

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)

Case No: CA&R48/2024

In the matter between:

SIYABULELA MZINI

APPELLANT

and

THE STATE

RESPONDENT

APPEAL JUDGMENT

YOUNG AJ:

[1] On 8 February 2024, the appellant, who was legally represented at the trial, was convicted on both counts, comprising kidnapping (count 1), and rape (count 2) in contravention of section 3 of the Criminal Law (Sexual Offence and Related Matters) Amendment Act 32 of 2007.

[2] The appellant was sentenced to five (5) years' imprisonment in respect of count 1 and life imprisonment in respect of count 2. This appeal lies against the appellant's conviction and sentence in respect of both counts.

[3] The State adduced the evidence of 4 witnesses, comprising the complainant, Sonwabile Kuthuka ("Kuthuka"), Aviwe Goduka ("Goduka") and Sivenathi Tokota ("Tokota"). The State further placed reliance on a J88 medico-legal report, which was handed in by agreement. The appellant, in turn, testified on his own behalf.

[4] The complainant, who was 21 years old at the time, testified that during the evening of 30 September 2022, she together with Kuthuka had visited their friend Tokota, at Tokota's boyfriend's home situated at 7th Avenue in Kwa Nobuhle, a

township on the outskirts of Uitenhage. The appellant arrived at the home, unannounced and inebriated. The complainant acknowledged that she knew the appellant as a taxi conductor, more commonly known in the community as 'Biza'. Shortly after his arrival, the appellant aggressively demanded that the complainant accompany him to his home. The complainant refused, but the appellant pulled the complainant by the arm and closed the door behind them. The appellant did so, despite her friends' protestations. The complainant at that point, complied, in the hope that she would escape as soon as the opportunity arose. As they approached the gate of the property, the complainant attempted to flee but was stopped by the appellant. The appellant revealed an axe which he had holstered on his hip, and threatened the complainant with violence, should she again attempt to escape.

[5] The appellant proceeded to escort the complainant to his home, against her will and under the continuous threat of harm. On arrival and once isolated in the appellant's home, the appellant instructed the complainant to undress herself. She refused. The appellant pushed the complainant onto the bed. Out of fear, the complainant ultimately complied. The appellant raped the complainant on four (4) separate occasions over the course of the next approximately five (5) hours. Sometime during this period, Kuthuka and others unknown to the complainant, attended at the appellant's home and called out her name. This, with the aim of rendering assistance to the complainant. In response, the complainant could only muster the word, '*Ja*'. The appellant, in turn, cursed at and threatened Kuthuka and those outside with violence. As the appellant exited his home, Kuthuka and those with him, ran away.

[6] The appellant eventually fell asleep, which presented the complainant with an opportunity to escape. The complainant dressed herself and exited the appellant's home, which awoke the appellant. The appellant pursued the complainant. The complainant hid behind a dustbin in an adjacent yard, until she could no longer hear the appellant. The complainant then ran to Goduka's home and reported that she had been abducted and raped by the appellant. Whilst trying to do so, the complainant was sobbing so much, that Goduka could hardly make sense of what she was trying to relay to him. All that Goduka could discern was that she had been raped by the appellant. Goduka advised the complainant to report the matter at the police station, but she refused, explaining that the appellant had threatened the life

of her youngest sibling. The complainant, instead, went home to bath to rid herself of the scent of the appellant. She, however, did not wash her underwear, which were stained with the appellant's semen.

[7] Kuthuka corroborated, to a large extent, the complainant's evidence. Kuthuka confirmed that he, together with the complainant, visited Tokota at her boyfriend's home during the evening of 30 September 2022. Approximately thirty minutes after their arrival, they heard a knock on the front door. The complainant opened the door, and it transpired that it was the appellant. He entered the home and enquired about the whereabouts of Tokota's boyfriend. It was explained to the appellant that Tokota's boyfriend was not at home. Despite this, the appellant remained and turned his attention instead, to the complainant. He immediately demanded that she leave with him, but she refused. Kuthuka similarly objected, but the appellant cursed at him and aggressively grabbed the complainant's hand and forcefully removed her from the home. Tokota provided Kuthuka with the appellant's address, and approximately five (5) minutes after they had left, Kuthuka proceeded to the appellant's residence. Unbeknownst to the complainant and the appellant, Kuthuka eventually caught up to them near an open field. He witnessed the complainant struggle, the appellant slapping the complainant, and thereafter pulling her along by her hand. He then sought the assistance of friends that lived nearby and proceeded to the appellant's home to assist the complainant. After calling out the complainant's name, the appellant emerged from his home. One of Kuthuka's friends suggested that they run away, because they did not know whether the appellant was armed.

