

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: A23/2023

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO THE JUDGES: YES/NO
(3)	REVISED.
.....	
.....	
DATE: 31/05/24	SIGNATURE: [Redacted]

In the matter between:

SHIMANE FRANS KOTA

:APPEALLANT

And

THE STATE

:RESPONDENT

JUDGEMENT

MAPHELELA AJ

- [1] This is an appeal by the appellant against both the Conviction and the sentence by the Magistrate Court for the regional district of Mogalakwena held at Mahwelereng. The appellant was found guilty of rape and house breaking with intend to rape and the rape. As a result, the appellant was sentenced to life imprisonment for rape.
- [2] The appellant had pleaded consensual sexual intercourse and alleges that the complainant was his girlfriend. The court *a quo* had to determine whether the elements of consent had been satisfied.
- [3] It is therefore not necessary to deal with all the circumstances leading to the alleged rape. Both the appellant and the Complainant gave evidence during the hearing of this matter and upon fully assessing the matter, the appellant was found guilty and sentenced accordingly.
- [4] The question to be determined by the court *a quo* was whether there was consensus for the parties to have gotten into sexual activities on the day in question. The appellant agreed to have engaged with consensual sexual intercourse with the complainant while the complainant indicated that, there was no such consensus and that she did not invite the appellant to her place on the day in question nor knew his identity until he was identified at his home with the underwear he was wearing on the day in question.
- [5] The appellant's counsel did not make much of the submission during the appeal hearing. The counsel submitted that based on the evidence of a single witness, the cautionary rule should have been applied. Despite the evidence of the complainant

not been corroborated, the court *a quo* should have found the appellant not guilty. He further submitted that the complainant could not identify the person who raped her except that they had to follow the footsteps until they arrived at the appellant's place and found him sleeping.

- [6] The appellant's counsel further submitted that there was bad blood between the appellant and the complainant in that, he always proposed to her all the time when she goes to the shops. For that reason, it was submitted that the complainant had a motive to lay charges against him. This submission goes against the appellant's submission in that he says that there was consensus that they had sexual intercourse and if on the other hand she had a motive to incriminate him because he was proposing love to her, it will automatically mean that there was no consensus because this statement says the complainant laid charges because she had a bad blood relationship.
- [7] The appellant in his evidence testified that the complainant was his girlfriend and that they had consensual sex on the night in question after he was invited by the complainant. The appellant denies breaking and entering the complainant's house on the night in question. He further testified that post the sexual activity they slept and only in the morning they fought about money problem.
- [8] Reference was made to the case of *Woji v Santam insurance Co Ltd*¹ where the following was stated, "*There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of a single witness. The trial judge will*

¹ 1981 (1) SA 1020 (A) at 1028 B-D and *S v Souls and others* 1991 (3) SA 172(A)

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 or defects or contradictions in the testimony, he is satisfied that the truth has been told."

- [9] The appellant further referred the appeal court to the case of *S v Webber*², where the court held that *"A conviction is possible on the evidence of a single witness. Such witness must be credible, and the evidence should be approached with caution. Due consideration should be given to factors which affirms, and factors which detract from the credibility of the witness. The probative value of the evidence of a single witness should not be equated to that of several witnesses"*.
- [10] The appellant's counsel further submitted that the contradictions in his evidence were not material for one to conclude that his version is not reasonably possibly true. Reference was also made to the case of *State v V*³ where the court said the following, *"it is trite that there is no obligation upon the accused person, where the state bears the onus, to convince the court. If his version is reasonably possible true, he is entitled to his acquittal although his explanation is improbable. A court is not entitled to convict unless it is satisfied not only that the explanation is improbable but that beyond reasonable doubt it is false. It is permissible to look at the probabilities of the case to determine whether the accused's version is reasonable possible true, but one subjectively believes is not the test"*

