



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

Not Reportable

Case no: AR30/23

In the matter between:

KHUMBULANI LILLY SIWANI

APPELLANT

and

THE STATE

RESPONDENT

This judgment was handed down electronically by circulation to the parties' representatives by email, and released to SAFLII. The date for hand down is deemed to be 26 JUNE 2024 at 14:30pm

ORDER

In the result, I make the following order:

- 1 The appeal against the appellant's conviction and sentence is dismissed.

JUDGMENT

Jikela AJ (Chetty J) concurring:

[1] The appellant was charged in the Regional Court, Durban of having raped three females, one of them on diverse occasions between the period of 29 April 2017 and 3 August 2019, in contravention of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 read with the provisions s 51(1) and Part 1 of Schedule 2 of Act 51 of 1997 (counts 1 and 3) and contravention of s 3 of Act 32 of 2007 read with s 51(1) and Part 3 of Schedule 2 of Act 51 of 1997 (count 2).

[2] The record showed the appellant was alerted to the applicability of life imprisonment in the event of his conviction in counts 1 and 3 in terms of section 51 (1) of the Criminal Law Amendment Act, this being the prescribed minimum sentence.

[3] The appellant pleaded not guilty to the charges. He was legally represented at his trial. On 21 February 2022, the trial court convicted the appellant as charged, and on 10 March 2022, the appellant was sentenced to life imprisonment on counts 1 and 3, and ten-years imprisonment on count 2. The trial Court directed that all three sentences shall run concurrently.

[4] The matter serves before us as an automatic appeal in terms of section 309 of the Criminal Procedure Act 51 of 1977 (CPA). The appellant appeals against conviction and sentence.

[5] The issues on this appeal can be summarised as follows:

- (a) Whether the complainant in count 1 had sufficiently identified the appellant as her attacker.
- (b) Whether the evidence of the complainants in all three counts, who were single witnesses was reliable to prove the allegations of rape beyond reasonable doubt.
- (c) Whether the effective sentence of life imprisonment imposed is shockingly inappropriate.

Ad Conviction

[6] The facts of the matter are succinctly captured in the judgment of the trial Court nonetheless, it is necessary to briefly state the facts as presented before the trial Court. I do not propose to repeat the evidence of the first complainant, ZJ regarding her encounter with the appellant on which she testified that on the evening of 29 April 2017 at Nklonga informal settlement, in the company of her sister Zanele, whilst walking back to their home after collecting her mother's cell phone from Pinky's residence, which was about 6 to 7 houses away from theirs, ZJ first took note of the appellant that he was amongst the people who were sitting outside at Pinky's residence drinking some beverages. She further took note of the appellant when he walked out of Pinky's

residence approaching them. There was adequate lighting on the street from the outdoor lights of the nearby houses. As they walked, the appellant caught up with them and rudely asked them what they were laughing at. Before ZJ could respond, the appellant slapped Zanele on her face. At that stage, ZJ observed that the appellant had a closed Okapi knife in his hand. They both fled and Zanele took the direction of her home, whilst ZJ fled into a footpath leading to a bushy area. The appellant chased ZJ and as she ran, the appellant struck her with the handle of the closed Okapi knife on top of her head causing her to sustain an open wound. She continued to run away until she tripped and fell into a ditch.

[7] ZJ had another opportunity to see the appellant at a close distance when the appellant jumped into the ditch, by this time the appellant had opened the knife and exposed the blade. He placed the knife to her throat and instructed her to undress herself and lie down on the ground. She had time to look at the appellant taking off his trousers and without using a condom, the appellant inserted his penis into the vagina of ZJ and had sexual intercourse with her against her will. Furthermore, the appellant instructed ZJ to step out of the ditch and once again the appellant inserted his penis into the vagina of ZJ and had sexual intercourse with her. Similarly, on the second occasion, ZJ had ample time to identify the appellant. The appellant ran away after hearing voices of people approaching their direction.

[8] With regard to the second complainant, AM, the appellant's challenge is about the reliability of her evidence given that she was a single witness testifying about a rape incident. Briefly, her testimony was as follows; on 9 February 2019 at Foreman Road informal settlement in Sydenham, during the evening, she was at a local shebeen when a scuffle ensued between her uncle and a group of males, to whom she referred as 'amatlokoma'. Amid the argument, the appellant arrived and intervened on behalf of AM's uncle. Whilst quelling the conflict, a fight ensued between the appellant and the amatlokoma group.

