

CA&R: 152/2023

[3] The appellant appeals against his conviction and sentence in respect of count 1 by way of an automatic appeal in terms of section 309(1) of the Criminal

Procedure Act 51 of 1977. Accordingly, and notwithstanding that both charges arose from the same incident and that the facts underscoring both of his convictions are inextricably linked, no appeal lies against the appellant's conviction and/or sentence on count 2. Whether or not an appellant in such circumstances enjoys an automatic right of appeal in respect of those counts to which lesser sentences were imposed is subject to conflicting judicial decisions.¹ However, for the purposes of this judgment I need not deal with this aspect, which falls outside of its necessary scope.

[4] The evidence of the complainant was that she was raped by the appellant on the afternoon of 9 October 2022 whilst walking home. En route, she came across the appellant who was well known to her. At his request, she accompanied him to two separate locations for the purposes of selling a cellular telephone.

[5] Having been unsuccessful, and at the instance of the appellant, they proceeded to walk in the direction of the complainant's home, via a shortcut through a bushy area. The appellant informed the complainant of his affection towards her. When not reciprocated, he grabbed her from behind; touched her inappropriately; and commented on his seemingly sudden need for sexual intercourse. He threw her to the ground and instructed her to loosen her pants and pull them down. She obliged to due fear. He thereafter placed his hand over her mouth and raped her per vaginum. He then cautioned her not to tell anyone about what had happened. She purported to agree. This she did as she wanted the appellant to allow her to go home. The appellant put his arm around the complainant's neck and throttled her. She attempted to loosen his grip but lost consciousness and was purportedly left for dead.

[6] When she regained consciousness, she ran in the direction of her home. She noticed that she was bleeding from her nose and face. She came across several friends and, in an emotional state, immediately reported the incident to them, identifying the appellant as her assailant. This was confirmed by the evidence of the first report, Tiana Stoffels. After having been assisted home, she reported the incident and the identity of her rapist to her mother. They proceeded to the police

¹ *Appolis v S* (A91/2021) [2021] ZAWCHC 105 (1 June 2021); and *N.A.N v S* (A150/2012) [2023] ZAGPJHC 1338 (17 November 2023).

station whereafter the complainant was taken to the hospital and medically examined. The complainant at no stage waived in her identification of the appellant as the person who had assaulted and raped her.

[7] The evidence of the complainant's mother, insofar as her involvement was concerned, accorded in all material respects with that of the complainant. In addition, she testified that her daughter, who was covered in blood, was hysterical on her arrival home. She noted that her top was torn.

[8] The statement recorded by the doctor who examined the complainant was consistent with her evidence in court. Various injuries were noted, requiring medical attention. The J88 recorded 3 sutured lacerations on the right side of her scalp; abrasions to her nasal bridge, between her eyebrows and on the right side of her nose; bruising and scratches on the anterior aspect and sides of her neck; abrasions to the back of her right shoulder and middle back; and abrasions and scratches to her lower legs. Fresh vaginal injuries were identified consistent with recent trauma and vaginal penetration. Samples were taken from her, which together with her panties were sent for DNA analysis. The DNA obtained from the samples matched the DNA of the appellant.

[9] The appellant's defence was a denial of the assault and rape. Instead, he contended that the act of sexual intercourse between him and the complainant on the day in question was consensual. According to the appellant, he and the complainant had an arrangement whereby they engaged in casual sexual relations with each other. This was never put to the complainant in evidence. They met up at a tavern and agreed to go back to the appellant's home. There they drank; chatted; and had consensual sexual intercourse. At the complainant's request, he thereafter accompanied her to a friend's house, where he left her in an uninjured state. He did not see her thereafter.

[10] As for her motive to falsely implicate him, the appellant stated that the complainant was offered R10,000.00 to lay a false charge of rape against him. He does not allege that she was raped by any other person nor, for reasons which are apparent, was it suggested that she may have been mistaken in her identification of

the appellant. Whilst the appellant was unable to explain how the complainant sustained her physical and gynaecological injuries during examination in chief, he thereafter suggested in cross-examination that she sustained them voluntarily as part and parcel of the plan to frame him.

[11] By parity of reasoning, on the appellant's version, the complainant had consensual sexual intercourse with him on the day in question with the sole purpose of falsely implicating him. She thereafter, in collusion with another unnamed person, was voluntarily assaulted and injured, including gynecologically, before running through the bushes to cry rape. All this, for payment of the sum of R10,000.00. Let me say at this point that this version is so improbable that it cannot be reasonably possibly true.

[12] The trial court, in its judgment on conviction, recognised that the complainant was a single witness. Notwithstanding the application of the requisite caution to the complainant's evidence, the trial court had no hesitation in accepting her evidence as credible, probable, and reliable in all material respects. On the contrary, the appellant failed to impress the trial court as a witness. Whilst he consistently raised objection in relation to the commission of the offences, his evidence was found to be inconsistent, contradictory, improbable, and tailored to suit his version. On a general examination of the evidence, giving due consideration to the contradictions and inconsistencies in his evidence and the patently inherent probabilities in respect thereof, the trial court rejected the appellant's version as to the events in question as being wholly improbable and not reasonably possibly true. This being so and having found that the state had proven its case beyond reasonable doubt, the appellant was convicted on both counts.

