

SOUTH AFRICA / JUDGMENT

Cornelissen v S (A110/2021) [2022] ZAFSHC 24 (10 February 2022)

[2022] ZAFSHC 24**COURT**

Free State High Court, Bloemfontein

BEFORE

Daniso, Litheko

CASE / FILE NUMBER

A110/2021

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**IN THE HIGH COURT
OF SOUTH AFRICA,
FREE STATE
DIVISION, BLOEMFONTEIN**

Appeal number: A110/2021
In

the matter between: SOUL
CORNELISSEN
Appellant
and
THE STATE
Respondent
HEARD

ON: 31
JANUARY 2022
CORAM: DANISO,
J et LITHEKO, AJ

JUDGMENT

BY: LITHEKO, AJ

DELIVERED ON: 10 FEBRUARY 2022

INTRODUCTION

- [1] The appellant appeals against his conviction on one count of rape, one count of kidnapping and one count of assault with intent to do grievous bodily harm, as well as sentence of life imprisonment imposed by the Regional Court in Bloemfontein. The count of rape on which the appellant was convicted constituted a contravention of section 3 read with other relevant sections of the Criminal Law Amendment Act (Sexual Offences and Related Matters), Act 32 of 2007 further read with Section 51(1) and Schedule 2 of the Criminal Law Amendment Act, 105 of 1997.
- [2] The court a quo took the three convictions together for purposes of sentence and on the 28th May 2018 sentenced the appellant to life imprisonment.
- [3] The appellant has an automatic right of appeal in terms of Section 309(1)(a) of the Criminal Procedure Act 51 of 1977, as amended (the CPA) in view of the fact that he was sentenced to life imprisonment.
- [4] The appeal against the convictions turns on the evaluation of the evidence. The appellant had pleaded not guilty and in his plea explanation in terms of Section 115 of the CPA he claimed that the sexual intercourse with the complainant was consensual and, regarding assault GBH, he denied all allegations against him. He did not tender any explanation in respect of his plea of not guilty to kidnapping. There are essentially two mutually destructive versions of the events that unfolded between Wednesday the 20th July 2016 and Sunday the 24th July 2016.

THE ISSUE

- [5] The issue in this appeal is whether the court a quo was correct in accepting the version of the state and rejecting that of the appellant.

THE FACTS

- [6] RAPE AND KIDNAPPING.

6.1 The complainant, M[...] R[...] aged 22 years old at the time of the trial, is the wife of the appellant and they have three minor children. However, at the time of the incident they had not been staying together for a period of about three weeks. The complainant had a protection order against the appellant but the terms thereof are of no relevance in the appeal as he was not charged with a contravention thereof.

6.2 On the night of the 20th July 2016 the complainant was at her parental home with her mother, who had been recently discharged from hospital. They were sitting by the fire outside when the appellant arrived in possession of a 16 cm long panga. He demanded that the complainant leave with him and, when she refused, he threatened to kill her and her family. He then pulled the complainant to his place, hitting her on her shoulders with the flat side of the panga along the way. Upon entering in the appellant's shack, she sat on a couch. There were altercations between them, when she wanted to go and intimating that she does not want the appellant, which attracted the attention of the appellant's mother and his neighbour. The appellant dismissed them, ordering his mother not to interfere in his affairs. He got into bed and told the complainant to join him, threatening to kill her if she does not do so and she complied with the order, sleeping in her T-shirt and a tight.

6.3 While they were sleeping the appellant tried to remove the complainant's tights. She held the tights and a tussle ensued resulting in the appellant removing one leg of the panty and the tight when she got tired of fighting. The appellant then had sexual intercourse with her for 25 - 30 minutes without her consent. In the morning, the appellant's mother, who stays on the same premises in another shack, came into the appellant's shack with their youngest child. The complainant reported to the appellant's mother that the appellant brought her there against her will. She however did not report to her about the rape because the appellant's mother was scared of the appellant. From the 20th July 2016 until the 24th July 2016 the appellant kept her in his shack. She did not take a bath and relieved herself in a bucket as the appellant did not allow her to leave.

6.4 On the night of Saturday the 23rd July 2016, while she was sleeping, the appellant removed her tight and panty and raped her for the second time. This time she did not resist as she realised that that would not help. After the second rape she told the appellant that she was going to report the matter. The appellant asked for forgiveness for what he had done. She did not sustain any injuries as a result of the rapes.

