



**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: A103/2021

In the matter between:

ZAMANI EMMANUEL THANTSI

Appellant

and

THE STATE

Respondent

CORAM: MATHEBULA, J *et* RAMOS, AJ

HEARD ON: 24 JANUARY 2022

JUDGMENT BY: MATHEBULA, J

DELIVERED ON: The judgment was handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII on 01 April 2022. The date and time for hand-down is deemed to be 01 April 2022 at 10H00.

Introduction

- [1] The appellant was convicted in the Regional Court, Bloemfontein on one count of rape and sentenced to life imprisonment. The charge arose out of an incident in which the appellant and the complainant had sexual intercourse. The central question is whether that act was consensual or not. Given the sentence imposed on the appellant, this appeal is before us as of right.

Grounds of appeal

- [2] As far as the conviction is concerned the grounds of appeal are: -

1. The trial court erred in finding that the appellant was guilty beyond reasonable doubt.
2. The trial court erred in finding that state witnesses were credible witnesses and that there were no material contradictions in their testimonies, and
3. The trial court erred in not accepting the version of the appellant and thus making a negative inference against him.

- [3] On the question of sentence, the main ground of appeal is that the trial court incorrectly found that there were no substantial and compelling circumstances present to deviate from imposing minimum sentence. The appellant was not a first offender, but a substantial period of time has passed since the last conviction. The trial court, it was argued, did not fully canvas or mention all mitigating factors and did not cumulatively consider them as substantial and compelling circumstances.

The facts

- [4] The complainant testified that she was in a love relationship with the appellant which had ended about two (2) weeks prior to the incident. On 21 June 2015, she visited a local tavern with her sibling and a friend. The appellant arrived with his friends and approached her. He coerced her to leave with him and forcefully stated that if she does not, he will embarrass

her. She obliged because she was afraid of him. It appears that they (together with his friends) club hopped until early the next morning. Thereafter they retreated to his parental home. The appellant was staying in a separate room detached from the main house. They arrived at around 06H00 in the morning. Two (2) hours later, his friends arrived looking for him and he left with them. The complainant, who was left behind, spent the whole day with his mother and even assisted her to prepare family meals. During this period, she even changed into his more comfortable clothes.

- [5] His mother told her that the appellant had brought home another woman earlier in the week. It appears that this did not sit comfortably with the complainant. The appellant eventually returned and he found her in his room watching television. He had a beer in hand and attempted to kiss her. She was unwilling because she wanted an explanation about the woman she was told about. During the four (4) months that they have been together, the relationship was marred by infidelity on the part of the appellant.
- [6] The tiff ensued and she tried to leave the room, but was blocked by the appellant. There and there the appellant started assaulting her with open hands. He took out a stick that was under the bed and assaulted her with it. The aforesaid stick is depicted on Photo 5 and 6 of Exhibit "A". They fell and the appellant picked up a bottle and assaulted her several times with it. Thereafter he took a hammer and continued the assault on her. This is also depicted on Photo 4 of Exhibit "A".
- [7] After the assault the appellant demanded sexual intercourse from her. She refused decisively stating how could she be expected to have sexual intercourse after sustaining injuries. He was also swearing at her. In the process the bottle used to assault her was broken. The appellant took hold of a broken bottle and used it to threaten her to have sexual intercourse with him. He even assisted her to undress because she was injured. Thereafter he proceeded to have sexual intercourse with her. When he was done, he lit a cigarette and after smoking they slept. She observed that he was fast asleep when she opened the door and went straight to the police station to

report the crime of rape on her. It will appear that the police station is not far from where they were.

- [8] Cross examination revealed that the reason why the complainant did not tell her sibling and his friend about the evasive measures from the appellant is because she wanted to avoid any altercation. She reiterated that she was forced to go to the appellant's parental home. His mother found her in his bed and she did not divulge her ordeal. A question was posed to her why she did not leave during the absence of the appellant. Her response was that she did not have the taxi fare. Her handbag was left with her sibling. It was pointed out to her that her prolonged stay at the appellant's home was indicative of her willingness to be there. She disagreed and asserted that it was far from her home thus she could not walk such a long distance.
- [9] The evidence of the arresting officer is briefly as follows. When he met the complainant she was emotional and told him that she has been assaulted and raped by her boyfriend. He did not take cognisance of any external injuries. She took them to his place where he was arrested. The evidence of the nursing sister was largely based on the J88 admitted as part of the record. Her injuries are well documented and requires no further discussion.
- [10] The appellant, on the other hand, alleged a different set of facts. He was staying together with the complainant who was only visiting her parental home. On 20 June 2015, he received a call from the complainant to come fetch her from Wiped Inn tavern. He did so. Immediately after their arrival at home they engaged in sexual intercourse. Around 08H00 the parole officers arrived and thereafter he went to his vegetable market. He returned home around 20H00.
- [11] He ate his food that the complainant had fetched from the main house. Thereafter they engaged in sexual intercourse for the second time that day. Once they were done, the complainant started asking him about his multitude affairs. Seemingly triggered by what his mother told her earlier. The verbal attack escalated rapidly and culminated in her slapping him with

