

SOUTH AFRICA / JUDGMENT

Gaosiwe and Another v S (A281/2017) [2019] ZAGPPHC 1001 (24 October 2019)

[2019] ZAGPPHC 1001

COURT

North Gauteng High Court, Pretoria

BEFORE

Maumela, Kubushi

CASE / FILE NUMBER

A281/2017

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No: A 281/2017

24/10/2019

In

the Matter between:

TSHEPO

GAOSIWE

First Appellant

W[....]

J[....]

Second Appellant

and

THE

STATE

Respondent

JUDGMENT

Maumela J.

INTRODUCTION.

1. This is an appeal against both conviction and sentence. The First Appellant is Tshepo Gaosiwe, an adult male who was 26 years of age at the time he was arraigned. The Second Appellant is W[...] B[...] J[...], an adult male who was 17 years of age at the time he was arraigned. Before the Magistrates Court for the Regional Division of North West, held in Klerksdorp, (the court a quo), the two Appellants, who were legally represented throughout the trial, were each charged with one count of Rape in contravention of section 3, read with sections 1, 56(1), 57, 58, 59, 60 and 61 of the Sexual Offences and Related Matters Amendment Act 2007, Act No 32 of 2007 read with the provisions of Section 51 (1) and (2) and Schedule 2 of the Criminal Law Amendment Act 1997, Act No 105 of 1997 ("the Criminal Law Amendment Act").

ALLEGATIONS.

2. The allegations against the Appellants were that upon or about 6 October 2012, at or near Jouberton in the Regional Division of North West, the Appellants did unlawfully and intentionally, commit an act of sexual penetration with the complainant to wit, P.M, by having sexual intercourse with her without her consent. From the onset, the state indicated that in the event of conviction it shall seek that the provisions of Section 51(1) and/or Section 52 and Schedule 2 of the Criminal Law Amendment Act, be applicable for purposes of determining sentence. This was because allegations are to the effect that more than one person or culprit raped the complainant.
3. The Appellants understood the charge put. They understood the essence of section 51 and Scheduled 2 of the Criminal Law Amendment Act being read with the charge. Both Appellants pleaded Not Guilty to the charge. They both opted to exercise their right to remain silent and not to disclose the basis of their defence. By agreement, admissions of the Appellants were recorded in terms of section 220 of the Criminal Procedure Act 51 of 1977 ("the Criminal Procedure Act"). The state led evidence, so did the defence. The court a quo accepted the version of the state and rejected that of the defense.

BACKGROUND.

4. The complainant in this matter was walking in the street in the company of another lady who was unknown to her, when they were accosted at knifepoint by the Appellants. The Appellants robbed the complainant and the unknown lady of their cell phones (which were later returned). One of the Appellants physically assaulted the complainant by hitting her with a fist on the mouth and on the thigh. The complainant and the other lady were dragged by the Appellants to a disused creche where the complainant was raped by both Appellants

in turn.

5. When this incident occurred, the Appellants were unknown to the complainant as a result the complainant did not report the incident to the police. Six weeks after the incident, the complainant whilst on the way to buy electricity with her sister came across one of the Appellants pushing a wheelbarrow in the street. The complainant could immediately recognise the culprit and shouted out that he is the boy who raped her. The complainant lost consciousness and when she came to the second culprit was also present. The Appellants were as a result arrested.
6. The complainant testified in a close circuit. After an informal identification parade in court, it was established that the Second Appellant is the one who raped the complainant first and the First Appellant is the one who hit the complainant with fists and raped her on the second occasion.

EVIDENCE.

7. The first witness to be called by the state was Dr. Tulili Samuel Kimberly. His credentials were not contested. Under oath, he testified that at the time of the incident he was employed in Klerksdorp Tshepong Complex Hospital. He is currently employed at Charlotte Maxeke Academic Johannesburg General Hospital. He confirmed that he is the one who completed the J88 form, which was handed in court. He stated that in the course of his work, he examined a patient known as P.M, who was born on 26 November 1974. He recollected that the complainant complained of having been physically and sexually assaulted by two unknown men who raped her in turns on 6 October 2012. He said that the men used condoms. They also assaulted her with fist blows. He said that the complainant, who was

in her sound and sober senses, was sad and crying. He said that the complainant was not on contraception. At the time of examination, that is, after the incident, the complainant had had consensual sex on 17 November 2012.

8. The doctor testified that before the examination, the complainant had taken a bath, douched herself, showered, urinated and changed her clothes. He stated that about six weeks after the incident, signs of injury were less likely to be still visible on the complainant because it takes about up to two weeks for healing to happen. Under cross-examination, this witness stuck to his version.
9. P.M. was the second witness to be called by the state. She testified that on 6 October 2012, she went to a place called Transem to buy milk and yoghurt. She found the place closed. There were other people waiting for the place to open. She had left children at home and when the place delayed to open she decided to leave. She left in the company of one lady who was also waiting for the place to open. She did not know this lady. While walking with this lady, just after they had crossed the railway line, they were grabbed from behind by two men who held them at knife- point. The men demanded their cell phones. She refused to hand over her cell phone. The man who grabbed her forcibly took her cell phone from

inside her bra. As the man did this, he punched her on the mouth and thigh. She and the other lady were dragged to a nearby disused creche. The witness confirmed images reflected in a photo album, stating that they depict the place at the creche to which she and the other lady were dragged by the Appellants.