[9] Of significance is that AM and the appellant are acquaintances. They are originally from the same village in the province of the Eastern Cape. When AM was giving evidence in court, she referred to the appellant as 'Lilli.' She testified that back

in her home village, the appellant is known by the name Lili. The record shows that even the appellant's friend namely Talusi referred to him as Lilli.

[10] AM and her friend decided to escort her uncle to his residence, which was located within the neighbourhood. On their way back to the shebeen, they ran into the appellant. The appellant approached AM, grabbed her by the front of her clothing, and demanded that she must assist him in looking for his cap which he lost during the scuffle at the shebeen. The two of them proceeded back to the shebeen where they made enquiries from the patrons as to who might have seen the appellant's cap.

[11] AM managed to escape from the appellant and went straight to her friend's shack. The appellant followed AM to her friend's shack. Upon his arrival, he knocked at the door and called AM by her name. Because they were acquaintances, AM recognised the appellant's voice and decided to go out of the shack and attend to him. She did so because her friend was taking a bath in a one-room shack, thus it would have been inappropriate for the appellant to enter the room. Moreso, she feared that the appellant would kick open the door and enter regardless.

[12] AM noticed that the appellant was holding a knife. The appellant grabbed AM and dragged her to his shack which was in close proximity to her friend's shack. The appellant closed the door and grabbed hold AM and threw AM on top of the bed. The appellant undressed AM whilst holding the knife in his hand. He then took off his pants and inserted his penis into the vagina of AM and had sexual intercourse without her consent. When AM protested on the basis that she was pregnant, the appellant's response was that he would rip open her stomach. The sexual violation of AM was exacerbated by the appellant's knife that was placed on top of the bed that they were lying on.

[13] Accordingly, I find that the evidence of AM was clear and satisfactory in all material respects.

[14] This takes me to the evidence of the third complainant, NM. On 3 August 2019 at Foreman Road informal settlement in Sydenham at about 04h00 in the morning, NM was asleep at her cousin's shack room alone. She was awakened by the appellant

knocking aggressively at the door stating that he was looking for his girlfriend, Anathi. Anathi is NM's cousin. The appellant later misled NM by stating that she must open for him so that he could collect an item that belonged to him which was inside the shack room. The unsuspecting NM believed that the appellant was speaking the truth and opened the door. She discovered that the appellant was in possession of a knife. The appellant demanded that NM should accompany him to the tavern to find Anathi. NM testified that she had no alternative but to comply as the appellant had a knife in hand. They walked for a while until they reached a bushy area. The appellant instructed NM to undress herself. She refused and that caused the appellant to cut her panty with a knife. That alone was enough to cause NM to succumb to his demand. The appellant instructed NM to lie on her back on the ground, he took off his trousers and inserted his penis into the vagina of NM against her will. NM was six months pregnant at the time.

[15] On the second occasion, the appellant found a piece of cardboard laying around and instructed NM to kneel on the cardboard so that he would penetrate her from behind, to which she complied. The appellant inserted his penis into the vagina of NM and had sexual intercourse with her. Again, on the third occasion, the appellant penetrated NM from behind. When he finished, he wiped his penis with NM's pinafore that she wore on that early morning. NM was not familiar with the area of Foreman Road informal settlement; thus, she depended on the appellant to take her back to Anathi's shack room.

[16] On their arrival back at the shack, after the appellant ate the leftover food and when he finished, he instructed NM to lie on the bed. The appellant inserted his penis into the vagina of NM and had sexual intercourse with her for the fourth time that morning. She testified that the shack was well lit with electricity light. Anathi arrived shortly after the appellant had left the shack. NM reported the whole incident of rape to Anathi. It turned out that Anathi had come across the appellant on her way to the shack room. Anathi identified the appellant by the description of his clothing given by NN. Anathi knew exactly who the appellant was and where his friend resided. NM then discovered that the appellant had left his brown jacket in Anathi's shack room.