[7] ASSAULT GBH

7.1 On Sunday the 24th July 2016 the complainant's brother Teboho Raletele (the second state witness) arrived at around 10 a.m. looking for the complainant. The complainant informed him upon enquiry that she had not reconciled with the appellant and that she wanted to go back home. When he told the complainant to get the child so they could leave, the appellant would not have any of that and told the complainant she would leave on Monday when the appellant goes to work. The second state witness's plea for the appellant to release the complainant angered the appellant. He got hold of the panga and attacked the second state witness therewith injuring him on the hand wherewith he blocked the panga. As the appellant was attacking the second state witness, the latter reached for an axe and a spade behind the couch. They exited the shack and two friends of the appellant who were outside reprimanded the appellant not to fight. The complainant then left with the second state witness. Along the way the appellant came and the second state witness and appellant started throwing stones at each other. The appellant was later joined by two friends, one of whom had a firearm. They changed direction and that was the last

she saw of the appellant and his friends.

7.2 Upon her arrival at home, the complainant changed her clothing and took the protection order in order to report the matter to the Bloemspuit police as they did not come when she called them. She reported to her mother and her sister, Makatleho Linga (the fourth state witness) about the rape and the kidnapping. At the police station she laid a charge of rape and kidnapping and she was taken to National Hospital for examination and treatment.

[8] The second state witness testified that the fourth state witness informed him that on the 20th July 2016 the appellant took the complainant by force and he was armed with a sword. He then went to the appellant's place to look for the complainant as he also knew that they were no longer in a relationship. On his arrival at appellant's place

he met the appellant at the door, where he was directed by two people he had met outside. Appellant allowed him to enter to see the complainant and upon entering he was hurt to discover that the complainant was relieving herself in a 20 litre bucket that was in the shack. She confirmed that she is not in a relationship with the appellant and that she wanted to go home. When he related this to the appellant, suggesting that he must leave with the complainant, the appellant attacked him with a sword which he blocked, sustaining an open wound in the process on his right hand. He used his own weapon, a stick to fend off the attack and managed to leave with the complainant. He later on, in the street, got involved in a further fight with the appellant, throwing stones at each other. The appellant was together with other two people, one of whom had a toy gun.

[9] The state then called Zacharia Moletsane, the appellant's neighbour who confirmed that the appellant and the complainant were arguing and he asked the appellant not to fight. The appellant advised that they were resolving their issues and not fighting.

[10] The fourth and last state witness to be called was Makatleho Linga, the complainant's sister. She testified that on the 20th July 2016 at night while in bed she heard the appellant and the complainant arguing. The appellant wanted the complainant to leave

with him and the complainant did not want to do so. The appellant was holding a panga and when the complainant ran into the

house, the appellant pulled her out of the house. She did not do anything, fearing that the appellant might hurt her with the panga that he had. On the 24th July 2016, she called and asked the second state witness to go check the complainant. He went and later that day came with the complainant. She observed an injury on his hand and he reported that he found the complainant in appalling conditions having being confined in a shack relieving herself in a pee pot. She confirmed that the complainant reported that she was raped and the appellant kept her against her will and did not want her to leave. The appellant was not even going to work in order to keep an eye on her. She was crying when she made the report. She was also afraid to go alone to the police station to lay a charge. She confirmed that the complainant and the appellant were always fighting.

- [11] The appellant testified in his defence and confirmed his relationship with the complainant. On the day in question at 12h00 the complainant called him and told him to come and pick up their children when he knocks off. He indeed went to the complainant's place, where he found her together with her mother and her sister, the fourth state witness. He stood at the gate and the children went to him and he left with them. Later the complainant called him to fetch her. He went to fetch the complainant. He asked what the complainant wanted from him as she had obtained a protection order against him. The complainant apologised to him, ostensibly for having obtained a protection order against him. He forgave her and they went to his place where the complainant prepared food while he bathed and then watched TV. After eating they slept and had consensual sexual intercourse. In the morning he went to work, leaving the complainant in the shack.
- [12] On Sunday the 24th July 2016, the complainant wanted them to have sex but this did not materialise as they were disturbed by a knock on the door. Later the second state witness arrived and he wanted to see his sister who, according to the appellant was inside the shack watching TV. He later went into the house, after receiving a report from a child that the complainant and the second state witness were arguing. He then went into the shack and upon asking the second state witness what was happening, the latter hit him with an open hand on his face. He fell as a result of the assault and the second state witness took out a panga but the appellant quickly grabbed it and they fought over it. In the process, the second state witness injured his finger.
- [13] In cross-examination, unable to explain the reasons why his version was not put to the witnesses, he blamed his legal representative. The material allegations that he was questioned about are the following:
- 13.1 why it was not put to the complainant that he went to her place of residence at the complainant's invitation as she called him to fetch the children,
- 13.2 why it was also not put to the complainant that he went twice to the complainant's home, and on the second occasion he stood in the street and called the complainant to come to him as she had obtained a protection order against him,
- 13.3 why it was not put to her that he confronted the complainant with the protection order that she had obtained against him and that she apologised for doing so whereafter they left together,
- 13.4 why the allegations that they used a pee bucket was not disputed when his testimony was that they used a neighbour's toilet.
- 13.5 why it was not put to the complainant that she initiated sexual intercourse that never materialised as they were disturbed by a knock on the door,
- 13.6 why it was not put to her that they had consensual sexual intercourse only on the 24th July 2016 and not on the 24th July 2016,

