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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

21 June 2024

DATE

SIGNATURE

CASE NUMBER: A58/2021

In the matter between:

KGOSIMORE EDWARD MAFIXA

Appellant

and

THE STATE

Respondent

Coram: DOSIO J

Heard: 3 June 2024

Delivered: 21 June 2024

ORDER

The appeal in respect to conviction is dismissed.

The appeal against sentence is upheld. The sentence of life imprisonment is set aside and replaced with a sentence of fourteen (14) years' imprisonment.

In terms of s282 of Act 51 of 1977 it is ordered that the sentence of fourteen years' imprisonment is antedated to 15 July 2016.

JUDGMENT

DOSIO J:

Introduction

[1] The appellant was arraigned in the Regional Court, sitting in Roodepoort on one count of rape, a contravention of s3 of The Sexual Offences and Related Matters Act 32 of 2007 ('Act 32 of 2007'), read with s51 (1) of The General Law Amendment Act 105 of 1997 ('Act 105 of 1997'). The respondent alleged that on 6 January 2016 the appellant unlawfully and intentionally had sexual penetration more than once, with a female person, to wit B[...] R[...] ('the complainant'), by inserting his penis and finger in her vagina without her consent.

[2] The appellant pleaded not guilty but was convicted as charged on 12 July 2016. On 15 July 2016 the appellant was sentenced to life imprisonment in terms of s51(1) of Act 105 of 1997.

[3] The appeal is in respect to conviction and sentence.

[4] The appellant was legally represented.

[5] Condonation for the late filing of the appeal was granted.

Evidence

[6] Three witnesses testified for the State, namely, the complainant, N[...] R[...] ('the complainant's mother') and Ndivhidzani Muthelo, who is the officer who opened the case.

[7] The appellant's version is that he had sexual intercourse with the complainant with her consent. The complainant came to his house and because she owed him R150-00, she offered to sleep with him to pay off the debt.

[8] The complainant denies the sexual intercourse was with consent. She states she took her cell phone to the accused so that he could fix it. On her return to pick it up, the appellant asked if he could kiss her vagina. She declined and that is when the appellant grabbed her and started fingering her in her vagina. She tried to run but the appellant tossed her onto the couch and inserted his penis into her vagina. The complainant was 17 years old when this happened. She immediately told her grandmother and then proceeded to the police station to lay a charge against the appellant.

[9] The complainant's mother corroborated the complainant's version that she was raped and also that the complainant had reported the rape to the grandmother.

Ad conviction

[10] It is trite law that the onus rests on the State to prove the guilt of the accused beyond reasonable doubt. If his version is reasonably possibly true, he must be acquitted.

[11] In considering the judgment of the Court a quo, this Court has been mindful that a Court of Appeal is not at liberty to depart from the trial court's findings of fact and credibility, unless they are vitiated by irregularity, or unless an examination of the record reveals that those findings are patently wrong.¹

[12] Counsel for the appellant contended that:

(a) although corroboration existed for the version of the complainant, in the form of the report made to her mother and the medical examination, this on its own is not enough to satisfy the cautionary rule for a single witness.

¹ See *S v Francis* 1991 (1) SACR 198 (A) at 198 J – 199A and *S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 645 E-F

(b) the following shortcomings in the complainant's evidence were ignored by the Court a quo, namely the nurse who compiled the J88 medical report, recorded that the complainant mentioned she was raped in a shack and not in a house as testified by the complainant in court. In addition, the J88 does not mention that the appellant placed his finger in the complainant's vagina.

(c) the charge does not fall within the ambit of s51(1) of Act 105 of 1997, as the trial court could not come to a finding beyond a reasonable doubt that the complainant was indeed raped more than once during the same incident

[13] The complainant explained in detail what happened when she was raped. She stated that when she came to pick up the cell phone that the appellant had fixed, the appellant asked her if he could kiss her vagina. She denied his request and that is when the appellant grabbed her hands and started fingering her in her vagina. She tried to run away and that is when the appellant tossed her on the couch and put his penis in her vagina.

