respondent, being the complainant who was a single witness at all material times.

4.2 in not evaluating the evidence of the complainant with circumspection and in finding that she was a credible witness, accepting her version of events to have constituted the true state of affairs without reservation to the exclusion of the appellant's version, thus patently disregarding the improbabilities and inconsistencies in her evidence as well as her vague, evasive and often argumentative demeanor.

4.3 in not having comprehensive regard to the significance of the contradictions in the evidence of the complainant and that of Siya (the second state witness).

4.4 in disregarding the appellant's evidence to the effect that the complainant had made sexual advances to him through dancing prior to the incident.

4.5 in finding that the state had proved its case beyond reasonable doubt despite the appellant's evidence that the sexual intercourse between him and the complainant was consensual.

4.6 in finding that there was no consent on an assessment of the circumstantial evidence.

4.7 in finding that the complainant had no reason to falsely implicate the appellant despite evidence that she had a relationship with Siya which she had every reason to protect at the appellant's expense.

FACTS

[5] The complainant in this matter is Y[...] S[...], an adult female. On 9 June 2018 she was drinking alcohol at the place of the appellant.

[6] The appellant also invited his friend by the name of Siya as well as other people to his place. Siya and Y[...] S[...] (the complainant) were known to each other as they used to work together.

[7] Siya had on previous occasions attempted to court the complainant who at the time had shown no interest because she was involved in a relationship with somebody else. On the night in question, however, she was single and when everybody else left in the early hours of the morning, she stayed behind with Siya.

[8] The house of the appellant had two bedrooms. The complainant and Siya slept in one of the bedrooms where they had consensual intercourse around 5 o'clock in the morning. The complainant thereafter fell asleep. As she laid on the bed, she was wearing only a top facing the wall.

[9] Whilst she was still sleeping someone entered the bedroom. After which she felt movement behind her as the person was touching her chest and thighs. Because she had been sleeping with Siya, she thought that the person touching her was Siya. This person penetrated her vaginally from behind and had sexual intercourse with her. She tried to turn her face, but this person pushed it back with his hand. She called out Siya's name and this person only murmured in response.

[10] After some time as they were still having sexual intercourse, she heard the door opening and another person entering the room. This person stood next to the bed and exclaimed 'what the hell is going on here?' It is at that point that the complainant realized that the person she was having sexual intercourse with was the appellant and that the one who had just entered the room, Siya. She immediately told the appellant to get off her, covered her face with her hands and exclaimed 'Oh my gosh'. The appellant left the room.

[11] She then asked Siya to escort her home. As they were leaving the appellant was in the lounge. She tried to throw punches at him, but Siya intervened.

[12] The complainant went to the police station where she laid charges of rape against the Appellant. It is her evidence that later that same day the Appellant went to her house to ask for forgiveness but her friends who were there shouted and swore at him.

[13] The complainant's case is that she never consented to have sexual intercourse with the appellant. The Appellant's case is that Y[...] agreed to have sex with him.

[14] Siya, whose full name is Siyabulela also testified in court. He corroborated the evidence of the complainant in all material respects.

[15] He testified further, that after he and the complainant had fallen asleep, after having engaged in sexual intercourse, he woke up to see the Appellant who entered the bedroom whilst naked and stood at the end of the bed. The appellant was busy putting on a condom. Puzzled at the Appellant's conduct, he took him out of the room into the bathroom and asked him what he was doing. In response the Appellant simply asked, "**why are you not giving me ass?**", referring to the complainant.

[16] Siya told him that he could not do that. The Appellant left and Siya continued to use the bathroom. Unbeknown to Siya, on leaving the bathroom the appellant went back to the bedroom where he had sexual intercourse with the Complainant. When Siya entered the bedroom, the complainant was very upset and angry on

realizing that it was actually the appellant, and not Siya who was having sexual intercourse with her. Siya then escorted the complainant home. On the way the complainant did not want to speak about the incident as she was still angry.

[17] The appellant testified in his defence, and confirmed there was a party at his house on the night in question. He also confirmed that the complainant and other people were present at the party. It was his first time to meet the complainant at the said party. He also confirmed inviting Siya who joined the party later.

[18] According to him, the complainant and Siya were only colleagues and friends. He never saw them kissing or hugging. He testified that Siya left his house, fully dressed, about 5 to 6 am in the morning.

[19] After Siya had left, he entered the room where he found the complainant sleeping. They started talking and he asked if he could join the complainant in bed, to which the complainant agreed. She was wearing only a panty and a top at the time. He took off his shoes and trousers and joined the complainant in bed. He asked the complainant if she likes him, and she said yes. They started kissing each other.

[20] They then engaged in sexual intercourse, and both were naked at the time. The complainant was lying on her back, and he was on top of her, and they changed positions and she lied on her stomach whilst he got on top of her. On his version he never penetrated the complainant from behind.

[21] He then noticed Siya who was standing next to the bed whilst fully dressed, asking, ***“what the hell is going on here?”***. At that point the Complainant told him to get off her and he complied.

