

SOUTH AFRICA / JUDGMENT

Kgatlhane v S (CA10/2024 ; RCA27/2018) [2024] ZANWHC 215; [2024] 4 All SA 542 (NWM) (23 August 2024)

[2024] ZANWHC 215

COURT

North West High Court, Mafikeng

BEFORE

A B Scarrott, M Morgan

CASE / FILE NUMBER

CA 10/2024

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IN

THE HIGH COURT OF SOUTH AFRICA

(NORTH-WEST

DIVISION, MAHIKENG)

CASE

NO.: CA 10/2024

REGIONAL

COURT CASE NO.: RCA 27/2018

IN

THE CRIMINAL APPEAL
OF:

KGOROTLHE
THOMAS KGATLHANE
APPELLANT
and
THE
STATE
RESPONDENT

JUDGMENT

SCARROTT AJ and MORGAN AJ

BACKGROUND

RELEVANT TO THIS APPEAL

- [1] This is an appeal by the Appellant against his conviction and sentence by the Regional Magistrates Court for the district of the Greater Taung, on four counts of rape and two counts of robbery with aggravating circumstances.
- [2] The record filed in this matter reflects that the trial commenced on 25 April 2019. On 17 October 2023 the Appellant was found guilty on all six counts and on 2 November 2023 was sentenced. The charges and sentences imposed are as follows:
 - (a) Count 1: the 28 June 2011 rape of MM – Sentence: Life imprisonment;
 - (b) Count 2: the 8 August 2015 rape of EM – Sentence: 10 years imprisonment;
 - (c) Count 3: the 6 March 2016 rape of LM – Sentence: 10 years imprisonment;
 - (d) Count 4: the 6 March 2016 robbery (with aggravating circumstances) of LM – Sentence: 15 years imprisonment;
 - (e) Count 5: the 26 July 2016 rape of OL – Sentence: Life imprisonment; and
 - (f) Count 6: the 26 July 2016 robbery (with aggravating circumstances) of OL – Sentence: 15 years imprisonment (to run concurrently with the sentence on count 5).
- [3] The charges of robbery, counts 4 and 6, are linked to counts 3 and 5 respectively and consist of charges that the Appellant assaulted and took by force property belonging to the complainants in counts 3 and 5.
- [4] The Appellant, who was legally represented throughout the proceedings, pleaded not guilty to each of the charges.
- [5] Numerous witnesses were called by the Respondent, including the four complainants.
- [6] The Appellant closed his case on conclusion of the State's case, electing not to testify and to lead no witnesses of his own. This is considered further below insofar as count 2 is concerned.

APPEAL: CONDONATION

- [7] The Appellant applied for condonation for the failure to prosecute his appeal within prescribed time frames. The condonation application was not opposed.

- [8] This Court is of the view that it is in the interests of justice that this appeal be heard, notwithstanding any delay in the timing of the application and the lack of explanation for the delay, for, inter alia, the following reasons:
- (a) The Appellant was convicted on 5 of the 6 counts based on DNA evidence which the Respondent now says in its Heads of Argument "...does not tally with the chain evidence that is why the Respondent concede (sic) on count 1,3,4,5 and 6". This is dealt with comprehensively below. As appears below the Appellant has real prospects of success in his appeal in respect of these charges;
 - (b) The degree of lateness is not such that this Court should decline to hear this appeal and doing so will not prejudice the State;
 - (c) This Court is mindful that whilst the exercise by the Court of the discretion to allow a late appeal will be exercised liberally, it is required that: "there is some reasonable ground for the exercise of its discretion in favour of the appellant[1]".
- [9] Taking all of the circumstances of this case, including the merits of the appeal on five of the six counts (dealt with below), the degree of lateness, the explanation for the delay (entirely absent in this matter), and the importance of the case (involving a number of very serious charges), all aspects considered and none being individually decisive on their own[2], this Court is of the view that there is a reasonable basis to exercise the discretion of this Court to allow the late filing of the appeal and to hear this appeal as filed.
- [10] The late filing of the notice of appeal is condoned and this Court will hear the appeal.

APPEAL: COUNTS 1,3,4,5 and 6

- [11] It is trite that a Court of appeal will not overturn a Trial Court's findings of fact unless they are shown to be vitiated by material misdirection or are shown by the record to be wrong. See *S v Francis*[3].
- [12] In each of counts 1,3,4,5 and 6, the complainants could not and did not identify their attacker.
- [13] It was not disputed in these proceedings that the three complainants in these charges were each subjected to a horrific ordeal and that they were raped and, in two instances, also robbed as they claimed. The record shows that the evidence of these complainants was not challenged by the Appellant and that the complainants and witnesses (that testified as to their interaction with the complainants at the time), in each of these charges, were not cross-examined in this regard. As these complainants all testified that they could not identify their attacker, this is not surprising.
- [14] The Appellant was charged in counts 1,3,4,5 and 6 after a DNA sample taken from the complainant in count 2, who knew and could and did identify the Appellant as her attacker, was compared to DNA samples taken from the three complainants in counts 1,3,4,5 and 6.

