



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: A277/2017

In the matter between

V NCANGO

Appellant

and

THE STATE

Respondent

CORAM: REINDERS, J et NULLIAH AJ

HEARD ON: 5 FEBRUARY 2018

DELIVERED ON: 14 JUNE 2018

JUDGMENT BY: NULLIAH, AJ

INTRODUCTION

[1] This is an appeal against both conviction and sentence on a charge of rape read with the provisions of section 51(2) of the Criminal Law Amendment Act 105 of 1997. The accused, now the appellant in this matter, was initially arraigned on a charge of rape in the Welkom Regional Court and was ultimately convicted on the veracity of the testimony of the complainant. A custodial sentence of ten (10) years was subsequently imposed in terms of the minimum sentence legislation as embodied in section 51(2) of the Criminal Law Amendment Act 105 of 1997. Leave to appeal against both conviction and sentence was granted on the 15 September 2016.

[2] The appeal as against conviction has as its premise, the following:

- The court erred in finding that the State had proved its case beyond reasonable doubt;
- The court erred in finding that the complainant was a credible witness in light of the contradictions in her testimony;
- The court erred in not accepting the version of the appellant and making a negative finding against his evidence and that of his defence witness.

[3] The appeal against sentence is premised on the following:

- The trial court erred in overemphasising the aggravating factors with little or no consideration to the mitigating factors;

- The trial court erred in that several mitigating factors were not properly considered;
- The trial court erred in not finding the existence of substantial and compelling circumstances.

FACTUAL BACKGROUND

[4] An account of the incident leading to the appellant's arraignment was related by the complainant, V. A. B.. During the late hours of the night on the 27th December 2015, she visited a place called 'The Lounge', accompanied by her friends and her brother. She consumed four Storm quart ciders that night and was moderately drunk. The appellant, a friend of her brother and whom she regarded as an older brother was also present and was involved in a fight outside 'The Lounge'. She reprimanded him and went back inside. She later saw him in the early hours of the next morning at another tavern called 'Supa's Place'. He was seated in his car accompanied by two others and he called out to her. She proceeded towards his vehicle and sat in the back seat. One of the occupants immediately left the vehicle and the appellant then asked the second occupant to go and buy liquor. Left alone with the appellant, she requested that he take her home as she was feeling tired and sleepy. On route, the appellant asked her if she was going to kiss him. She refused as she had a boyfriend and she and the appellant were not involved in a romantic relationship. The appellant threatened to take her back to 'Supa's Place' to which she readily agreed. While the appellant was driving, she fell asleep in the back seat and awoke to find the appellant on top of her, busy raping her. She was unaware of where they were or how they had gotten there. She only observed water, trees and bushes around her.

- [5] She pushed him off her and wiped her vagina with a piece of tissue that she found in the car. She told the appellant that she was going to take the tissue with her to the police and report him. The appellant grabbed the tissue from her and stomped it with his shoes. He bragged that her case would not be attended to as she was drunk and his friend 'Dumi' was the police officer on duty. The appellant then drove her to her house and on route they passed the mother of the appellant. She wanted to inform his mother of what had happened but the appellant refused to stop the vehicle and drove onwards towards her home. They also met her brother on the street on their way to her home. After the appellant left her and, upon entering her home, she immediately reported the incident to her brother and proceeded to lay a charge. She went to Bongani Hospital where she was treated. She sustained no physical injuries.
- [6] According to the complainant, she was never involved in a romantic relationship with the appellant. She denied asking the appellant for lift from 'The Lounge' to 'Supa's Place'. She maintained that she sat in the back seat of the appellant's vehicle when they left 'Supa's Place'. She admitted that she could not recall the precise nature of the conversation between herself and the appellant other than it was a general conversation. However, she was adamant that they never conversed about having sexual intercourse. She denied undressing herself, she was also unaware at which stage she was undressed and she awoke to find herself undressed.
- [7] The brother of the complainant, P. D. B., the first report in this matter, confirmed that the complainant was seated in the car of the appellant

when he arrived at his home and that she did not vacate the vehicle immediately. The appellant has been his friend since school and they have known each other for more than ten years. The complainant appeared to be of sober disposition and did not inform him of the rape immediately upon seeing him. The complainant appeared unhappy when she entered the house approximately ten minutes later and reported to him that she had been raped by the appellant.