[14] In the matter of *Stellenbosch Farmer's Winery Group Ltd and Another v Martel & Cie*

*SA and others*² the Supreme Court of Appeal held that:

'The technique generally employed by the courts in resolving factual disputes of this nature may be conveniently summarized as follows: To conclude on the disputed issues, a court must make findings on

(a) credibility of the factual witnesses, (b) their reliability and (c) the probabilities. As to (a) the court's findings on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as:

- (i) The witness's candour and demeanour in the witness box,
- (ii) His bias, latent and blatant,
- (iii) Internal contradictions in his evidence,
- (iv) External contradictions with what was pleaded on his behalf or with established fact or with his own statements or actions,

² *Stellenbosch Farmer's Winery Group Ltd and Another v Martel & Cie SA and others* 2003 (1) (SA)11(SCA)

(v) The probability or improbability of particular aspects of his own version,

(vi) The calibre and cogency of his performance compared to that of other witnesses testifying about the event or incident.

As to (b), a witness's reliability will depend, apart from the factors mentioned under (a) (ii), (iv) and (v) above; on opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c) this necessitates an analysis and improbability of each party's version on each of the disputed issues. In the light of (a), (b) and (c), the court will then, as a final step determine whether the party burdened with the onus of proof has succeeded in discharging it'.³

[15] Although there may be some contradictions between the J88 and what the complainant testified in court, the complainant maintained her version that it was the appellant that raped her. The Court a quo was correct in finding her a credible witness. The version of the appellant that the complainant falsely implicated him was correctly rejected by the Court a quo. Had the complainant wanted to pay the appellant in kind for fixing her cell phone, there would be no reason for her to then falsely incriminate him. The Court a quo was correct in accepting the evidence of the complainant that she did not consent to sexual intercourse. Although she was a single witness, she gave her testimony in a clear and coherent manner.

[16] After a thorough reading of this record, this Court has no doubt as to the correctness of the Court a quo's factual findings.

[17] The primary question to be answered in this appeal is whether the evidence established that the appellant had raped the complainant more than once, thereby bringing the provisions of s51(1) of Act 105 of 1997 into operation.

[18] The court a quo, without referring to any authority or analysing the evidence, pertinently found that the appellant raped the complainant more than once.

³ Ibid paragraph 5

[19] In the matter of *S v Blaauw*,⁴ the court held that:

'Mere and repeated acts of penetration cannot without more, in my mind, be equated with repeated and separated acts of rape. A rapist who in the course of raping his victim withdraws his penis, positions the victim's body differently and then again penetrates her, will not, in my view, have committed rape twice. This is what I believe occurred when the accused became dissatisfied with the position he had adopted when he stood the complainant against a tree. By causing her to lie on the ground and penetrating her again after she had done so, the accused was completing the act of rape he had commenced when they both stood against the tree. He was not committing another separate act of rape.

Each case must be determined on its own facts. As a general rule the more closely connected the separate acts of penetration are in terms of time (i.e. the intervals between them) and place, the less likely a court will be to find that a series of separate rapes has occurred. But where the accused has ejaculated and withdrawn his penis from the victim, if he again penetrates her thereafter, it should, in my view, be inferred (d) that he has formed the intent to rape her again, even if the second rape takes place soon after the first and at the same place.'⁵ [my emphasis]

[20] In the matter in casu, the appellant fingered the complainant then changed her position to rape her. There is no suggestion that the intention to have sexual intercourse ended after the appellant placed his finger in the complainant's vagina or that he had the intention to rape her twice. This was one prolonged act of intercourse and amounts to a single continuing course of conduct. The evidence does not suggest that there was an interruption in the appellant's conduct between the time he withdrew his fingers and the insertion of his penis into the vagina of the complainant. The appellant did not ejaculate after he fingered the complainant. The finding of the Court a quo that two separate rapes occurred when the appellant inserted his penis and thereafter inserted his fingers cannot be sustained. The Court a quo erred in this regard and accordingly, it is replaced with one count of rape.