13.6 why it was not put to the second state witness that he was the initial aggressor who slapped the appellant for no reason.

13.7 why it was put to the second state witness that he did not sustain any injuries when he was at the place of the appellant,

[14] He denied that the complainant used a bucket to relieve herself. He testified that they were using a neighbour's toilet and he was surprised why the complainant was not confronted with this version. He testified that he does not know why the complainant laid charges against him when sexual intercourse was consensual.

[15] The appellant called his mother, Griet Cornelissen who did not know anything and had never seen the complainant between the 20th July 2016 and the 24th July

2016. Her testimony did not assist the court a quo in any manner.

THE LEGAL POSITION

[16] As indicated earlier, the question that needs to be asked is whether the court a quo was correct in holding that the state had proved the guilt of the appellant beyond a reasonable doubt.

[17] It is trite that the state has a duty to establish the guilt of the appellant beyond a reasonable doubt and conversely, the appellant is entitled to his acquittal if there is a reasonable possibility that he might be innocent.[1]

[18] A court of appeal is not entitled to interfere with the trial court's factual findings, which are presumed to be correct, in the absence of demonstrable, material misdirection and clearly erroneous findings on the part of the trial court.[2] It is not for the court of appeal to second-guess the well-reasoned factual findings of the trial court.[3]

[19] The version of the appellant, as put to the complainant, was that she was still staying with the complainant. This was however contradicted by the appellant when he testified that he went to the complainant's place to fetch the children at the request of the complainant. He returned there later, still at the complainant's request, to fetch her. They left together after the complainant had apologised for having obtained a protection order against him.

[20] The appellant testified that he had sexual intercourse with the complainant only once on the 20th July 2016 although it was put to the complainant that the two incidents of sexual intercourse that she testified about, were with her consent. It was also not put to the complainant that she wanted another session of sex on Sunday which was interrupted by a knock on the door.

- [21] The appellant confirms the version of the complainant that upon his arrival at the complainant's place he found her in the company of her mother and sister, the fourth state witness. The latter's evidence corroborated that of the complainant that she was removed from her place against her will and that the appellant had a panga in his possession. This is further consistent with the report that was given to the second state witness.
- [22] The complainant's evidence that she was kept against her will and provided with a bucket wherein to relieve herself was corroborated by the second state witness who testified that he saw the 20 litre bucket wherein the complainant was relieving herself and that the condition that he found the complainant in hurt him.
- [23] The complainant and the second state witness corroborated each other regarding the events that took place after the arrival of the second state witness at the place of the appellant. Firstly, the complainant intimated to him that she had been kept against her will and she was crying. Secondly, he saw the 20 litre bucket which the complainant used to relieve herself. Thirdly, she witnessed the assault on the second state witness that resulted in an injury to his right hand. This was also corroborated by the fourth state witness although she could not recollect which hand was injured.
- [24] The court a quo gave a detailed judgment. The Learned Magistrate was mindful of the cautionary rules which applied to the complainant's evidence as a single witness. He carefully analysed her evidence and found no shortcomings therein. Counsel for the appellant conceded in her oral submissions that there were no material contradictions in the complainant's evidence. The Learned Magistrate, in his application of the provisions of section 208 of the CPA, found that she was a truthful, reliable and credible witness. The Learned Magistrate concluded as follows,
- "The court observed the complainant during her testimony. The court finds no inherent improbabilities in her evidence. The background leading to the alleged rape was corroborated".*
- [25] The Learned Magistrate was also careful not to accept the complainant's evidence only at face value and properly applied his mind in order to exclude a possibility of reliance on any fabrication on her part. In this regard he said, if she was fabricating, "she could have easily perhaps informed her brother when he arrived that they have reconciled." This he found to have been indicative of consistency on the part of the complainant coupled with the uncontradicted evidence of the appellant's neighbour, the third state witness, that he heard the appellant and the complainant arguing and told the appellant not to fight.
- [26] The Learned Magistrate rejected the appellant's version as false beyond reasonable doubt in respect of all the charges. In his testimony the appellant came up with a totally different version that was not put to the complainant or the second state witness in their cross-examination. As indicated, for this the appellant blamed his legal representative.

