



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: A35/2024

(1)REPORTABLE: NO
(2)OF INTEREST TO OTHER JUDGES: NO
(3)REVISED
28/10/2024 [Redacted Signature]
DATE SIGNATURE

In the matter between:

LUCAS MANDLA MNCULWANE

Plaintiff

and

THE STATE

Defendant

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 28 October 2024.

JUDGMENT

ENGELBRECHT, AJ

[1] The appeal is from the Regional Court Nigel in the Regional Division Gauteng.

[2] The appellant was convicted and sentenced to life imprisonment on contravention of Section 3 read with Sections 1, 56(1) to (61). Further read with the provisions of 592(2), 94, 256, 257 and 281 of the Sexual Offences Act 32 of 2007.

[3] Condonation was granted for the late filling of the heads of argument in respect of both the Appellant and the Respondent.

[4] The essence of the Appellants appeal is that the trial court over emphasised the case of the State whilst giving a cursory gloss over the Appellants case. It is trite that when evaluating the evidence before it a court should take into account all the evidence presented and not compartmentalize the state case against that of the defence case. In this regard the Court refers to **Trainor 2003(1) SACR 35 (SCA)** where Navsa JA held the following: "The passage from the magistrate's judgment quoted in para [6] demonstrates a misconception of how evidence is to be evaluated." In **S v Van Aswegen 2001 (2) SACR 97 (SCA) Cameron JA (at 101 a-e)**, after observing that this misconception has its origin in cases like **S v Kubeka 1982(1) SA 712 (V) at 715 G**, referred with approval to **S v Van Tellinghen 1992(2) SACR 104 (c) at 106a-h** and **S v van der Meyden 1999 (1) SACR 447 W at 449 h- 450b**. In the latter case Nugent J said the following at 449h- 450b: *"It is difficult to see how a defence can possibly be true if at the same time the state's case with which it is irreconcilable is completely acceptable and unshaken. The passage seems to suggest that the evidence is to be separated into compartments and 'the defence case' examined in isolation, to determine whether it is so internally contradictory or improbable as to be beyond the realm of reasonable possibility, failing which the accused is entitled to be acquitted. If that is what was meant, it is not correct. A court does not base its conclusion, whether it be to convict or to acquit on only part of the evidence. The conclusion which it arrives at must account for all the evidence.*

[5] *The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The*

process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne 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 of it might be found to be only possibly false or unreliable, but none of it may simply be ignored."

[6] Navsa JA further held that "*A conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable the quality of that evidence, as must corroborative evidence, if any particular issue or in respect of the case in its entirety. The compartmentalised and fragmented approach of the magistrate is illogical and wrong*" 40f-41c.

[7] The facts of the matter at hand are briefly that the complainant was sent to pick mielies in the mielie field in Duduza Nigel. Complainant set off to do as her mother requested. She was in the company of two friends. Just as they were about to enter the mielie field the Appellant approached them. Appellant had a bag with him and she recalled that he also had Vaseline in his possession. Appellant told her friends T H and T to wait there whilst he and complainant entered the mielie field. Inside the field he undressed her made her to lie down face up and then inserted his penis in her vagina. When he was done he smeared Vaseline in her vagina. Afterwards she told her friends T H and T and they in turn told her brother and sister who in turn reported the matter to the elders. Complainant denied that the Appellant was in Balfour that day. On that day that she was raped she was visiting her friend T H. Appellant is her next -door neighbour. Complainant's sister corroborated her version that Appellant was with the complainant and her friends, she saw them together that day. T H testified that she made a report to complainant's sister. After 15 July 2020 the Appellant disappeared until the police found him. The alleged rape took place on 15th July 2020 in Duduza. Appellant was arrested on 03rd September 2020 in Balfour. Complainant was medically examined by Dr Mosheledi on 23rd August 2020 who concluded that genital penetration with a blunt object like an erect penis had taken place.

[8] Appellant maintained that he was not in Duduza on the 15th July 2020. His late father took ill and on 15th July 2020 he was at his father's place in Balfour. On the 15th July 2020 he was already in Balfour since 27th March 2020. In support of his alibi he called his uncle, Mr Misha Phiri as well as his sister Me Sibongile Mbhila. Me Mbhila testified that on the 24th March 2020 she went to fetch the Appellant and drove him to Balfour, left him there with their father and immediately returned to Duduza. She was adamant that the Appellant did not return to Duduza because when she called the Appellant, he would give her an update report on their father's health. On the 15th July 2020 she called and enquired about their father's health, and spoke to her father. As regards Appellants whereabouts on the 27th March 2020 she does not know anything. What she is certain about is that on 24th March 2020 she secured an appointment at Home Affairs in order that Appellant change his surname. And, for this purpose an appointment letter was issued. She does not know what Appellant is talking about the 27th March 2020. She was further adamant that she was telling the truth that she returned home from Balfour around 10 or 09 o'clock and not as Appellant testified that they left Home Affairs between 13h00 and 14h00. Appellant did not attend their father's funeral because he was arrested. Mr Phiri testified that Appellant arrived in Balfour on the 24th March 2020 and a week after Appellant arrived the police arrested him. He too referred to the appointment letter of Home Affairs for a change of surname that Me Mbhila had for the 24th March 2020. That appointment letter was with him and that is why he is able to remember it. Effectively, according to the evidence of Mr Phiri, Appellant could not have committed the crime since he was in custody.