- [15] The Trial Court found that the DNA evidence taken from the complainants in counts 1,3,4,5 and 6 matched the sample taken from the Appellant after the attack on the complainant in count 2 and that the Appellant was the perpetrator in all six charges.
- [16] The Appellant appeals his conviction and sentence inter alia on grounds that the DNA sample used to identify him on these charges is not referred to in the DNA test results taken from the complainants i.e. was not proven to be his DNA.
- [17] Whilst there are other grounds of appeal, these are considered below in dealing with count 2 and not at this time as the question of the Appellant's identification through the DNA samples is dispositive of the appeal in respect of counts 1,3,4,5 and 6.
- [18] In its Heads of Argument the Respondent has stated in respect of counts 1,3,4,5 and 6, that:
- “The Respondent have noted that the 212(4) and (8) which was handed as exhibit S, with the reference sample is LDB89285XS Kgatlhane*

Kgorotlhe Thomas on page 3 is different from the one taken from the Appellant by Constable Kudunyane. The sample taken from the Appellant is 16 VBDB5243TF which was sent by Constable Kudunyane to forensic laboratory in Pretoria. This does not tally with the chain of evidence that is why the Respondent concede (sic) on count 1,3,4,5 and 6. The Respondent concedes because the only link was the DNA result of which the chain evidence in this case was not properly canvassed.” (own emphasis).

- [19] Whilst the Respondent's “concession” is noted, it is still for this Court to consider the evidence presented before the Trial Court and to consider whether the DNA evidence as tested and accepted by the Trial Court did prove, beyond reasonable doubt, that the Appellant was the perpetrator in counts 1,3,4,5 and 6.
- [20] If the DNA as tested does not match that taken from the Appellant, then there is no other evidence that links the Appellant to these charges and the appeal against the conviction and sentencing on these charges must succeed.
- [21] The evidence presented to and accepted by the Trial Court shows, inter alia, that:
- (a) On 20 March 2017, Mr Kudunyane, at the time a member of the South African Police Services, took a buccal DNA swab from the Appellant
- thereby collecting a DNA sample from him;
- (b) The DNA sample kit number that was used to take the Appellant's DNA sample was 16DBDB5243TF. The DNA sample taken from the Appellant was placed in a sealed bag with the identification number PA4003387861;
- (c) Mr Kudunyane made a statement under oath reflecting the above and that statement was handed into the Trial Court, without objection, and entered as “EXHIBIT G”;

- (d) There is no evidence in the record that any other DNA sample was taken from the Appellant and accordingly, it is DNA sample 16DBDB5243TF as stored in evidence bag PA4003387861 that identifies the Appellant's DNA in these proceedings;
- (e) The DNA samples taken from the complainants and applicable to counts 3,4,5 and 6 were analysed and the results submitted in terms of section 212(8) of the Criminal Procedure Act as EXHIBIT R. The DNA samples taken from the complainants and applicable to counts 1 and 2 were analysed and the results submitted in terms of section 212(8) of the Criminal Procedure Act as EXHIBIT S.
- [22] Each of EXHIBIT R and EXHIBIT S reflects that the DNA sample kit number taken as that of the Appellant and used to conclude that the Appellant was the attacker, was different to that in EXHIBIT G, i.e. was not 16DBDB5243TF.
- [23] EXHIBIT R tested "reference samples [FSE-570884 (10DBAC9298XX; "KGATLHANE KGOROTLHE THOMAS")] TAUNG CAS53/08/15 and [10DBAB9412EB (10DBAB9412XX; "KGATLHANE THOMAS KGOROTLHE")] TAUNG CAS40/03/15" and concluded that the Appellant was the perpetrator.
- [24] EXHIBIT S tested "reference sample [FSE-570884; 10DBAC9285EB; 10DBAC9285XX "KGATLHANE KGOROTLHE THOMAS)] TAUNG CAS53/08/15
- and concluded that the Appellant was the perpetrator.
- [25] Ultimately the record in this matter shows that the DNA evidence that was taken from the Appellant (reflected in EXHIBIT G) i.e. that from DNA kit 16DBDB5243TF as stored in sealed bag number PA4003387861, was not compared to the DNA samples taken from the complainants and as compared in EXHIBIT R and EXHIBIT S.
- [26] The record contains no evidence that explains how the DNA in EXHIBIT R and EXHIBIT S is linked to the Appellant.
- [27] The Trial Court accordingly misdirected itself and was wrong when it accepted that EXHIBIT R and EXHIBIT S linked the Appellant to the charges in any of counts 1,3,4,5 and 6. There was no basis for it to have done so. As it was only the DNA results that identified the Appellant as the perpetrator in counts 1,3,4,5 and 6, it follows that the Trial Court was wrong in convicting the Appellant of the crimes in these counts. The sentencing is similarly wrong.
- [28] The appeal against conviction and sentence in counts 1,3,4,5 and 6 must succeed.
- [29] The obvious question that needs to be asked and which this Court cannot answer, is whose DNA was tested in EXHIBIT R and EXHIBIT S and whether it can be used to identify and charge any identifiable person. This needs to be considered by the Director of Public Prosecutions. The interests of justice, the complainants and the Appellant are entitled to and require no less.

