

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

CASE NO: AR346/2022

In the matter between:

PHILANI STUDIO KHANYILE

APPELLANT

and

THE STATE

RESPONDENT

Coram: Mngadi J and Marimuthu AJ

Heard:

Delivered:

ORDER

On appeal from: Greytown Regional Court (sitting as the court of first instance):

1. The appeal against the conviction of the appellant is dismissed.
2. The appellant's conviction of rape in terms of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 is confirmed.

3. The appeal against the sentence is upheld. The sentence of life imprisonment is set aside and substituted with a sentence of 14 years' imprisonment.

4. The sentence is antedated, in terms of section 282 of the Criminal Procedure Act 51 of 1977, to 23 November 2021.

JUDGMENT

MARIMUTHU AJ (MNGADI J concurring)

Introduction

[1] The appellant was arraigned in the Greytown Regional Court and charged with one count of contravening the provisions of section 3, read with sections 1, 56(1), 57, 58, 59, 60 and 61 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act (SORMA)¹ and read with the provisions of section 51(1) and Schedule 2 of the Criminal Law Amendment Act (the CLAA).² It was alleged that the appellant, on 2 February 2020, unlawfully and intentionally committed an act of sexual penetration with the complainant by inserting his penis into the vagina of the complainant without the consent of the complainant.

[2] The provisions of section 51(1) and Schedule 2 of the CLM applied as it was alleged that the complainant was assaulted with the intent to do grievous bodily harm.

[3] On 17 August 2021, the appellant, duly represented, pleaded not guilty and raised consent as his defence. On 19 November 2021, the court *a quo* found the appellant guilty as charged and on 23 November 2021, it proceeded to impose a sentence of life imprisonment upon the appellant. In terms of section 309(1)(a) of

¹ Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

² Criminal Law Amendment Act 105 of 1997.

the Criminal Procedure Act,³ the appellant noted his intent to exercise his automatic right to appeal in respect of both his conviction and sentence.

The State's case

Ms N[...] B[...] (the complainant)

[4] The complainant testified that on 2 February 2020, at around 19h00, she was walking alone to her home after having attended a function at the Mchunu homestead when she noticed the appellant walking behind her. She paid no heed to him, assuming that he was also proceeding in the same direction as her.

[5] After a short while, the appellant caught up to her and grabbed her at the back of her neck. He then strangled her when he was facing her, and this prevented her from screaming. He thereafter grabbed her by the arm and pulled her in the direction of a field. As they made their way to the field, they had to negotiate a slope. They both fell down the slope. The appellant continued pulling her towards the field and she continued to resist. Her resistance caused her to fall again, and she injured her arm on the fallen barbed wire fence.

[6] When they reached a place close to the field, the appellant instructed her to undress, and she refused. The appellant then strangled her again and struck her with his clenched fists near her eyes. She then lowered her tights and panties to her knees. The appellant lowered his pants. The appellant caused her to fall, and he went on top of her. He then inserted his penis into her vagina, and he made certain movements. He instructed her to also make movements and she duly complied.

[7] After the appellant finished with the sexual intercourse, he informed her that they should do it again and she refused. She informed the appellant that she was thirsty and that she needed a drink of water. The appellant then suggested that she suck his penis since she was refusing to have sexual intercourse with him again. She refused to suck his penis and this refusal caused the appellant to assault her

³ Criminal Procedure Act 51 of 1977.

again. She pleaded with the appellant to let her have a drink of water from the nearby river.

[8] The appellant finally acceded to her request for a drink of water, and they went to the river. She went to the river pretending to drink, got into the river, and crossed over to the other side of the river. She hid in the bushes on the other side of the river. The appellant did not enter the river but searched for her using the light of his cellular phone. She remained hidden in the bushes for a long time. By her account, she was accosted by the appellant around 19h00 and she only exited the bushes in the early hours of the morning 'when the chickens were making a noise'.