- [8] She informed him that she had asked the appellant for a lift home and whilst travelling with him, the appellant had asked her to kiss him. She refused to kiss him and the appellant had told her to get out of his car. She had fallen asleep and she awoke to find the appellant was busy raping her in a veld somewhere. She further informed her brother that upon threatening to report the appellant to the police, she was told that he knew a certain 'Dumi' in the police force and he would not be arrested. She further informed him that they had also driven past the appellant's mother on their way home but the appellant refused to stop the vehicle. She denied being in a relationship with the appellant. He was unaware of any relationship that existed between the appellant and complainant nor would he have objected if indeed one existed. He instructed the complainant to lay a charge with the police.
- [9] The J88 was handed in by agreement between the parties and accepted as evidence by the trial court, confirming that no injuries were sustained by the complainant on her private parts. The application brought in terms of section 174 of Act 51 of 1977 was refused.

- [10] On his own version, the appellant admitted to having consensual sexual intercourse with the complainant. He knew the complainant for approximately ten years and they were involved in a romantic relationship on and off for approximately six to seven years. They had engaged in sexual intercourse many times notwithstanding the fact she had a boyfriend. On the night of the 27th, he refused to give the complainant a lift to 'Supa's Place' and informed her that he was not going there. He further denied being involved in a fight at 'The Lounge'. He later testified that he headed for 'Supa's Place' alone as he wanted to move on his own and he and the complainant had had an altercation about her boyfriend. While at 'Supa's Place', the complainant approached him and his two friends whilst they were seated in his car and chatted with them. He had met his friends, Mbulelo and Skosana at 'Supa's Place'. She got inside and sat in the front seat and they engaged in a general conversation. She did not appear to be drunk.
- [11] Upon both his friends leaving the vehicle, they left for a graveyard to go and have sexual intercourse and were conversing. On route, they stopped at his place because the complainant was feeling cold and wanted a warm top. They kissed and the complainant undressed herself and they engaged in consensual sexual intercourse in the front passenger seat. After intercourse, she wanted to wipe herself off and he gave her some toilet paper. They returned to 'Supa's Place', bought more beer and he then took the complainant home. They met the complainant's brother at her house and talked to him there. The complainant was awake throughout the night and appeared to be in control of her senses and capable of making her own decisions. He could not fathom why the complainant would accuse him of rape.

- [12] The second defence witness testified that he knew the appellant since 2014. He is a barman and served the appellant regularly. They often went out together. He was aware of the love affair between the complainant and the appellant and the appellant often borrowed the keys to his room to have sexual intercourse. On the night of the incident, the complainant had requested his room keys but he did not have it. He was unable to account for the appellant omitting to mention this in his testimony. He initially stated that he left 'The Lounge' for 'Supa's Place' together with the appellant. He later maintained that the appellant left alone and he met the appellant along the way and they arrived at 'Supa's Place' together.
- [13] He was seated in the vehicle at 'Supa's Place' with the appellant and Mbulelo when the complainant approached. The complainant was drunk but she knew what she was doing and was talking to them. Upon her entering the car, she and the appellant started kissing and he reprimanded them. He testified that the complainant and the appellant would always hug and kiss each other, even in front of her siblings. He and Mbulelo stepped out of the vehicle to buy liquor together and upon his return from buying alcohol, the appellant and complainant drove off. He confirmed that he was neither Mbulelo nor Skosana. However, he was with the appellant that morning and he had no idea why he was not mentioned.

GROUND OF APPEAL

- [14] The fundamental question that arises on appeal in respect of conviction is whether the state had proven its case beyond a reasonable doubt.

- [15] The central thrust of the appellant's challenge apropos the conviction lies against the trial court's accession of single witness testimony that was saturated with contradictions and improbabilities notwithstanding the applicable cautionary rule.
- [16] The issue for determination on appeal apropos sentence is whether the trial court exercised its discretion properly and judicially in imposing an effective term of ten (10) years imprisonment.
- [17] The central thrust of the appellant's challenge apropos sentence lies against the imposition of a strikingly inappropriate minimum sentence notwithstanding the presence of substantial and compelling circumstances.