10. One of the men led her into a room. He ordered her to strip completely naked and she complied. The man left the room, only to return about twenty minutes later, holding a condom in his hand. The witness stated that due to fright, she did not attempt to flee while the man was away. She just lay naked on the floor. The man grabbed her legs. He covered her face with a blanket and opened her legs wide. He then inserted his penis into her vagina and had sex with her without her consent. She assumed that the man used the condom because before he raped her, she saw him holding the condom in his hand. She also saw the condom after the incident. She

said that no sperms flowed out her private parts which further confirmed to her that the culprit used the condom in raping her. He ordered her to get up before he left the room. It is then that the second man came into the room while she was still naked.

11. The witness stated that the second man came into the room holding a condom in his hand. When she saw him she wondered where she had seen him before. This was because his face looked familiar to her. The man ordered her to kneel down and she complied. The man penetrated her vagina with his penis from behind, and had sex with her without her consent. She assumed that the man used the condom because she felt no wetness in her private parts. As he was leaving the room, the man ordered her to put on her clothes and she obeyed.
12. She stated that she heard the two men talking in slang from the passage. She heard them mentioning that she is a sister to Fisa who is her sister's son. The two men agreed with one another and the man who raped her last returned into the room and gave her back her cell phone. He ordered her and the other lady to leave. She and the other lady ran from the scene. Upon emerging at the area where there are shacks, she shouted for help. Amidst their shouts for help, she and the other lady parted ways. Initially, no one came out to assist, but after she reached extension 5, people came out to help. She said there were some of her family members in the crowd of onlookers. She sat on the ground and cried. She related to the bystanders the ordeal she and the other lady suffered. Her younger brother, Tebogo and his friends took her home.
13. The witness testified that she entertained no hope of ever seeing her assailants again. As a result, she dissuaded herself from reporting the incident to the police. Besides, she would not have known where to find the culprits. She said that the incident happened in broad daylight and it lasted over three hours. Over that time, the faces of the two culprits were exposed to her sight. As a result, she could remember their faces. The recollection of their faces was not based on any particular facial feature.

14. The complainant stated that, six weeks later, on 19 November 2012, she was walking along the street in the company of her sister Dineo when she saw one of the culprits, the Second Appellant, pushing a wheelbarrow along the street. She immediately raised the alarm. She informed all around that the Second Appellant raped her. She stated that although she does not rely on specific facial features, she could clearly remember the faces of the two culprits. She said that as soon as she shouted for help, the man who was pushing the wheelbarrow moved towards her and at the same time produced a knife. When she saw this, she lost consciousness. She does not know what happened while she was unconscious.
15. She said that later, she regained consciousness and the police arrived. According to her, there were many bystanders. She saw that the man who had been wielding a knife got apprehended by members of the public. At that time, the First Appellant was part of the crowd of onlookers. Her assailants were placed into a police-van. At their instance, she accompanied the police to the scene of the crime at the creche. After showing the police around at the scene, she was taken to hospital. The witness testified that she was afraid to tell her husband about the rape ordeal because she was concerned that doing so might affect her marriage negatively. She was determined to save her marriage and that is why she consulted a doctor only after a long period of time.
16. At this time, people were re-arranged in the court-room. The complainant was taken outside. Some of the police officers were put together with the Appellants. The complainant was brought back in and was requested to point her assailants out. At the prompt of the court, the complainant pointed the two Appellants out from among the people who had been lined up. The complainant pointed

the Second Appellant out as the culprit who raped her first. She stated the First Appellant as the one who assaulted her with fist

blows on the upper lip and on her thigh and also raped her on the second occasion. Under cross-examination, this witness stuck to her version.

17. She stated that she lives about five streets away from the place where she purchases electricity, which place is near the community hall. She explained that she has her own residence and at the time of the incident, she was visiting at her parents' home. She said that on the day of the incident, she was gripped with fear, so much so that she was confused and did not notice how the culprits were dressed.
18. Dineo Shirley Seruwe ("Dineo") was the third witness to be called by the state. Under oath she told the court that the complainant is her sister. She confirmed that on 19 November 2012, in the morning, she was walking, with the complainant. The two were going to buy electricity from Matlosana Municipal offices. She testified that they saw a person who was pushing a wheelbarrow. Her sister told her that the person who is pushing a wheelbarrow raped her. Her sister was pointing at the person who was pushing a wheelbarrow as she said so. This witness said that at that time, the person her sister pointed at approached them and produced a knife. The complainant fell to the ground. She said that a crowd of people

surrounded them. The witness stated that before this day, she was not aware that her sister was raped.

