

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU – NATAL DIVISION, PIETERMARITZBURG**

Case No: AR7/2023

In the matter between:

SIFUNDO NKOSI

APPELLANT

and

THE STATE

ORDER

On appeal from: the Regional Court, Mtubatuba, sitting as court of first instance:

1. The appeal is dismissed.
2. The conviction and sentence by the trial court is confirmed.

JUDGMENT

Delivered on: 16 February 2024

Ntlokwana AJ et Hadebe J concurring

Introduction

[1] This is an appeal brought by the appellant against conviction and sentence on a charge of rape, in terms of the provisions of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

[2] Upon conviction on the charge of rape, the appellant was sentenced to ten years imprisonment. He is currently on bail pending this appeal.

[3] the appeal is before this court with the leave of the trial court.

[4] the complainant, who was raped in 2018 on 1 January, had earlier on enjoyed the New Year's Eve at her home in the company of her brothers and two friends. The rape occurred in the early hours of the morning in a bushy area along the road whilst on her way accompanying her two friends to their home. The complainant was 16 years of age at the time of the rape incident.

[5] on conviction, the appellant challenges the credibility and reliability of the evidence presented by the State, in that:

- (a) the complainant is a single witness, the trial court should have applied the cautionary rule, the appellant believes that the trial court not properly apply caution and the trial court misdirected itself in so doing;
- (b) the trial court erred in not considering the contradictions in the State case, specifically on the incident of rape as the complainant is the only witness in so far as that aspect is concerned;
- (c) the defence was not furnished with the DNA results despite the fact that the state alleges examination of the complainant by the doctor.

As a result, the argument in this regard is that the state failed to discharge the onus resting on it to prove its case beyond reasonable doubt.

[6] on sentence, the ground of appeal is that another court would find the sentence of ten years harsh, and it is submitted on behalf of the appellant that a lesser sentence would be appropriate and proportionate to the crime, taking into account the appellant's personal mitigating factors.

Factual background

[7] At the start of the proceedings, the state, in terms of section 212(4) and (8) of the Criminal Procedure Act 51 of 1977 (as amended), handed in the J88 medico – legal report, (J88) compiled by Dr. Newman from Hlabisa Hospital. The defence had no objection to the handing in of the medical report. It was then admitted as evidence and marked exhibit "A". According to the report, Dr. Newman examined the complainant on 1st January 2018 at Hlabisa Hospital at about 15h00. In the medical report, it is recorded that the complainant had a dusty skirt, and scratch marks on the inner thighs and calves on both sides, as well as on the right arm. These scratch marks were in the form of multiple longitudinal abrasions. On gynaecological examination, Dr. Newman observed

that the complainant's private parts had swelling and bruising. The medical report concluded that these findings were in keeping with the history of assault and forced penetrative vaginal sexual intercourse.

[8] The evidence of the complainant is that on 1 January 2018 at about 4:00 am the complainant left home with two of her friends, Z and M, the two friends were going home. The complainant was accompanying them to their home. ON their way they came across three boys, the complainant mentioned the name Sifundo, the appellant, being one of the three boys. The three boys came up to the three girls, the appellant specifically approached the complainant telling her that 'there's this child that I always wanted'. The appellant paid personal attention to the complainant, and together with the others, they walked in pairs. The appellant grabbed the complainant by the hand and continued walking with her up to a muddy place.

[9] At this muddy place, the appellant told the complainant that he was going to carry her across the muddy place. In reply, the complainant told the appellant not to carry her as she could walk on her own, however, the appellant proceeded to carry her anyway. From there on, they proceeded to walk. The appellant continued holding the complainant's hand, in the presence of the others. During this period, the complainant was under the impression that the appellant was just playing with her, as he had seen him before. The appellant had transported the complainant and other young women on two previous occasions to the traditional reed dance, an annual event hosted for virgin maidens at the Zulu King's Palace.

