

**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY**

Case No: CA & R 25/2023

Heard on: 06/05/2024

Delivered on: 28/06/2024

Reportable: YES / NO

Circulate to Judges: YES / NO

Circulate to Magistrates: YES / NO

Circulate to Regional Magistrates: YES / NO

In the matter between:

STEVEN KAOTSANE

APPELLANT

and

THE STATE

RESPONDENT

Coram: Williams ADJP et Mamosebo J

JUDGMENT

MAMOSEBO J

- [1] The appellant appealed against his conviction of rape by the Kuruman Regional Court, Mr L Mdoda, on 03 December 2021, and the sentence of life imprisonment imposed on him on 22 February 2022. He enjoys an

automatic right of appeal as contemplated in s309(1)(a) of the Criminal Procedure Act 51 of 1977 (the CPA).

The merits on conviction

- [2] The appellant was legally represented when he pleaded not guilty to a charge of rape. In his plea explanation he admitted formally in terms of s 220 of the CPA, to having been the driver of the Toyota Ford Ranger; that he met the complainant and her friends at Biker's Joint; that the complainant and her friends needed a lift to Obama and that he gave them the lift; that he had consensual sexual intercourse with the complainant. Therefore, the only element that the State needed to prove was whether there was consent or not.
- [3] Mr Steynberg, for the appellant, and Ms Stellenberg for the respondent, agreed that although a portion of the record was interrupted, it is not necessary for it to be reconstructed. This Court is in a position to adjudicate the appeal on the available record.
- [4] The State led the evidence of the complainant Ms M[...] J[...] M [...], Mr B[...] M [...], the complainant's boyfriend, Ms K[...] M [...], complainant's younger sister, and Dr Nezingu Lengo whose completed J88 report of the medico legal examination was also handed in by the prosecutor. The appellant testified in his defence but closed his case without calling any witnesses.
- [5] The background facts are the following. 16 December 2019 was the birthday of K[...] M [...], the complainant's younger sister. They arranged to celebrate it with their friends in town namely, M[...] S [...], M[...] S [...], N[...] K [...], K[...] and R [...]. They later went to a pub known as 'The Bikers' Joint' in Mothibistad where they stayed until late. They met the appellant who offered them a lift. Mpho drove the appellant's vehicle to Obama after the appellant had indicated to them that he was not in a condition to drive.
- [6] All the friends including her sister alighted the vehicle at Obama and, surprisingly, the accused took charge of the driving again. It could be

around 22:00 to 23:00 when appellant and the complainant left Obama. He offered to take her home at Magwanyane Village but took the opposite direction instead, to Promised Land, and stopped at a bushy area where he had sexual intercourse with her on the car seat without using a condom. He returned to the driver's seat but the engine would not start. Her evidence is that he pushed her causing her to fall on the shrubs sustaining scratch marks on her thighs, neck and cheeks. The appellant again pulled off her underwear and had sexual intercourse with her in the open veld.

[7] They subsequently walked to his shack where they further had sexual intercourse throughout the night which caused her to have vaginal bleeding. She did not scream at any point because he threatened her with a knife. The following morning, she fled to a nearby house and sought help. Her boyfriend, Mr B[...] M[...], arrived with the police who, after their preliminary investigations, took her for medical treatment. The appellant was later arrested.

[8] Mr Steynberg contended that the trial Court erred in not applying the cautionary rule to the evidence of the complainant who was a single witness in the trial proceedings in respect of the rape itself. The trial Court further erred in convicting the appellant amidst all the contradictions in the evidence of the State.

[9] The first issue in this appeal is whether the sexual intercourse was consensual or not. Although the complainant was a single witness regarding the rape, her testimony was clear and coherent. She was corroborated by K[...] that the appellant offered to take the complainant home. A further corroboration is found in her condition as testified to by her boyfriend and K[...] that she cried continuously, has abstained from sexual intercourse with her boyfriend and that she was still traumatised when they met her in hospital. The doctor explained that she was bleeding from her vagina and it was outside her menstrual cycle.