19. The witness stated that while so fallen and while she was in an unconscious state, her sister's legs kicked about. She testified that her sister was doused with water whereupon she regained consciousness. A little while later, as she and her sister were about to go home, she saw members of the community returning to where she and her sister were. They had the man in their grip. She noticed that both of the culprits who attacked her sister and the other lady were apprehended by the crowd of onlookers. At that time, her sister was traumatized and confused. The police arrived and she assumed that someone called them.
20. The witness testified that the police enquired what was going on. In her confused state of mind, she could not follow what was being said between the police and the two culprits. She concentrated more on the complainant. After speaking with both Appellants, the police requested the complainant to accompany them so that she can point out the scene of the crime to them. Despite the confusion, the trauma and the fear that had gripped her, the complainant went along with the police to the scene of the crime. The witness stated that the police had come driving in a sedan and a bakkie. The two Appellants were kept inside the bakkie. She and her sister were transported in the sedan. She explained how at the creche her sister, the complainant, pointed out different places to the police as areas where the crime occurred. She stated that they found a certain man at the creche whom the police questioned but she was not privy to the conversation between the police and that man. The police then took them to the police station and later to Witrand Hospital in Potchefstroom where the complainant was examined. Under cross-examination this witness stayed stuck to her version .
21. The witness declined to comment about whether the complainant moved about the location between the day of the incident to the day she and her sister saw the man who was pushing a wheelbarrow. She explained that she and the complainant do not stay at the same house but they speak on the phone occasionally. On 19 November 2012, she is the one who needed to go to the Municipal offices and she asked the complainant to accompany her.
22. The state called Pulane Makwene Qaba as its fourth witness. Under oath, this witness testified that she is a sergeant with twelve
- (12) years of experience under the South African Police Services. She is stationed at Jouberton Police Station. On Monday, 19 November 2012, she was doing patrol work when she noticed a group of people near Masedi Primary School. There was a lot of commotion and noise where the group of people was. She drew nearer and saw that there were two young men seated on the ground who seemed to have been captured by the group. She enquired what was going on and a lady by the name of P.M. who is the complainant in this case, pointed out the two young men seated on the ground and accused them of having raped her and a certain lady who was in her company at the time. She stated that the manner in which P.M. put it was that each of the two young men raped her and also raped the unknown lady who

was in her company.

23. The witness stated further that P.M. told her that she did not report the rape to the police because she did not entertain hope of ever locating her assailants. She testified that she then called for back-up. The two culprits were taken to the police station where the complainant laid a charge of rape against them. She stated that the complainant led her to a disused building, stating that it is where she was raped. Once they were at the scene, the complainant pointed places out to her where the alleged rape took

place. The state then closed its case.

24. The First Appellant, Tshepo Ernest Gaosiwe, testified in his defence. Under oath he testified that on 6 October 2012, he and the Second Appellant were on their way from the scrapyard at the industrial area which the complainant spoke about. On their way, they met two ladies. They stopped the two ladies and demanded cell phones from them. He said that the two ladies started screaming, saying that they do not have cell phones. The two ladies fled in different directions. He pursued one of the ladies, namely the complainant. The Second Appellant pursued the other lady. The other lady wielded an axe against the Second Appellant. He realized

that the lady was giving the Second Appellant a tough time. He dragged the complainant towards the Second Appellant and managed to subdue the lady who was cheeky, and wielding an axe.

25. The First Appellant stated that he then told the other lady that if she ever tries to chop him with the axe, he will dispossess her of it and chop her with it. It is then that the other lady put the axe on the ground and asked him what he wanted from her. He told her that he wants her cell phone. She took out the cell phone from the area of her breasts and gave it to him. He and the Second Appellant swapped the ladies, he got hold of the lady who brandished the axe and the First Appellant held the complainant and they moved in different directions. He was in possession of the cell phone of the lady who brandished the axe. He then noticed that the picture profile on the screensaver of that cell phone was of a person he knows.
26. On enquiring from the lady who the person on the screensaver was, the lady told him that it was her boyfriend, Fisa. He then told the Second Appellant that there is a possibility that the two ladies know them while they do not know the ladies. He and the Second Appellant agreed to give the phone back, to the two ladies. When they gave the phone back, the complainant hugged him, saying to him "thank you for understanding." They then parted with the ladies.
27. He said that on 19 November 2012, early in the morning, he saw the complainant at the place where electricity is sold. He was standing in a queue when the complainant's cousin, Tebogo, approached him and told him that his maternal aunt has a problem with him. He gave his electricity card and money to one Katlego and stepped outside. He exited through the main gate and found many people standing around the gate. At that stage, the

complainant came nearer to him, exclaiming and saying "this is that child!" She was moving her hands up and down as she said this. He said that by that, the complainant meant that he is the one who victimized her. He approached the complainant, asking her what her problem was. The complainant slapped him and demanded her memory card back. When he denied having taken anything from her, the people that were at the gate started assaulting him.

28. He said that he led the people to his parental home where he gave them his own memory card. As they moved, the people shot photos of him, ridiculed him and frog marched him. At that time, a vehicle arrived with two ladies. Based on its red number plates, he assumed that it belongs to government. He said that the two ladies asked what was happening. He explained to the ladies all that was going on, revealing that the people were assaulting him for something he did not do. At that time one lady emerged from the car and remarked: "these things are the ones that are raping our children." He further explained to the two government ladies that the complainant was accusing him of rape and robbery of her phone, which he denied.
29. The witness testified that the two ladies remarked that this is a very serious case. They took him in their car to the police station. He said that at some point, the police sent one of the community members, Tshepo, to fetch the Second Appellant who had been the first to be assaulted by members of the community. From there, he and the Second Appellant were loaded in one of the police vehicles and were taken to a creche. The complainant and her cousin were ferried in a sedan. At the creche they were kept in the motor vehicle. The complainant and her cousin went with the police inside the creche. After a short while, they came out and went into the sedan. They all headed to the police station. He denied having raped the complainant.
30. The Second Appellant, W[....] B[....] J[....], also testified under oath in his defence. He told the court that he recalls the 6 October 2012 in relation to this case. On that day, he and the First Appellant were on their way from the scrapyards when they met two ladies of whom one was unknown to him, while he knew the other who stayed on the third street from his parental home. He used to go and buy sorghum beer from her parental home. He and the First Appellant dispossessed one of the ladies who he had grabbed of her cell phone. This is the lady who initially wielded an axe against them. He stated that the lady who wielded an axe left. They too left.
31. He stated that he and the First Appellant later gave the cell phone back to the ladies, but they retained its memory card which he kept. He denied that he and the First Appellant ever assaulted the ladies. He stated that they gave back the cell phone because he realized that the complainant is known to him. He stated that he and the First Appellant might have kept the two ladies over a period of an hour. They then parted ways with the ladies. According to him, the complainant and the First Appellant held a conversation. They all left. He stated further that five days after the incident, he met the complainant at the place where they sell bunny-chows and she gave him an ugly look before she left. Over that time, he avoided going

to buy sorghum beer at the complainant's place because he feared consequences for what he and the First Appellant did to the complainant.