APPEAL: COUNT 2

BACKGROUND:

COUNT 2

[30] The charge in count 2 is that of rape:

“IN THAT on or about the 08 August 2015 and at or near Magogong in the Regional Division of North West the said accused did unlawfully and intentionally commit an act of sexual penetration with the complainant to wit, [“EM”] by 19 years old by inserting his penis in her vagina and had sexual intercourse with her without the consent of the said complainant”.

[31] The Appellant pleaded “not guilty” to this charge.

[32] Witnesses led by the Respondent on count 2 included EM herself and her grandmother.

[33] The Appellant initially stated through his legal representative that he would testify, at least in respect of count 2 and as to the element of consent on that charge. Ultimately when the State closed its case the Appellant, having been advised by his legal representative of the consequences of not testifying, exercised his right not to testify. The Appellant accordingly elected to conduct only a “passive defence” and closed his case without leading or giving any evidence on any of the charges or as to his personal circumstances.

[34] The Appellant was found guilty and convicted of the rape of EM based on her testimony and was sentenced to 10 years imprisonment. The Trial Court also made consequential orders in terms of section 103(1) of the Firearm Control Act 60 of 2000 and section 120 of the Children’s Act 38 of 2005.

[35] The Appellant appeals his conviction and sentence on count 2.

LEGAL POSITION: Crime of Rape

[36] Section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007 (the “Amendment Act”) provides that:

“Any person (“A”) who unlawfully and intentionally commits an act of sexual penetration with a complainant (“B”),

without the consent of B, is guilty of the offence of rape”.

[37] The Amendment Act states that “Sexual Penetration”, “includes any act which causes penetration to any extent whatsoever by ...the genital organs of one person into or beyond the genital organs, anus, or mouth of another person” and that “consent” means voluntary or uncoerced agreement and expressly excludes forced or coerced consent.

[38] The Appellant appeals his conviction on count 2, essentially on the following grounds:

- (a) That the Trial Court misdirected itself by finding that the complainant (EM) was honest, credible and to be relied on and her evidence

sufficient to return a conviction on a charge of rape;

- (b) That the Trial Court misdirected itself by failing to apply the cautionary rule when evaluating the evidence of EM as a single witness;
- (c) That the sexual intercourse was not forceful but consensual.

Any challenges relating to the DNA samples are ignored in this charge as the sexual intercourse is not disputed.

[39] The Appellant appeals his sentence on count 2 on the following grounds:

- (a) The Trial Court misdirected itself by failing to find that the Appellant's personal circumstances are substantial and compelling circumstances justifying a departure from imposing the prescribed minimum sentence;
- (b) The Appellant was a first-time offender, single and only 33 years old at sentence; he is educated to "standard 5" and was unemployed at the time of arrest;
- (c) The Appellant had spent six years in custody awaiting finalisation of the trial;
- (d) Although the complainants were raped, the Appellant did not cause them grievous bodily injuries by using the knife in his possession. The Appellant concedes the seriousness of the offences;
- (e) The personal circumstances of the Appellant cannot be regarded as flimsy, they are substantial and compelling of a departure from the prescribed minimum sentences.

GENERAL PRINCIPLES APPLICABLE TO AN APPEAL ON CONVICTION

[40] This Court is an Appeal Court and is constrained to consider the appeal by the Appellant against his conviction in accordance with the established and applicable principles. Those that are apposite in casu, include the principles set out below. All emphasis is added.

[41] The powers of an Appeal Court to interfere with findings of fact of a Trial Court are limited[4].

[42] As is stated in the oft-cited case of *S v Francis*:

This Court's powers to interfere on appeal with the findings of fact of a trial court are limited (*R v Dhlumayo and Another* 1948 (2) SA 677 (A)). ... In the absence of any misdirection the trial court's conclusion, including its acceptance of D's evidence, is presumed to be correct. In order to succeed on appeal accused 5 must therefore convince us on adequate grounds that the trial court was wrong in accepting D's evidence - a reasonable doubt will not suffice to justify interference with its findings (*R v Dhlumayo* (supra); *Taljaard v Sentrale Raad vir Koöperatiewe Assuransie Bpk* 1974 (2) SA 450 (A) at 452 A - B). Bearing in mind the advantage which a trial court has of

seeing, hearing and appraising a witness, it is

only in exceptional cases that this Court will be entitled to interfere with a trial court's evaluation of oral testimony (S v

Robinson and Others 1968 (1) SA 666 (A) at 675 G - H).

This Court must be mindful that it did not have the benefit in seeing and hearing the witness being steeped in the atmosphere of the trial. Not only has the trial court the opportunity of observing the demeanor, but also their appearances and whole personality. This should not be overlooked[5].

[43] In S v Hadebe[6] Marais JA stated the following regarding the limitations on the powers of an Appeal Court to interfere with the findings of fact of a Trial Court:

In the absence of demonstrable and material misdirection by the trial Court, its findings are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong.