- [27] The Learned Magistrate reasoned that in view of the defence of consent that the appellant had pleaded, it was imperative to put to the complainant a version that on Sunday, the interrupted sexual intercourse was initiated by the complainant. He found, correctly, that if the version of the appellant was the truth in this regard, under no circumstances would she have cried rape.
- [28] Regarding the assault GBH, the appellant had put to the second state witness that he was not injured. However, in his testimony the appellant acknowledged the injury and gave an explanation as to how the second state witness sustained same. This sudden change in the appellant's version was indicative of mendacity on his part, and points to this having been an attempt on the appellant's part to mislead the court. Furthermore, the appellant testified that the second state witness was the initial aggressor by slapping him when this version was not put to him in cross-examination. The Learned Magistrate found that appellant was not a reliable witness as he changed his version. Although in his cross-examination of the complainant the appellant denied that there

was any fight between him and the complainant that attracted the attention of the third state witness, in his testimony, he admitted

this and sought to explain it by testifying that the argument was simply about money that the complainant misused on liquor instead of obtaining an Identity Document.

- [29] The Learned Magistrate was alive to the fact that he had to make a choice between the two conflicting versions before him. In making a choice in favour of the complainant's version he understood that he had to accept that version in its entirety. He referred to the following summary of the cautionary rule in case of *S v Sauls*:^[4]

"there is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of a single witness. The trial Judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told"

- [30] In *S v Hadebe & Others*,^[5] Marais JA cited the following passage in *Motshephi and Others v R* (1980-1984) LAC 57 at 59 F-H, which I find apposite here:

"The question for determination is whether, in the light of all the evidence adduced at the trial, the guilt of the appellants was established beyond reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. 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."

[31] The Learned Magistrate took into consideration all the contradictions in the testimony of the complainant as well as those in the testimonies of the complainant and other witnesses for the state and having done so, found that her version was the truth. He rejected the appellant's version as false beyond reasonable doubt. In my view he was correct in doing so. The version of the appellant was riddled with improbabilities and the fact that he came up with a version that was either not put to the state witnesses, or was different to that put to the state witnesses indicated that he was fabricating a version to fit in with the state's case. The law does not require the prosecution to close every possible loophole, even more so those based on conjecture and which is utterly fanciful.[6]

[32] In conclusion the state proved beyond reasonable doubt that the appellant took the rape complainant from her parental place against her will and kept her at his place thereby restricting her freedom of movement. He had sexual intercourse with her on the night of the 20th July 2016 and again on the night of the 24th July 2016 without her consent. When the second state witness tried to rescue the complainant, the appellant assaulted him with a panga with intent to cause him grievous bodily harm. The appellant was aware of the unlawfulness of his conduct in doing so and intended the consequences of his actions. The appellant was therefore correctly convicted of rape read with the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997, kidnapping and assault GBH.

SENTENCE

[33] The appellant's ground whereupon the sentence is challenged is that the court a quo erred in its finding that there existed no substantial and compelling circumstances warranting a deviation from the minimum sentence and that the sentence of life imprisonment is shocking and inappropriate.

[34] The rape in this matter falls within the ambit of Section 51(1) of the Criminal Law Amendment Act, which prescribes a minimum sentence of life imprisonment in circumstances where the victim was raped more than once, unless there are substantial and compelling circumstances that justify deviation from the minimum prescribed sentence.

[35] Counsel for the appellant directed our attention to the personal circumstances of the appellant, which are that he was 27 years old, a first offender, he has three minor children with the complainant, aged 7 years, 4 years and 2 years old, he was gainfully

employed and the sole breadwinner of his family, his highest educational qualification is standard 5 and that he spent a year and

10 months in custody awaiting finalisation of his trial. She submitted that this factors, taken cumulatively, together with the fact that the complainant did not sustain any physical injuries, constitute substantial and compelling circumstances.