EVALUATION

- [18] The appellant essentially placed reliance on the failure of the trial court to properly apply the cautionary rule in the evaluation of the evidence of the complainant who was a single witness. The appellant contended that the testimony of the complainant was perforated with contradictions, inconsistencies and improbabilities, some of which were clearly omitted from the judgment of the trial court. The appellant further contended that the trial court erred in finding the contradictions and improbabilities innate in the testimony of the complainant inconsequential; it erred in finding the testimony of the complainant satisfactory because she was honest and possessed no reason to falsely implicate the appellant and it erred in finding that the second state witness corroborated the evidence of

the complainant. It was the appellant's contention that the trial court's finding on credibility was not correct and that the copious contradictions and improbabilities between the complainant and the second state witness created the impression that the evidence was fabricated. Notwithstanding the appellant's concession that his testimony was not absent any contradictions, the appellant maintained that they were not material to the extent that it rendered his version not reasonably possibly true.

[19] The respondent supported both the conviction and sentence and contended that the trial court neither erred in its verdict nor misdirected itself in meting out sentence. It was patently alive to the cautionary rule in its assessment of the contradictions and probabilities inherent in the complainant's testimony and treated the complainant's evidence with the requisite caution and circumspection. The trial court gave a carefully reasoned and deliberative judgment and was correctly persuaded with the evidence of the complainant.

[20] It is well established that the guilt of an accused must be proven beyond reasonable doubt.¹ It is also putative that the state bears the onus of proving the guilt of the accused beyond a reasonable doubt. There exists no burden on the accused to prove his version or his innocence. The accused's version only has to be reasonable possibly true.²

¹ *S v V 2000 (1) SASV 453 (SCA)*

² *S v Sithole and Others 1999(1) SACR 585 (W); S v Van Der Meyden 1999 (2) SASV 79(W) and S v Mattioda 1973 (1) PH H 24.*

- [21] It is also accepted that a court of appeal will be extremely reticent to interfere with the credibility findings of the trial court as well as the evaluation of the oral testimony, given the better position of the trial court in hearing and appraising the evidence of the witnesses. It will however, interfere if it is convinced that the credibility findings made by the trial court are patently incorrect.³
- [22] It is further trite law that the evidence of a single witness must be approached and evaluated with the necessary caution.⁴ However, the exercise of such caution should and ought not to displace the exercise of common sense.⁵ All the contradictions, inconsistencies and probabilities must be weighed up to arrive at a conclusion that the State has proven its case beyond a reasonable doubt. It is apparent from the evaluation of the evidence presented that the trial court was indeed alive to the fact that this was single witness testimony in respect of the rape and was alert to the dangers attendant thereto. The record indeed evinces that the evidence of the complainant was properly scrutinised and that the cautionary rule was properly applied in the appraisal of her evidence as a single witness.
- [23] The trial court, in applying the cautionary rule correctly found the evidence of the complainant to be satisfactory in all material respects. A conspectus of the record reveals that the complainant indeed presented a coherent and cogent account of events. Her evidence was forthcoming and there were no attempts at evasion. She did not unnecessarily embellish even when provided with the

³ *S v Mkhohle* 1990 (1) SACR 92 at 100 e.

⁴ *S v M* 1992(2) SASV 188 (W) op 194 h-l; *J v S All SA* 1998 (2) SA 267 (A).

⁵ *S v Aardman and Ander* 1968 (3) SA 339 (A).

opportunity to do so and indeed had no reason to falsely incriminate the appellant. Notwithstanding the contradiction that existed between her testimony and that of the second state witness or any omission in her testimony, the trial court correctly found it to be immaterial having regard to the totality of the evidence tendered.

[24] The complainant readily admitted to being under the influence of alcohol and considered herself to be moderately drunk. It is noteworthy that her state of sobriety at that stage was indeed corroborated by the second defence witness. She admitted to that she could not recall all aspects of the conversation and ascribed this to the general nature of the conversation. This was also corroborated by the appellant who described the conversation as general. She readily admitted that she was tired and sleepy and fell asleep in the back seat of the car. This is consistent with her version that she had been awake the entire night and had consumed only alcohol, having eaten only the night before. The complainant however, remained resolute in her testimony that she was neither involved in a relationship nor did she consent to having sexual intercourse with the appellant.