32. He said he met with the complainant again in the street where he resides on 19 November 2012. He was pushing a wheelbarrow and was in the company of one of his friends. The complainant was standing in the street with a certain lady who was unknown to him. As they were passing where the complainant was standing, he heard the complainant telling the lady she was with that: "here is this child". Plus minus five metres after passing the complainant, the complainant started screaming at the people who were sitting at the street corner selling fruits and vegetables saying that here is the person who robbed me. The people then gave chase and apprehended him. One of the people, Fisa assaulted him with clenched fists. Other people, about thirteen of them joined in the fray and assaulted him as well. He denied that the complainant fell to the ground or fainted. According to him, the complainant told the people who were assaulting him to leave him alone because it is the First Appellant whom she wanted to be brought to book. He said that he led the people who apprehended him to the First Appellant's place of abode but they did not find him there. The

First Appellant's sibling told them that he went to buy electricity. He went home to have a change of clothes and then went to stand at a corner of a busy street. His friends came by and he explained to them what happened. The group of people fetched the First Appellant from the electricity outlet and brought him to a place near a school where they continued to assault him. They were at a distance close enough for him to see what was happening.

33. He said that a friend was sent by the group of people to call him. Fisa was part of that group. He said that the complainant demanded a memory card. The person who came to call him offered him his 16 Gig memory card which he agreed to replace at a later stage. However, the group of people declined the memory card he offered them, demanding the exact memory card that was taken from the complainant. The crowd encircled him and made him to sit on the ground. He said that at that time, a white government vehicle came passing. The lady driver was one of the state witnesses. At her enquiry, the group accused him and the First Appellant of having robbed the complainant of her phone.
34. He testified that the lady called for back-up on her phone. At that stage he was bleeding and was using a T-shirt to wipe the blood. The First Appellant was swollen. He stated that after the police arrived it was only then the complainant claimed that he raped her. He and the First Appellant denied complicity when confronted about the accusations the complainant was levelling against them. He stated that on 6 October 2012, he and the First Appellant, the complainant and the other lady never went to Tshepo Themba creche.
35. Under cross examination, the Second Appellant testified that he and the First Appellant were not friends but because they stayed in the same vicinity and collected and sold scrap metal, he requested the First Appellant that they work together. He stated that on the day of the incident, it is the First Appellant who suggested and he agreed that they should rob the complainant and the lady in her company. He stated that as soon as he and the First

Appellant accosted the complainant and the other lady, it dawned on him that the complainant is the lady from whose home he used to buy cartons. He alerted the Second Appellant to that fact but

the Second Appellant did not say anything. He stated that as they approached the two ladies they fled in different directions. He denied that he and the Second Appellant held the complainant and the other lady at knife-point.

36. The Second Appellant stated that he stopped pursuing the lady who wielded an axe. He said that the First Appellant brought the complainant to him and he got hold of the lady who had an axe. The First Appellant showed him a cell phone of which he dispossessed the other lady. He and the First Appellant intended to sell the memory card taken from the cell phone of which the other lady was dispossessed. He stated that before they robbed the other lady of the cell phone; they already had a buyer lined up for the memory card. However, they gave back the cell phone because he knew one of the two ladies. The First Appellant drew his attention to the image on the screensaver of the cell phone of which they robbed the other lady. The First Appellant pointed out that he knew the person whose image appeared on the screen saver but he, the Second Appellant, did not know that person. He stated that it is the First Appellant who handed the cell phone back to the other lady.
37. The Second Appellant said that he saw the First Appellant and the other lady speaking to one another before they hugged one another but he does not know why. He said that the complainant did not hug anyone. He also stated that the other lady was crying but the complainant did not cry.
38. The Second Appellant told court that after the day of the incident he no longer went to buy sorghum beer at the complainant fearing that the people there might call the police.
39. The court accepted the version of the state and rejected that of the defence. Both Appellants were found guilty of rape as charged. They opted to testify under oath in mitigation of sentence.

AD CONVICTION.