- [36] It is necessary to assess whether that court a quo misdirected itself in finding that no substantial and compelling circumstances existed that warranted imposition of a sentence lesser than the prescribed life imprisonment.
- [37] Counsel for the respondent argued that the sentence of life imprisonment was appropriate as there were not substantial and compelling circumstances warranting a deviation therefrom whereas for the appellant it was submitted that such circumstances existed and that an appropriate sentence would be between 20 years and 22 years direct imprisonment.
- [38] Sentencing is a matter within the discretion of the trial court. A court of appeal can only interfere with the sentence imposed if it is demonstrated that the trial court misdirected itself to such an extent that its decision on sentence is manifestly wrong or is so disproportionate or shocking that no reasonable court could have imposed it.[7]
- [39] Rape has been described as a “horrifying crime and is a cruel and selfish act in which the aggressor treats with utter contempt the dignity and feelings of the victim”.[8] In the case of *S v Chapman* [1997] ZASCA 45; 1997 (2) SACR 3 (SCA) the court said the following of rape: *“it is a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim”*[9]
- [40] In this case, the gravity of the rape perpetrated upon the complainant is aggravated by the fact that the complainant is his wife who had deserted him and had obtained a protection order against him owing to a history of violent treatment that she endured at the hands of the appellant. She was forcefully removed from her parental home, where she had found refuge, in the presence of her mother and sister, and dragged against her will, confined into a shack in contravention of her constitutional right to freedom of movement, and raped on two occasions. The trial court described this conduct, correctly so, as indicative of “masculine display of power”. In a further unwarranted display of power, the appellant attacked the second state witness when he begged for permission to take the complainant home, thereby making himself guilty of assault GBH. The complainant, although she had deserted the appellant, was entitled to a more humane treatment by the appellant as the mother of his children but instead he lived up to his ways that led to the desertion in the first place.
- [41] The trial court took into account the personal circumstances of the appellant, the nature and seriousness of the offenses as well as the interest of society. It was correct in finding that the personal circumstances of the appellant, considering the facts of this case, did not constitute substantial and compelling circumstances justifying deviation from the prescribed sentence of life imprisonment. He kidnapped the complainant in the course of contravening a protection order of which he had knowledge and practically kept her hostage in appalling conditions where she could neither bath, change her clothing nor relieve herself in descent ablution facilities.

[42] I am not persuaded that there is any basis whereupon it can be found that the sentence imposed by the trial court is disproportionate or shocking and that no other court would have imposed such a sentence. This court is, in my view, not entitled to interfere with the sentence imposed by the trial court.

[43] There is one last issue that needs attention and that is the fact that the trial court took all the convictions together for purposes of sentence. This approach is undesirable as the appellant ought to have been punished separately for each crime of which he was convicted, moreso that the complainant in the rape and kidnapping convictions is not the same as the one in the assault GBH matter.[10]

[44] The proper approach would have been to sentence the appellant for each conviction separately, which is what we propose to do.

THE ORDER

[45] In the light of the above I would make the following order:

1. The appeal against conviction and sentence is dismissed.
2. The sentence of the court a quo is altered to read as follows:
3. In terms of section 276(1)(b) the accused is sentenced as follows:
 - 3.1 On count 1 of rape the accused is sentenced to life imprisonment.
 - 3.2 On count 2 of kidnapping the accused is sentenced to 5 years imprisonment.
 - 3.3 On count 3 of assault GBH the accused is sentenced to 3 years imprisonment.
 - 3.4 The sentences in count 2 and 3 are ordered to run concurrently with the sentence on count 1, the effective sentence is life imprisonment.

M.S. LITHEKO, AJ

I concur and it is so ordered

N.S. DANISO, J

On behalf of appellant: Me S. Kruger Instructed by: Legal Aid South Africa Bloemfontein
On behalf of respondent: Adv. A. Ferreira Instructed by: Office of the Director of Public Prosecutions Bloemfontein

/roosthuizen

[1] R v Difford 1937 AD 370 at 373

[2] S v Hadebe and others 1997 (2) SACR 641 (SCA) at 645 E - F

[3] Mashongwa v PRASA 2016 (3) SA 528 (CC) at paragraph 45

[4] 1981

(3) SA 172 (A)

[5] 1998

(1) SACR 422 (SCA) at 426 E-H

[6]S v Sauls (supra) at 182 G - H

[7]S v Bogaards 2013 (1) SACR 1 (CC) at paragraph 41

[8] N v T 1994 (1) SA 862 (C) at 864 G

[9] At 5 a - b

[10] Jaars and Another v S (A304/2016)[2018] ZAGPJHC 428 (8 June 2018) at paragraph 109

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