[25] Notwithstanding her state of sobriety, her narration of the incident evinces a vivid recollection of what transpired. Her evidence reveals that the incident occurred in the back seat of the appellant's car which was not challenged by the appellant and who later testified that they engaged in sexual intercourse in the front seat of his car. Her observations that there were trees, bushes and water around them is consistent with the contents of the J88 and the version of the second state witness that the incident happened in the veld somewhere. The absence of abrasions at the back of her legs as

illustrated in the J88 is consistent with her testimony that the incident happened in the vehicle and not in the veld. This is further corroborated by the appellant who testified that they engaged in sexual intercourse in the vehicle which was parked in a graveyard, *albeit* on his version it was consensual and occurred in the front seat of his vehicle.

[26] In as much as there exists a contradiction in the testimony of the two state witnesses as to where the appellant threatened to drop off the complainant after her refusal to kiss him, the trial court properly found it immaterial having regard to the totality of the evidence. It patently suggests the absence of collusion between the state witnesses as contended by the appellant. The record of proceedings clearly reflects the consistency in the testimony of both state witnesses in that the complainant informed her brother of a certain 'Dumi', the 'police official' that would ensure her case would not be attended to. That the complainant was emotional when she entered her house and spoke to her brother was indeed corroborated by her brother. Given the nature and duration of the friendship between the brother and the appellant, it is highly improbable that he would not have known of a romantic relationship between the appellant and the complainant which spanned almost seven years. This is further buttressed by the evidence of the second defence witness that the relationship was not conducted in secret, contrary to the version of the appellant, and ultimately lending credence to the version of the complainant that there was indeed no relationship.

[27] It becomes apparent that the testimony of the second state witness reveals aspects which were omitted in the testimony of the

complainant. Her brother also questioned the existence of a relationship between her and the appellant. Notwithstanding such omission in the testimony of the complainant, such questioning is in accord with the fact that he is her brother, he was also friend to the appellant and he was the first report. The revelation of such omission indeed serves to provide a holistic account of events and further serves to buttress the complainant's version that she was never involved in a relationship with the appellant.

- [28] It is indeed correct that the complainant did not try to get away from her attacker as soon as the opportunity presented itself. Her testimony that she was seated in the vehicle with the appellant was corroborated by the second state witness and the appellant. Her testimony in fact reveals the congruency of her conduct from the onset. She reprimanded the appellant for being involved in a fight the night before, she approached the appellant when he called out to her and sat with him in the car, she asked him to accompany her home, she did not hesitate to be dropped off when the appellant threatened her after her refusal to kiss him, she pushed him off her when she found him on top of her raping her. She was alone and unhesitatingly threatened to go to the police. She wiped herself after being raped and threatened to take the tissue to the police. It becomes apparent that she was not intimidated by the appellant to the extent that he rendered her unable to speak or defend herself. This may well be ascribed to the fact that she had known him for a long time and considered him to be a brother. It is precisely the consistency of her conduct throughout that renders her version more probable.

- [29] Salient aspects of the complainant's testimony remained uncontested and were patently not catechised. That she asked for and was refused a lift by the appellant at 'The Lounge' over an altercation about her boyfriend was never canvassed with the complainant. Notwithstanding her testimony that the appellant called her to his car, the appellant elected not to refute it. It is noteworthy that her evidence was that she was raped in the back seat contrary to the appellant's version that they had intercourse in the front seat. It is also noteworthy that the complainant was not interrogated about the short stop over to retrieve a jersey for her at the appellant's home on route to the graveyard. Given the romantic sexual relationship that supposedly existed between the appellant and the complainant, the reason why the complainant would choose that specific encounter to accuse the appellant of rape also remained uninterrogated.
- [30] The trial court correctly found that the version of the appellant on its own and when contrasted with the testimony of his witness resonated with contradictions and improbabilities. While the appellant conceded their existence, he contended that it did not render his version not reasonably possibly true. It however, becomes patent that these were not trifling in nature as posited by the appellant.
- [31] The trial court properly found it improbable that notwithstanding having a sexual relationship for many years, the complainant would on this occasion denunciate him of rape. While it is correct that the trial court incorrectly mentioned that they were in a romantic relationship for 15 years, this does not diminish the profundity of the contradictions inherent in his and his witness's testimony, nor does

it detract from the improbability of his version. Furthermore, his refusal to give the complainant a lift to 'Supa's Place' vacillates from not wanting to go there, to wanting to move on his own to finally refusing the complainant a lift over an argument regarding her boyfriend.