[8] Goduka testified that on the morning of 30 September 2022, at approximately seven o' clock, the complainant arrived at his home in tears. Goduka explained that on arrival, the complainant's physical appearance was indicative of an individual who had been assaulted. Due to the persistent sobbing by the complainant, all that he could discern, was the complainant saying that she had been raped by the appellant. He advised the complainant to report the matter at the police station, but she declined to do so.

[9] Tokota also testified. She confirmed that the complainant and Kuthuka had visited her at the home of her boyfriend. According to Tokota, the appellant arrived at the home and appeared intoxicated. The appellant instructed them that the

complainant would be leaving with him. He threatened to stab her, Kuthuka and the complainant if they persisted with their refusals. She noticed that the appellant was armed with a large knife or axe, which was holstered on his hip. The appellant thereafter forcefully removed the complainant from the home, by grabbing her by the hand and pulling her. Lastly, she confirmed that Kuthuka had set out to follow the complainant and the appellant, and that she had remained at home.

[10] The J88 medico-legal report concluded that there was strong evidence of traumatic vaginal penetration, which was evinced by a fresh tear to the posterior fourchette, and fresh blood emitting from the vagina and cervix. This, one day after the incident. The State submitted that the medical examination supported on the probabilities, the complainant's evidence that she had not consented to sexual intercourse with the appellant.

[11] The appellant testified on his own behalf and called no other witnesses. According to the appellant, he and the complainant had known each other for some time and had agreed to date. The complainant would regularly visit his home. On 30 September 2022, they were due to meet at the bus stop in front of her home, but she had not been there. He searched for her, and eventually found the complainant at the home of Tokota's boyfriend. He berated the complainant for not honouring their meeting and thereafter, stood up to leave. On his way out, the complainant followed him. He denied having touched the complainant, and instead, asserted that they walked together through sixth avenue, without any attempt by the complainant to flee from him. He also denied that he had slapped the complainant. On arrival at his home, he switched on the lights, and they sat on the bed. He denies having pushed the complainant onto the bed, and asserted instead, that the complainant had consented to sexual intercourse. According to the appellant, no one arrived at his home looking for the complainant. After they had sexual intercourse, they fell asleep and woke up at approximately seven o' clock in the morning, which is when the complainant left of her own accord.

[12] In this court, and in respect of his conviction, the appellant contented that the trial court erred in finding that the State had proven its case beyond a reasonable doubt, and further erred in rejecting the defence of the appellant. In support of these grounds, the appellant called in aid a single contradiction which emerged from the

evidence. The contradiction is expressed as follows in the heads of argument prepared by counsel for the appellant:

“Sonwabile Kuthula testified under cross examination that when they go to the house of the appellant where the complainant said she was taken, she did not sound to be terrified, where he was standing it looked like everything was okay inside the shack, this is why he went back home.

If she was being threatened or crying he would have saved her.”

[13] This court reminded counsel for the appellant of the trite principle that evidence and more specifically in this case: a single contradiction, ought not to be considered and assessed in isolation. Instead, it must be considered and assessed in the context of the evidence in its totality. And queried with counsel, whether the appellant’s ground of appeal in respect of his conviction was consistent with this principle. Counsel for the appellant conceded, correctly so, that it was inconsistent. As stated by the Supreme Court of Appeal in *S v Chabalala*:¹

“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 weigh so heavily in favour of the State as to exclude any reasonable doubt about the accused’s guilt.”

[14] The evaluation of evidence in a criminal trial requires an evaluation of the ‘mosaic of evidence as a whole’.² The context within which the appellant has sought to cast his ground, was aptly addressed *S v van der Meyden*³:

¹ 2003 (1) SACR 134 (SCA) at page 140 A – B.

² *Khumalo v S* (723/20) [2022] ZASCA 39 (4 April 2022) at para [19]: “Considering all the circumstances of this case, I am of the view that the evidence tendered by the State weighs so heavily as to exclude any reasonable doubt about the applicant’s guilt. Expressed differently, the mosaic of the evidence as a whole is, beyond reasonable doubt, inconsistent with the applicant’s innocence. The inescapable inference is that the applicant was the aggressor on the night of the incident; that he shot at the complainant, chased him into a yard, fired more shots at the complainant and then robbed him of his money.”

³ 1999 (1) SACR 447 (WLD) at 448 F – H.

“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. These are not separate and independent tests, but the expression of the same test when viewed from the opposite perspective. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true. The two are inseparable, each being the logical corollary of the other ... in whatever the form the test is expressed, it must be satisfied upon a consideration of all the evidence. 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, it does not look at the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true.” (own emphasis).