[9] She crossed back over the river and proceeded to the Mzolo homestead. She was in a love relationship with Mr Lindezakhe Mzolo (Mr Mzolo), and she decided to seek assistance from him upon exiting the river. His home was closer than her home and she was wet and did not have any shoes to make the trip. She testified that she lost several items of clothing, including her shoes during the incident. When she arrived at the Mzolo homestead, she knocked on the door and Mr Mzolo opened it.

[10] She reported to Mr Mzolo that the appellant had accosted and raped her. She requested to change out of her wet clothes, and she then went to sleep. In the morning, she requested Mr Mzolo to accompany her to search for her missing clothing items. They went in search of her tights, panties, hat, and shoes. She found her tights and hat by the river, and she found one shoe at the spot where the appellant had grabbed her. She did not find her panties and the other shoe.

[11] She then reported the incident to the police, and was taken to the Greytown Hospital for medical assistance. She sustained injuries to both eyes and she had a cut on her arm.

[12] She testified that she did not consent to sexual intercourse with the appellant and that it was painful when the appellant penetrated her vagina with his penis.

Mr Lindezakhe Mzolo (Mr Mzolo)

[13] Mr Mzolo was the first report and second State witness. He confirmed that he was in a love relationship with the complainant and that she had called at his home in the early hours of the morning, around 03h00. When she arrived at his home, her denim skirt and T-shirt were wet, and she changed out of them.

[14] The complainant reported to him that she was accosted and raped by 'Studo'. She also informed him that the appellant had grabbed her and strangled her. He noticed that the face of the complainant was swollen and that she had nail marks on her neck.

[15] At around 05h00, he accompanied the complainant to search for her missing clothing items. Only some items were recovered, including one shoe.

Dr Peter Mukuka (Dr Mukuka)

[16] Dr Mukuka testified that he was based at the Greytown Hospital and that on 3 February 2020, he examined the complainant and completed the requisite J88 form wherein he recorded all of his findings and conclusions. It is not necessary to repeat the entirety of the evidence of Dr Mukuka, save for the following:

(a) The complainant reported to him that on 2 February 2020, she was returning from a function around 19h00 when she was accosted by Stu Khanyile. He got hold of her, throttled her, punched her in the face, and raped her twice without a condom. She managed to escape by wading through the river.

(b) The complainant's face was swollen below both eyes and she had abrasions on the left lower arm on the posterior aspect. She also had numerous nicks or cuts to the posterior forchette of the vaginal area, which is the lower entrance of the vagina.

[17] Dr Mukuka explained that the possible causes of the numerous cuts to the vagina were due to penetration and the pressure effect on the vagina, especially when there is forced penetration. He explained further that these injuries would be unlikely if there was consensual intercourse as the impact would be minimal and the muscles would be relaxed.

[18] He stated that the complainant had localised areas of swelling just below her eyes and this was consistent with being punched several times in the face.

[19] The J88 form was admitted by the appellant and forms part of the appeal record as exhibit 'A'. This concluded the evidence of the State.

The appellant's case in the court *a quo*

[20] The appellant testified in his defence and called no witnesses. The appellant testified that he was in a secret love relationship for a period of a year with the complainant. They started their relationship a year prior to February 2020. Their relationship remained secret due to him being younger than her and the complainant was married.

[21] On the date of the incident, he met with the complainant at a function at the Mchunu homestead. They arranged to meet later that evening at the tavern at the Ndlela homestead. Upon meeting at the Ndlela homestead, they drank together. The complainant purchased three quarts of Black Label beers and left the Ndlela homestead. To alleviate suspicion from the people of the neighbourhood that knew them at the Ndlela tavern, the complainant informed him that he should wait for 30 minutes and then leave the tavern to meet her.

[22] He left the tavern 30 minutes after the complainant, at around 19h30. He met the complainant at the bus stop, and they opened a quart of beer. The complainant suggested that they find a less visible spot and they then made their way to a nearby stream. They consumed the second quart at the stream.

[23] At the stream, they began kissing and the complainant undid the button of his trousers and lowered his boxer shorts. She then lowered her skirt, tights, and panties and they proceeded to have sexual intercourse. This was the fifth time that he had sexual intercourse with the complainant since they started their secret love relationship.

