

**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE DIVISION: MAKHANDA]**

CASE NO. CA&R196/2023

In the matter between:

UNATHI HESI

Appellant

and

THE STATE

Respondent

JUDGMENT

JOLWANA J:

[1] The appellant appeared before the Regional Court sitting in Tarkastad in the Eastern Cape on two charges, one of which was a charge of housebreaking with intent to rape and rape, and the other being theft of loose potatoes and vetkoeks with a combined value of R20.00. He pleaded not guilty to both charges. He was however convicted on both charges. He was thereupon sentenced to life imprisonment in respect of housebreaking with intent to rape and rape. In respect of the theft conviction he was sentenced to 3 months imprisonment. He has exercised his automatic right of appeal in respect of the rape conviction and sentence. He appeals only against conviction in respect of the theft count.

[2] On 15 September 2019 the complainant was at her great grandmother's house at M[...] Street in T[...] at about 21:00 that Sunday night. At that time the complainant was all by herself. The house was fenced, had seven rooms and there were only two exit doors. The kitchen door was closed and locked. The front door was just closed but it was not locked. The windows were closed as well. The gate was closed but it was not locked. There was electricity in the house which provided light.

[3] The complainant testified that at the time of the incident she was in her room lying down on top of the bed, but she was not underneath the blankets. The appellant came into her room and immediately switched off the electric light in the room. Her evidence was that she did not see the appellant when he entered through the dining room door but because it was not locked he would have used it to gain entry into the house. When the appellant entered the room, she was in deep sleep. She was woken up when she heard her bedroom door opening and it made a sound as it was being opened. Initially, she thought it was her boyfriend who was entering.

[4] When the appellant switched off the light she then woke up. At that stage she did not know who was entering her bedroom. She then thought that it was a stranger because her boyfriend did not switch off the light when he entered her bedroom. She woke up in a state of shock and realised that the person entering was the appellant. She recognised appellant through his voice. Furthermore, she had her electric heater on, and it provided sufficient light. After switching off the light the appellant came to her bed and climbed on to the bed where she was lying.

[5] He took off his pants and his shirt after which he undressed her of her jeans, trousers, her tight pants and her black panty which she was wearing. He threatened to kill her if she made noise. When all of this was happening, she was already aware that it was the appellant. She screamed in fear. He proceeded to take out his penis and inserted it into her vagina thus raping her. She was terrified at the time. After he inserted his penis in her vagina, he penetrated her two times. He used a pillow to smother her to prevent her from screaming. The complainant explained that after inserting his penis in

her vagina he ejaculated, and this was the second time in which he inserted his penis into her vagina.

[6] He then used a pillow to smother her. This was the third occasion which was when he penetrated her from the back by inserting his penis into her anus. He did the back penetration by turning her around so that her back faced him and inserted his penis in her anus. The complainant explained that on the first occasion when he vaginally penetrated her, he did not ejaculate. He again inserted his penis into her vagina which is when he ejaculated. The third occasion was when he penetrated her anally. However, he did not ejaculate on the third occasion. After the anal penetration he got off her and it was at that stage that he smothered her with a pillow saying she was making noise.

[7] She then heard her mother's voice coming from the dining room. She could not respond to it because the appellant had smothered her. She then heard the sound of the door closing. The appellant stood up on realising that her mother had left and went to the kitchen. Her mother did not come to the bedroom. At the time the appellant was going to the kitchen she was getting dressed so that she could run away and report what had happened to her. She did not follow him to the kitchen. The appellant came back to the bedroom to get his lumber jacket. It was at that stage that she noticed that he was carrying loose potatoes and some fat cakes. These were in the kitchen before he took them. He took his lumber jacket and left with the potatoes and the fat cakes.

[8] Not long thereafter, her boyfriend arrived. She and her boyfriend had an argument emanating from their previous quarrel. After that argument they slept but they did not engage in sexual intercourse. In the morning, she did not tell him what had happened to her. She did not tell him that the appellant was there but eventually she told him. She explained that she was initially reluctant to tell him because she thought he was not going to believe her. When she eventually told him that the appellant was there, his response was that maybe he was looking for him. She then decided not to tell him the details of what actually happened because she knew he was not going to believe her.

[9] She woke up the following morning after telling him that the appellant was there leaving him in bed without telling him where she was going. She went to her next-door neighbour Nolubabalo Mtwazi (Nolubabalo) and reported to her what she was put through by the appellant. She simply told Nolubabalo that the appellant came into her house and raped her but did not tell her the details of how he raped her. Nolubabalo advised her to go to the police and report the incident. Indeed, she went to the police and reported the matter. The police came to her house as part of the investigation. They then looked for the appellant. She showed the police a shirt that was hanging in the washing line at the appellant's home which the appellant was wearing when he came to her house. However, the appellant was not at his home. She and the police looked for him and even went to her boyfriend's place to look for the appellant. They did not find him even there. The police then brought her home. At the time he went to the police to report the rape she was taken to Tarkastad Hospital where the doctor examined her including in her private parts.