² 1971 (3) 754 (A) at 758

³ 2000 (1) SACR 453 (SCA) at 455 B

- [11] On that basis, the appellant prays that both the conviction and sentence should be set aside.
- [12] The respondent dealt with the issue around the evidence of a single witness in this case being the complainant. The respondent referred to *S v Sauls and Others*⁴ where the court said: *"There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of 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, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told."*
- [13] The respondent in her submission submitted that the court *a quo* was alive to the cautionary rule and correctly applied it. It can be easily deducted from the evidence on record that the complainant was reliable, credible, and truthful witness and that there were no material contradictions in her evidence.
- [14] Counsel for the respondent submitted that the complainant had no reasons or ulterior motive to implicate the appellant and that should that have been her intention, there was nothing which prevented her to do that from the onset. It was further submitted that if so, she could have done so immediately when her neighbor arrives.

⁴ 1981 3 SA 172 (A) held at 18E-G

- [15] At paragraph 10 and 20 on page 64 Volume 2, the complainant stated the following in her evidence which I will quote *"After he has finished, he started looking around inside the room. My child woke up, the two-year-old. He started crying; then he started telling the child to keep quiet. He grabbed me again. He got erect again and then climbed-on top of me, and then took his penis and then inserted it into my vagina"*.
- [16] *"After he had finished, he got off. He started to... Then he was intending to leave. I heard a door being closed"*.
- [17] It is also important to also note that, the appellant has used the knife against the complainant and according to evidence there were stab wounds on her hands. It is not clear why would the appellant use the knife on a woman. He alleges that she was becoming violent as she was demanding the money from him, and he picked up the knife from the house which he used. There is no explanation in his evidence as to why did he took the knife with him since it was found by the Police in his room where they found him after the alleged rape incident.
- [18] There is no indication from the appellant as to why he decided to use the knife against the complainant, what he alleges is that she was becoming violent demanding the money after sexual intercourse. There is no indication as to how violent she was and if she had any dangerous weapon in her possession. The appellant could have made an option to run away if she was becoming violent. As I have indicated all these are not mentioned in the appellant's evidence.

- [19] In this instance it is clear that there was no consent from the respondent. In the case of *Mugridge v State*⁵ the court said the following regarding consent at paragraph (40) *"The law requires further that consent be active, and therefore mere submission is not sufficient"*. In *Rex v Swiggelaar*, Murray AJA commented as follows: *"The authorities are clear upon the point that though the consent of a woman may be gathered from her conduct, apart from her words, it is fallacious to take the absence of resistance as per se proof of consent. Submissions by itself is no grant of consent, and if a man so intimidate a woman as to induce her to abandon resistance and submit to intercourse to which she is unwilling, he commits the crime of rape. All the circumstances must be taken into account to determine whether passively is proof of implied consent or whether it is merely the abandonment of outward resistance which the woman, while persisting in her objection to intercourse, is afraid to display or realizes is useless"*.
- [20] In the current case it is very clear that the complainant was resisting the rape by the appellant hence, the use of the knife on her with no reasonable explanation by the appellant why was the knife used where it is very clear that at no stage did she overpower the appellant or posed any danger to the him.
- [21] *S v Van der Meyden*⁶ the court stated that *"What must be born in mind, however, is that the conclusion which is reached (whether it be to convict or acquit) must account to all the evidence"* Both parties have referred to this case law. The question

⁵ (657/12)[2013] ZASCA 43;2013(2) SACR 111(SCA)(28 March 2013)

⁶ 1999 (1)SARC 447 (w) Negent, *S v Trainor* 2003 1 SACR 35 (SCA) at 40f-41C

which now this court must answer with respect to all the evidence given during the trial is whether the court *a quo* has considered the evidence before it in its entirety.