open hands. She hit him so hard that he temporarily lost his consciousness. His evidence is to the effect that the complainant was the aggressor.

- [12] According to the appellant, the fight ensued and the complainant fell to the ground. That is how she sustained injuries on her person. He vehemently denied assaulting her with a stick and hammer as alleged by the complainant. The only injury he was aware of, occurred when she hit the table.
- [13] On the strength of this evidence the trial court found that there was enough reliable and credible evidence to convict the appellant on the charge of rape as defined in Part 1 of Schedule 2. The main findings on the facts are that the appellant forcefully took the complainant who was his ex-girlfriend to his home. Once there he demanded sexual intercourse and when she refused, he assaulted her. As a result, she gave in and he proceeded to rape her.

Legal principles

- [14] An appeal is essentially a re-trial on the record and its ambit is limited to the issues raised by the appellant. It is trite that the factual and credibility findings made by the trial court are normally accepted unless there are demonstrable and material misdirection. The presumption is that they are correct and will only be disregarded if the recorded evidence shows them to be clearly wrong.¹
- [15] The learned magistrate correctly referred to the decided cases when he was dealing with the principles relating to evidence of a single witness and approach to evaluating evidence in general. The learned magistrate quoted and relied on **S v Singh** where the court stated that in order to resolve factual dispute, other than the merits and demerits of the state and defence witnesses, the court must consider the probabilities of the case.²

¹ S v Hadebe and Others 1997 (2) SACR 641 (SCA) at 645E-F.

² 1975 (1) SA 227 (N) at 228G-H.

[16] The modern approach often quoted and applied in our courts was well articulated in **S v Chabalala** by Heher AJA (as he then was) writing for the undivided bench with reference to **S v Aswegen 2001 (2) SACR 97 (SCA)** where he said the following: -

“[15] The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt. The result may prove that one 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 an *ex post facto* determination and a trial court (and counsel) should avoid the temptation to latch on to one (apparently) obvious aspect without assessing it in the context of the full picture presented in evidence. Once that approach is applied to the evidence in the present matter the solution becomes clear.”³

Discussion

[17] I hold a firm view that there are misconceptions of evidence by the trial court. The principle is clear that even if the trial court has accepted the complainant's evidence, the court must still look at the evidence of the appellant. What stands out is that reliable evidence must be weighed against the one that is false. The court should also not lose sight of any independently verifiable evidence. In this matter there is a J88 and photo album compiled by the police. What is of utmost importance is that the conspectus of evidence is required. That does not absolve the state of onus on the case in its entirety or particular issue. The complainant denied that

³ 2003 (1) SACR 134 (SCA).

she was in a love relationship with the appellant. It had ended some two (2) weeks prior to the incident. On the J88 it was recorded that she had the last sexual intercourse with the same suspect (meaning the appellant) on 20 June 2015. That is a mere one (1) day before the incident. The nursing sister even recorded that her assailant was her boyfriend, meaning the appellant. This in my view, is consistent, with the evidence of the appellant that they were still in a love relationship.

- [18] The other point is that the altercation was triggered by her insistence that he must come clean on the affair with the other woman who was there earlier in the week. If they were no longer in a love relationship, why will she still bother about his many affairs (if any). When the complainant reported the incident of rape to Constable Rammogo, she stated that the appellant was her boyfriend. This is also boldly written in her statement made for the police. It is improbable that both the nursing sister and the police officer will make the same mistake in the circumstances. On the probabilities, the learned magistrate was clearly wrong to hold that they were no longer in a love relationship at the time of the incident. This finding is not sustained by the facts.
- [19] Another finding was that the appellant forcibly removed the complainant from the tavern to his parental home. The main evidence relied upon is that the appellant threatened to undress and embarrass the complainant in-front of the other patrons at the tavern. There is no suggestion that he was armed or did anything to pull through this stunt. Assuming indeed that he made such threats. It is unclear on the evidence that indeed he was even capable to do anything to her.
- [20] The complainant simply alleged that she left with him to avoid altercation with her sibling. It is puzzling that if she was unwilling to go with him and could have been afforded protection by her sibling, she would forgo that for a false peace. The evidence on record shows that together with his friends they visited several places. At no stage did she hint to any of them of her predicament nor make a run for it. The appellant's mother found her under