[22] He was later informed about the rape allegation. He then decided to go to the complainant's house where he tried to talk to the Complainant. However, her friends who were there with her started shouting and throwing bottles at him, so he left

[23] According to him therefore, the sexual intercourse with the complainant was consensual, therefore, he denies raping her.

[24] The only determinable issue at the trial court therefore, was, whether the sexual intercourse between the appellant and the complainant **was consensual**.

LEGAL PRINCIPLES

[25] The learned Magistrate was alive to the fact that the Complainant was a single witness¹. (But the complainant was not a single witness-Siya witnessed the sexual intercourse after a request was made to him, for the appellant to have sex with the complainant-which request he had denied)

[26] The learned Magistrate considered the cautionary rule not on the basis of the nature of the offence, but because the Complainant was single witness. (See par 29 above)

[27] The learned Magistrate correctly evaluated the version of the state and appellant taking to account the probabilities and improbabilities and found that the state has proven its case beyond reasonable doubt².

[28] In determining whether the State has proved its case beyond reasonable doubt, reference can be made to the case of **S v Chabalala**³, when a court is faced with two irreconcilable versions, as the court was in this case, in **Chabalala** case, the court stated as follows:

“The Correct approach is to weigh up all the elements which points towards the guilty of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weakness, probabilities and improbabilities on both sides and, having done so, decide whether the balance weighs so heavily favour of the State as to exclude

¹ Record 195 line-12 -17 (volume 2)

² Record p210 line 3-9 (volume 2)

³ 2003 (1) SACR 134 (SCA) 140 a-b

reasonable doubt to the accused's guilt. The results may prove that once scrap of evidence or one defect in the case for either party (such as the failure to call a material witness concerning an identity parade) was decisive but that can only be on ex post facto determination and a trial court (and counsel) should avoid the termination to latch on to one (apparently) obvious aspect without assessing it in context of the full picture in evidence".

[29] In **S v Trainor**⁴, it was held that;

"A conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable, the quality of that evidence must of necessity be evaluated as must corroboratively evidence, if any. Evidence, of course, must evaluated against the onus on any particular issue or in respect of the case in its an entirely".

[30] The court *a quo* correctly applied the above principles and found that the complainant and Siya were reliable and credible witnesses⁵, that their evidence was objective and that they did not attempt to exaggerate the issues.

[31] (In the case of **Kruger AM v State**⁶ the court stated as follows;

"The fact that the Complainant informed her sister of what happened immediately after the incident, is not only admissible under section 58 of the Criminal Law (Sexual Offences and Related Matters, Amended Act, 32 of 2007), but shows consistency on her part in regard to her complaint, and factor that serves to rebut any suspicion that she may have fabricated her allegations. Moreover, in a case such as this, where the Complainant is in a state of distress and whipping almost immediately after the incident is also relevant and serves to rebut a defence of consent." I am not sure if this is

⁴ 2003 (1) SACR35 (SCA) para 9

⁵ Record p195 line 18-24 volume (2) and p199 lines 20-21 (volume 2)

⁶ 2014 (1) SACR 647 (SCA)

applicable given that no first report was made in this regard given that the witness Siya witnessed the rape firsthand).

[32] The court *a quo* correctly found that both the complainant and Siya's reaction on what was happening painted a picture of exasperation and surprise or shock. **See: Record; page 202 lines 5-7 volume 2.**

[33] The court *a quo* correctly applied the principle in the **Chabalala** (*supra*) and was satisfied that the probability in this case favour the State.

[34] (The court *a quo*, as I have indicated above was alive the cautionary rule. In the case of **S v Sauls and others**⁷ the court stated the following:

"There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness (see the remarks of Rumpff JA in S v Webber 1971 (3) SA 754 (A) at 758). The trial Judge will weigh his evidence, will consider its merits and demerits and having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings defects or contradictions in the testimony, he is satisfied that the truth has been pulled. The cautionary rule referred to De Wiliers JP in 1932 may be a guide to a right decision but it does not mean that the appeal must succeed on any criticism, however slender, of the witness's evidence were well founded.") See my comments at paragraph 29 above-the complainant was not a single witness and therefore, in my view, the cautionary rule was not applicable).

[35] On the basis of all the evidence, court *a quo* was satisfied that there is sufficient corroboration for the evidence of the Complainant to justify the findings that the appellant's guilt had been established.

[36] The power of the court of appeal to interfere with a trial court's factual findings is limited. In the case of **S v Francis**⁸, the court stated the following:

⁷ 1981 (3) SA 172 (A) @ 180 E-G

“The court’s powers to interfere on appeal with findings of fact of a trial Court are limited. Accused No 5’s complained is that the trial court failed to evaluate D’s evidence properly. It is not suggested that the court misdirected itself in any respect. In the absence of any misdirection the trial Court’s conclusion, including its acceptance of D’s evidence is presumed to be correct. In order to succeed on appeal accused No. 5 must therefore convince us on adequate grounds that the trial court was wrong in accepting D’s evidence- a reasonable doubt will not suffice to justify interference with its findings, bearing in mind the advantage which a trial Court has of seeing, hearing and appraising a witness, it is only in exceptional circumstances that this court will be entitled to interfere with a trial Court’s evaluation of oral testimony.