40. The court is to determine the correctness or otherwise of the verdict, (Guilty as charged), arrived at by the court a quo against the two Appellants. In order to do so, it has to assess the evidence that was before the court with a view to establish whether the court a quo did not misdirect itself in its finding that the state proved its case beyond reasonable doubt or not. The court also has to assess the version of the defence in order to determine whether there is no reasonable possibility that an innocent explanation advanced by the accused might possibly be true.
41. In the case of *R v Difford*,^[1] pronouncing on the test concerning the standard of proof in criminal cases, the court stated the following:

"These are not separate and independent tests, but the expression of the same test when viewed from opposite perspectives. 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 the logical corollary of the other'

42. In their heads of argument the Appellants raised various grounds of appeal, in particular that the court a quo erred in failing to mero motu apply the provisions of section 174 of the Criminal Procedure Act at the close of the state's case. However, in court the Appellants did not persist with their challenge in regard to their appeal on the conviction. For the reasons that follow hereunder, the Appellants' approach was correct in not doing so.
43. In this case identity is not an issue. The identity of the Appellants was never contested during trial. The court a quo was satisfied about the evidence of the complainant as to the identity of the Appellants. The Second Appellant used to frequent the complainant's home on occasion to buy sorghum beer that is why the complainant could recognise his face even though at the time of the incident she could not remember who he was. Besides, the two Appellants corroborated each other to the effect that they were in each other's company when they robbed the complainant of her cell phone. They, however, both dispute having raped the complainant.
44. On the day of the incident, the complainant was able to view the culprits well. Over a considerable period of time spanning around three (3) hours, their faces were before her at all material times. She described before the court a quo what role each of the culprits played in the attack, including the sexual attack on her.
45. On the day the complainant saw the Second Appellant pushing a wheelbarrow, she immediately recognised him and notified her sister with whom she was walking. She exclaimed; "This is the child who raped me". When she saw the Second Appellant moving towards her, she fainted. She made it known to all around that the Second Appellant raped her. As such, it cannot be that the complainant only made accusations of rape against the two Appellants after the arrival of the police.
46. The court a quo has found that the two Appellants raped the complainant. It is trite that when it comes to findings of fact, appellate courts are laden with limitations. They can only interfere with findings of trial courts if there is misdirection in the court a quo's conclusions. In the case of *S v Francis*[2] the court stated the following with regard to powers of appellate courts:

"The powers of a Court of appeal to interfere with the findings of fact of a trial Court are limited. In the absence of any misdirection the trial Court's conclusion, including its acceptance of a witness' evidence is presumed to be correct. In order to succeed on appeal, the Appellant must therefore convince the Court of appeal on adequate grounds that the trial Court was wrong in accepting the witness' evidence - a reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage which a trial Court has of seeing, hearing and

appraising a witness, it is only in exceptional cases that the Court of appeal will be entitled to interfere with a trial Court's evaluation of oral testimony. "

47. The court a quo was clearly satisfied about the evidence of the complainant. She gave a clear account of what took place from the time she was accosted and raped by the Appellants and when she saw the Second Appellant pushing a wheelbarrow, until the police arrived and arrested the two Appellants. She stuck to her story even under cross examination when she explained how she was raped by the Appellants each in turn. Taking into consideration the quality of the evidence advanced by the state, there is no basis upon which to interfere with the findings of the court a quo.
48. The issue that the complainant is a single witness in regard to the commission of the rape is of no consequence. In considering the complainant's evidence, the court a quo did exercise the requisite precaution. Section 208 of the Criminal Procedure Act provides as follows: ' n accused may be convicted of any offence on the single evidence of any competent witness.' The evidence of a single witness will normally be accepted if it is satisfactory in every material respects and where possible is corroborated. In determining whether the evidence is satisfactory the trial court's approach to such evidence is with caution. When applying the cautionary rules courts should warn themselves of the dangers inherent in such evidence and should look for safeguards like corroboration in the evidence reducing the risk of wrong conviction. The safeguard need not consist of corroboration, but, if corroboration is relied upon as a safeguard, it must go the length of implicating the accused in the commission of the crime.[3]
49. In the case of S v Sauls and Others[4] the court stated the following:

"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 the evidence, will consider its merits, and demerits and, having done so will decide whether it is trustworthy and whether despite the fact that there are shortcomings or defects or contradictions in his testimony, he is satisfied that the truth has been told. The cautionary rule may be a guide to the right decision but it does not mean that the appeal should succeed if any criticism however slender, of the witness' evidence was well founded... It has been said more than once that the exercise of caution must not be allowed to replace common sense"
50. The court a quo was satisfied about the evidence of the complainant as also corroborated by that of her sister Dineo. The objective evidence of the complainant's sister that the complainant pointed out the Second Appellant as the person who raped her immediately she saw him, corroborates the complainant's evidence as to the commission of the offence. It confirms the certainty of the complainant's evidence that the Second Appellant raped her. The First Appellant is brought into the picture by his own admission that he was with the Second Appellant on the day the complainant was robbed. It is highly improbable that the reaction of the complainant when she saw the Second Appellant could have been occasioned by the fact that the Appellants took her memory card.

51. The evidence of the complainant, as corroborated by that of her sister constitutes proof beyond a reasonable doubt regarding complicity of the two Appellants. There was, therefore, no basis upon which this court could have rejected the evidence of the complainant in this case for the reason that she is a single witness.
52. There was, therefore, no misdirection by the court a quo which called on this court to interfere with its finding of guilt beyond reasonable doubt. The appeal on conviction in respect of both the First and the Second Appellants stands to be dismissed.

RE: SENTENCE.

53. The offence of which the Appellants were convicted of is rape read with the provisions of section 51 (1) of the Criminal Law Amendment Act in that the complainant was raped by more than one culprit. The essence thereof is that in the event of conviction, the court is bound to consider imposing the prescribed minimum sentence, in this case life imprisonment.
54. The court a quo sentenced both Appellants, each to undergo life imprisonment. Both bring an appeal against this sentence, the First Appellant contending, in the main, that the sentence imposed by the court a quo is shocking and disproportionate to the facts of the case and the Second Appellant contending that the provisions of the Criminal Law Amendment Act were wrongly applied to him. In these proceedings, the court has to determine the correctness or otherwise of the sentence imposed upon

both Appellants. To be able to make such a determination, the court has to consider the basis upon which the court a quo was motivated to impose the sentences it did upon the Appellants.