[10] Thereafter things took an ugly turn, the complainant testified that the appellant grabbed her on both hands. M noticed this and she told the appellant to 'leave the child alone.' The appellant told M to walk a bit, and that he and the complainant will remain behind. The appellant thereafter pushed the complainant into the bushes. At this stage one of the appellant's friends told the appellant to leave the child alone, the appellant took out a knife and chased them away. The complainant tried to run away but could not get far due to the long grass in the area, the appellant caught up with her.

[11] Once the appellant caught the complainant, he made her lie down on the grass , facing up , he then took out his penis and inserted it in the complainant's vagina, raping her in the process.

[12] The next witness called by the State is N N M (M). She confirmed that she was in the company of the complainant when they left the complainant's residence at about four o'clock in the morning of 1 January 2018, and on their way, they came across three boys. The three boys seemed to be passing them, then suddenly, they turned back and joined them, and they greeted them cordially. The boys thereafter walked with them. While walking, Sifundo, the appellant, grabbed the complainant's hand and kept on talking to her.

[13] M confirmed that the vicinity around which they encountered the appellant and his friends, was muddy as it was raining. She further confirmed that the appellant had taken it upon himself to carry the complainant across the muddy patch.

[14] Having passed the muddy area, the appellant kept on grabbing the complainant, refusing to let her go, despite the complainant's request to let go of her. What was happening between the appellant and the complainant at that stage did not raise alarm, as according to M, the complainant and the appellant were known to each other, and the impression created was that they were just playing.

[15] Soon thereafter, things took a turn for the worst when M heard that the appellant wanted the complainant to kiss him by force, a quarrel ensued, and the complainant demanded to be let go. Whilst walking along the road, they came across a place that had trees. M saw the appellant pulling the complainant into the bushes, M's sister Z requested the appellant to let go of the complainant. The appellant aggressively told her to get lost.

[16] According to M the appellant continued pulling the complainant into the bushes, and her sister Z was brave enough to follow them into the bushes. M did not follow them to the bushes because she was afraid. Seeing what was happening both M and Z left and went to report the incident to the complainant's brothers. The brothers came together with Z and M, they found the complainant in the bushes where the appellant had pulled her to.

[17] The third witness by the State is the brother of the complainant, Zwelakhwe Thulasizwe Ncube. Mr Ncube testified that on arrival at the scene, he was told by the complainant that she had been raped, and the name given to him by the complainant as the person who raped her was Sifundo. Mr Ncube found the complainant hysterical and

crying with her bottom clothing stained with blood. Thereafter, Mr Ncube together with the complainant and others embarked on a search for the appellant. The search ended up at the homestead of the appellant. The appellant was not at home but was called and he arrived later.

[18] When the appellant arrived at his homestead, Mr Ncube had already reported the incident to the elders at the appellant's homestead. Mr Ncube stated that when questioned by the family members about the incident, the appellant admitted to having committed the rape, the police were thereupon called, and the appellant was arrested.

[19] In his defence, the appellant testified that on 1 January 2018, he was in the company of his cousin, and another male friend. On their way from a tavern, they met the complainant and two other ladies, coming from the opposite direction. The appellant confirmed that he and the complainant knew each other as they had met on previous occasions. After greeting the three ladies, the appellant walked to the complainant her cell phone number, the appellant's phone went off, thus he was not able to get the number from the complainant.

[20] Thereafter, according to the appellant, he and the complainant greeted and hugged each other, walked along, and came across a muddy place. The appellant then requested to carry the complainant, he picked her up and carried her across the mud. The appellant and complainant broke away from the group and continued walking behind them. At some point both the appellant and the complainant stood on the road and continued talking, according to the appellant. He further stated that whilst standing along the road, the complainant informed him that her brothers were approaching them, upon that statement by the complainant the appellant immediately separated from her and walked away leaving the complainant along the road.

[21] The appellant denied that he raped the complainant, he also denied that he admitted to raping the complainant when asked about the rape at his homestead. He further denied going to the bush with the complainant, stating that the complainant was lying and that he never penetrated her vaginally.

Thubelihle Buthelezi, the appellant's cousin, testified in support of the defence case. He stated that he appellant did not rape the complainant and that the appellant did not pull the complainant into the bushes. According to Thubelihle Buthelezi, the appellant and the complainant were walking and talking, nothing appeared suspicious from what he

saw. He denied that the appellant had a knife and according to him, there was never a stage that appellant was chasing any of the girls whilst with them.