[17] Without wasting time, Anathi and NM approached appellant's friend, Talusi and reported to him that the appellant had raped NM. Talusi knew where the appellant resided. He took NM and Anathi to the appellant's shack room. On their arrival, they found three occupants asleep. Talusi entered the shack room and proceeded to where the appellant was sleeping, and without difficulty, NM identified the appellant as her attacker. He was still wearing the same clothing that he wore earlier when he raped her. The appellant stood up in denial, holding the knife in a stabbing position. and threatening to stab Talusi and NM. The appellant managed to escape from them.

[18] There can be no doubt as to NM's reliability of her identification of the appellant. Just like the other complainants, she spent substantial time with the appellant, and she too had ample opportunity to identify the appellant. With all three complainants, the appellant threatened them with a knife. The use of violence, offensive language, and knife to instil fear in his victims are distinguishable traits possessed by the appellant when he pounced on his prey. Further, the complainants were raped at various times and did not know each other. I have also taken note that ZJ and NM were completely unacquainted with the appellant before their encounter with him, therefore, they did not have reasons to falsely implicate him. Even with AM, there is no evidence to suggest that she had any reason to falsely implicate him of raping her. All three complainants were impressive witnesses whose narration was clear and satisfactory in every material respect.

[19] Dr Thandeka Khanyile, a district surgeon at Addington Hospital, examined AM on 9 February 2019. She took swab samples for DNA analysis, and she prepared a J88 report. Similarly, in respect of ZJ, Dr Olovoocon examined her at Port Shepstone Hospital and recorded on the J88 report that ZJ had a mild laceration on the scalp. This is consistent with the testimony of ZJ. Swab samples were also taken for DNA analysis. Further, in respect of NM the State relied on the J88 report prepared by Dr Vedish Singh who examined her at Addington Hospital on 3 August 2019. Swab samples were taken for DNA analysis. The forensic DNA report proved that ZJ and NM were raped by the appellant. There was no challenge to the DNA samples and the results of the DNA analysis. In this regard, I am convinced that there was sufficient corroboration of the evidence of the complainants.

[20] Against the weight of this evidence, the appellant raised the defence of consent to sexual intercourse and suggested that he was in a love relationship with ZJ and AM. In respect of NM, he offered a bare denial of the allegations against him. These allegations were denied by ZJ and AM. It is incomprehensible to me that both ZJ and AM who were allegedly in a healthy love relationship with the appellant would falsely accuse him of serious offences such as rape because they did not get money after having sexual intercourse with him. In my view, the appellant made these assertions to demean, humiliate, and discredit them as unreliable witnesses in court. I am in agreement with the argument advanced by the State that the defence of consent was conveniently raised by the appellant in light of the positive DNA report linking him to counts 1 and 2.

[21] Before us at the hearing of this matter, Ms Fareed for the appellant, submitted that it was highly improbable that ZJ, could have positively identified the appellant as there were no streetlights where she was sexually assaulted. Since ZJ was assaulted on her head it would have been difficult for her to identify her assailant, with blood flowing down her face. Further, it was submitted that the trial Court erred in not approaching the evidence of ZJ as a single witness in the incident of rape, with caution. ZJ was criticised for not shouting for assistance whilst being sexually assaulted. Therefore, it was submitted that her evidence was not reliable. Ms Fareed submitted further that the trial Court erred in rejecting the appellant's version. His version ought to have been found to be reasonably and possibly true.

[22] With regard to the conviction in count 3, Ms Fareed submitted in her heads of argument that the evidence of NM as a single witness in the incidence of rape was not clear and satisfactory in all material aspects. Further, it was submitted that NM's evidence was not dependable for the reasons that she did not shout out for assistance whilst being sexually assaulted. To that end, it was submitted that the State failed to prove the guilt of the appellant beyond reasonable doubt and therefore the conviction should be set aside.

[23] On the other hand, the State submitted that it was common cause that the appellant had sexual intercourse with ZJ and AM. Further, that the complainants did not know each other prior to their respective encounters with the appellant, therefore,

they would falsely implicate him and lastly, that the appellant was known to AM by the name of Lili. It was submitted further that in all three counts, the complainants were impressive witnesses.