55. It is trite law that in order to arrive at a fitting sentence, the court has to consider what is referred to as the 'sentencing triad', as outlined in the case of *S v Zinn*[5] where the court stated that in imposing sentence, the court has to take into consideration:

"the crime committed, the interests of the accused, and the interest of the community."

56. Our courts have held the view that when all of the three factors are considered for purposes of determining the sentence to be imposed, the court is more capable of arriving at a balanced sentence. In achieving such a balance, the court has to avoid overemphasizing or underemphasizing any of the three factors mentioned above. In the case of *S v Holder*[6] the court stated the following:

"By die toepassing van hierdie benadering moet egter nie net gewaak word teen 'n onderbeklemtoning van of die besondere mens (die beskuldigde), of die misdaad of die maatskappy nie, maar ook teen 'n oorbek/emtoning van een van hierdie drie elemente. Daar moet gestreef word na 'n gepaste vonnis, volgens die eise van die tyd, en 'n gepaste vonnis sal altyd 'n vonnis wees wat gebaseer is op 'n gebalanseerde ooweging van die drie elemente."

58. The following factors are apposite in this case -

THE CRIME

59. Rape is a cruel offence, which visits untold trauma on victims. It is a direct affront against the human rights of those that it targets. In an overwhelming number of instances, it is women to a much greater extent, and then children and the vulnerable that get targeted. It is an offence where perpetrators wrongly exert their physical strength over their victims, thereby undermining their confidence and their sense of self-worth. It is completely unjustifiable. Besides, there is nothing wrong that the victims do to deserve being subjected to it. More often than not, it is perpetrated amidst harrowing violence, regardless of how the victim conducts him or herself before, while and after it has been committed.

60. In the case of *S v Ncheche* the court stated the following concerning rape:

"Rape is an appalling and utterly outrageous crime, gaining nothing of any worth for the perpetrator and inflicting terrible and horrific suffering and outrage on the victim and her family. It threatens every woman, and particularly the poor and vulnerable. In our country, it occurs far too frequently and is currently aggravated by the grave risk of the transmission of Aids. A woman's body is sacrosanct and anybody who violates it does so at his peril and our Legislature, and the community at large, correctly expects our courts to punish rapists very severely."

61. In this case, the complainant was physically assaulted when she tried to resist the culprits when they robbed her of her cell phone at knife point. As if suffering robbery was not bad enough for her, the complainant a married woman, was also raped not only by one, but by two men. The rapes were in very quick succession. She was humiliated and made to undress and left completely naked in the presence of men she did not know. She was made to lie on the uncomfortable floor with no covering.

THE INTEREST OF THE COMMUNITY

62. Incidents where offences of a sexual nature get committed are on the increase. The community is inundated with incident of attacks of a sexual nature that target women, children, and the vulnerable. These offences bring untold grief to bear against the victims. Communities are growing intolerant of this kind of offences as a result a trend is emerging where members of the community are growing the habit of taking the law into their hands. Members of the community are growing agitated at every instance where they suspect anyone of committing such offenses. It has gotten so bad that even innocent people get unnecessarily attacked on the basis of suspicion that has not been confirmed. This has a potential of promoting lawlessness and lack of respect for life. Courts have to grow sterner in punishing sexual offenders. Kangaroo courts, if not stopped in their tracks, have the potential to create an impression that there can be justification in breaking the law or taking it into one's own hands. It is for that reason that the court ought to take into consideration the interests of the community in determining the imposition of fitting sentences in order to curb this trend.

63. At the same time, the court has to heed the reality that the community expects courts to deal with perpetrators of serious crimes, especially perpetrators of sexual offences, with purpose and meaning, so as to protect potential victims of acts of criminality who are innocent citizens or visitors in our country.
64. For the above reasons, in the event of conviction on a charge of rape, it behoves courts in determining the sentence to be imposed, to send a clear message to all. The message should be such that it dissuades all would be perpetrators from subjecting women, children, and the vulnerable to physical, mental and sexual abuse. Women, children and the vulnerable must not be violated for simply walking the streets, or relaxing in what is supposed to be the sanctity of their homes. Male first and foremost, and all other sexual offenders have no right to target their victims in order to satisfy their misplaced lust or urge to exercise their power and authority over their victims. In the event of conviction on such offences, it is incumbent on courts to rise up to be counted in fighting this scourge.
65. In the case of *S v Matyityi*[7] the court stated the following regarding the constitutional rights of women to safety:

"As this court. has previously sought to make clear, women in this country have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives"

THE INTEREST OF THE APPELLANTS

66. The court a quo took into consideration the personal circumstances of the First Appellant that when he was arrested he was staying at number [...]. He was originally born in Mahikeng. He is unemployed and he attended school up to Grade 11. He has no reason for having left school. Both his father and mother are alive. He stays with his step mother in Jouberton. His father stays in Mahikeng and the mother stays with one of his siblings in Johannesburg. The father is a pensioner and the step mother is still working. He was twenty six (26) years of age at the time of the offence. He is married with one child. His wife is staying with the child at her parents' place. He spent 18 months in custody awaiting trial and he is a first offender.
67. When he left school he was employed at [...], delivering juices as an Assistant Driver. He then got retrenched and acquired another job at [...] as a packer. This is where he was at the time of his arrest. He was released on bail and while awaiting trial, he then acquired employment in Upington delivering newspapers in return for a salary of R550-00 per week. All in all he earned R2220-00 per month. He would give half of that amount (R1110-00) to the mother of his child for the latter's upkeep. His child's mother is unemployed but receives a government grant for the child. He is the sole breadwinner for his child. He has a clean bill of health he does not drink alcohol and only smokes cigarettes.