[22] It also follows from the facts that the onus rests on the state to prove the guilt of the accused beyond reasonable doubt, that no onus rests on the accused to prove his or her innocence. See *S v Mhlongo* 1991 (2) SACR 207 (A), at 210d-f; *R v Hlongwane* 1959 (3) SA 337 (A), at 340H it was held that in order to be acquitted, the version of an accused need only be reasonably possibly true. The position was set out by *Nugent J* in *S v Van Der Meyden* above, where the following was indicated: “*the onus of proof in a criminal case is discharged by the state to prove the guilt of an accused person beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonable that he might be innocent, the process of reasoning which is appropriate to the application of that test in any case will depend on the nature of the evidence which the court has before it. What must be born in mind, however, is that the conclusion which is reached (Whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false, some might me found to be unreliable, and some of it might be found to be only possibly false or unreliable, but none of it may simply be ignored*”.

(See *R v Difford* 1937 AD 370 at 373 and 383). These are not separate and independent tests, but the expression of the same test when viewed from opposite perspectives. To convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true. The two are inseparable, each being the logical corollary of the other.”

- [23] This was not a normal case where a party must only prove that there was sexual intercourse between the two adults where one says I was raped and the other denies having been involved in sexual activity with the complainant. It is doubtful that the complainant in this case could have provoked the appellant to the extent that he could have used a knife to scare her. There is again no explanation in his evidence as to what action was the complainant doing which posed a danger to him. The appellant had an option of running away from her if there was any threat, there is no indication why he could not stay away from her but decided to use the knife.
- [24] The correct approach to the evaluation of evidence in a criminal trial was enunciated by the court as follows in *S v Chabalala*⁷ where the following was said *"The trial Court's approach to the case was, however, holistic and in this it was undoubtedly right: S v Van Aswegen 2001 (2) SACR 97 (SCA). The correct approach is to weight 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 strength and weakness, probabilities 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 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 onto one (apparently) obvious aspect without assessing it in the context of the full picture presented in evidence...."*

⁷ 2003 (1) SACR 134 (SCA) para 15

- [25] Under the circumstances I am satisfied that, the court *a quo* had assessed all the evidence before it and after such assessment it concluded that, the Complainant did not give consent to the appellant and as such the appellant was correctly convicted.
- [26] With regard to the sentence, it is trite sentence is within the discretion of the trial court. It is also a well-known principle that the court of appeal does not have unfettered power to interfere with the sentencing of the trial court. It may, however, do so when it is found that the trial court has misdirected itself or if the sentence imposed was so disturbingly disproportionate that no reasonable court would have imposed it. The test is not whether the trial court was wrong but whether it has exercised its discretion properly. (See *S v Romer*⁸).
- [27] *S v Vilakazi*⁹ the court said the following regarding the personal circumstances in mitigating of sentence, “*The personal circumstances of the appellant, so far as they are disclosed in the evidence, have been set out earlier. In cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is employed, are in themselves largely immaterial to what the period should be, and those seems to me*

⁸ 2011 (2) SACR 153 (SCA) at paras 22 and 23

⁹ (576/07) [2008] ZASCA 87; [2008] 4 All SA 396 (SCA); 2009(1)ASRC 552 (SCA); 2012 (6)SA 353 (SCA) (3 September 2008) at paragraph 58

to be kind of "flimsy" ground that Malgas said should be avoided. But they are nonetheless relevant in another respect. A material consideration is whether the accused can be expected to offend again. While that can never be confidently predict his or her circumstances might assist in making at least some assessment. In this case the appellant has reached the age of 30 without any serious bruises with the law. His stable employment and apparently stable family circumstances are not indicative of an inherently lawless character".

[28] The other consideration which the court has considered was the time the appellant has spent in prison since after the incarceration. *"At the time he was sentenced he had accordingly been imprisoned for over two years. While good reason may exist for denying bail to a person who is charged with a serious crime it seems to me that if he or she is not promptly brought to trial it will be most unjust if the period of imprisonment while awaiting trial is not then brought to account in any custodial sentence that is imposed. In the circumstances I intend ordering that the sentence which for the purpose of considering parole is a sentence of fifteen years imprisonment commencing on the date that the appellant was sentenced, is to expire two years earlier than would ordinarily have been the case"*

[29] The court a quo has found that the appellant had raped the appellant more than once, and had also stabbed the complainant and inflicted grievous bodily harm on her. The manner in which the offence was committed within the ambit in which the minimum sentence of life imprisonment is applicable in terms of the *Criminal Law*

*Amendment Act*¹⁰ (CLAA) unless the court finds substantial and compelling circumstances to exist which justify a deviation from the prescribed minimum sentences.