[44] This Court is similarly constrained when assessing the evidence that served before the Trial Court and that led to the conviction. In this regard:

(a) The onus rests with the State to prove the guilt of an accused beyond reasonable doubt. The Supreme Court of Appeal in the matter of Shackle v S[7] stated:

“The court does not have to be convinced that every detail of an accused’s version is true. If the accused’s version is reasonably possibly true, in substance, the court must decide the matter on acceptance of that version. Of course, it is permissible to test the accused’s version against the inherent probabilities; but it cannot be rejected merely because it is improbable. It can only be rejected on the basis of inherent probabilities if it can be said that it will be so improbable that it cannot be reasonably possibly true”.

(b) As regards the weighing up of the elements pointing to the guilt and to the innocence of an accused, Heher AJA stated in the matter of S v Chabalala[8]:

“The correct approach is to weigh up all the elements which points towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and,

having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt to the

accused’s guilt. The result may prove that one scrap of evidence or one defect in the case for either party (such as failure to call a material witness concerning an identity parade) was decisive but that can only be on an ex post facto determination and a trial court (and counsel) should avoid the temptation to latch onto one (apparently) obvious aspect without assessing it in the context of the full picture in evidence.”

- (c) The evaluation of all of the evidence in a criminal trial comprises of the evaluation of the “mosaic of evidence as whole” as aptly stated in the matter of *Khumalo v S*[9] as follows:

“Considering all the circumstances of this case, I am of the view that the evidence tendered by the State weighs so heavily as to exclude any reasonable doubt about the applicant’s guilt. Expressed differently, the mosaic of the evidence as a whole is, beyond reasonable doubt, inconsistent with the applicant’s innocence...” (own emphasis)

GENERAL PRINCIPLES APPLICABLE TO AN APPEAL ON SENTENCE

- [45] The general discretion on sentencing lies with the Trial Court[10]. The appeal court has no general discretion to correct the sentences of the Trial Court.

- [46] As with appeals against conviction, the powers of the Appeal Court regarding the powers of an Appeal Court regarding sentencing, are regulated by the principles laid out in the body of established judicial precedent[11]. The principles that are applicable in casu include the following (all emphasis added):

- (a) An Appeal Court is generally loath to interfere with the sentence of a Trial Court. As with the assessment of facts, the Trial Court has the advantage of having been present when the matter was heard. As far back as 1920, the Appellate Division (as it then was) in the case of *R v Maphumulo and Others*[12] stated that:

"The infliction of punishment is pre-eminently a matter for the discretion of the trial Court. It can better appreciate the atmosphere of the case and can better estimate the circumstances of the locality and the need for a heavy or light sentence than an appellate tribunal. And we should be slow to interfere with its discretion."

- (b) In *S v Barnard*[13] the Supreme Court of Appeal stated: “A court sitting on appeal on sentence should always guard against eroding the trial court’s discretion ... and should

interfere only where the discretion was not exercised judicially and properly. A misdirection that would justify interference by an appeal Court should not be trivial but should be of such a nature, degree or seriousness that it shows that the court did not exercise its discretion at all or exercised it improperly or unreasonably.”

- (c) In *S v Hewitt*,[14] Maya DP held that: “It is a trite principle of our law that the imposition of sentence is the prerogative of the trial court. An appellate court may not interfere with this discretion merely because it would have imposed a different sentence. In other words, it is not enough to conclude that its own choice of penalty would have been an appropriate penalty. Something more is required; it must conclude that its own choice of penalty is the appropriate penalty and that the penalty chosen by the trial court is not. Thus, the appellate court must be satisfied that the trial court committed a misdirection of such a nature, degree and seriousness that shows it did not exercise its sentencing discretion at all or exercised it improperly or unreasonably when imposing it. So, interference is justified only where there exists a “striking” or “startling” or “disturbing” disparity between the trial court’s sentence

and that which the appellate court would have imposed. And in such instances the trial court's discretion is regarded as having been unreasonably exercised."

- (d) In *S v Bogaards*[15], Khampepe J in the Constitutional Court stated as follows regarding the power of an Appeal Court to interfere with a sentence imposed by the Trial Court:

"It can only do so where there has been an irregularity that results in the 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."

- [47] This principle was also echoed by and phrased by Du Toit[16] as follows: "The sentence will not be altered unless it is held that no reasonable court ought to have imposed such a sentence, or that the sentence is totally out of proportion to the gravity or magnitude of the offence, or that the sentence evokes a feeling of shock or outrage, or that the sentence is grossly excessive or insufficient, or that the trial judge had not exercised his discretion properly, or that it was in the interest of justice to alter it." [17]

- [48] When it comes to sentencing, the Trial Court "...enjoys pre-eminent discretion and the court of appeal will not lightly interfere with the exercise of same." [18] In *S v Singh*[19] Tshiqi JA held that: "The task of imposing an appropriate sentence is in the discretion of the trial court. A court of appeal may only interfere if the sentence is shockingly inappropriate."

