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

APPEAL CASE NO.: CA & R 99/2022

CASE NO.: RCUM 130/2019

In the matter between:

NKCUBEKO MBIYO

Appellant

and

THE STATE

Respondent

JUDGMENT

BODLANI AJ

Introduction

[1] The appellant, Mr Nkcubeko Mbiyo was arraigned in the Regional Court, Mthatha (the trial court). He was charged with 1 count of rape, in contravention of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the Sexual Offences Amendment Act). He pleaded not guilty to the charge but was

nonetheless convicted. He was sentenced to 10 years' imprisonment. The trial court made no order in terms of s 103(1)(g) of the Firearms Control Act 60 of 2000.

[2] The appellant unsuccessfully sought leave to appeal from the trial court against his conviction and sentence. He then successfully petitioned the Judge President of the Eastern Cape Division of the High Court, Mthatha in terms of s 309C of the Criminal Procedure Act 51 of 1977 (the CPA) for leave to appeal against his conviction and sentence. Thus, this appeal comes before us with the leave of this court.

Background facts

[3] The appellant and the complainant had been known to each other for a few years. The complainant and one of her sisters were congregants in the appellant's church. The appellant was a pastor. At the time of the alleged rape, the complainant was residing with her siblings in an apartment they were renting in Mthatha. More about the appellant's siblings later. She, the complainant, was a 19 year old scholar in Mthatha.

[4] On the day of the alleged rape, the complainant had initially been on school holidays in her ancestral home in Ngqeleni. However, the appellant had arranged with the complainant's mother for the complainant to travel back to Mthatha so that she could attend the funeral of a former congregant in the appellant's church. The funeral was to be held in Ngcobo.

[5] The complainant was meant to be part of the appellant's church's worship team.¹ Thus, in the afternoon of the day when she was allegedly raped, the complainant was back in Mthatha, in her apartment. According to the complainant, contrary to what had been agreed between her mother and the appellant, she did not call or meet the appellant upon her arrival in Mthatha. She just went to her apartment. Later in the afternoon, she heard a knock on the door. She opened, only to find that the appellant was her visitor.

¹ As I understand it, a 'worship team' is a choir assembled from some members of a church to sing in a specific occasion and at the request of the church or its leadership.

[6] They both sat on the bed. A few minutes later, the appellant attempted to kiss her. She refused to be kissed. This notwithstanding, the appellant continued with the kissing. A few moments later, the appellant undressed the complainant and thereafter, himself. The complainant had resisted being undressed. However, she neither screamed nor shouted. She merely made it clear to the appellant that she did not approve of what he was doing.

[7] The complainant's disapproval notwithstanding, the appellant had sexual intercourse with her, without her consent. In this regard, the complainant testified that the appellant inserted his penis inside her vagina, and then made up and down movements. When he was done raping her, the appellant admonished the complainant not to tell anyone about what he had done to her. He then left. As had originally been arranged for the complainant to attend the funeral in Ngcobo the following day, and be part of the worship team, she did.

[8] Part of the congregants who attended the funeral was the complainant's older sister, Ms. N. The complainant only became aware that Ms. N was also attending the funeral when the vehicle in which she was travelling, as arranged either by the appellant's church or by the appellant, went to fetch her where she had been attending a music concert in Cicirha, Mthatha. Immediately before and after the funeral, the complainant did not disclose that the appellant had raped her.

[9] A few days after the funeral, the complainant went back to Ngqeleni to be with her mother. She returned to Mthatha at a time closer to the resumption of her school program. It came to pass that shortly before the school holidays in September 2023, she decided she wanted to disclose that the appellant had raped her. However, she was scared that such disclosure would cause a rift between her and Ms. N whom she considered to be very close to the appellant and his family.

[10] Eventually, she decided that she would write a letter and leave it lying on the floor in the apartment. She hoped that one of her siblings would find and read it. She carried out her plan. It worked in that Ms. N found the letter lying on the floor in the apartment whilst the complainant was at school. She read it and concluded that the

author had been raped. She kept the letter so that they could discuss the content once everyone was back in the apartment that afternoon.