- [30] Counsel for the appellant has submitted that the appellant was born on 27th April 1980, was 35 years at the time of the commission of the offence and 43 years at the time of sentencing. The appellant's father had separated with his mother when he was young, and there was no good relationship between the appellant and his father. The appellant had a good relationship with his stepfather. The appellant was employed as a gardener earning R1000.00 per month. The appellant was also doing odd jobs generating R6000.00 per month. The appellant had two minor children whom he is maintaining and had a good relationship with them even though he is not a primary caregiver. The appellant is first offender at the age of 43. Counsel for the appellant submitted that cumulatively taken, the appellant's personal circumstances constitute substantial and compelling circumstances justifying a deviation from the prescribed minimum sentence of life imprisonment.
- [31] The court *a quo* in sentencing the appellant has taken into consideration his personal circumstances and the aggravating factors. The court *a quo* found that rape was prevalent in the area of jurisdiction where the victims were raped in their own homestead where they were supposed to feel safe like it happened to the complainant. The appellant took advantage of the complainant after seeing that the complainant was left alone with her child. What aggravates was that the complainant

¹⁰ 105 of 1997

was raped in her home where she was supposed to feel free and protected. The appellant raped and stabbed the complainant which had left a lifelong scar on her. The complainant was violated in the presence of her own child, even though there is no evidence that the child had witnessed that.

[32] After weighing the accused personal circumstances and aggravating factors, the court *a quo* found that there were no substantial and compelling circumstances justifying a deviation from the prescribed minimum sentence of life imprisonment. The question which this court had to decide is whether the trial court had exercised its discretion properly. According to the presentence report, the appellant does not acknowledge the offences he had committed. That shows that the appellant is not remorseful for what he did. What aggravate the most is that after raping the complainant, the appellant had stabbed complainant for no apparent reason, and did not even assist the complainant in getting medical attention. The appellant did not use a condom risking infecting the complainant with all sorts of illness/diseases. The appellant had raped the complainant in the comfort of her home where she was supposed to feel safe.

[33] In *S v Chapman*¹¹ the court said:

"The courts are under a duty to send a clear message to the accused, 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".

¹¹ 1997 (3) SA 345 (SCA) at 345D

[34] What the appellant had submitted as constituting substantial and compelling circumstances, are what has been held in Vilakazi case above, to be largely immaterial and seems to be the kind of "flimsy" ground that Malgas said should be avoided. The appellant had a good relationship with his stepfather, and therefore did not lack a father figure to give him guidance. He simply chose to follow the wrong path. The aggravating factors far outweigh the mitigating factors. In my view, the court *a quo* had correctly exercised its discretion in this matter and there is nothing to fault it. It follows that the appeal on sentence stands to fail.

[35] In the result the following order is made:

35.1 The appeal on both conviction and sentence is dismissed.

ACTING JUDGE MAPHELELA

JUDGE OF THE HIGH COURT, POLOKWANE;
LIMPOPO DIVISION

I AGREE

JUDGE KGANYAGO

**JUDGE OF THE HIGH COURT, POLOKWANE;
LIMPOPO DIVISION**

APPEARANCES

FOR THE APPELLANT : MR R MACHOVANI

INSTRUCTED BY : MACHOVANI ATTORNEYS

FOR THE RESPONDENT : ADV SB RANGOATO

INSTRUCTED BY : STATE ATTORNEYS

DATE OF HEARING : 22ND MARCH 2024

DATE OF JUDGEMENT : 31 MAY 2024