[15] This court’s powers to interfere on appeal with the findings of fact of a trial court are limited. Absent demonstrable and material misdirections by a trial court, its findings of fact are presumed to be correct.⁴ That presumption remains, unless the evidence establishes them to be clearly wrong.⁵

[16] In my view, the appellant was correctly convicted in respect of both counts. The trial court was mindful and indeed, applied the cautionary rule in respect of the single witness testimony of the complainant insofar as the rape count was concerned.⁶ It furthermore applied the general principle concerning the evaluation of evidence, with reference to the *dictum* in *S v Trainor*⁷. In this regard, and by means of a limited example, the trial court *inter alia* held as follows:

“If one looks at the evidence in totality that complainant was forcibly taken is more probable because that is the very reason why Sonwabile decided to follow them and attempt to rescue the complainant. After witnessing the accused assault the complainant he made a further attempt to rescue the complainant from the accused by organising a group of friends as a backup

⁴ *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 705.

⁵ *S v Monyane and Others* 2001 (1) SACR 543 (SCA) at para [15].

⁶ *S v Sauls and Others* 1981 (3) SALR 172 (A).

⁷ 2003 (1) SACR 35 (SCA).

because he feared the accused. That complainant is scared and ran away in the morning makes the state very much probable.

The defence version on the other hand is improbable in that if the complainant and the accused were lovers why would people worry about complainant's safety and follow her and follow her on the way. Because that would not have been concerning any concern."

[17] In addition, the trial court addressed the contradictions apparent from the evidence of the State witnesses, but held correctly that they were not of a material nature, such as to justify rejection of their evidence. The discrepancies in the evidence of the appellant, stood on a different footing. The trial court considered these to be 'pockets of recent fabrication' in that the appellant inexplicably adduced evidence, which was not put to the State witnesses.

[18] The credible evidence of the complainant and the corroborative testimony of the State witnesses, together with the contents of the J88 medico-legal report, confirmed that the appellant's version and explanation were not only improbable but were false beyond a reasonable doubt.

[19] In the result, and given the established falsity of the appellant's explanation, his conviction on both counts must be sustained.

[20] At the outset of the trial, the appellant had been informed that section 51(1) of the Criminal Law Amendment Act 105 of 1997, relating to a minimum sentence of life imprisonment, would be of application in the event of a conviction in respect of count 2, unless substantial and compelling circumstances were found to exist justifying the imposition of a lesser sentence.

[21] The appellant appeals against the imposition of the minimum sentence of life imprisonment on the basis that it is 'shockingly inappropriate'. The appellant contends that the trial court erred in the following respects: (a) by not taking proper account of the fact that the appellant's previous conviction in respect of rape had occurred sixteen (16) years prior to the rape of the complainant on 30 September 2022; (b) by not taking proper account that the appellant had already spent fourteen

(14) months in custody awaiting trial; (c) by not taking proper account that the complainant sustained no serious injury as a result of the rape, and (d) by finding that no substantial and compelling circumstances existed which warranted deviation from the minimum prescribed sentence of life imprisonment.

[22] A court of appeal ought not to lightly interfere with the trial court's exercise of its discretion in relation to sentence.⁸ In Du Toit's commentary⁹, the learned authors observe that:

"A court of appeal will not, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court..."

[23] This principle found expression in *S v Hewitt*,¹⁰ where Maya DP (as she then was) held that:

"It is a trite principle of our law that the imposition of sentence is the prerogative of the trial court. An appellate court may not interfere with this discretion merely because it would have imposed a different sentence. In other words, it is not enough to conclude that its own choice of penalty would have been an appropriate penalty. Something more is required; it must conclude that its own choice of penalty is the appropriate penalty and that the penalty chosen by the trial court is not. Thus, the appellate court must be satisfied that the trial court committed a misdirection of such a nature, degree and seriousness that shows it did not exercise its sentencing discretion at all or exercised it improperly or unreasonably when imposing it. So, interference is justified only where there exists a "striking" or "startling" or "disturbing" disparity between the trial court's sentence and that which the appellate court would have imposed. And in such instances the trial court's discretion is regarded as having been unreasonably exercised."

⁸ *S v Romer* 2011 (2) SACR 153 (SCA) and *S v Livanjee* 2020 (2) SACR 451 (SCA).

⁹ E du Toit (et al), *Commentary on the Criminal Procedure Act* (Jutastat, RS 66, 2021) at ch30-p42A.

¹⁰ 2017 (1) SACR 309 (SCA)

[24] In *S v Malgas*,¹¹ Marais JA explained the rationale informing the prescribed minimum sentence:

“...The very fact that this amending legislation has been enacted indicates that Parliament was not content with that and that it was no longer to be “business as usual” when sentencing for the commission of the specified crimes.

...In what respects was it no longer business as usual? First, a court was not to be given a clean slate on which to inscribe whatever sentence it thought fit. Instead, it was required to approach that question conscious of the fact that the legislature has ordained life imprisonment or the particular prescribed period of imprisonment as the sentence which should ordinarily be imposed for the commission of the listed crimes in the specified circumstances. In short, the legislature aimed at ensuring a severe, standardised, and consistent response from the courts to the commission of such crimes unless there were, and could be seen to be, truly convincing reasons for a different response.”