- [10] The apparent contradictions pertaining to the evidence of the State pertaining to whether or not she escaped from the appellant's home only in her panties, t-shirt and skirt or only in her skirt and bra is to me immaterial. What is noteworthy is that she escaped to the neighbours and sought help therefrom and the doctor found multiple scratches on her cheek, anterior side of her neck, lateral outer side of right thigh, inner side of left thigh, both elbows on the posterior side and blood on the vulva and vagina. The doctor explained that the complainant may not have suffered any tears because of her compliant hymen.
- [11] The appellant's version was not without contradictions which were conceded by the defence. He seemed to suggest in his evidence that the complainant fell from the vehicle into shrubs when she alighted because of the height of the vehicle¹. However, later during cross-examination, he claims that she fell from the vehicle because she was drunk.² He says he had put his arm around the complainant when they sat at the back but this was not put to the complainant. Despite being aware of the complainant's injuries he withheld them from his attorney because he did not think it was important to tell his attorney.³ According to the appellant, as they were driving around, they ended up sitting next to each other and he put his arm around her and they were attracted to each other. He describes their so-called attraction as *'being charmed'*. The complainant disagreed with him.
- [12] The appellant testified that the complainant said the following at a tavern at Wrenchville about him⁴ *"when I was requesting them to buy me beer as well, then Motshidisi then shout[ed] at me, saying that I do not have money, I am penniless, my car is not even in a good condition and I am now being a parasite, dependent on women."*

Her testimony was that she had a boyfriend and did not entertain the thought of having sexual intercourse with a stranger. The aforementioned utterances

¹ Record page 209 line 8

² Record page 245 line 8

³ Record page 249 lines 12 -15

⁴ Page 203 of the record

made at Wrenchville negates, in my view, the suggestion by the appellant that she was attracted to him. On the suggestion by the appellant that she demanded R500.00 from him as compensation the following morning after the sexual intercourse, she explained that it was actually the appellant who sent people to her offering her money to withdraw the charges. She told the appellant that she was not destitute and did not need his money. K[...] and her boyfriend have corroborated her version regarding her financial position. It is untenable that she would ask for money from him when she had already assessed him not being in a strong financial standing within a few hours of their interaction at Bikers Joint. His version in that regard is therefore not persuasive. I should add that the contradictions in the testimony of the complainant did not, in my view, affect her credibility. See *S v Mkohle* 1990 (1) SACR 95 (A) at 98f-h and *S v Mafaladiso en andere* 2003 (1) SACR 583 (SCA) at 593e – 594h.

- [13] The approach to be followed in assessing evidence is suggested by Nugent JA in *S v Mbuli* 2003 (1) SACR 97 (SCA) at para 57 where the Court held:

“[57] It is trite that the State bears the onus of establishing the guilt of the appellant beyond reasonable doubt, and the converse is that he is entitled to be acquitted if there is a reasonable possibility that he might be innocent (R v Difford 1937 AD 370 at 373, 383). In S v Van der Meyden 1999 (2) SA 79 (W), which was adopted and affirmed by this Court in S v Van Aswegen 2001 (2) SACR 97 (SCA), I had occasion to reiterate that in whichever form the test is applied it must be satisfied upon a consideration of all the evidence. Just as a court does not look at the evidence implicating the accused in isolation to determine whether there is proof beyond reasonable doubt, so too does it not look at the exculpatory evidence in isolation to determine whether it is reasonably possible that it might be true. In similar vein the following was said in Moshephi and Others v R LAC (1980 - 1984) 57 at 59F – H, which was cited with approval in S v Hadebe and Others 1998 (1) SACR 422 (SCA) at 426f - h:

'The question for determination is whether, in the light of all the evidence adduced at the trial, the guilt of the appellants was established beyond reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees.'"

- [14] As alluded to earlier, the appellant has formally admitted to having sexual intercourse with the complainant. Where they differ is that he says it was consensual while the complainant refutes that contention. The Regional Magistrate was alive to the sentiments expressed by Olivier JA⁵ in *S v J* 1998 (2) SA 984 (SCA) where the Court held:

"In my view, the cautionary rule in sexual assault cases is based on an irrational and out-dated perception. It unjustly stereotypes complainants in sexual assault cases (overwhelmingly women) as particularly unreliable. In our system of law, the burden is on the State to prove the guilt of an accused beyond reasonable doubt - no more and no less. The evidence in a particular case may call for a cautionary approach, but that is a far cry from the application of a general cautionary rule."