[11] In the letter, the complainant disclosed that she had had an unwanted sexual encounter with the appellant and, that even before the unwanted sexual encounter, the appellant had previously touched her private parts without her consent. The complainant also wrote that the appellant had taken away from her something that was very precious. In the course of her testimony, the complainant disclosed that the precious matter the appellant took away from her was her virginity.

[12] In the course of the discussion of the content of the letter with her siblings, the complainant disclosed that the appellant raped her on the eve of the funeral she was requested to attend in Ngcobo, and that she had been scared to make the disclosure because Ms. M, was very close to the appellant and her family. She also disclosed that she was not ready to report a case of rape for investigation by the police inasmuch as she was concerned that her mother might blame her for what had happened.

[13] During the school holidays, in September 2023, the complainant went to Johannesburg. Whilst there, she also received professional counselling. In the meanwhile, her older siblings had informed the complainant's mother about the content of the complainant's letter and the discussions they had after its discovery. The complainant's mother found it hard to believe that a trusted family friend, according to her, the appellant, had raped one of her children.

[14] Upon arrival back in Mthatha from Johannesburg, the complainant reported a case of rape for investigation by the police. She also attended to a medical doctor, Dr. *Ntloko*, who completed a J88. The medical doctor was called to testify. She confirmed examining the complainant, receiving history from her including being told by the complainant that she had been raped, and completing the J88. Among others, the medical doctor found that the complainant was no longer a virgin. Her hymen was perforated, she found.

Evidence adduced by the defence

[15] The appellant denied raping the complainant. He asserted that in June and July 2019 and on the day of the alleged rape, he did not meet the complainant. Insofar as the complainant had testified that she had hitherto been part of the worship team in the appellant's church, the latter had arranged for her to attend the funeral of a congregant as part of the worship team on or about June 2019, the appellant made common cause with her.

[16] The common cause issues notwithstanding, the appellant denied meeting the complainant on the day of the alleged rape. He also denied visiting the complainant's apartment. His version was put to the complainant thus:

MR NQORO: Accused person also informed me that on the day in question in – he was on his house in Tekoleni(?) doing his daily chores with his wife.

MS M[...]: He is telling lies.

[17] It was also his version that:

MR NQORO: And further informed me on the day of the funeral he was not there, he attend – he was – he attended the wedding in other place.

ACCUSED: He is telling the truth.

[18] When under cross examination, his version was:

PROSECUTOR: On that day you were also attending a wedding.

ACCUSED: I was at Mandela Park, Your Worship, organising items that were to be taken a wedding ceremony.

ACCUSED: He is telling the truth.

[19] Later, whilst still under cross examination, it was put to the appellant that:

PROSECUTOR: I put it to you Mr Mbiyo, that the reason on the day in question you had summoned the complainant to Mthatha is because you knew that she would be alone there as you wanted to satisfy your sexual desires.

ACCUSED: That is not true, Your Worship. I was busy on the day in question and would not have gone there to satisfy my sexual desires, whereas I have at home and the phone, I am not mistaken, was with my wife on that day, Your Worship, and she was heavily pregnant at the time about to deliver, Your Worship, and that is why I was busy also at Mandela Park, Your Honour.

[20] According to the appellant, there was bad blood between him and Ms. *M*. He assumed that the complainant had laid false charge of rape against him because MS. *M* was using her. Her motivation, testified the appellant, was that he had had a fallout with Ms. *M*. They were not in good terms since the emergence of a dispute between them, concerning Ms. *M*'s future academic and professional pursuits.

[21] It was common cause that the appellant had, for a while, been involved in Ms. *M*'s academic and professional pursuits. Notwithstanding his testimony about there being bad blood between him and Ms. *M*, the appellant, also testified that he had arranged for Ms. *M* to attend the same funeral as the complainant.

The trial court's findings

[22] In convicting the appellant, the trial court accepted the version of the complainant against the appellant's version. It also accepted the evidence of Ms *M*, and that of Dr. *Ntloko*, the medical doctor who examined the complainant. It treated the evidence of the latter witnesses as corroboration of the complainant's version.

Evaluation

[23] The question on appeal is narrow. It is whether the appellant's guilt was proven beyond reasonable doubt. In doing so, it has to be determined whether the trial court committed any irregularities during the trial, and whether those irregularities undermined the appellant's right to a fair trial. In criminal proceedings the State bears the onus to prove the accused's guilt beyond reasonable doubt.