⁴ *S v Blaauw* 1999 (2) SACR 295 (W)

⁵ Ibid page 300 a-g

Ad sentence

[21] The Court a quo accordingly wrongly applied the provisions of s51(1) of Act 105 of 1997 and sentenced the appellant as if he had raped the complainant twice.

[22] In light of the appellant being convicted of only one count of rape, s51(2) of Act 105 of 1997 states that the crime of rape falls under the ambit of Part III of Schedule two and a sentence of not less than ten years imprisonment must be imposed.

[23] The question to be considered by this Court is whether there are substantial and compelling circumstances which would justify the imposition of a sentence of less than ten years' imprisonment or whether there were aggravating circumstances which require that a sentence heavier than the minimum prescribed sentence be imposed.

[24] A sentence imposed by a lower court should only be altered if;

- (a) An irregularity took place during the trial or sentencing stage.
- (b) The trial court misdirected itself in respect to the imposition of the sentence.
- (c) The sentence imposed by the trial court could be described as disturbingly or shockingly inappropriate.⁶

[25] The following aggravating factors are present, namely:

- (a) The appellant maintained his innocence throughout the trial. Instead of taking responsibility for what he had done, he portrayed the complainant as being a liar, thus victimizing her further.
- (b) The evidence indicates that there was a measure of persistence on the part of the appellant in continuing with his actions to have intercourse with the complainant.
- (c) The appellant abused the position of trust as the complainant was his client and merely wanted her cell phone fixed.

⁶ See *S v De Jager and Another* 1965 (2) SA 616 (A), *S v Rabie* 1975 (4) SA 855 (A), *S v Petkar* 1988 (3) SA 571 at 574 C and *S v Salzwedel and other* 1999 (2) SACR 586 (SCA)

(d) The appellant is not a first offender. He has six previous convictions, ranging from assault, to malicious injury to property and possession of an unlicensed firearm. He has been in and out of prison over the past few years. He was currently on parole when the matter in casu was committed

[26] The appellant testified in mitigation of sentence and the following factors were stated:

- (a) That he apologised for what he had done and stated that he was thirty-three years old.
- (b) That he was unemployed at the time of his arrest but intermittently acquired certain temporary jobs where he earned approximately R1500 per month.
- (c) That he had two children aged eight and nine years respectively.

[27] The offence for which the appellant has been found guilty is a serious offence. The complainant stated that the incident causes her to have nightmares, resulting in her instability and preventing her from going to school. The rape has also caused her to feel fragile and insecure. She stated she will bath numerous times to eradicate the feeling of being dirty and cheap. It took her three months to walk past the appellant's house.

[28] In the matter of *S v Malgas*⁷ the Supreme Court of Appeal stated that: 'if the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.'⁸

[29] Section 51(3) of Act 105 of 1997 as amended is of importance in that it states that:

'(3) (a) 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 subsection, it shall enter

⁷ *S v Malgas* 2001 (1) SACR 496 SCA

⁸ *Ibid* paragraph I

those circumstances on the record of the proceedings and must thereupon impose such lesser sentence: Provided that if a regional court imposes such a lesser sentence in respect of an offence referred to Part 1 of Schedule 2, it shall have jurisdiction to impose a term of imprisonment for a period not exceeding 30 years.