- [32] The trial court properly found his version even more improbable by having sexual intercourse in the front seat of the car and in a graveyard notwithstanding the availability of the back seat, the room at his own house where he had stopped to retrieve a jersey for the complainant as well as the room of the second defence witness that he and the complainant frequented. The mother of the appellant was clearly not an issue. By the appellant's account, his mother was aware of their relationship and was surprised that the complainant had laid such a charge.
- [33] It is also noteworthy that the appellant initially testified that the complainant was 'fine' when assessing her state of sobriety and later ascribed her lack of recollection about their conversation about sexual intercourse to being under the influence of alcohol. This was correctly found by the trial court to be both convenient and opportunistic.
- [34] The omission of the appellant in mentioning the presence and the evidence of his witness to the complainant lends credence to the conclusion drawn that the presence of this witness was a resourceful and opportunistic afterthought. The defence witness placed himself at both 'The Lounge' and 'Supa's Place' on the night and the morning in question. He was knowledgeable about the nature of the relationship between the appellant and the complainant and often

availed his room for their use. It was also his testimony that the complainant requested the keys for his room for that exact purpose on the morning in question. It is astounding that the complainant was never confronted by the appellant with such crucial evidence inimical to her allegation nor given the opportunity to refute it.

[35] The evidence of the appellant and his witness is correctly found by the trial court to be peppered with contradictions and improbabilities. The appellant testified that he left 'The Lounge' alone and arrived at 'Supa's Place' alone. It is only at 'Supa's Place' that he met with his friends. Contrary to the appellant's version, the defence witness stated that the appellant gave him a lift from 'The Lounge' to 'Supa's Place'. When confronted with the testimony of the appellant, his version vacillates to that of being met halfway and given a lift by the appellant to 'Supa's Place'. Notwithstanding the subsequent version tendered by this witness, it nonetheless contradicts the version of the appellant who testified that he arrived at 'Supa's Place' alone. The testimony of the appellant that the relationship between him and the complainant was of a clandestine nature due to her reticence to disclose their relationship was clearly trounced by his witness who testified that the appellant and complainant were always kissing and hugging in public, even in the presence of her siblings. He testified that he even reprimanded them in consequence on the morning of the incident. It is also noteworthy that this was never reconnected with the complainant or her brother and merely serves to buttress the version of the complainant.

[36] Having regard to the above, I am satisfied that the trial court exercised the requisite caution and correctly found that there existed no evidential basis to suggest that the evidence of the complainant

and her witness was untruthful and unreliable. The appellant's version on its own and when coupled with that of his witness is riddled with contradictions, inconsistencies and improbabilities to the extent that the correctness of the credibility findings of the trial court cannot be doubted. I am content to find that it cannot reasonably possibly be true and that the trial court correctly rejected the version of the appellant as false beyond a reasonable doubt. The evidence of the second defence witness constituted a pitiable attempt to salvage the appellant from the consequences of his actions. The trial court correctly found that the appellant took advantage of the complainant because she was under the influence of liquor and raped the complainant as narrated by her. There therefore exists no reason to warrant tampering with the appellant's conviction.

- [37] The appellant contended that the approach of the trial court was unbalanced and the requisite factors for consideration in the determination of sentence, namely the personal circumstances of the appellant, the nature and gravity of the offence committed, the interests of the community as well the prevalence of the crime were incorrectly approached. According to him, the trial court over emphasised the aggravating factors with little or no consideration to the mitigating factors. He further contended that several of the mitigating factors advanced were not properly considered including his period of incarceration awaiting trial, the absence of any serious physical injuries or any lasting emotional trauma sustained by the complainant and that alcohol played a role in the commission of the crime. Notwithstanding the concession that rape is indeed a serious offence, the appellant contended there should be a differentiation between the degrees of seriousness in such cases. He maintained that the imposition of the minimum sentence should be reserved for

the more serious cases of rape. Furthermore, there existed good potential for rehabilitation and this alone was a mitigating factor.⁶ The appellant further contended that all circumstances advanced should have persuaded the court to find the existence of substantial and compelling circumstances that would have empowered the trial court to deviate from the imposition of the prescribed minimum sentence of ten years imprisonment. Accordingly, the trial court erred in finding that there were no substantial and compelling circumstances present to deviate from the minimum sentence. It was submitted that the sentence of seven years was a more appropriate sentence.