[24] Furthermore, the accused's version cannot be rejected solely on the basis that it is improbable, but only once the trial court has found, on credible evidence, that the

accused's explanation is false beyond a reasonable doubt. The corollary is that if the accused's version is reasonably possibly true, the accused is entitled to an acquittal. It is also trite that in an appeal, the accused's conviction can only be sustained after consideration of all the evidence, including the accused's version of events.

[25] At the heart of this appeal, is the determination of the correct approach to the evaluation of evidence by the trial court. In the evaluation of the elements of the offence in the crime of rape, the onus rests on the State to prove all the elements of the crime, including the absence of consent and intention. This is so even where the version put to the complainant is a denial of any sexual contact with the complainant.

[26] In *Vilakazi v The State*,² the Supreme Court of Appeal quoted with approval what was said in *S v York*³ in relation to the absence of consent. It said:

‘It is always, of course, for the prosecution to prove the absence of consent. This entails that even if the defence, as here, is that no intercourse took place, the court must, in the adjudicative process, be alive to the possibility that there might have been consent nonetheless.’

[27] In *casu* the only issue in dispute is whether the complainant was raped by the appellant. It is common cause that the appellant was convicted on the evidence of a single witness, the complainant. Thus, her evidence had to be treated with caution. In terms of s 208 of the CPA, an accused may be convicted on any offence on the single evidence of a competent witness.

[28] Counsel for the appellant, Mr. *Mfeya*, contended that the trial court paid lip service to this cautionary rule, and did not apply it. He made this submission in relation to the fact that during cross examination, the complainant conceded that when she gave certain testimony, she had not always told the truth. However, a closer scrutiny of those instances reveal that it was on matters immaterial to the question whether the appellant had committed the offence of rape.

² [2008] ZASCA 87; [2008] 4 All SA 396 (SCA); 2009 (1) SACR 552 (SCA) para 47.

³ 2002 (2) SACR 111 (SCA) para 19.

[29] For instance, in cross examination, the complainant conceded that she was not candid with the trial court when she suggested that the appellant had also attended the funeral in Ngcobo. However, a closer consideration of the record suggests that the complainant's attorney put it as a fact to the complainant that the latter had led such evidence during her testimony in chief, when in fact she had not.

[30] Reliance was also placed on the complainant's suggestions that she delayed reporting the offence because she was scared that the appellant may have killed her had she reported the offence, just like it had happened with *Uyinene Mrhwetyana* – an event Mr. *Mfeya* contended had yet to happen at the time of the alleged rape. For the following reasons, I am not able to reject the complainant's version simply on this basis.

[31] It must be borne in mind that s 59 of the Sexual Offences Amendment Act provides that:

‘In criminal proceedings involving the alleged commission of a sexual offence, the court may not draw any inference only from the length of any delay between the alleged commission of such offence and the reporting thereof.’

[32] Thus, I am not able to draw an adverse inference from the delay in reporting. As I understand Mr. *Mfeya*'s submission, we are required to draw an adverse inference from the justification the complainant gave for the delay in reporting the offence. It is not entirely clear to me why we should do so when we need not be concerned with the delay to begin with. At best, this would be a matter for consideration in the overall assessment of the complainant's credibility. This, the trial court did. It was satisfied with the complainant's credibility. The limitations of an appeal court in this regard are legion and well stated.

[33] Assuming I am wrong, the complainant had other justifications for the delay in reporting the offence. One of them was that she was scared that had she told her mother, she would have blamed her for it. The other was that she was also scared because Ms. *N*, had a close relationship with the appellant and his family. The record confirms that, even on the appellant's version, not only did he, at some point, consider himself to be close to Ms. *N*, he was also known to the complainant's mother.

[34] In any event, in *S v Mafaladiso en Andere*,⁴ the Supreme Court of Appeal held that where there are material differences between the witness' evidence and their prior statement, the final task for the judge is to weigh up the previous statement against *viva voce* evidence, to put all the evidence together and to decide which is reliable and whether the truth has been told despite any shortcomings.

[35] Thus, despite whatever shortcomings there are in the evidence, perceived and actual, the task of the court is to consider the totality of the evidence to ascertain if the truth has been told. The record shows that there are two conflicting versions on how the events unfolded on the day in question. The question which needed to be considered by the trial court was whether on the totality of evidence, the State proved its case beyond reasonable doubt. It was satisfied.