He continued by explaining the core meaning to be attached to the words ‘substantial and compelling’:

“Secondly, a court was required to spell out and enter on the record the circumstances which it considered justified a refusal to impose the specified sentence... Moreover, those circumstances had to be substantial and compelling. Whatever nuances of meaning may lurk in those words, their central thrust seems obvious. The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny.”

[25] And in *S v Vilakazi*,¹² Nugent JA set out the approach to be adopted by courts where the minimum sentence legislation finds application:

“It is clear from the terms in which the text was framed in Malgas and endorsed in Dodo that it is incumbent upon a court in every case, before it

¹¹ 2001 (1) SACR 469 (SCA) at paras 7 – 9.

¹² 2009 (1) SACR 552 (SCA) at para 14.

imposes a prescribed sentence, to assess, upon a consideration of all the circumstances of the particular case, whether the prescribed sentence is indeed proportionate to the particular offence. The Constitutional Court made it clear that what is meant by the “offence” in that context ... consists of all factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence and the culpability of the offender.”

[26] In seeking to meet this threshold, the appellant placed reliance on his personal circumstances, which form his grounds of appeal against the imposed sentence. His personal circumstances however, are unremarkable. As concluded by the trial court, the only circumstance worthy of consideration was his incarceration for a period of fourteen (14) months whilst awaiting trial. But even in this instance, the trial court correctly identified it as a mere factor that ought to be considered.¹³

[27] Ultimately, the trial court held that no substantial and compelling circumstances existed which merited deviation from the imposition of life imprisonment.

[28] In *Maila v S*,¹⁴ the court dealt with mitigating factors raised on behalf of an appellant, which were not dissimilar to the factors raised by the appellant in these proceedings. The Court held as follows:

“Taking into account Jansen, Malgas, Matyityi, Vilakazi and a plethora of judgments which follow thereafter as well as regional and international protocols which bind South Africa to respond effectively to gender-based violence, courts should not shy away from imposing the ultimate sentence in

¹³ *S v Radebe* 2013 (2) SACR 165 (SCA) at para 14: “A better approach, in my view, is that the period in detention pre-sentencing is but one of the factors that should be taken into account in determining whether the effective period of imprisonment to be imposed is justified: whether it is proportionate to the crime committed. Such an approach would take into account the conditions affecting the accused in detention and the reason for a prolonged period of detention. And accordingly, in determining, in respect of the charge of robbery with aggravating circumstances, whether substantial and compelling circumstances warrant a lesser sentence than that prescribed by the Criminal Law Amendment Act 105 of 1997 (15 years’ imprisonment for robbery), the test is not whether on its own that period of detention constitutes a substantial or compelling circumstance, but whether the effective sentence proposed is proportionate to the crime or crimes committed: whether the sentence in all the circumstances, including the period spent in detention prior to conviction and sentencing, is a just one.”

¹⁴ [2023] ZASCA 3 (23 January 2023) at para 59.

appropriate circumstances, such as in this case. With the onslaught of rape on children, destroying their lives forever, it cannot be 'business as usual'. Courts should, through consistent sentencing of offenders who commit gender-based violence against women and children, not retreat when duty calls to impose appropriate sentences, including prescribed minimum sentences. Reasons such as lack of physical injury, the inability of the perpetrator to control his sexual urges, the complainant (a child) was spared some of the horrors associated with oral rape, which amount to the acceptance of the real rape myth, the accused was drunk and fell asleep after the rape, the complainant accepted gifts (in this case, sweets) are an affront to what the victims of gender-based violence, in particular rape, endure short and long term. And perpetuate the abuse of women and children by courts. When the Legislature has dealt some of the misogynistic myths a blow, courts should not be seen to resuscitate them by deviating from the prescribed sentences based on personal preferences of what is substantial and compelling and what is not. This will curb, if not ultimately eradicate, gender-based violence against women and children and promote what Thomas Stoddard calls 'culture shifting change.' (emphasis supplied)

[29] In conclusion, no grounds exist warranting interference with the imposition of life imprisonment in respect of count 2 concerning the rape of the complainant.

[30] Similar considerations apply in respect of count 1 concerning the kidnapping of the complainant. There is no basis for suggesting that the Magistrate exercised his discretion improperly or misdirected himself. Nor is the sentence imposed disturbingly inappropriate or disproportionate that no reasonable court would have imposed it. Here too, no basis exists warranting interference with the sentence.

Order

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

The appeal against conviction and sentence is dismissed.

D.T. YOUNG
ACTING JUDGE OF THE HIGH COURT

I agree.

T.V. NORMAN
JUDGE OF THE HIGH COURT

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