[22] The last witness called by the defence is Mandlenkosi Buthelezi, the appellant's uncle who was present at the homestead when the appellant is said to have admitted to raping the complainant. Mandlenkosi Buthelezi acknowledged that the complainant's family came to the homestead to report the rape allegedly committed by the appellant. The appellant was not at home at the time when the complainant's family arrived at the homestead, he had to be called to come home. When he arrived home, the appellant was asked about raping the complainant, the response was that he did not do it, thus denying that he raped the complainant. Mandlenkosi Buthelezi denied that the appellant admitted to raping the complainant. Mandlenkosi Buthelezi denied that the appellant admitted to raping the complainant. The defence then closed its case.

Issues to be determined

[23] The fundamental question to be determined is whether the state has proven, that the appellant is the person who raped the complainant, beyond reasonable doubt. There are two significant issues in this regard, one being the reliability of the complainant's version considering that he is a single witness on the issue of rape. The second issue is the sufficiency of the evidence presented by the state which points to the appellant as the perpetrator who committed the crime of rape on the complainant.

Legal framework

[24] The state relied on the evidence of a single witness, the complainant, who was the only witness testifying on the actual act of rape allegedly committed by the appellant. In evaluating the evidence of a single witness section 208 of the Criminal Procedure Act 51 of 1977 (the Act) provides that an accused person can be convicted of any offence on the single evidence of a competent witness. In the matter of *Stevens v S*¹ it is stated that the cautionary rule is:

'a well-established judicial practice that the evidence of a single witness should be approached with caution.'

¹ *Stevens v S* [2005] 1 ALL SA 1 (SCA) para [17].

[25] In applying this judicial practise, courts have set out an approach on how the cautionary rule should be applied, in this regard, *S v Sauls*² provides that:

“There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness... 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, even though there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told.”

It is critical to note that the exercise of caution must not be allowed to displace the exercise of common sense. In this regard see *S v Banana*.³

Analysis on conviction

[26] On behalf of the appellant, it was argued that the learned Regional Magistrate should have approached the evidence of the complainant with caution on the basis that the complainant was a single witness to the actual act of rape. This begs the question as to whether the cautionary rule was applied by the learned Regional Magistrate in evaluating the evidence presented before the court a quo. The point of departure from the appellant's submission was that the learned Regional Magistrate failed to approach the complainant's evidence with caution. This proposition is not supported by what is recorded in the judgment of the Learned Regional Magistrate. In the matter, acknowledged that it was only the complainant who implicated the appellant.

[27] In the judgment it is stated further that the appellant was a child under the age of 18, this the evidence of the complainant attracted the cautionary rule, as such it had to be approached with great caution, and the Learned Regional Magistrate further stated that before convicting on the evidence of the single witness, the court must be satisfied that the witness in question is an honest witness who testified clearly and credibly in all material respects. This is what is stated in *S v Sauls*, as quoted above, as the correct approach in dealing with the evidence of a single witness.

[28] The complainant was very clear on what occurred on the day, her evidence was straightforward, and she stuck to her version throughout when testifying before the court

² *S v Sauls and others* 1981 (3) 172 (A) at 180E-G.

³ 2000 (2) SACR 1 (ZSC); 2000 (3) SA 885 (ZS).

a quo and she was unshaken. ON the issue of sexual intercourse, the complainant remained unshaken in that, the appellant took her to the bush and then inserted his penis into her vagina.

The Learned Regional Magistrate found that the evidence of the complainant that she was sexually penetrated on the day in question was corroborated by the medical evidence. I am in agreement with the findings of the learned Regional Magistrate that indeed the complainant was sexually penetrated on the day in question, and I can find no misdirection on the par of the learned Regional Magistrate in arriving at this conclusion, based on the evidence presented before the court aquo.