- [49] In the matter of *Chitumbura and Another v S*[20] the Court quoted the above referred to phrase from Du Toit with approval, referred to the Supreme Court of Appeal matter of *S v Kgosimore*[21] and stated the following: "Regard may be had also to the judgment of Scott, JA in *S v Kgosimore* 1999

- (2) SACR 238 (SCA), relied on by the State, where his lordship held that if the discretion of the trial court was properly and reasonably exercised, there was no scope at all for interference in the

sentence. This collection of expressions of resistance to interference in lower court sentencing underscores just how jealously our judicial

hierarchy protects the prerogative below, and it is difficult to add to it."

THE EVIDENCE BEFORE THE TRIAL COURT

- [50] Count 2 differs from counts 1,3,4,5 and 6 (where only the DNA linked the Appellant to the charges) in that the complainant (EM) in count 2 knew the Appellant and was able to and did positively identify him as the person who had sexual intercourse with her. It was in fact not challenged that the Appellant and EM were known to each other or that they had sexual intercourse on the day in question.

- [51] The complainant, EM, a 23-year-old female, testified that on 8 August 2015:

- (a) She met the Appellant whilst she was walking to perform an errand for her grandmother;

- (b) The Appellant asked her to accompany him to collect an item;
- (c) The Appellant was known to her. They grew up together;
- (d) EM, noting what she terms “his actions” when he took her cell phone from her, asked him not to hurt her as she was still

breastfeeding, even showing him that she was producing breast milk. EM stated that, in response, the Appellant said that he did not care;

- (e) The Appellant forcibly dragged or pulled EM by her hand to a furrow where he forced her to lie down;
- (f) When EM resisted and tried to get up, the Appellant threatened her with a knife, undressed her and inserted his penis into her vagina;
- (g) EM did not consent to sexual intercourse with the Appellant and attempted to resist;
- (h) After the rape the Appellant said that he regretted having “slept” with EM without a condom even after EM told her she was breastfeeding. The Appellant returned her cell phone to her;
- (i) When she returned home, crying, EM told her grandmother that she had been raped by the Appellant and called the South African Police Services whereafter she was taken to hospital to be examined.

[52] EM was cross-examined by the Appellant’s legal representative who put to her the Appellant’s version and stated that the Appellant

would testify and confirm his version. That version, denied firmly in all respects by EM, was that:

- (a) The Appellant was in a relationship with her;
- (b) On the day in question EM was in fact walking for a different purpose to that stated by her, namely, to collect money from her “boss”;
- (c) The Appellant asked EM to have sex with him;
- (d) EM undressed herself;
- (e) They had sexual intercourse which was consensual; and
- (f) The Appellant never forced EM to go with him and the decision to go with him and to have sex was mutual.

[53] Ultimately and on closure of the State’s case, the Appellant’s legal advisor informed the Trial Court that notwithstanding her having explained the consequences of not doing so to the Appellant, the Appellant had elected not to testify with regards to any of counts 1,2,3,4,5 or 6. The defence then closed their case without the Appellant testifying and without leading any evidence.

[54] The Trial Court questioned the Appellant as to his decision not to testify and to close his case at that time [without testifying or leading any evidence]. The Appellant confirmed his decision to the Court.

[55] The Trial Court accepted the State's evidence. Faced with the uncontroverted evidence that was presented in respect of count 2 and

with nothing to gainsay it and no contrary evidence, the Trial Court convicted the Appellant of the rape of EM.

CONSIDERATION OF GROUNDS OF APPEAL

[56] The sexual intercourse between EM and the Appellant on the day in question was common cause according to the submissions of the legal representatives of the Appellant at trial. The following is also stated in the Appellant's Heads of Argument (emphasis added):

"... The appellant only cross-examined the complainant on count 2 [EM] stating that the sexual intercourse was consensual on the date in question. ... At the end of the state case the appellant closed his case without testifying and he did not call any witnesses to his defense".

[57] This leaves the Appellant's challenge to the evidence of EM and the elements of consent, unlawfulness and intention, to be considered.

The Evidence of EM

[58] In casu the Appellant was convicted of rape on the evidence of EM, a single witness. The cautionary rule relating to the evidence of a single witness thus applies. The application of this rule serves as a guide to the Courts in assessing such evidence.

[59] The starting point in reviewing the evidence of EM before the Trial Court, being the evidence of a single witness on which the appellant

was convicted, is to remind ourselves that as this is the only direct evidence before the Trial Court to support the charge of rape, her evidence must establish all of the elements of rape (sexual penetration of another person; without the consent of the latter person; unlawfulness and intention[22]) and must do so beyond reasonable doubt.[23]

[60] The Criminal Procedure Act expressly provides that an accused may be convicted, of any offence, on the single evidence of any competent

witness[24]. As Shongwe JA stated in *Mahlangu v The State* (497/10) [2011] ZASCA 64:

The court can base its finding on the evidence of a single witness as long as such evidence is substantially satisfactory in every material respect or if there is corroboration. The said corroboration need not necessarily link the accused to the crime (See *S v Hlongwa* 1991

(1) SACR 583 (A), *Stevens v S* [2005] 1 ALL SA 1 (SCA) para 17 and *S v Artman* 1968 (3) SA 339 (A) at 341A-B).