[38] The respondent argued that no misdirection occurred as contended by the appellant and that the sentence imposed by the trial court on the appellant met all the sentencing demands of the time and no appellate interference was warranted. The respondent further argued the mitigating factors tendered for consideration did not constitute substantial and compelling circumstances.

[39] The cardinal principle governing an appeal against sentence is that punishment of an offender is pre-eminently a matter for the discretion of the trial court. It is putative that the court hearing an appeal against sentence should be vigilant not to erode the sentencing discretion entrusted to the trial court. It is well established that interference by the appellate court is warranted only if the discretion of the trial court was not judicially and properly exercised or if there exists a marked disparity between the sentence imposed by the trial court and the sentence that the court of appeal

⁶ *S v Makhatu 2006 (2) SACR 582 (SCA)*.

would have imposed had it been the trial court⁷. The test to be surmounted in every appeal against sentence is whether the sentence is vitiated by irregularity or misdirection or disturbing inappropriateness.⁸ This was seamlessly captured in **S v Malgas 2001(1)** SACR 469(A) at 478d-e which articulated the principle as follows:

“A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates the exercise of that discretion, an appellate court is off course entitled to consider the question of sentence afresh. In doing so, it assesses the sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate court is at large. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which appellate court would have imposed had it been the trial court is so marked that it can be that it can properly be described as ‘shocking’, ‘startling’ or ‘disturbingly inappropriate’. It must be emphasised that in the latter situation the appellate court is not at large in the sense in which it is at large in the former. In the latter situation, it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may

⁷ S v Pillay 1977(4) SA 551 (A) on 535 E-G; see also S v Rabie 1975 (4) SA 855 (A) at 857 D-F; see also S v Shapiro 1994 (1) SACR 112(A) at 119j -120c; see also S v Anderson 1964 (3) SA 494 (A) on 495D-E.

⁸ S v Makondo 2002(1) SA at 431E-F (SCA); see also S v Mothibe 1977(3) SA 823 (A) 830 D.

only do so where the difference is so substantial that it attracts epithets of the kind I have mentioned.”

[40] The trial court record clearly evinces a proper consideration of the individual circumstances of the case in the light of the renowned triad of factors relevant to sentence. The personal circumstances at the disposal of the trial court included the following, namely, that the appellant was 31 years old at the time of the commission of the offence, he was a first offender⁹, he was married and had three minor children, he was in gainful employment at Star Diamond Mine and earned a monthly income of R4800. In the determination of an appropriate sentence, the trial court also considered the period of incarceration awaiting trial, the nature of the injuries sustained by the complainant and that alcohol played a role in the commission of the offence.

[41] It is trite law that the sentence of an accused person must be balanced between the interest of society, the nature, seriousness and the prevalence of the offence and the personal circumstances of the accused.¹⁰ The seriousness of the crime that the appellant has been convicted of was given prominence in **S v S 1995 (1) SASV 50 (ZS)** on 61 d.

“The essence of the crime is an assault on the bodily integrity of a woman’s femininity. If it is a function of the criminal law to protect members of society

⁹ S v Woods 1973(4) SA 95 (RA) 96H – 97B:

The question of an appropriate sentence in the case of a first offender almost always presents a judicial officer with problems of a particular difficulty ... the publicity, his exposure as a criminal, the far reaching and often devastating effects of imprisonment on his social, family and economic life are, in the case of a first offender, aspects of punishment that should never be overlooked and under estimated.