[29] In line with the principle enunciated in *S v Chabalala*⁴ that the court required to evaluate all the elements of the evidence that point towards the guilt of the accused against all those that are indicative of his innocence, looking at probabilities and improbabilities on both sides, the learned Regional Magistrate embarked on evaluating the evidence presented to establish if it was the appellant who sexually penetrated the complainant by inserting his penis in her vagina without her consent.

[30] The learned Regional Magistrate reasoned that, at some stage, the complainant and the appellant were holding hands, the appellant even lifted the complainant over a muddy place, happy and fine. Suddenly, things changed, the appellant pulled the complainant to the bushes. Attempts to rescue the complainant were warded off by the appellant, who was at this stage carrying a knife and was aggressive.

[31] The learned Regional Magistrate stated that it was at this stage that those in the company of the complainant left, going to the home of the complainant, they came back with the brothers of the complainant. The complainant was found in the bushes, she immediately informed her brothers that she was raped by Sifundo. The appellant denied that he raped the complainant. His version was that he only left when the brothers came while he was standing on the road and the appellant. This was found by the learned Regional Magistrate to be inconsistent with the factors that are common cause, stating that if the appellant was indeed standing on the road with the complainant, why then would he suddenly leave when the complainant's brothers were approaching.

[32] This court accepts that the evidence before the Learned Regional Magistrate pointed to the appellant as the person who raped the complainant. The contradictions

⁴ *S v Chabalala* 2003 (1) SACR 134 (SCA) para 15.

relating to whether the appellant had a knife or not are not material to the extent that the Magistrate misdirected herself in her findings in evidence. It has been held that, where there has been no misdirection on facts, a court of appeal will assume that the court *aquo's* findings are correct and will accept the findings unless it is convinced that the trial court is clearly wrong.⁵

Analysis on sentence

[33] With regards to the appeal on sentence, the annexure to the charge sheet provided that, section 51(2) and Part III of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 was applicable in that, the appellant upon a conviction on a charge of rape, would attract the imposition of the prescribed minimum sentence, which in the case of the appellant being the first time offender, would be imprisonment for a period of not less than ten years, unless the appellant could show the existence of substantial and compelling circumstances which warrant deviation from the prescribed minimum sentence of ten years.

[34] On the first day of the trial, the appellant was represented, and he acknowledged that he understood the implications of the minimum sentence he was facing should he be convicted, he also confirmed that he understood that he would be required to place to the satisfaction of the trial court substantial and compelling circumstances to warrant the imposition of a lesser sentence.

[35] The court *aquo* imposed the prescribed minimum sentence of ten years. Section 51(3)(a) of the Criminal Law Amendment Act 105 of 1997 as amended, provides that:

“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 circumstances, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence.”

Section 51(3)(aA) of Act 105 of 1997 goes further by listing instances where the court is precluded from considering such as constituting substantial and compelling circumstances justifying the imposition of a lesser sentence. According to this provision,

⁵ *R v Dhlumayo and others* 1948 (2) SA 677 (A) at 705 – 706.

when imposing a sentence in a rape matter, an apparent lack of physical injuries to the complainant shall not constitute substantial and compelling circumstances for imposition of a lesser sentence. This also applies to a situation where there was a relationship between the accused and the complainant prior to the offence being committed.

[34] It is on the basis of this legislative provision that the court *aquo* imposed a sentence of 10 years. It is trite that the imposition of a sentence is basically a matter of discretion conferred upon the trial court. The trial court is also empowered in terms of section 51 of the Criminal Law Amendment Act 105 of 1997, to exercise a discretion in imposing prescribed minimum sentences for certain serious offences, rape being one of them.

[35] It is so that an appellate court cannot in the absence of material misdirection by the trial court, impose its own sentence, or substitute the sentence imposed by the trial court solely because it prefers its own sentence. The trial court's decision is not absolute, any material misdirection by the trial court will vitiate its exercise of the said discretion. Where there is material misdirection by trial court, the appellate court may be justified in imposing its own sentence if the trial court's sentence is disturbingly inappropriate or shocking.⁶

[36] In mitigation, the appellant's counsel submitted that the trial court did not take into account the appellant's personal circumstances, it was also submitted that the trial court did not take into account the fact that despite the seriousness of the act of rape, the complainant did not suffer very serious injuries during the rape incident.

