



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

Case No.: CA&R236/2024

In the matter between:

MXOLISI GLADMAN HINA

Appellant

and

THE STATE

Respondent

JUDGMENT

Cengani-Mbakaza AJ

Introduction

[1] This is an appeal against both conviction and the sentence of life imprisonment imposed by the Regional Magistrate sitting in Gqeberha (the trial court). The appellant was charged with rape allegedly committed on or about 03 September 2017 and at or near Missionvale, Gqeberha. The allegations are that the appellant inserted his penis into the complainant's vagina without her consent. In the trial court, the appellant pleaded not guilty and in accordance with the provisions of s 115 of the Criminal Procedure Act 51 of 1977 (the CPA), the appellant reserved the

basis of his defence. Pursuant to s 309 (2) of the CPA, he duly noted his appeal, however exercised his automatic right of appeal in terms of s 309 (1) of the CPA.

The facts

[2] The complainant testified that during the afternoon on the day in question, she was busy with her normal chores at home when her friend, Ms N, asked if they could go to the appellant's place. Although Ms N was not acquainted with the appellant, only knowing him by sight, she acceded to the request. Upon arrival at the appellant's place, they consumed beer with the appellant. Suddenly, Ms N left the house and she was left with the appellant inside the room.

[3] When the complainant attempted to leave the room, the appellant pulled her by her hair and threw her onto the bed. He started to assault her with fists on her face. As she struggled to fight back, the appellant bit her finger. Exhausted from the struggle, the complainant ultimately succumbed to the pressure and allowed the appellant to proceed as he wished. The appellant pulled off her pants and raped her. An effects of a combination of the consumption of beer and the struggle with the appellant caused her to fall asleep on his bed.

[4] After some time, she woke up and realised that she was naked. Instead of releasing her, as the complainant begged him to do so, the appellant raped her for the second time and passed out thereafter. When she heard the appellant snoring, the complainant fled the scene. She ran to Ms M, another friend, to report the matter. She explained to Ms M why she was in that state. She was half naked, trembling due to fear and nervousness and her finger was bleeding from the biting. Ms M gave her a skirt to wear.

[5] The other terrifying experience for the complainant, so she testified, was having to go to her boyfriend and explain what had happened. Ms M assisted in narrating the events to her boyfriend. The complainant's boyfriend gathered community members. They all proceeded to the appellant's home, where they found him sleeping. The complainant's boyfriend stabbed the appellant who then fled the scene. With police assistance, the complainant was taken to the Thuthuzela Care

Centre, a facility that handles cases such as the present. She was subsequently transferred to Dora Nginza hospital for examination.

[6] Ms M testified that she saw the complainant on the day of the incident. Her evidence corroborates the complainant's evidence regarding the state in which the complainant was upon arrival at her place. They subsequently reported the matter to the complainant's boyfriend and the community. Ms M confirmed that the complainant reported to her that she was raped by the appellant.

[7] The state's final witness, Ms N, testified about visiting the appellant's residence with the complainant. She explained that when she stepped out of the house, leaving the appellant and the complainant, she intended to relieve herself although she did not inform the complainant of this. She also testified that she was among the people who saw the complainant later that evening, reporting the incident and displaying an injury on her finger. The next day she left the area and went to Jansenville.

[8] The medical report which was handed in by agreement as part of the state's evidence, confirmed that the complainant sustained a cut on her index finger and experienced neck stiffness. Dr Mtini, who compiled the report, concluded that these injuries were consistent with a physical assault. In his report, the Dr Mtini opined that sexual assault could not be excluded. As part of its case, the state also presented photographs depicting the appellant's home where the incident took place. The photographs also depicted the complainant's clothing on the appellant's bed, namely a tight and her pants.

[9] In his defence, the appellant testified that she was not at his house and that he did not assault or bite the complainant's finger. In essence, he disputed the version of events about which the complainant and Ms N testified.

Appeal against conviction.

[10] The appellant relies on two grounds of appeal in his notice of appeal, namely:

‘1. The trial court erred in finding that the state had proven its case beyond reasonable doubt, particularly given the complainant’s status as a single witness.