[24] They opened the third quart of beer and drank it. They started kissing again and wanted to have sexual intercourse for the second time. While kissing the complainant, he noticed a snuff container between her breasts, and he confronted her about it. The complainant then informed him that she was using the snuff to put inside her vagina.

[25] He was surprised by this disclosure. He had previously enquired from her whether she used anything in her vagina as he always developed a rash on his penis after engaging in sexual intercourse with her. She did not disclose the use of the snuff at that stage. He questioned her about her prior non-disclosure and she remained silent. Her silence angered him, and he hit her twice with an open hand on the side of her face just below the eyes.

[26] After he had assaulted her, they sat down and had a discussion. The complainant apologised for her actions and suggested that they find a solution to their problem. She informed him that he was not supposed to hit her. She asked him not to break up with her as she was still young, and she loved having sex. To his mind, he considered their problem resolved.

[27] The complainant then informed him that she was thirsty. He informed her that the shops were closed, and he suggested that she should go to the river for a drink of water. She entered the river and drank from it, and they then made their way to the main road. The complainant was going to the home of Mr Mzolo. He accompanied the complainant for a short distance on her route and he then turned around to go to his home. They parted ways amicably.

[28] He was unable to recall if the complainant had all her clothing items when they parted ways. This concluded the appellant's case.

Issues to be determined

[29] There are two issues to be determined in this matter. Firstly, whether the *court a quo* correctly rejected the defence of consent, and secondly, whether the provisions of section 51(1) of the CLAA were applicable.

Legal principles

[30] There are limited instances when a court of appeal can interfere with the findings of a trial court. In *S v Francis*⁴ the following was held:

'The powers of a Court of appeal to interfere with the findings of fact of a trial Court are limited. In the absence of any misdirection the trial Court's conclusion, including its acceptance of a witness' evidence, is presumed to be correct. In order to succeed on appeal, the appellant must therefore convince the Court of appeal on adequate grounds that the trial Court was wrong in accepting the witness' 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 the Court of appeal will be entitled to interfere with a trial Court's evaluation of oral testimony.'

[31] In *S v Hadebe and others*,⁵ Marais JA stated:

'... in the absence of demonstrable and material misdirection by the trial Court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong.'

[32] The court *a quo* was faced with two mutually destructive versions. The issue to be determined is whether there was any misdirection by the court *a quo* in accepting the version of the State and rejecting that of the defence.

[33] Nugent J in *S v Van der Meyden* stated:⁶

⁴ *S v Francis* 1991 (1) SACR 198 (A) at 198j-199a in the headnote.

⁵ *S v Hadebe and others* 1997 (2) SACR 641 (SCA) at 645e-f.

⁶ *S v Van der Meyden* 1999 (1) SACR 447 (W) at 448f-g.

'The *onus* of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent...'

The learned judge went on to state that:

'A court does not look at the evidence implicating the accused in isolation in order to determine whether there is proof beyond reasonable doubt, and so too does it not look at the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true.'⁷

Evaluation of the evidence by the *court a quo*

[34] The court *a quo* was acutely aware of the approach to be adopted when determining the guilt of an accused person and in this regard, cited the following paragraph of *S v Chabalala*⁸ which reads:

'The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt.'

[35] The complainant was a single witness to the incident, as is the case in almost all rape matters. There are certain rules of caution that apply when dealing with the evidence of a single identifying witness and one of those rules is to seek corroboration from the other presented facts. *In casu*, the complainant made an immediate disclosure of the rape to her lover, Mr Mzolo. Mr Mzolo and the independent medical evidence corroborated the version of the complainant regarding the rape.

⁷ Ibid at 448h-i.

⁸ *S v Chabalala* 2003 (1) SACR 134 (SCA) para 15.

[36] The court *a quo* was alive to the contradictions that presented in the State case.