[13] In respect of conviction, the appellant contends that the trial court failed to prove its case beyond reasonable doubt for the following two reasons. Firstly, by finding that the only reasonable inference that could be drawn from the medical evidence is that the complainant was raped in circumstances where the doctor testified that the injuries could have been sustained during consensual intercourse; and secondly, by finding that the complainant was a credible witness whilst it was established during cross-examination that she withheld information of

communication between her and the appellant from court.

[14] There is no merit in either of these two grounds.

[15] In dealing with the latter aspect first, there exists nothing in the record to justify a finding that the complainant in any manner withheld or attempted to withhold communication between her and the appellant from court. She readily conceded that the appellant had contacted her via social media following his arrest, which she reported to her mother. Her mother, in turn, reported this fact to the investigating officer. This was confirmed by her mother as well as the appellant in their respective evidence. The complainant's reason for not having disclosed this fact when initially questioned as to whether she had been in contact with the appellant following the incident was fully and satisfactorily explained by her and in no manner detracts from her evidence as to the events which led up to and including the rape.

[16] Insofar as the complainant's gynecological injuries are concerned, the trial court properly considered the opinion of the examining doctor that such injuries could be incurred during consensual sexual intercourse; this of course being dependent upon several factors. Having acknowledged this fact, the trial court went on to analyse the appellant's evidence in respect of the incident. Penetration of the complainant's vagina was consensual and unrushed. She was well lubricated, and he had no difficulty in penetrating her. These features considered, the trial court cannot be faulted in concluding that on the probabilities, the complainant sustained the gynecological injuries due to forced sexual penetration. In any event, this was but one of an overwhelming number of factors considered by the trial court in arriving at its ultimate conclusion.

[17] To borrow from the court's phraseology in *Songoni v S*,² in dealing with "moral certainty" in the manner discussed by the Supreme Court of Appeal in *S v Mavinini*,³ the appellant's conviction "*on the application of the rules of evidence, interpreted within the precepts of the Bill of Rights, was properly attained through a proper application of the rules of the system.*" There is accordingly no doubt in my

² 2023 (1) SACR 290 (WCC) (18 July 2022).

³ [2009] 2 All SA 277 (SCA) at paragraph 26.

mind that such “*moral certainty*” exists as to the guilt of the appellant in the present matter.

[18] In respect of the sentence imposed, the appellant contends that the sentence induces a sense of shock and disbelief and that the sentencing court overemphasised the interest of society and the crime committed at the cost of the personal circumstances of the appellant. As stated, the prescribed discretionary sentence of life was imposed in respect of count 1, the sentencing court having found no substantial and compelling circumstances to exist justifying the imposition of a lesser sentence.

[19] The appellant was 38 years of age at the date of trial. His highest level of education is grade 9. He is the biological father of two minor children, both of which are in the primary care of their biological mother. He is married. Prior to his arrest, he was gainfully employed as a builder, receiving approximately R1,500.00 every fortnight. He has one previous conviction for robbery, having been convicted in August 2010 and sentenced to 15 years’ imprisonment. It is unclear which of the appellant’s personal circumstances or which circumstances, taken cumulatively, is alleged by the appellant to amount to substantial and compelling.

[20] The offence, as conceded by the appellant’s legal representative at trial, is very serious. I do not agree that the trial court overemphasised the interest of society and the seriousness of the offence at the cost of the appellant’s personal circumstances, to which the trial court consciously and properly considered. The appellant showed no sign of remorse, nor was any such remorse contended for by his legal representative. As for his prospect for rehabilitation, no such evidence was advanced. To draw any other conclusion in such circumstances, would amount to a speculative hypothesis in favour of the appellant as cautioned against in *Malgas*.⁴

[21] Regard being had to what I have set out above, and with particular reference to the facts of this matter viewed collectively with the high levels of violence against woman and children (inclusive of the legitimate expectations and legal interests of

⁴ [2001] 3 All SA 220 (A).

the community), which are widely reported on and have been referred to as “a *pandemic of sexual violence against woman and children*” by the Supreme Court of Appeal,⁵ life imprisonment neither induces a sense of shock and disbelief nor is it unjust.

[22] In the result, the following order is issued:

1. The appeal against conviction and sentence is dismissed.

**I BANDS
JUDGE OF THE HIGH COURT**

JOLWANA J:

I agree.

**M JOLWANA
JUDGE OF THE HIGH COURT**

For the appellant: Mr H Charles
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For the respondent: Ms H Obermeyer
Instructed by: Office of Director of Public Prosecutions Makhanda

Date heard: 8 May 2024
Judgment granted: 17 July 2024

⁵ *Director of Public Prosecutions, Grahamstown v TM* (131/2019) [2020] ZASCA 5 (12 March 2020).

This judgment was handed down electronically by circulation to the parties' legal representatives by email on 17 July 2024. The date and time for delivery is deemed to be 10h00 on 17 July 2024.