[36] The test to be applied as set out in *S v Van Der Meyden*⁵ is as follows:

'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 (see, for example, *R v Difford* 1937 AD 370 at 373 and 383...'

[37] In *S v Singh*⁶ the court discussed the approach to be followed when there is a conflict of fact in a criminal matter. It said the following:

'... it would perhaps be wise to repeat once again how a court ought to approach a criminal case on fact where there is a conflict of fact between the evidence of the State witnesses and that of an accused. It is quite impermissible to approach such a case thus: *because the court is satisfied as to the reliability and the credibility of the State witnesses that, therefore, the defence witnesses, including the accused, must be rejected. The proper approach in a case such as this is for the court to apply its mind not only to the merits and demerits of the State and the defence witnesses but also to the probabilities of the case.* It is only after so applying its mind that a court would be justified in reaching a conclusion as to whether the guilt of an accused has been established beyond all reasonable doubt.' (Emphasis added.)

⁴ 2003 (1) SACR 583 (SCA) at 584.

⁵ 1999 (1) SACR 447 (W) at 448.

⁶ *S v Singh* 1975 (1) SA 227 (N) at 228E-H.

[38] Further, in *S v Mbuli*,⁷ the Court made the following important remarks:

‘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...* [I]n 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 not look at the exculpatory evidence in isolation to determine whether it is reasonably possible that it might be true. *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”.’ (Emphasis added.).

[39] Against these principles, on the evidence presented and for the following reasons, I agree with the findings and conclusions of the trial court. It is common cause that the appellant called and requested the complainant’s mother to release the complainant so she could attend the funeral of a former congregant in Ngcobo. The request was grounded on the desire to have the complainant as part of the worship team. The complainant’s mother agreed.

[40] At the appellant’s instance, the complainant’s mother agreed to have the complainant report her arrival in Mthatha to the appellant. When the appellant called and made his requests to the complainant’s mother, he was aware that the complainant was with her mother and her younger sister in Ngqeleni. Ms. N’s undisputed evidence was to the effect that she had informed the appellant that there was no one in the apartment where Ms. N, her older sister, the complainant and the complainant’s younger sister lived in Mthatha.

[41] Not only did the appellant, on the uncontested evidence, know that the parties identified above were not in the apartment, he knew where each one was and why. He

⁷ *S v Mbuli* 2003 (1) SACR 97 (SCA) at 110C-E and G-H.

knew Ms. N, was attending a music concert in Cikirha, Mthatha, Ms. N's older sister was in hospital in the wake of prematurely giving birth to her baby, the complainant and the complainant's younger sister were in Ngqeleni because of the midyear school holidays.

[42] Ms. N's communication to the appellant of these intimate details about the whereabouts of her siblings and why negates the presence of bad blood the appellant testified existed between her and Ms. N. It must be remembered that the appellant testified that bad blood between him and Ms. N was the reason he suspected Ms. N influenced the complainant to lay a false charge of rape against him. Also, Ms. N attended the same funeral as the complainant at the appellant's instance and request. Ms. N's testimony in this regard was not disputed in cross examination.

[43] Thus, the notion that there was bad blood between the appellant and Ms. N was rightly rejected by the trial court. Interestingly, upon arrival in Mthatha the complainant did not call the appellant, as had been agreed between the appellant and the complainant's mother. To satisfy himself that she had arrived and as he already knew, would be alone in the apartment, the appellant called the complainant and verified that fact.

[44] The other anchor in the appellant's case was that he could not have gone to the complainant's apartment because he did not know where it was. For the following reasons, this suggestion too falls to be rejected as false. In fact, it must be accepted that the appellant knew where the apartment was. Not only did Ms. N testify that the appellant knew where their apartment was, she placed the appellant at the apartment on two occasions.

[45] Ms. N's evidence was that at some point she had occasion to move to Ngcobo. When it was time for her to go there, the appellant fetched her from the apartment together with the household utensils she required to be delivered to Ngcobo. On coming back from Ngcobo, the appellant dropped her in the apartment. Ms. N's testimony about the appellant's visit to the apartment, when he visited, and why he visited was not disputed in cross examination.