The report that the complainant made to Dr Mukuka that she was raped twice by the appellant contradicts her evidence that she was raped once. She did testify that the appellant wanted to have sexual intercourse with her again, but he failed to sustain an erection. The complainant was honest in testifying to the single act of rape. The other contradiction related to the clothing items that were recovered by the complainant and Mr Mzolo on the morning following the rape. The complainant and Mr Mzolo differed on the precise number of clothing items that were recovered. In my view, the court *a quo* correctly found that the complainant was a credible and reliable witness and it dealt fully with these contradictions in its judgment. I am in agreement with the findings of the court *a quo* that the contradictions were not material.

[37] The appellant was not a particularly impressive witness. He was found wanting on several occasions when he was cross-examined by the State. The version advanced by the appellant when he testified differed significantly from the version that was put to the complainant. It was never put to the complainant that she had spoken to the appellant when they were at a function at the Mchunu homestead; it was not put to her that they had agreed at the function that they would meet thereafter at the Ndlela homestead; it was not put to the complainant that there were other people on the road walking with the appellant when he left the Mchunu homestead. It was also not put to the complainant that she had purchased three quarts of beer from the Ndlela homestead and that they had consumed these quarts together; it was never put to her that she had suggested that they move to a more private area away from public view and that it was actually his suggestion that she should go to the river to drink water when she wanted to consume more alcohol. He was unable to explain why crucial aspects of his version were not canvassed with the complainant.

[38] The version of the complainant is consistent with the injuries recorded by Dr Mukuka. The recovery of her dispersed clothing items reconciles with her evidence of being dragged from the road to the area near the river. Her presenting at the Mzolo homestead with wet clothing and no shoes corroborates her version that she

had to wade through the river. Counsel for the appellant before us correctly conceded that she was unable to advance an argument against the court a quo's finding of guilt.

[39] The court a *quo* correctly rejected the defence of consent and correctly found that the version of the appellant was not reasonably possibly true and that the State had proved its case against the appellant beyond a reasonable doubt.

[40] The court a *quo* correctly found the appellant guilty of contravening section 3 of SORMA. The next issue to be determined is whether the provisions of section 51(1) of the CLAA were applicable.

Applicability of section 51(1) of the CLAA

[41] The appellant was charged under the provisions of section 51(1) of the CLAA. The court a *quo* concluded that the State had proved that the rape involved the infliction of grievous bodily harm. The complainant presented to Dr Mukuka with swelling under her eyes. It was established that this noted injury was caused through several punches of the appellant. It is unclear from the presented evidence precisely when these punches were directed to the complainant. It was the evidence of the complainant that two punches were delivered to either side of her cheeks immediately prior to the rape. She was never led on the nature and extent of the remaining punches. The complainant did state that after the rape, she had suffered further acts of assault when she refused to have sexual intercourse with the appellant for the second time, and when she refused to suck his penis. It is possible that this particular injury was caused after the rape. Consequently, this injury does not trigger the applicability of section 51(1).

[42] The court a *quo* devoted considerable attention to the issue of strangulation. It was the evidence of the complainant that the appellant strangled her on several occasions when they were together. Mr Mzolo also confirmed having noticed nail marks on the neck of the complainant. The complainant failed to disclose the strangulation to Dr Mukuka and he noted no injuries around the neck of the complainant when he conducted his examination. While I accept that the

complainant was strangled at different times, the question is whether these acts of strangulation constituted the infliction of grievous bodily harm. The absence of signs of strangulation on the admitted medical report suggests that the degree of force used was minimal.

[43] In *Director of Public Prosecutions, Gauteng Division, Pretoria v Moabi*,⁹ Molemela AJA stated:

'... the test for ascertaining whether grievous bodily harm has been inflicted is factual and objective. The correct approach to that enquiry necessitates a holistic consideration of all objective factors pertaining to the incident, with a view to ascertaining whether bodily injuries were inflicted and whether they are of a serious nature.'

In *Moabi*, the degree of force used to strangle the complainant caused the complainant to lose consciousness. The strangulation referenced in *Moabi* and the acts of strangulation in *casu* are significantly different. There is no evidence on the record to suggest that the strangulation of the complainant in this matter was of a serious nature.