(a A) when imposing a sentence in respect of the offence of rape the following shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence:

- (i) The complainant's previous sexual history;
- (ii) An apparent lack of physical injury to the complainant;
- (iii) An accused person's cultural or religious beliefs about rape; or
- (iv) Any relationship between the accused person and the complainant prior to the offence being committed.' [my emphasis]

[30] It is clear from the provisions of s51(3) (a A) of Act 105 of 1997 that the lack of physical injury to the complainant is not a compelling and substantial circumstance. In the matter of *S v Vilakazi*⁹ the Supreme Court of Appeal took into consideration the fact that the appellant had reached the age of 30 years without any serious brushes with the law and his stable family circumstances were not indicative of an inherently lawless character. As a result, the Supreme Court of Appeal imposed a sentence of fifteen years imprisonment for the crime of rape. The Court held further that:

'A substantial sentence of 15 years' imprisonment seems to me to be sufficient to bring home to the appellant the gravity of his offence and to exact sufficient retribution for his crime. To make him pay for it with the remainder of his life would seem to me to be grossly disproportionate.'¹⁰

[31] Although this matter is the appellant's first conviction pertaining to a sexual offence, the appellant has had numerous brushes with the law and his previous convictions of assault and malicious damage to property are indicative of a disposition to violence.

⁹ *S v Vilakazi* (576/07) [2008] ZASCA 87; [2008] 4 All SA 396 (SCA) ; 2009 (1) SACR 552 (SCA); 2012 (6) SA 353 (SCA) (3 September 2008)

¹⁰ Ibid paras 59

[32] Although the appellant has two children, he was not the primary caregiver and as a result this does not amount to a substantial and compelling circumstance.

[33] In the matter of *S v Mahomotsa*¹¹ the Supreme Court of Appeal held that: 'It perhaps requires to be stressed that what emerges clearly from the decisions in *Malgas* and *Dodo* is that it does not follow that simply because the circumstances attending a particular instance of rape result in it falling within one or other of the categories of rape delineated in the Act, a uniform sentence of either life imprisonment or indeed any other uniform sentence must or should be imposed. If substantial and compelling circumstances are found to exist, life imprisonment is not mandatory nor is any other mandatory sentence applicable. What sentence should be imposed in such circumstances is within the sentencing discretion of the trial court, subject of course to the obligation cast upon it by the Act to take due cognisance of the legislature's desire for firmer punishment than that which may have been thought to be appropriate in the past. Even in cases falling within the categories delineated in the Act there are bound to be differences in the degree of their seriousness. There should be no misunderstanding about this: they will all be serious but some will be more serious than others and, subject to the caveat that follows, it is only right that the differences in seriousness should receive recognition when it comes to the meting out of punishment. As this Court observed in *S v Abrahams* 2002 (1) SACR 116 (SCA) "some rapes are worse than others and the life sentence ordained by the Legislature should be reserved for cases devoid of substantial factors compelling the conclusion that such a sentence is inappropriate and unjust' (para 29).''¹² [my emphasis]

[34] The appellant pleaded not guilty and abused the trust that a client had in him. This rape had a devastating effect on the seventeen years old complainant, in that she has had feelings of insecurity and instability. The appellant used his fingers and penis to penetrate the complainant. The appellant is fortunate that the

¹¹ *S v Mahomotsa* (85/2001) [2002] ZASCA 64; [2002] 3 All SA 534 (A) (31 May 2002)

¹² Ibid paras 18

[36] In the premises I make the following order;

The appeal against sentence is upheld. The sentence of life imprisonment is set aside and replaced with a sentence of fourteen (14) years' imprisonment.

In terms of s282 of Act 51 of 1977 it is ordered that the sentence of fourteen years' imprisonment is antedated to 15 July 2016.

D DOSIO
JUDGE OF THE HIGH COURT

I agree, and it is so ordered

T BOKAKO
ACTING JUDGE OF THE HIGH COURT

This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand- down is deemed to be 10h00 on 21 June 2024.

APPEARANCES

ON BEHALF OF THE APPELLANT: Adv. J Nel
Legal Aid SA

ON BEHALF OF THE RESPONDENT: Adv. A De Klerk
Instructed by Office of the National
Prosecuting Authority