[37] In *Maila v S*⁷, where it was submitted that the complainant was not physically injured, as the matter was not one of those brutal cases, the Supreme Court of Appeal stated that, apart from this minimising the traumatic effects of rape on any victim and more so a child, rape always causes its victims severe harm, irrespective of the presence of physical injuries or lack thereof. The appellant is thus precluded from relying on the lack of physical injuries as one of the grounds for substantial and compelling considerations. As stated above, the legislature in terms of section 51(3)(aA) of Act 105 of 1997 specifically provides that, because the complainant had suffered no physical injuries during rape, such could not be considered as a compelling and substantial

⁶ S v Malgas 2001 (1) SACR 469 (SCA) para 12

⁷ Maila v S 429/2022 [2023] ZASCA 3 (23 January 2023)

circumstance, this the lack of physical injuries to the complainant is not a ground for consideration on whether the appellant should get a lesser sentence than the prescribed minimum sentence of 10 years.

[38] In aggravation, the state submitted that rape is a humiliating, degrading and brutal invasion of the dignity and person of the victim. Despite the fact that the appellant lifted the complainant, carrying her over the muddy area, soon thereafter he forcefully dragged the complainant to the bushes, using violence to ward off any effort to rescue the complainant. The appellant, the state further submitted, was very aggressive during the rape attack, and the complainant was left bruised. It is thus not correct that the complainant suffered no physical serious injuries.

[39] In assessing the appropriate sentence, the learned Regional Magistrate referred to a well-known case of *S v Rabie*⁸ where it was stated that:

“Punishment should fit the crime as well as the criminal and it must be fair to society and be blended with a certain measure of mercy according to the circumstances of the case.”

The court *aquo* acknowledged that, in relation to personal circumstances of the appellant, his age, that he is the first-time offender, and that the offence was not planned, counted in favour of appellant.

[40] For the act of rape committed by the appellant, the community expects the courts to impose a heavy sentence to deter the appellant from being aggressive and then commit rape. In *S v Ncheche*⁹ it was stated that:

“The legislature and the community at large expect the court to punish rapists very severely.”

The court further stated that:

“Rape is an appalling and utterly outrageous crime, gaining nothing of worth for the perpetrator, and inflicting terrible and horrific suffering and outrage on the victim

⁸ *S v Rabie* 1975(4) SA 855

⁹ *S v Ncheche* (2005 (2) SA 386 (WLD)

and her family.’

[41] The court aquo, took into account that the appellant used violence to commit the crime, and was aggressive when he was told to stop what he was doing. The trial court also took into account that the complainant was a virgin when she got raped and that throughout the trial, the appellant showed no sign of being remorseful for his actions. The trial court concluded that there were no substantial and compelling factors that warranted deviation from the prescribed minimum sentence of 10 years. A sentence of 10 years was therefore imposed on the appellant.

[42] It has been lamented that the crime of rape remains the single greatest violation of women’s sexuality, the physical brutality meted out by the perpetrators goes to the core of women’s subordination within the communities they live in¹⁰.

[43] A clear and unambiguous message should be sent out that the courts will not shy away from prescribing the minimum sentences where there are no grounds for deviation as was correctly found by the trial court. The complainant was known to the appellant, despite this, the appellant had no mercy, got aggressive and raped the complainant. This is a heinous violation of the dignity of the complainant. The appellant deserved no less a sentence than that imposed by the trial court. I am satisfied that the sentence is an appropriate sentence that does not require interference by this court.

[44] I accordingly make the following order:

1. The appeal against conviction and sentence is dismissed.
2. The conviction and sentence by the trial court is confirmed.

Ntlokwana AJ

Hadebe J: I agree, it is so order.

APPEARANCE DETAILS:

¹⁰ Carmichele v Minister of Safety and Security and another 2001 (4) 938 (CC) para 29

For the Appellant:	Ms T Cetera
Instructed by:	Legal – Aid South Africa
For the Defendant:	Mr J Khathi
Instructed by:	Director of Public Prosecutions
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Judgment delivered on:	16 February 2024