[44] I am of the view that the acts of strangulation in this matter do not constitute grievous bodily harm. In *S v Legoa*¹⁰ Cameron JA stated:

'That wording, in my view, clearly indicates that for the minimum sentencing jurisdiction to exist in respect of an offence, the accused's conviction must encompass all the elements of the offence set out in the Schedule.'

In my view, the State failed to prove that the rape involved the infliction of grievous bodily harm.

⁹ *Director of Public Prosecutions, Gauteng Division, Pretoria v Moabi* [2017] ZASCA 85; 2017 (2) SACR 384 (SCA) para 14 (the majority judgment by Gerven AJA agreed with Molemela AJA regarding the issue of the infliction of grievous bodily harm, but disagreed on the issue of whether special leave to appeal was required).

¹⁰ *S v Legoa* 2003 (1) SACR 13 (SCA) para 14.

Sentence

[45] Having concluded that the rape does not fall within the provisions of Part 1 of Schedule 2 of the CLAA, it follows that the minimum sentence of life imprisonment was not applicable, and the sentence must be set aside. This court accordingly is at large to impose sentence afresh.

[46] It was submitted in mitigation of sentence of the appellant that his personal circumstances were that he was 25 years old when the offence was committed, he is single with no children, he has a grade six level of education, he is unemployed but does try to obtain casual employment, he has no previous convictions or pending cases against him, and he has no chronic illness. It was further submitted that the age of the appellant made him a good candidate for rehabilitation and that his personal circumstances, taken cumulatively, constituted substantial and compelling circumstances to warrant a deviation from the prescribed minimum sentence.

[47] In aggravation of sentence, the State argued that the appellant was convicted of a very serious and prevalent offence, the complainant was not only raped but was also assaulted, the appellant showed no remorse and took no responsibility for his conduct, his age was not a factor as he was an adult when he committed the offence, and that his personal circumstances do not constitute substantial and compelling circumstances.

[48] In aggravation of sentence, the State also handed in the victim impact statement of the complainant. The statement detailed that the complainant suffered from nightmares following the offence, and she reported about the cruelty, degradation, and humiliation that she suffers after the incident. She stated that she now fears for her safety and is unable to move around freely. She felt disrespected as she was old enough to be the mother of the appellant. She feels depressed which causes her to not work properly. The community views her in a negative light and she now has a stigma attached to her name. The incident has caused adverse problems in her relationship with her partner. She stated that the rape turned her 'happiness to bitterness', she feels embarrassed and humiliated by the incident and that her life is now a mess.

[49] I am also mindful that the complainant resorted to drastic measures by entering the river in the middle of the night to escape the appellant and that she had to hide from him for a long period of time on the other side of the river.

[50] In *S v Chapman*,¹¹ Mohamed CJ stated:

'Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, to privacy and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilisation. Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives.'

[51] Having found that Part I of Schedule 2 of the CLAA finds no applicability, the offence would then attract the minimum sentence prescribed under Part III of Schedule 2, namely a term of ten years' imprisonment.

[52] The aggravating circumstances in this matter outweigh those factors that mitigate in favour of the appellant. The appellant prowled upon a defenceless woman who was old enough to be his mother to satisfy his carnal desires. His conduct was despicable and deplorable. A sentence of ten years' imprisonment would be inappropriate in this matter. Society demands that the courts meet out appropriate punishment on offenders who have little to no regard for other law-abiding citizens.

[53] In determining an appropriate sentence, I have considered the triad of factors alluded to in *S v Zinn*¹² namely, the crime, the offender, and the interests of society. I have further considered the age of the appellant and the possibility of his

¹¹ *S v Chapman* 1997 (3) SA 341 (SCA) at 3441-3458.

¹² *S v Zinn* 1969 (2) SA 537 (A).

Instructed by: Legal Aid South Africa
Pietermaritzburg

Counsel for the respondent:

Instructed by: Director of Public Prosecutions
 Pietermaritzburg

Date of argument 01 September 2023

Date of judgment 02 August 2024