Legal principles

[24] Prior to 1998, the law took the view that the cautionary rule as it applies to accomplices had to be applied to the evidence of complainants in sexual cases. However, this rule was abolished by the Supreme Court of Appeal (SCA) in *S v Jackson*¹. In *S v M*² the court reaffirmed the principle in *S v Jackson*. Melunsky AJA had this to say:

'In *S v Jackson* it was pointed out at 476e-f that the application of the cautionary rule to sexual assault cases was based on irrational and outdated perceptions. Although the evidence in a particular case might call for a cautionary approach, this, it was emphasised in the judgment, was not a general rule: the State was simply obliged to prove the accused's guilt beyond reasonable doubt. The factors which motivated this Court to dispense with the cautionary rule in sexual assault cases apply, in my view, with equal force to all cases in which an act of a sexual nature is an element.'

[25] Further, s 60 of the Sexual Offences Act³ provides that a court may not treat the evidence of a complainant in a sexual offence case with caution on account of the nature of the offence⁴. This, however, does not detract from the unassailable need for the complainant's testimony to be clear and reliable in all material respects. Therefore, I disagree with the appellant's contention that the evidence of the complaints should have been rejected for being unreliable, and unsatisfactory.

[26] It is trite that, when evaluating the evidence of an alleged victim of rape or sexual assault, a court need do no more than exercise the caution that is necessary when there is only one witness to the offence alleged. In addition, the evidence of the

¹ *S v Jackson* 1998 (1) SACR 470 (A).

² *S v M* 1999 (2) SACR 548 (SCA).

³ Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 ('the Sexual Offences Act').

⁴ Section 60 of the Sexual Offences Act states that:

'Notwithstanding any other law, a court may not treat the evidence of a complainant in criminal proceedings involving the alleged commission of a sexual offence pending before that court, with caution, on account of the nature of the offence.'

complainant must not be seen in isolation but rather as part of the mosaic of evidence before the court⁵.

[27] Therefore, I am satisfied that on the totality of the evidence in this case, the trial court was correct in concluding that the guilt of the appellant in respect of the rape charges was established beyond reasonable doubt. Therefore, I conclude that there is no reason to interfere with the conviction of the appellant.

Ad Sentence

[28] A further question to consider in this appeal is the presence or otherwise of the substantial and compelling circumstances to warrant a deviation from the prescribed minimum sentence of life imprisonment for counts 1 and 3. It was submitted on behalf of the appellant that the trial court erred by failing to consider the time spent by the appellant in detention awaiting trial as a substantial and compelling circumstance to warrant a deviation from the prescribed minimum sentence of life imprisonment in the case of the appellant.

[29] The State submitted that there is no need to interfere with the imposed sentence because the appeal court may only interfere with sentence if there is a manifest misdirection by the lower Court and that the sentence is shockingly inappropriate or there was an irregularity during the trial or sentencing of the appellant. This was not the position in this case.

[30] I have considered the well-established legal principle that a court of appeal will only, under special circumstances, interfere with the findings made in a court of first instance, in particular where such failure to interfere will lead to an injustice. In *S v Francis*⁶ 1991 (1) SACR 198 (A) at 204C-E the following was stated:

'This Court's powers to interfere on appeal with the findings of fact of a trial Court are limited (*R v Dhlumayo and Another* 1948 (2) SA 677 (A))... In the absence of any misdirection the trial Court's conclusion, including its acceptance of D's evidence, is presumed to be correct. In order to succeed on appeal accused No. 5 must therefore

⁵ *S v Sauls & others* 1981 (3) SA 172 (A) at 180; In *S v J* 1998 (2) SA 984 (SCA).

⁶ *S v Francis* 1991 (1) SACR 198 (A) at 204C-E.

convince us on adequate grounds that the trial Court was wrong in accepting D's evidence - a reasonable doubt will not suffice to justify interference with its findings ... Bearing in mind the advantage which a trial Court has of seeing, hearing and appraising a witness, it is only in exceptional cases that this Court will be entitled to interfere with a trial Court's evaluation of oral testimony . . .'

[31] In sentencing the appellant, the trial court took into account the personal circumstances of the appellant, the nature of the offence, and the interests of society. The appellants personal circumstances and mitigating factors were stated as follows:

31.1 The appellant was 26 years of age at the time of trial, with no previous convictions. He was unmarried with no children and had no family responsibilities. He earned a living by selling chips.