[46] There are obvious consequences that flow from the failure to dispute, in cross examination, Ms. N's evidence in this regard. One of those consequences was stated by the Constitutional Court in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*,⁸ more than 25 years ago. It said:

'[61] The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. This rule was enunciated by the House of Lords in *Browne v Dunn* and has been adopted and consistently followed by our courts. Ms. N on her version in this regard.'

[47] I recognise that when the complainant testified under cross examination, it was put to her that the appellant had never been shown and did not know the complainant's apartment. However, the failure to cross examine Ms. N on the issue, bearing in mind that she put more facts and substance to the appellant's knowledge of the apartment, timed and linked it to a specific purpose and event which necessitated the appellant's presence there makes for the conclusion that the appellant denial of his knowledge of the complainant's apartment was anything but serious.

[48] This is more so when it is considered that Ms. N was the primary reason for the appellant's attendance at the apartment. In any event, it is clear that the trial court rejected the appellant's version that he neither knew nor had he ever been to the apartment where it was alleged, he had committed the offence of rape. Bearing in mind the advantages enjoyed by the trial court of seeing, hearing and appraising the witnesses, it is only in exceptional circumstances that an appellate court will interfere with the trial court's evaluation of oral evidence and conclusions on matters of fact.⁹

⁸ *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* (CCT16/98) [1999] ZACC 11; 2000 (1) SA 1; 1999 (10) BCLR 1059 (10 September 1999). Also read paras 62 to 73.

⁹ *R v Dhlumayo & Another* 1948 (2) SA 677 (A) at 705-706; *Sanlam Bpk v Biddulph* 2004 (5) SA 586 (SCA) para 5; *Roux v Hattingh* 2012 (6) 428 (SCA) para 12.

[49] A disturbing feature of this appeal is that the evidence of the complainant was also that she had long been sexually harassed and molested by the appellant through inappropriate touching, another fact that was not disputed in cross examination. Thus, on a conspectus of all the evidence, I conclude that when the appellant sought the complainant's presence in Mthatha, the day before the funeral in Ngcobobo, he knew exactly what his intentions were.

[50] Ultimately, as he had intended for it, the appellant knew the complainant would be alone in the apartment upon her arrival from Ngqeleni. Thus, she would be vulnerable and available to him. He also knew that if he went to the apartment, he would not only find the complainant, but he would do with her as it pleased him. This speaks to premeditation, an issue that following the finding of guilt, had to be considered when sentencing the appellant. Because the appeal lies against both conviction and sentence, it is to the issue concerning sentence that I now turn.

[51] The Constitutional Court, in *S v Bogaard*,¹⁰ said the following about this Court's power to interfere with a sentence imposed by a lower court:

'It can only do so where there has been an irregularity that resulted in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it.'

[52] There is no foundation for the suggestion that in sentencing the appellant, the trial court committed an irregularity that resulted in a failure of justice, nor can it be said that the trial court misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it.

[53] If anything, the trial court stuck to the sentencing regime that is applicable in cases of rape, having earlier explained the applicable regime to the appellant. It considered the evidential matter that both parties placed before it for the purposes of sentence. In the evaluation of the evidence before it, it found no compelling reasons for deviation from the prescribed minimum sentence. I found none.

¹⁰ *S v Bogaard* [2012] ZACC 23; 2013 (1) SACR 1 (CC) para 41.

Conclusion

[54] In view of the conclusions I have arrived at and the findings I have made, I would dismiss the appeal. Accordingly, the following order shall issue:

1. The appeal is dismissed.

A M BODLANI
ACTING JUDGE OF THE HIGH COURT,
EASTERN CAPE DIVISION.

I agree

N GQAMANA
JUDGE OF THE HIGH COURT,
EASTERN CAPE DIVISION.

APPEARANCES:

For the Appellant	:	MR. MFEYA
Instructed by	:	MESSRS NQORO ATTORNEYS INC Attorneys for the Appellant No. 27 Victoria Street MTHATHA
For the Respondent	:	MR. BIKITSHA
Instructed by	:	THE DPP, MTHATHA Attorneys for the Respondent MTHATHA
Heard on	:	22 October 2025
Delivered on	:	24 October 2025