68. The Second Appellant's personal circumstances are that at the time of arrest he was staying in a shack with his brother and uncle. The shack was situated at number [...] on the premises of his grandmother's RDP house. At the time of the commission of the offence he was seventeen (17) years old and when he was sentenced he was about to turn twenty one (21) years. He studied up to grade 7 and has no reason why he left school. He was orphaned at the age of sixteen (16). This left him without parental guidance. He earned a living by doing odd jobs earning R70-00 per day. He is laden with TB which he contracted while in custody. After his arrest he was incarcerated in a place of safety in Bosasa, Potchefstroom where he stayed for six months before he was admitted to bail but was in September 2013 arrested in connection with another case which was subsequently withdrawn. He has since then been in custody awaiting trial. He had a rough time while in prison and as a result he took up membership of one of the prison gangs. He has since dissociated himself with the prison gangs. He is unmarried. His uncle and his maternal aunt see to his maintenance.

DISCUSSION

69. Appellate courts do not have a free hand on the strength of which to interfere with sentence imposed by trial courts. Our courts have ruled that appellate courts may interfere with sentences imposed by trial courts where there is a material misdirection by the trial court which vitiates its exercise of that discretion.

70. The above position was reiterated in the case of *S v Malgas*[8] when the court stated the following:

"A Court exercising appellate jurisdiction cannot, 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."

71. For the reasons that follow hereunder, I find the sentence imposed by the court a quo upon the First Respondent not vitiated by any material misdirection on the basis of which this court may interfere.
72. In terms of the provisions of the Criminal Amendment Act a court may only impose the prescribed minimum sentence, in this case life imprisonment, where there are no substantial and compelling circumstances warranting deviation from imposing such a sentence.
73. The court in *S v Malgas* held that when considering whether there are substantial and compelling circumstances "All factors traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process. While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored. The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick

(‘substantial and compelling’) and must be such as cumulatively justify a departure from the standardised response that the Legislature has ordained.”

74. When embarking on the inquiry whether substantial and compelling circumstances exist, the court a quo took into account into the triad, that is, the crime committed, the interest of society as well as the blameworthiness of the Appellant. It, correctly so, came to the conclusion that due to the interest of society and the manner in which the complainant was raped there were no substantial and compelling circumstances to deviate from the imposition of the prescribed minimum sentence of life imprisonment.
75. On appeal, it was submitted on behalf of the First Appellant that the trial court erred in failing to take cumulative effect of the following factors, namely the fact that he was a first offender, he was incarcerated for eighteen (18) months pending finalization of the trial, he was married with a child who he was maintaining, the complainant did not suffer serious physical injuries, the items of which the complainant was robbed were recovered, as substantial and compelling circumstances.
76. In *S v Malgas*, the court states as follows:

“Courts are required to approach the imposition of sentence conscious that the Legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances. Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts. The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the public policy underlying the legislation and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded. The Legislature has, however, deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence.”

77. As ordained in *Malgas*, when it comes to serious crimes like rape, aversion to imprisoning first offenders is one of the factors that must be excluded. The consideration that the complainant was not seriously injured during the ordeal is neither here nor there because no one can assess the psychological harm suffered by the complainant in a rape case. The effect of the trauma is also apparent from the fact that the complainant lost consciousness when she saw the Second Appellant in the street. The extent at which the complainant got

petrified upon seeing the Second Appellant is testimony enough of the trauma she suffered at the time of victimization. This could not have been only because the Appellants dispossessed her of her cell phone at knife point without raping her. She could not even face the Appellants in court in presence of court officials and the court orderlies. It should also be remembered that the complainant was medically examined six weeks after the incident. The doctor testified that six weeks was too long for such examination as injuries heal after two weeks. More importantly, section 51(3) of the Criminal Law Amendment Act stipulates that lack of injury by a complainant

should not be considered as a substantial and compelling circumstance. It was also submitted that both Appellants were arrested a few weeks after the rape. Again this is not of any significance because the complainant felt seriously violated and traumatized from the minute the attack upon her started.

78. The Constitutional Court in *Child Law v minister of Justice and Constitutional Development & Others* (National Institute for Crime Prevention and the Re-integration of Offenders, as Amicus Curiae), remarked that-

“[17] Under Malgas the minimum sentencing legislation had two operative effects. First the statutorily prescribed minimum sentences must ordinarily be imposed. Absent “truly convincing reasons” for the departure, the scheduled offences are “required to elicit a severe, standardised and consistent response from the courts” through the imposition of the ordained sentences. Second, even where those sentences do not have to be imposed because substantial and compelling circumstances are found, the legislation has a weighed effect leading to the imposition of consistently heavier sentences.”