[61] Regarding EM's evidence:

- (a) The Trial Court accepted EM's evidence;
- (b) The Appellant's statement to the Trial Court, through his legal representative, was that the sexual intercourse that took place was consensual. This was strenuously denied by EM on all occasions that this was put to her. The Appellant led no evidence to show that the sexual intercourse was consensual, and the only contentions in this regard were confined to the version that was put to EM by the Appellant's legal representative. EM was firm and clear in her denial that she consented;
- (c) EM was not shown in cross-examination to have been dishonest, to lack credibility, to be unreliable or to hold bias. No basis was present to find that her evidence was not satisfactory. On the contrary, a reading of the record shows that her evidence was uncontroverted,

consistent, and clear. From an evidentiary point of view, EM's evidence was satisfactory in all respects, and there was, and is, no basis to regard it as biased or unreliable[25];

- (d) EM testified that the Appellant committed an act of sexual penetration with her, using threats and a knife to overcome her resistance; EM testified to physically "resisting" and trying to resist the Appellant, and she expressly states that she did not consent. From her evidence, there can be no doubt that the Appellant's actions were also unlawful and intentional. EM's evidence provided clear evidence, beyond a reasonable doubt, of all the elements of rape. Her testimony, left undisturbed as it was, was sufficient to return a conviction of rape, as the Trial Court did.

[62] EM told her grandmother directly after the attack that the Appellant had raped her. The evidence from EM's grandmother was consistent with and corroborates that of EM, at least on the subsequent events when arriving at her grandmother's house after the attack.

[63] The record of EM's testimony and cross-examination shows clear and firm evidence of the elements of the crime of rape by the Appellant that was undisturbed by the cross-examination.

The Lack of Contrary Evidence

[64] In response to EM's evidence, the Appellant exercised his constitutional right[26], as he was entitled to silence. The Appellant led no evidence at all and closed his case immediately after the State closed its case.

[65] The consequence of the Appellant not testifying or leading any evidence at all is that the Trial Court was left with only the evidence of the State to the extent that it was not disturbed by cross-examination.

[66] As the Constitutional Court stated in *S v Boesak* [2000] ZACC 25; 2001 (1) SACR 1 (CC) at 24:

“The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence. What is stated above is consistent with the remarks of Madala J, writing for the Court, in Osman and Another v Attorney-General, Transvaal[27], when he said the following [at para 22]:

“Our legal system is an adversarial one. Once the prosecution has produced evidence sufficient to establish a prima facie case, an accused who fails to produce evidence to rebut that case is at risk. The failure to testify does not relieve the prosecution of its duty to prove guilt beyond reasonable doubt. An accused, however, always runs the risk that, absent any rebuttal, the prosecution’s case may be sufficient to prove the elements of the offence. The fact that an accused has to make such an election is not a breach of the right to silence. If the right to silence were to be so interpreted, it would destroy the fundamental nature of our adversarial system of criminal justice.”

- [67] The grounds of attack against the evidence of EM as raised in this appeal are stated baldly and without reference to any evidence, facts or circumstances that would justify the proposition that EM was not honest, credible or reliable or as to why (beyond her being noted to be a single witness) her evidence was not sufficient or acceptable in all respects. The Appellant does not refer in his legal argument to any examples or evidence that would lead to the conclusion that EM was dishonest, not credible, that her evidence could not be relied on or that it was not satisfactory in any respect. The record shows no reason to impugn the honesty, credibility or reliability of EM or her evidence.
- [68] As far as the content of the evidence is concerned, the person who could lead evidence of the sexual intercourse being by consent (the Appellant’s version as conveyed in legal argument), the Appellant, elected not to do so. That being so, the suggestion put to EM that the sexual intercourse was consensual is without any evidence and is no more than a version put to EM and denied firmly by her. The Trial Court could not speculate on a version put by the Appellant’s legal representative and was constrained to evaluate the evidence that was led. There was no evidence that the sexual intercourse was consensual, and there was direct and reliable evidence from EM that it was not.
- [69] EM’s evidence had to be not only credible but also reliable[28]. Having read the record reflecting EM’s evidence, this Court is of the view that EM’s evidence was the truth, was clear and satisfactory in every respect,[29] and was correctly accepted by the Trial Court when accorded the caution appropriate for a single witness.
- [70] The Trial Court was required to consider the evidence in its totality, the probabilities and improbabilities of both the State and the defence’s cases and whether the guilt of the accused was proven beyond reasonable doubt. On the evidence, it was.

- [71] Whilst the record does not refer directly to EM being a “single witness”, this does not mean that the cautionary rule was not applied or that the evidence of EM was not accorded due scrutiny. The Trial Court did consider the evidence as led, only being from the State, and said: “I accept the version of the State that it has proven the guilt of the accused beyond reasonable doubt”. The magistrate also stated, with respect to EM, “I cannot say she has any motive or bias against the accused”.
- [72] The record and, in particular, EM’s evidence and cross-examination are sufficient for this Court to accept that the evidence of EM was sufficient in all respects and established, beyond reasonable doubt, that all the elements of rape were present. It was correctly accepted.
- [73] There is no basis for this Court to interfere with the conviction of rape on count 2.