[10] The complainant explained that the night of the incident was not the first time that the appellant had come to her place of residence. He would come together with her boyfriend but he had never come there alone before. The appellant had no relationship with her. She further elaborated that she told the appellant that as a friend to her boyfriend she could not be the one raping her because she trusted him. He frequented her place of residence and she never thought that he could sexually assault her. At some stage she told her boyfriend what the appellant had done to her.

[11] Under cross-examination the complainant denied that on the day of the incident she had been drinking alcohol with the appellant and her boyfriend at Mpolweni Tavern. She testified that her boyfriend would come to her place every night at different times. Before the incident the appellant had never come to her place without her boyfriend. When he entered her bedroom that night, he did not say anything except at the time he was climbing onto the bed which is when he told her to shut her mouth. At that stage she already knew that the person was the appellant having recognised him. In her room her four-bar heater was on which provided sufficient light for her to be able to identify him.

Save for some immaterial contradictions like at which stage was a pillow placed on her face, was it on the second penetration or third penetration occasion, her evidence in chief and her evidence under cross examination remained largely consistent.

[12] The version of the appellant that was put to the complainant was that the appellant, the complainant and her boyfriend were drinking together at Mpolweni Tavern on the day of the incident. Whilst they were there her boyfriend told her not to drink any alcohol. She then asked the appellant to pour some alcohol for her. She and the appellant then made plans to meet later at her place and that her boyfriend must not know about those arrangements. The appellant agreed to those plans. The complainant then whispered to him that she would leave the door unlocked to allow him to come into her house so that they may sleep together. Thereafter she left him with her boyfriend. The appellant later went to her house leaving her boyfriend at the tavern and found the gate locked. He called out to the complainant who then came to open the gate for him. They both went into the house and had one round of consensual vaginal sexual intercourse. After that there was a knock on the door which was her boyfriend knocking. The complainant told him to hide and sneak out after her boyfriend would have come in. He did so and went home. He was shocked the next day when he heard that she was saying that he raped her. The complainant denied the entire version of the appellant as being false and denied giving him consent to have sexual intercourse with her.

[13] The next State witness was Nolubabalo who confirmed that the complainant arrived at her house in the morning on 16 September 2019. She was shivering and in a state of shock and told her that something happened to her and said that she was raped and started crying. When she asked her who raped her, she said she was scared to name the person as he threatened to kill her if she mentioned his name. She then told her to report the matter to the police. She later came back with the police and told her that she had been to hospital as well. After she came back with the police, she told her that she had been raped by the appellant. After her evidence a medico-legal examination report was admitted into the evidence by agreement with the legal representative of the

appellant. It showed bruises inside the vagina, a 6 o'clock tear in the lower vagina and multiple anal circumferential tears. After that the State closed its case.

[14] The appellant's evidence was that he was 26 years old and resided at Z[...] L[...], Extension [...] in T[...] where he stayed with his mother. He was born there. On 15 September 2019 he met the complainant at Mpolweni Tavern and they drank together. The complainant was with her boyfriend. He went to the tavern at about 22:00. As the three of them were drinking together the complainant's boyfriend told her not to drink alcohol. The complainant came to him and asked him to pour her a drink and he poured her a glass. They were sitting at different tables. The appellant was sitting with the complainant's boyfriend while she was sitting with her friends at another table.

[15] He gave the complainant a glass of wine. She later came to him and said that he should visit her at her place, but he should not tell her boyfriend. She then left him at the tavern. At about 23:30 he also left proceeding to her place. When the complainant came to him asking him to come to her place her boyfriend was present. He went to her place and found the gate locked. He called out her name and she came to open the gate for him. They went inside the house. They then had consensual sexual intercourse. There was a knock at the door while she was on top of her. It was her boyfriend calling out her name. She got up and told him that their sexual encounter must be kept secret and that he must not tell her boyfriend or her mother. She told him to hide in another room after which she went to open the door for her boyfriend. Her boyfriend came into the house while he was still in the house. The complainant then came to the room in which he was hiding and told him to sneak out, which he did and went home to sleep. He was arrested a week later. He denied penetrating her more than once or penetrating her anally. He denied putting a pillow on her face to stop her from screaming saying there was no pillow there. He did not recall going to the kitchen and taking the items he was accused of stealing.

[16] Under cross-examination the appellant testified that the complainant was drunk. When the complainant told him that he must come to her house she did not tell him

what he would be going there to do. That was the first invitation he ever got from the complainant. He never thought that he and the complainant would have sexual intercourse. At 21:00 on 16 September 2019 he was still at work where he was doing his odd jobs. This was the same time that the complainant was being raped. When he was at the complainant's place the complainant was clad in a heart dotted gown which was black. When they got to her bedroom, she took off the gown and placed it on the floor and asked to have sexual intercourse with him. When she took off her gown, she was completely naked. He denied putting a pillow on her face and said that he never smothered her. He testified that the complainant never screamed. After his evidence the appellant's case was closed.