¹⁰ S v Banda and Others 1991(2) SA (BGD) on 355 A.

from those who would employ illegal means to prey on those less able to defend themselves, then rape is rightly regarded as a crime of the utmost gravity”

In **S v Ncheche** 2005(2) SACR 386 (W) the court expounded upon the gravity of the offence as follows:

“Rape is an appalling and utterly outrageous crime, gaining nothing of any worth for the perpetrator and inflicting terrible and horrific suffering and outrage on the victim and her family. It threatens every woman, and particularly the poor and the vulnerable. In our country, it occurs far too frequently and is currently aggravated by the grave risk of the transmission of Aids. A woman’s body is sacrosanct and anyone who violates it does so at his peril and our Legislature, and the community at large correctly expect our courts to punish rapists severely.”

The interests of the community was properly enunciated in **S v Chapman** 1997(2) SASV 3 (A) on 5 c-e:

“Woman in South Africa are entitled to protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives. The courts are under a duty to send a clear message to other potential rapists and to the community. We are determined to protect the equality, dignity and freedom of all women and we shall show no mercy to those who seek to invade those rights.”

The trial court further considered the prevalence of the crime in the imposition of a more severe sentence for purposes of deterrence.¹¹

¹¹ S v Reay 1987(1) SA 873(A) on 877 c.

- [42] In as far as the aggravating factors are concerned, the trial court correctly took these factors into account and rightly so and imposed what it considered to be a just and appropriate sentence. It correctly took cognisance of the fact that the appellant abused the trust that the complainant had in him while she was under the influence of alcohol. It also noted that in persisting with his claim of innocence, the appellant wasted the opportunity to show remorse for his actions. His lack of remorse impacts negatively on his prospects for rehabilitation.
- [43] It bears mentioning that the trial court record is patently absent of any victim impact report which serves to inform the determination of sentence. Notwithstanding the absence of physical injuries sustained by the complainant, the trial court correctly accepted that she would have endured emotional trauma because rape is indeed traumatic and ‘.... *perhaps the most horrific and dehumanising violation that a person can live through ... [it] is a crime that not only violates the mind and body of a complainant, but also one that vexes the soul.*’¹²
- [44] The trial court record is also absent of any information regarding the appellant being the primary caregiver. No argument was advanced that the appellant was indeed the primary caregiver to his minor children on whose best interests a custodial sentence might have an adverse impact. In the absence of such, I am inclined not to delve further into this arena.

¹² Brendan Solly Ndlovu v State [2017] ZACC 19.

- [45] It is also correct that a court hearing an appeal in which the minimum sentence legislation has application does not possess the proverbial clean slate on which to scribble its preferred sentence. The sentencing discretion of the trial court is indeed circumscribed by law. It is further required that the finding of substantial and compelling circumstances must be able to stand scrutiny and not be based on the whim of the presiding officer.¹³
- [46] The charge of rape for which the appellant has been convicted of clearly falls within the ambit of section 51 of the minimum sentence legislation. The minimum prescribed sentence for such offences is ten (10) years imprisonment for a first offender unless the court found that substantial and compelling circumstances existed justifying a departure. Notwithstanding the personal and mitigating factors tendered for consideration, the prescribed minimum sentence, was in the totality of the circumstances encountered here the only fair and just sentence. The trial court correctly found that there were no substantial and compelling circumstances present. I am of the view that the manner in which the complainant was taken advantage of and the inhumane and degrading treatment she was subjected to under the circumstances cannot justify a deviation from the imposition of the applicable minimum sentence.
- [47] Having said that, I am content that the trial court did not err or misdirect itself in any manner. Nor does there exist a disparity between the sentence imposed by the trial court and the one which this court would have imposed if it were the trial court. There thus

¹³ *Sv Matyiti 2011(1) SACR 40 (SCA)*.

exists no reason that warrants tampering with the sentence imposed by the trial court.

ORDER

[48] In the result, the following order is made:

- 1) The appeal against both conviction and sentence is dismissed.
- 2) The conviction and sentence imposed by the Regional Court on the appellant are confirmed.

Q NULLIAH, AJ

I concur

C REINDERS, J

On behalf of the appellant: PL van Der Merwe
Bloemfontein Justice Centre
Legal Aid SA

On behalf of the respondent: Adv S Giorgi
Office of the Director of Public
Prosecutions
Bloemfontein