[32] The main challenge to the imposed sentence was that the appellant had been in custody awaiting trial for two years before he was sentenced. Our courts have dealt with the question of whether a lengthy period of detention whilst awaiting trial may be regarded as a substantial and compelling circumstance to depart from the prescribed life sentences. As Rogers J pointed out in *S v Solomon & Others*⁷ that:

'[24] Where a court imposing a determinate sentence considers that pre-sentencing detention should be taken into account, the general trend is to deduct an equivalent period from what would otherwise have been an appropriate sentence. However, and as Goosen J explained in *S v Kammies & another* [2019] ZAECPHC 86 paras 34-49, this approach presents conceptual difficulty when life imprisonment is the prescribed sentence and there are no other circumstances justifying a departure from the statutorily ordained sentence. That was the position in *Kammies*, where the accused had spent three years in custody awaiting trial. Goosen J considered that *Radebe* was authority for the proposition that time spent awaiting trial can never on its own be a substantial and compelling circumstance. It was not permissible, furthermore, to attempt to account for pre-sentencing detention by having regard to the 'parole exclusion period' (i.e. the period the offender must serve before being considered for parole – usually 25 years in the case of a life sentence). He concluded that since there

⁷ *S v Solomon and Others* (CC23/2018) [2020] ZAWCHC 118; 2021 (1) SACR 533 (WCC) (12 October 2020)

was no rational way in which to take the pre-sentencing detention into account, he was required to impose life imprisonment.

.....

[26] In my view, the reason pre-sentencing detention on its own should not (at least ordinarily) be regarded as a substantial and compelling circumstance to depart from a prescribed life sentence lies in the implications of what Goosen J said in paras 38 and 39 of his judgment. A court must determine an appropriate sentence without regard to the parole exclusion period. The period actually imposed is what matters. Where an accused is arrested and kept in custody, pre-sentencing detention is concerned with the prejudice he suffers by virtue of the delay from the time he is arrested until the time he is sentenced. In the real world, there will always be a delay, no matter how efficient the criminal justice system is. Nevertheless, where the court is concerned with a determinate sentence, one can assess the accused's prejudice by contrasting the actual position with a hypothetical scenario in which there was no delay between arrest and sentencing. In the hypothetical scenario, the accused would have started his sentence on the date he was arrested and would thus have been released sooner.

[27] Where, however, the prescribed minimum sentence is life imprisonment, the sentence means imprisonment for as long as the accused is alive. Leaving aside, as one must, the prospect of parole, the accused would not have been released sooner on the hypothesis of no interval between arrest and sentencing.'

[33] Applying the dictum in *Solomon* to the facts of the present case, I am not persuaded that substantial and compelling circumstances existed that warranted deviation from the imposition of sentences of imprisonment for life in respect of counts 1 and 3. Indeed, the seriousness of the offences to which the appellant had been convicted and the interest of the society far outweighs his personal circumstances. In my view, the notable aggravating factors in the case against the appellant are that on each occasion the appellant used a knife either to attack his victims or induce fear. Further, the evidence in all counts was that he did not use protection when he raped the complainants and the psychological and emotional trauma that the complainants suffer. This is evident from the victim impact statements produced by the State during trial proceedings.

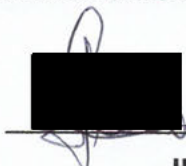
[34] The SCA has emphasised, however, that a trial court should not base a finding of substantial and compelling circumstances on flimsy or speculative grounds or

hypotheses⁸. More so, in *S v Abrahams*⁹ the SCA held that life imprisonment as a sentence for rape should be imposed only where the case is devoid of substantial factors compelling the conclusion that such a sentence is inappropriate and unjust.

[35] Having regard to the totality of the evidence, I am satisfied that there is no basis for this court to interfere with the convictions and sentences imposed by the trial court.

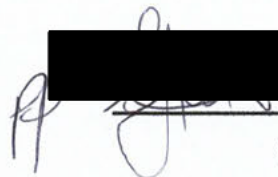
[36] In the result, I make the following order:

36.1 The appeal against the appellant's convictions and sentences is dismissed.



JIKELA AJ

I agree.



CHETTY J

⁸ *S v PB* 2011 (1) SACR 448 (SCA) para 9 -10.

⁹ *S v Abrahams* 2002 (1) SACR 116 (SCA), para 29.

Appearances

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Mr T Ramkelowan

Instructed by:

Office of the Director of Public Prosecutions:

Durban

Heard:

24 May 2024

Delivered:

26 June 2024

Judgment is delivered electronically to parties on 26 June 2024 at 14:30.