[17] The court a quo was mindful of the fact that the State relied on the evidence of a single witness and the cautionary rules that apply in assessing and evaluating that evidence. It went on to say that whilst it was so that there is no rule of thumb or formula for the consideration of the credibility of the evidence of a single witness it was required to weigh all the evidence, consider the merits and demerits of the case, and decide whether that evidence was trustworthy despite its shortcoming, defects or contradictions. Having done so it must satisfy itself that the truth has been told¹.

[18] In this matter the objective evidence reveals the following. The complainant was alone in her home at the time of the incident. The appellant was a frequenter to that home as he often went there with his friend who was the complainant's boyfriend. He would have been aware of the ways to enter that homestead and the fact that the main door was often closed and unlocked to allow the complainant's boyfriend to come in at some point during the night. The appellant left the Mpolweni Tavern leaving the complainant's boyfriend there in circumstances in which he would have known that the complainant would be alone. He went to the complainant's house and found her alone. His version was that he went there by arrangement with the complainant that he should go there and not tell the boyfriend of the complainant that he had been invited to go there.

¹ Ximba v S (957/2022) [2024] ZASCA 6 (19 January 2024 para 26.

[19] He got there and had sexual intercourse with the complainant which he said it was consensual. The first thing she did the following morning was to tell her neighbour Nolubabalo that she had been raped. Nolubabalo encouraged her to report the matter to the police. The police took her to hospital and the J88 report revealed some injuries in her vagina and she also had some anal injuries. The complainant's version was that not only was she penetrated by the appellant more than once but also on the third occasion she was anally penetrated. The vaginal and anal injuries support the complainant's version in some important respects in this regard.

[20] The evidence of the complainant, while very credible, was by no means perfect or without discrepancies. However, it was corroborated in some important respect by that of the appellant himself. It was also corroborated by that of Nolubabalo whose evidence was essentially that the complainant reported to her that she had been raped by the appellant. The appellant placed himself at the complainant's home that night and confirmed that he had sexual intercourse with her which he said was consensual. It is clear that the version of the appellant about consensual sexual intercourse with the complainant was fabricated, improbable and false beyond reasonable doubt as was most of his evidence. In the result the appeal against conviction in respect of the rape count must fail.

[21] The appeal against the sentence of life imprisonment is based on the court a quo being said to have failed to properly consider the personal circumstances of the appellant. Even on a cursory reading of the sentence judgment it is clear that the court a quo engaged with the personal circumstances of the appellant quite extensively. It however, also considered the fact that the appellant has previous convictions. One conviction was in 2015 for housebreaking with intent to steal and theft for which he was given a suspended sentence of eighteen months. In 2016 the appellant was convicted of a sexual offence and assault with intent to do grievous bodily harm. Both offences were taken together for purposes of the sentence. He was thereupon sentenced to five years imprisonment.

[22] The court then considered the seriousness of the rape offence and what it does to its victims. The prevalence of this offence against the vulnerable members of our society which are largely women and children was also a weighty consideration to the court a quo. The fact that the offence was well planned by someone who knew the living circumstances of the complainant, who also knew the complainant and her boyfriend very well was a very relevant consideration. It then concluded, having regard to all sentencing considerations that there were no substantial and compelling circumstances as would justify a departure from the ordained minimum sentence of life imprisonment in respect of the rape offence. I am of the view that there is no basis for this Court to interfere with the sentencing discretion exercised by the court a quo. The trial court cannot, on the facts of this case be faulted for not departing from the prescribed minimum sentence. Therefore, the appeal against the sentence of life imprisonment must fail.

[23] The appellant also appealed against the theft conviction. In appealing to this Court against the conviction and sentence in respect of the rape offence the appellant exercised his right to an automatic appeal having been sentenced to life imprisonment. However, the appellant failed to apply for leave to appeal against conviction for the count of theft. I am of the view that he should have done so. However, and in any event, having been sentenced to life imprisonment, the sentence of three months' imprisonment in respect of the theft conviction is not going to affect the amount of time he spends in prison. The relevant sentence for which he is not appealing will run concurrently with the life sentence in terms of the Correctional Services Act. He still retains the right to approach the court a quo and apply for leave to appeal if he is so minded. This court has no jurisdiction to entertain the appeal against conviction absent leave to appeal being sought and granted.

[24] In the result the following order shall issues:

1. The appeal against conviction and sentence in respect of count 1, housebreaking with intent to rape and rape is dismissed.

M.S. JOLWANA
JUDGE OF THE HIGH COURT

I agree:

I. BANDS
JUDGE OF THE HIGH COURT

Appearances

Counsel for the appellant:	V.M. Sojada
Instructed by :	Legal Aid South Africa Makhanda
Counsel for the respondent:	H. Obermeyer
Instructed by :	Director of Public Prosecutions Makhanda
Date heard:	08 May 2024
Date delivered:	20 June 2024