SENTENCING

- [74] The Appellant was sentenced to 10 years imprisonment for the rape of EM, which accords with the prescribed minimum sentence. The Trial Court considered the representations to it and concluded that there were no substantial and compelling reasons to deviate from the prescribed minimum sentence. Concerning count 2, the offence falls under Part III of Schedule 2 and S 51(2)(b) of the Amendment Act.
- [75] The Court a quo considered inter alia: the personal circumstance of the Appellant, the nature and seriousness of the offences (noting for present purposes that we are now considering only count 2), the need to balance the purposes of sentencing, the test set out in *R v Zinn* 1969 (2) SA 537 (AD), the need to consider the impact of the offence on the victims[30], the prevalence of violent crimes against women, the impact on the complainants, the lack of remorse, the need for mercy and the negative effect of sentencing on the Appellant.
- [76] The length of pre-trial incarceration (from 2017) was brought to the Trial Court's attention prior to sentencing and was known to the Court when the sentence was determined and imposed.

THE PRESCRIBED MINIMUM SENTENCE

- [77] The provisions of section 51(2)(b) of the Amendment Act are applicable in this matter and prescribe the following minimum sentence:

“Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person—who has been convicted of an offence referred to in...Part III of Schedule 2, in the case of ... a first offender, to imprisonment for a period not less than 10 years”.

[78] Section 51(3)(a) of the Amendment Act contains an exception and states that: “If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those

circumstances on the record of the proceedings and must thereupon impose such lesser sentence....” (own emphasis).

[79] Section 51(3)(a) of the Amendment Act excludes certain circumstances from the definition of “substantial and compelling circumstances”.

One of the exclusions is “(ii) an apparent lack of physical injury to the complainant...”[31]. The proposition in the Appellant’s Heads of Argument in addressing the minimum sentencing that “although the complainants were raped the appellant did not cause them grievous bodily injuries by using the knife in his possession ...”, is as offensive as it is unsustainable.

[80] The issue before this Court then is whether the Court a quo was correct in its finding that there are no “...substantial and compelling circumstances to deviate from prescribed minimum sentences” requiring that 10 years imprisonment be imposed in the circumstances.

[81] The argument submitted on behalf of the Appellant and considered by the Trial Court highlighted the personal circumstances of the Appellant and his incarceration during the lengthy trial as the basis for his contention that there were substantial and compelling reasons to deviate from the prescribed minimum sentence. The Appellant’s legal representative correctly conceded that the offences are “...very serious...”.

[82] In this appeal, it was argued on behalf of the Appellant that a more appropriate sentence would be 8 years imprisonment ante-dated to 2 November 2023 in terms of section 282 of the Criminal Procedure Act 51 of 1977.

[83] In the seminal judgment on minimum sentences, *S v Malgas*, [32] the following was stated by Marais JA in the SCA regarding sentencing and the implementation of the provisions of section 51 of the Criminal Law Amendment Act and the concomitant imposing of prescribed minimum sentences brought about thereby:

“...The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances. Nor were marginal differences in the personal circumstances or degrees of participation of co-offenders which, but for the provisions, might have justified differentiating between them. But for the rest I can see no warrant for deducing that the legislature intended a court to exclude from consideration, ante omnia as it were, any or all of the many factors traditionally and rightly taken into account by courts when sentencing offenders...”

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.”[33] (own emphasis)

[84] In *S v Vilakazi*[34] the judgment in *Malgas* and that of the Constitutional Court in *S v Dodo* were considered. Nugent JA stated in *Vilakazi* [35]:

“In cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be, and those seem to me to be the kind of ‘flimsy’ grounds that Malgas said should be avoided...”; and

“... the essence of the decisions in Malgas and in Dodo is that a court is not compelled to perpetrate injustice by imposing a sentence that is disproportionate to the particular offence. Whether a sentence is proportionate cannot be determined in the abstract, but only upon a consideration of all material circumstances of the particular case, though bearing in mind what the legislature has ordained and the other strictures referred to in Malgas. It was also pointed out in Malgas that a prescribed sentence need not be ‘shockingly unjust’ before it is departed from for ‘one does not calibrate injustices in a court of law’.[36] It is enough for the sentence to be departed from that it would be unjust to impose it.”

[85] Accordingly, then, if there are substantial and compelling reasons to depart from the prescribed minimum sentences or where imposing the minimum sentence would be unjust, the Court then is required to impose a lesser sentence[37].

[86] The grounds given by the Appellant in mitigation, which are contended to be substantial and compelling, are, save for the incarceration during the lengthy trial, personal circumstances as envisaged by *Vilakazi* and which *Malgas* warns are insufficient.

[87] The Trial Court being alive to the period of the Appellant’s incarceration whilst the trial was proceeding and having been

reminded of this in the arguments in mitigation, did not reduce the period of the sentence as a result and determined still to impose the prescribed minimum sentence of 10 years of imprisonment. Even when the lengthy incarceration during the trial is taken into account, the period of the sentence induces no sense of shock or sense that the sentence is disproportionate or inappropriate in the circumstances of this matter.