⁵ Record page 294

- [15] The trial Court was also mindful that the complainant was a single witness and hence approached her evidence with caution. It was contended that the trial Court erred in their evaluation of the evidence and had wrongly concluded that the guilt of the accused had been proved beyond reasonable doubt. The discrepancy regarding the time when they left Biker's Joint, that the complainant did not mention that they also went to Obama were taken into consideration by the trial Court and not regarded as material to render her evidence unreliable. The trial Court found that the complainant's evidence was corroborated by K[...] and Mpho. The trial Court should weigh the evidence of the single witness and consider its merits and demerits and having done so, should decide whether it is satisfied that the truth has been told despite the shortcomings or defects in the evidence. See *S v Sauls* 1981 (3) SA 172 (A) at 180E – G.
- [16] The actions of the complainant were consistent with her allegations. Her injuries as testified to by Dr Lengo were compatible with her evidence that she was penetrated without her consent and difficult to reconcile with the version of the appellant. His explanation of the multiple scratches on her body being caused by her fall from his vehicle were uncorroborated. Furthermore, on both versions, the complainant fled from the deceased's shack to an unknown neighbour's house with shoes in her hands. This is incompatible with the accused's version of consensual love-making. If the sex was consensual why would she escape to an unknown neighbour's house? When the complainant reached the neighbour's place, she was upset and immediately complained of having been raped and asked for a phone to seek further help.
- [17] There appears, from the evidence, to be no reason why the complainant would have lied to the unknown neighbour, her boyfriend, sister and father, Dr Lengo, the police and the trial Court that she was raped. Although the complainant was seeing the appellant for the first time, she trusted him to take her home. I am not convinced that the trial Court misdirected itself on the evidence before it, nor that its decision was wrong. On the contrary, the guilt of the appellant was proved beyond reasonable doubt. It is

inconceivable in this day and age that women are still predisposed to be unreliable, and require absolutely that their evidence be corroborated in every case. See *S v Jackson* 1998 (1) SACR 470 (SCA) at 476c – 477e. The defence by the appellant that the sexual intercourse was consensual is blatantly false and without merit. In my view, the State had discharged the *onus* of proving that the appellant had raped the complainant and the trial Court has correctly convicted him. It follows therefore that the appeal against the conviction must fail.

On sentence

[18] Sentencing is a matter pre-eminently within the discretion of the trial Court and a Court of Appeal will only interfere if there is a clear misdirection on the part of the trial Court, or the sentence is shockingly severe. See *Haarhoff and Another v Director of Public Prosecutions, Eastern Cape* 2019 (1) SACR 371 (SCA). In this instance, where the offence is coupled with the provisions of s 51(1) of the CLAA, the prescribed minimum sentence is applicable unless the court finds substantial or compelling circumstances to deviate from the prescribed minimum sentence.

[19] Majiedt JA, then, made the following salutary remarks in *S v SMM* 2013 (2) SACR 292 (SCA) at para 17:

“[17] *It is necessary to reiterate a few self-evident realities. First, rape is undeniably a degrading, humiliating and brutal invasion of a person's most intimate, private space. The very act itself, even absent any accompanying violent assault inflicted by the perpetrator, is a violent and traumatic infringement of a person's fundamental right to be free from all forms of violence and not to be treated in a cruel, inhumane or degrading way. In S v Vilakazi Nugent JA referred to the study done by Rachel Jewkes and Naeema Abrahams on the epidemiology of rape which concluded on the available evidence that 'women's right to give or withhold consent to sexual intercourse is one of the most commonly violated of all human rights in South Africa'.*”

[20] The prescribed minimum sentence in this regard is life imprisonment which the trial Court imposed. The question that stands for determination is whether there were substantial and compelling circumstances which warranted a deviation *in casu*.

[21] It remains unclear to this Court why prosecution continues to disregard the many admonitions by the Courts for a necessity of a victim impact report. The trauma that the complainant sustained ought to have been placed before Court by way of a professional opinion. It further boggles one's mind why the State did not call the first report, being the occupant of the home to which the complainant fled as that person would have also shed more light in as far as the condition in which the complainant was upon arrival and the report made to him or her.