[9] Complainant was certain about the identity of the person who raped her. He was after all her next- door neighbour and that fateful day was the day on which she was raped. She knew him prior to the alleged crime. See **S V Miggel 2007(1) SACR 675 (c)** per Saner AJ *"The probability that an identification is reliable is strengthened when the person who has been identified was known beforehand to the identifying witness. But even in that case, close attention must be paid to the opportunity which the witness had of identity of the person in question in the circumstance prevailing, in order to ascertain whether a correct identification was made. However, at the end of the day, the day, the test is, and remains, whether there was proof of ... beyond all reasonable doubt, taking into account the evidence as a whole, including the question as to whether an accused has even evidence or not (S V Mthetwa at 769 A-F) or has given a false alibi (S V Khumalo above at 328G) 678f-h"*. Also, due to the lapse of

time (this trial commenced two years after the alleged rape) there were contradictions between the evidence of the complainant and her friend TH. Complainant said the Appellant had Vaseline with him TH said he had Zambuck. Complainant said she was raped yet TH's response to the prosecutor regarding the first report is as follows: '...we asked D what happened in there and she said nothing.' These contradictions point away from any collaboration between the Complainant and TH. If anything, these contradictions confirm that Appellant was on the scene. The latter coupled with the version of Me Mbhila that she immediately returned home to Duduza from Balfour after dropping the Appellant (a return trip of approximately roughly 80km) is indicative that one could have been in two places on the same day. Her evidence is that she returned round about 10 or 09 o'clock whilst his version is that they left Home Affairs between 13h00 and 14h00 that day. The state's case in conjunction with the Appellant's own version nullifies the alibi raised by him.

[10] In my view, at the closure of the both the states and defence cases it was clear that the alibi of the Appellant did not stand true and that the state proved its case beyond reasonable doubt. Furthermore, it is clear that the trial court gave due consideration to the totality of evidence presented.

[11] Sentencing is primarily a matter of discretion more particularly whether the sentencing court exercised its discretion judicially and properly. In **S V Pillay 1977(4) SA 531(A) at 53 para E-G** the court held as follows "*As the essential enquiry in an appeal against sentence, however, is not whether the sentence was right or wrong but whether the court in imposing it exercised its discretion properly or judicially, a mere misdirection is not by itself sufficient to entitle the Appeal court to interfere with the sentence; it must be of such a nature, degree or seriousness that it shows directly or inferentially that the court did not exercise its discretion at all or exercised it improperly or unreasonable. Such a misdirection is usually and conveniently termed one that vitiates the Courts decision on sentence.*" See also **S V Romer 2011(2) SACR153 SCA at para 22.**

[12] The personal circumstances of the Appellant are as follows:

- he was incarcerated for 34 months pending the finalization of the trial;
- he was single with no dependants;
- he was not employed and had only completed grade 2;
- he was a first offender.

[13] On behalf of the complainant the following circumstances were put forth:

- she was a minor child aged 09 years at the time of the commission of the offence;
- the complainant was traumatised;
- the Appellant showed no remorse and, as was gleaned from the pre-sentence report the Appellant planned the rape to avenge one Mr Tshabalala;
- the Appellant abused the fondness children had towards him.

[14] On behalf of the Appellant Counsel requested this court to consider a reduction of the term of imprisonment from life imprisonment to 20 or even 25 years imprisonment.

[15] The fact that the Appellant was in custody for 34 months as an awaiting trial detainee does not entitle the Appellant to a discounted term of imprisonment if anything, his personal circumstances should recede to the background when it becomes clear that the offender is deserving of a substantial period of imprisonment. In this regard see **S V Vilakazi 2009 (1) SACR 552 SCA at paragraph 58.**

[16] In the matter at hand there are no indications before this court that the sentence was wrong or that the trial court did not exercise its discretion properly or judicially. It is clear that no substantial and compelling circumstances were advanced to move the Regional Magistrate to deviate from imposing the prescribed minimum sentence.

ORDER

The following order is proposed:

- 1. Condonation is granted for the late filing of both parties of heads of argument;**
- 2. The appeal against conviction and sentence is refused;**
- 3. The conviction and sentence are confirmed.**



N A ENGELBRECHT
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree, and it is so ordered



HOLLAND-MUTER J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA
APPEARANCES:

For the Appellant: Adv M G BOTHA

For the Respondent: Adv V TSHABALALA

Date of hearing: 15 October 2024

Date of judgment: 28 October 2024