[37] It is trite that as a court of appeal will have to show deference to the factual and credible finding made by the trial court. This is so as the trial court has the advantage which an appeal court never has of hearing and observing the witness as they testified and under cross-examination. As it was stated in ***R v Dhlumayo 1948 (2) SA 647 (A) at 705:***

“The trial court is steeped in the atmosphere of the trial. A court of appeal may only interfere where it is satisfied that the trial court misdirected itself or where it is convinced that the trial was wrong”.

SENTENCE

[38] The appellant, after he was convicted of rape, was sentenced by the Court *a quo* to ten (10) years’ imprisonment in section of terms of section 51(2) of the Criminal Law Amendment Act 105 of 1997.

[39] The issue here, is whether the Court *a quo* erred when it found that there were no substantial and compelling circumstances justifying a deviation from the prescribed minimum sentence of 10 years imprisonment.

⁸ S v Francis 1991 (1) SACR 198 A 204 C-E

[40] Rape is serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, dignity and the person of victim in this case Complainant.

[41] In the case of **S v Chapman**⁹ the court stated the following:

“The rights to dignity, to privacy and integrity of every person are basic to the ethos of the Constitution and to any defensible civilization. Women in this kind are entitled to protection of these rights. They have legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entrainment, to go and come from work and to enjoy the peace and tranquility of their homes without the fear, the apprehension and the security which constantly diminishes the quality and enjoyment of their lives.

[42] In the same matter of **S v Chapman** (*supra*) the court went further and stated as follows:

“Courts are under duty to send a clear message to the accused, to other potential rapist and to the community. We are determined to protect the quality, dignity and freedom of all women, and we shall show no mercy to those who seek to invade those rights.”

[43] A court’s discretion to interfere with a sentence on appeal is circumscribed. In **S v Malgas**¹⁰ the court stated the following:

“A court exercising appellant jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it was the trial court and then substitute the sentence arrived by it simple because it prefers it. To do so would be to usurp the sentencing discretion of the trial court.”

⁹ 1997 (3) SA 341 (SCA) 345 (A)

¹⁰ 2001 (1) SACR 122 (SCA at para 12)

[44] In this matter the court *a quo* dealt with issues of sentence carefully and thoroughly, having regard all the traditional factors and objectives of sentence, the prescribed minimum sentence, the appellant's personal circumstances, the probation officer's report as well as the impact that the offence had on the complainant.

[45] The court *a quo*'s approach in considering whether substantial and compelling circumstances exist cannot be faulted and I am of the view that there was no misdirection on the part of the court *a quo*.

[46] The court *a quo* found that the following were aggravating circumstances in this matter;

46.1 That the Appellant used deceit in satisfying his carnal desires.

46.2 The Appellant's disregard that Siya could enter the room at any moment did not stop him.

46.3 The Appellant was goal directed in that he went to the in room which the complainant and Siya were sleeping, already naked and even asked Siya if he could also have **ass**.

46.4 The complainant was vulnerable at that stage as she was asleep and the appellant took advantage of the situation;

46.5 The Appellant has shown no signs of remorse for his actions and in this regard the court *a quo* quoted the well-known case of **S v Matyityi**¹¹ where it was held:

"There is, moreover, chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is gnawing pain of conscience for the plight of another. Thus genuine concretion can

¹¹ 2001 (1) SA CR 40 (SCA)

only come from an appreciation and acknowledgement the extent of one's error".

[47] In this matter the court a quo correctly found that there were no circumstances regarding remorse that were applicable. The appellant remained steadfast in his denial and refused to take responsibility for his actions.

[48] Furthermore, I find that the court did not over-emphasized the interests of society over and above the personal circumstances of the appellant ad the offence committed in this matter. In the case **S v Msimanga Ander**¹² the court stated the following;

"The reason for the existence of criminal justice system is to serve the interests of the public in sentencing, as an integral part of that system, has the same raison d'être. Violent conduct any form is no longer to be tolerated, and courts, by imposing heavier sentences, convey the message, on the one hand to prospective criminal that such conduct is unacceptable and, on the other hand to the public that the courts take seriously the restoration and maintenance of safe living conditions. Deterrence is the over-arching and general purpose of punishment. Since no civilized community should have to tolerate barbaric conduct, in cases of crime in particular the deterrence and retribution aims of punishment are to be preferred over those of prevention and rehabilitation which in such cases play a subordinate role."

[49] The court a quo's approach in considering whether substantial and compelling circumstances exist cannot be faulted and I am of the view that there was no misdirection on the part of the court a quo.

[50] Having regard to the above considerations, in my view the learned magistrate did not misdirect himself in any way in his consideration of conviction and sentence. As such, the appeal cannot succeed.

¹² 2005 1 SA CR 377 (O)

[51] In the circumstances, following order is made:

1. The appeal by the appellant against both conviction and sentence are dismissed.

**N.R MTSHABE
ACTING JUDGE OF HIGH COURT
MAKHANDA**

I agree.

**V. NONCEMBU
JUDGE OF THE HIGH COURT MAKHANDA**

Appearances

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