[22] In every rape case the objective evidence of the medical doctor is crucial and helpful to determine a just sentence. Dr Lengo's report, particularly regarding the penetration and the nature of the injuries, could be more helpful but was, in my view, economic with the professional opinion as required. Despite being a qualified doctor holding an MBChB degree and having practiced since 2007, and in South Africa since 2013, he described the external injuries (abrasions) and confirmed that the bleeding from the vagina was not due to a menstrual cycle. However, on the J88 he wrote the following conclusion:

"...blood on vulva and vagina specimen collected for forensic no way to give conclusion."

It is necessary, in my view, for the medical doctors to appreciate the role they play in sexual offences cases and the nature of the evidence required by the Courts in order for the courts to arrive at a just outcome.

[23] It is settled that the Court views the offence of rape in a very serious light. We are mindful that the only physical injuries during the rape itself were the

multiple scratches on her body with no actual injuries on her private parts. This should, however, not be construed as a clean slate without consequences because the act of rape itself goes beyond physical injuries. It would have been ideal for a social worker or psychologist to have recorded the trauma that the complainant experienced. The State continues to contribute towards this sad state of affairs. The Regional Magistrate, agreeing with the State, found that there were no substantial and compelling circumstances to warrant a deviation from the prescribed sentence of life imprisonment.

[24] In **S v Malgas** 2001 (1) SACR 469 (SCA) at 482e Marais JA remarked:

"I. 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,"

[25] Bosielo JA in *S v PB* 2013 (2) SACR 533 (SCA) at para 21 remarked:

"[21] The most difficult question to answer is always: What are substantial and compelling circumstances? The term is so elastic that it can accommodate even ordinary mitigating circumstances. All I am prepared to say is that it involves a value judgment on the part of the sentencing court. I have, however, found the following definition in S v Malgas (above) para 22 to be both illuminating and helpful:

'The greater the sense of unease a court feels about the imposition of a prescribed sentence, the greater its anxiety will be that it may be perpetrating an injustice. Once a court reaches the point where unease has hastened into a conviction that an injustice will be done, that can only be because it is satisfied that the circumstances of the particular case render the prescribed sentence unjust, or as some might prefer to put it,

disproportionate to the crime, the criminal and the legitimate needs of society. If it is the result of a consideration of circumstances the court is entitled to characterise them as substantial and compelling and such as to justify the imposition of a lesser sentence.”

- [26] In *casu* the trial Court has overlooked not only the favourable personal circumstances of the appellant with fixed employment and a number of dependants but also that he is a candidate for rehabilitation. We are therefore at large to assess the evidence relating to sentence afresh and come to our own conclusion.
- [27] The appellant was born on 27 May 1982 and was 39 years old when sentenced. He is not married but has three children aged 8 and 5 years old and the youngest was born in 2020 while he was already incarcerated and was therefore unsure of the child's exact age. He was not the primary caregiver since the children resided with their mothers. However, he took care of his siblings and nephew because their parents are late. Before his arrest he was employed at Adonai Mine at Kolomela, Postmasburg earning between R18,000.00 – R19,000.00 per month. He paid R700.00 per month per child towards their maintenance. He dropped out of school in Standard 6. He has a valid driver's licence and received training in operating mining machinery at CAT.
- [28] The appellant's sister, Didimalang Susan Kaotsane, testified in his mitigation. She confirmed that he was not only looking after his siblings but also their asthmatic uncle and diabetic aunt. His legal representative had further placed the following on record: that his previous conviction of reckless and or negligent driving and Housebreaking with intent to steal and theft were imposed in 2006 and they had not only lapsed but were also unrelated to the offence of rape. The age of the previous convictions makes him a suitable candidate for rehabilitation. It was further contended that the injuries sustained by the complainant in the commission of the rape were not severe.

[29] Regard being had to the cumulative effect of the mitigating and personal circumstances of the appellant, a sentence of life imprisonment under these circumstances would not be competent. It follows that the appeal against sentence must succeed.

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

1. The appeal against the conviction is dismissed.
2. The appeal against sentence succeeds.
3. The order of the trial Court in respect of sentence is set aside and replaced with the following:

“The accused is sentenced to 25 years’ imprisonment.

MAMOSEBO J
NORTHERN CAPE HIGH COURT

I concur

WILLIAMS ADJP
NORTHERN CAPE HIGH COURT

Appearances:

For the Appellant:

Instructed by:

For the Respondent:

Instructed by:

Mr H Steynberg

Justice Centre, Kimberley

Adv A Stellenberg

Office of the Director of Public Prosecutions