his blankets and she did not report anything untoward. The appellant was away for the whole day and during this time she was at his home with her mother. I am mindful of the fact that the police station is only a stone throw away from his parental home. She even assisted her to prepare lunch. When all was done, she retreated to his room to watch television. The indications are that she was going to spend another night there. This somehow tally with the evidence of the appellant that she was somehow staying there. On this basis, I hold the view that the learned magistrate was clearly wrong on the facts.

- [21] I now turn to another error committed by the learned magistrate. The learned magistrate concluded that the appellant assaulted the complainant after she refused to have sexual intercourse with him. Therefore, the assault was to coerce her to give in to his demands. The relevant part of the record before the assault or fight started read as follows: -

<u>“MS NKHATI:</u>	He then wanted me to kiss him, I then refused and pushed him away.
<u>PROSECUTOR:</u>	Yes, ... [recording extremely slow].
<u>MS NKHATI:</u>	I refused to sleep with him, Your Worship, demanding something else from him about the girl that he had brought on Tuesday, whom was crying in his room, I demanded to know who she was from him.” ⁴

- [22] Having scrutinised the record I could not find anywhere showing his request or demand for sexual intercourse. There is no evidence that he wanted to sleep with her. The entire conversation revolved around the woman who was there and that is what ignited the fight. I also need to mention that the injuries which the complainant sustained are not consistent with those that could have been caused by repeated assault with dangerous weapons like a hammer and/or stick. These are well documented in the J88. They are consistent with the injuries sustained in a scuffle or as a result of open

⁴ Page 35 of the Transcribed Record at lines 10 – 16.

hands. Her injuries were not even visible to the police officer who went with her to arrest the appellant.

[23] It is common cause that the appellant and complainant engaged in sexual intercourse on the day in question. The question is whether it was consensual or not. What is of concern is that it took place after they had a fierce altercation. She even told him that how can they be intimate after she had been injured. The uncontested evidence is that he used a broken bottle to subdue her in order to have sexual intercourse with him. Immediately after the sexual intercourse she went to the police station to report him. On the probabilities that demonstrate her consistency that it was against her consent. To that extent I am satisfied that the respondent has proved the crime of rape against the appellant beyond reasonable doubt.

[24] This brings me to the question of sentence. The principles relating to the role of the court of appeal in matters pertaining to sentencing are well known and need no restatement.⁵ Life imprisonment is the capital punishment in the penal system of the Republic. It stands to reason that it must not be lightly imposed. Clearly as I have discussed in preceding paragraphs the learned magistrate misunderstood the facts. Therefore, the punishment imposed is not justifiable on the facts. The main point is that on the facts, as this court has found, the offence committed by the appellant does not warrant the sentence imposed by the learned magistrate. The offence is within the purview of section 51(2) of Act 105 of 1997. The prescribed minimum sentence of ten (10) years must ordinarily be imposed. Therefore, I am at liberty to interfere with it.

[25] The learned magistrate alluded to the basic triad of sentencing considerations. The appellant is a fairly young person with no children. He had a previous conviction which was committed about seven (7) years before this incident. He was convicted of having sexual intercourse with a minor. Apparently at the time of this incident he was still on parole. It is my considered opinion that long term imprisonment will suffice. I am mindful of

⁵ S v Pillay 1977 (4) SA 531 (A) at 535E-F.

the fact that the purpose of the sentence is not to break the offender but also to rehabilitate him. In the substituted sentence, I have taken cognisance of the fact that he had been incarcerated for two (2) years prior to conviction.

[26] I make the following order: -

26.1. The appeal is dismissed.

26.2. The sentence of life imprisonment is substituted with "Ten (10) years imprisonment *ante* dated to 11 August 2017".

M.A. MATHEBULA, J

I concur.

A. RAMOS, AJ

On behalf of appellant:
Instructed by:

Mr. P. Mokoena
Justice Centre
Bloemfontein

On behalf of respondent:
Instructed by:

Adv. B.G. Claassens
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/TKwapa