2. The trial court erred in rejecting the appellant’s version declaring it as a false fabrication.’

[11] In their heads of argument, the parties agree that the state proved that the complainant was raped and that the issue is whether the appellant was the perpetrator of the rape. It is a well-established principle that the state must prove the guilt of an accused person beyond reasonable doubt . The accused may only be acquitted if his version is reasonably possibly true. In this instance, it is necessary to examine whether the trial court properly evaluated the cautionary rules relevant to single-witness evidence , as well as the heightened caution required when identification is in issue.

[12] The principles which should guide an appellate court in an appeal purely upon facts were set out by Schreiner JA in *Rex v Dhlumayo and Another* as follows:

‘Ordinarily the appellant in a criminal appeal has to satisfy the appellate court that the verdict was wrong, at least to the extent that the trial court should have had a reasonable doubt as to his guilt. Where there has been no misdirection on fact by the trial Judge, the presumption is that his conclusion is correct; the appellate court will only reverse it where it is convinced that it is wrong.’

[13] Most importantly, “the trial Judge has advantages - which the appellate court cannot have - in seeing and hearing the witnesses and in being steeped in the atmosphere of the trial. Not only has he had the opportunity of observing their demeanour, but also their appearance and whole personality. This should never be overlooked. Consequently, the appellate court is very reluctant to upset the findings of the trial Judge.”

[14] To reach a finding that the case was proved beyond reasonable doubt, the trial court evaluated the evidence in its totality including the appellant’s bare denial.

The appellant resided in the same area and was known to the complainant and Ms N. The complainant and Ms N visited the appellant during the day. The appellant confirmed that he also had seen the complainant in the area before. The complainant's evidence was strengthened by consistencies in her account, including her immediate reporting of the incident and the identity of the perpetrator. Furthermore, she promptly pointed out the appellant's house after the incident. The presence of her underwear on the appellant's bed after the ordeal corroborated her testimony regarding the perpetrator's identity.

[15] Upon examination, the complainant's version was consistent with the proven facts. These factors collectively enhance the reliability of the complainant's identification of the perpetrator. Therefore, the trial court correctly evaluated the evidence and determined the identity of the appellant as the perpetrator. In the light of all the evidence, the appellant's evidence cannot be reasonably possibly true while at the same time the evidence of the state is "completely acceptable and unshaken." In the result, the appeal against conviction cannot stand.

Appeal against sentence.

[16] The prescribed sentence for rape, when committed on more than one occasion, is life imprisonment. Deviation from this sentence is only permissible if substantial and compelling circumstances exist. As established in *Malgas*, "a court exercising appellate jurisdiction cannot in the absence of material misdirection by the trial court, approach the question of sentence as 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. Where material misdirection by the trial court vitiates its exercise of discretion, an appellate court is of course entitled to consider the question of sentence afresh..."

[17] In the matter under consideration, the appeal against sentence is premised on the ground that the trial court should have found the existence of substantial and compelling circumstances, and the sentence imposed is shockingly inappropriate.

[18] The principles applicable in determining a fair, balanced and appropriate sentence have long been settled. The Constitution guarantees an individual's freedom from all forms of violence from any source . This was a brutal and cruel incident, resulting in physical injuries to the complainant. The appellant's conduct was relentless, with the complainant resisting until she was exhausted and unable to defend herself any further. The repetition of the rape on the same day including his previous conviction of rape, for which he was serving a 7-year prison sentence at the time of trial, strongly suggests a lack of prospects for rehabilitation.

[19] In applying the Zinn principles, the trial court thoroughly evaluated all the relevant facts, including the appellant's personal circumstances as presented by his legal representative and reflected in the pre-sentence report. Those personal circumstances, such as they are, recede into the background regard being had to the fact that the appellant must undergo a long term of imprisonment. Consequently, the trial court did not err in finding that substantial and compelling circumstances were absent and the sentence imposed does not induce a sense of shock.

[20] In the circumstances, the appeal against conviction and sentence must fail.

Order

[21] The appellant's appeal against conviction and sentence is dismissed.

N CENGANI-MBAKAZA
JUDGE OF THE HIGH COURT (ACTING)
Bloem J

I agree.

G H BLOEM
JUDGE OF THE HIGH COURT

APPEARANCES:

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