79. That court further stated at paragraph 39 of that judgment that whether there are substantial and compelling circumstances is answered by considering whether the minimum sentence is clearly disproportionate to the crime. In the circumstances of this case, the sentence of life imprisonment imposed against the First Appellant is just and appropriate. There are no truly convincing reasons why the court a quo should have departed from imposing that sentence, there is, also, none on appeal. The appeal against the First Appellant on sentence ought to be dismissed.
80. The situation in respect of the Second Appellant is different in that the provisions of the Criminal Law Amendment Act (as such life imprisonment) do not apply to him.[9]
81. The Second Appellant, like the First Appellant, was found guilty of the offence of rape and sentencing proceeded under the provisions of section 51(1) of the Criminal Law Amendment Act. In the court a quo it was submitted on his behalf that the following factors be considered as substantial and compelling circumstances and should, therefore, form a basis upon which the imposition of the prescribed minimum sentence can be avoided, namely (a) his youth, (seventeen
- (17) years of age) at the time of his arrest; (b) the fact that he is orphaned; (c) the fact that he was ill-treated in custody while awaiting trial; (d) the fact that he is laden with TB; (e) that he is a first offender and; (f) that the rape committed was not the worst type in that there was no excessive force used. The court a quo having considered all these factors concluded that there were no substantial and compelling circumstances to deviate from the prescribed minimum sentence and sentenced him to life imprisonment.
82. The Constitutional Court in *Centre for Child Law v minister of Justice and Constitutional Development & Others* (National Institute for Crime Prevention and the Re-integration of Offenders, as Amicus Curiae) has as far back as 2009 declared the age limit for the application of the provisions of Criminal Law Amendment Act as eighteen (18) years. The

Appellant was born on 19 September 1995 and at the time of the commission of the offence on 6 October 2012 he was seventeen (17) years old. The court at paragraph 38 of the judgment expressed itself as follows:

“... For so long as the Bill of rights stipulates that “child” means a person under the age of 18 years, its benefits and protections must be afforded to all those under the age of 18 years. This is a bulwark that the legislature cannot overturn without cogent justification.”

The provisions of the prescribed sentencing regime are therefore not applicable and the offence should be treated as rape as referred to before the enactment of the minimum sentencing legislation

83. On appeal it was argued, correctly so, on behalf of the Second Appellant that the court a quo erred by applying the provisions of the Minimum Sentencing Act and failed to apply the provisions of the Child Justice Act 84 of 2007 when sentencing him.
84. The parties were agreed that because of the crime committed by the Second Appellant a term of imprisonment would be an appropriate sentence. The parties were at odds as to the length of such imprisonment. It was submitted on his behalf that an appropriate and just sentence due to his personal circumstances would be imprisonment for a period of ten
- (10) years whilst in counter argument the submission was that a fair and proper sentence would be imprisonment for twenty (20) years.
85. The question to be determined by this court is the length of imprisonment that can be imposed as a sentence upon the Second Appellant
86. In *S v Malgas* the following was stated:

“A court exercising appellate jurisdiction cannot, in the absence of material misdirection by a 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. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate Court is at large.”
87. This is a case where the court a quo has seriously misdirected itself in imposing the sentence of life imprisonment where such sentence does not apply. This court is, therefore, at large to look at sentence afresh.
88. The court in *Centre for Child Law v Minister of Justice and Constitutional Development & Others (National Institute for Crime Prevention and the Re-integration of Offenders, as Amicus Curiae)* remarked as follows:

“31. But while the Bill of Rights envisages that detention of child offender may be appropriate, it mitigates the circumstances. Detention must be a last, not a first, or even intermediate, resort; and when the child is detained, detention must be “only for the shortest appropriate period of time”. The principles of “last resort” and shortest applicable period” bear not only on whether prison is a proper sentencing option, but also on the nature of the incarceration imposed. If there is an appropriate option other than imprisonment, the Bill of Rights requires that it be chosen. In this sense, incarceration must be the sole appropriate option. But if incarceration is unavoidable, its form and duration must also be tempted, so as to ensure detention for the shortest possible period of time.”

89. This is a case where incarceration of the Appellant cannot be avoided due to the gravity of the offence and the interest of the society as already stated earlier in the judgment. However, as ordained by the Constitutional Court when a child, as in this case, is to be detained the detention should be for the shortest possible period of time. The Second appellant has proposed a period of ten (10) years imprisonment whilst the proposition by the respondent would in the circumstances

of this case be a just and appropriate sentence to impose, when also considering the Second Appellant’s personal circumstances.

90. Consequently, the following order is made:

1. The appeal against the First Appellant in respect of the conviction and sentence is dismissed,
2. The appeal against the Second Appellant in respect of the conviction is dismissed.
3. The appeal against the Second Appellant in respect of sentence is upheld and the sentence of the court a quo is set aside and replaced by the following order:
 - a. “The Second Appellant is sentenced to twelve (12) years imprisonment.”
4. Both the First and Second Appellants are declared not fit to possess a firearm.

T.A. Maumela.

Judge of the High court of South Africa.

E.M. Kubushi.

[1] 1937 (AD) 307.

[2] 1991 (1) SACR 198 (A) at 203e -f.

[3] S v Gentle 2005 (1) SACR 420 (A) para [18].

[4] 1981 (3) SA 172 (A) at 180C - F.

[5] 1969 (2) SA 537 (A).

[6] 1979 (2) SA 70 (A) p74-75.

- [7] 2011 (1) SACR 40 (SCA).
- [8] 2001 (1) SACR 469 (SCA).
- [9] See *Child Law v minister of Justice and Constitutional Development & Others* (National Institute for Crime Prevention and the Re-integration of Offenders, as Amicus Curiae) 2009 (2) SACR 477 (CC).
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