[88] This Court strongly associates itself with the remarks of Laubscher AJ in *S v Leso*[38]:

“... the courts in this country must not shy away from its role to address and discount the fact that violence committed against woman and children must be condemned in the strongest terms, eradicated, and the seriousness of this task must be reflected in the manner in which the courts address same. This must be done whilst striking a balance with the court’s compelling duty to ensure that the punishment fits the crime and, of course, the offender.”

- [89] For a serious offence such as this, in which the Appellant showed such disregard for EM and her rights, raped a nursing mother, used a knife and advanced no reasons that could be regarded as “substantial and compelling”, the Trial Court could not depart from the minimum sentence as the starting point of what sentence was required.
- [90] The Trial Court imposed the minimum sentence aware of and notwithstanding the period of incarceration during the trial. There is no “striking”, “startling”, or “disturbing” disparity between the Trial Court’s sentence and that which this Appellate Court would have imposed. This is so even noting the period of incarceration during this lengthy trial.
- [91] There is no basis for this Court to interfere with the sentence imposed.

CONCLUSION

AND JUDGMENT

- [92] Having had regard to the record and the arguments led on behalf of the Appellant and Respondent, respectively:
- (a) The appeal against conviction and sentence with regards to counts 1,3,4,5 and 6 succeeds and the conviction and sentence on these counts is set aside.
 - (b) Regarding counts 1,3,4,5 and 6 the matter is referred back to the Director of Public Prosecutions to consider whether there is evidence to charge any person with the crimes in these charges
 - (c) The appeal against conviction and sentence with regards to count 2 is dismissed.
 - (d) The consequential orders made by the Trial Court are confirmed.

A B SCARROTT

ACTING JUDGE OF THE HIGH COURT, NORTH-WEST DIVISION, MAHIKENG

I AGREE.

M MORGAN

DATE: ____ AUGUST 2024

For the Appellant: Adv T G Gonyane

For the Respondent: Adv F T Tlatsana

APPEARANCES

Date of hearing: 18 June 2024

Date of judgment: 23 August 2024

For the Appellant: Mr T G Gonyane

For the Respondent: Adv T F Tlatsana

[1] Rheeders v Jacobsz 1942 AD 395.

[2] S v Mohlathe 2000

(2) SACR 530 (SCA).

[3] 1991

(1) SACR 198 (A) at 204.

[4] S v Francis 1991

(1) SACR 198 (A) at 204 C – E; R v Dhlumayo and Another 1948 (2) SA 677 (A).

[5] 1948 (2) SA 677 (A). See also Constitutional Court in Makate v Vodacom (Pty) Ltd 2016 (6) BCLR 709 (CC).

[6] 1997

(2) SACR 641 (SCA) at 645; S v Monyane and Others 2008 (1) SACR 543 (SCA) at 15. See also S v Robinson 1968 (1) 666 (A) at 675 and Khoza v S (A222/2022) [2023] ZAGPPHC 1122 (8 September 2023) at para [16].

[7] 2001

(1) SACR 279 (SCA) at 288 E-F. See also S v Munyai 1988

(4) SA 712 at 915G and S v Sithole and Others 1999

(1) SACR 585 W at 590.

[8] 2003 (1) SACR 134 (SCA) at page 140 A-B. See also S v Van der Meyden 1999 (1) SACR 447 (WLD) at 448 f-h.

[9] (723/2020) [2022] ZASCA 39 (4 April 2022) at para [19] and also see R v Blom 1939 AD 188 at 202, Cornick and Another v S 2007 (2) SACR 115 (SCA) at para 42, S v Van den Meyden 1999 (1) SACR 447(W) at 449d-e, cited with approval in S v Van Aswegen 2001 (2) SACR 97 (SCA) at 101a-f.

[10] S v Hewitt 2017 (1) SACR 309 (SCA).

[11] Criminal Procedure Handbook J J Joubert 12 Edition page 457.

[12] 1920 AD 56 at 57.

[13] 2004

(1) SACR 191 (SCA) at para [9].

[14] 2017 (1) SACR 309 (SCA).

[15] 2013 (1) SACR 1 (CC) at para [41].

[16] Commentary on the Criminal Procedure Act (Jutastat, 31 January 2021) at 30-41.

[17] Also see *S v Fhetani* 2007 (2) SACR 590 (SCA), *Director of Public Prosecutions, KwaZulu-Natal v P* 2006 (1) SACR 243 (SCA), *S v Anderson* 1964 (3) SA 494 (A); *Nevilimadi v S* (545/13)

[2014] ZASCA 41 (31 March 2014) and *S v Asmal* (20465/14)

[2015] ZASCA 122 (17 September 2015).

[18] *Gqika v S* (CA&R 112/2021) [2022] ZAECGHC 15 (1 March 2022) at para [20].

[19] 2016

(2) SACR 443 at para [23].

[20] (A190/201) [2017] ZAGPJHC 274 (14 September 2017) at para [9] and [10].

[21] 1999 (2) SACR 238 (SCA).

[22] *Snyman Criminal Law* 5th Edition page 355.

[23] *R v Mokoena* 1956

(3) SA 81 (A) at 85 – 8.

[24] S 208.

[25] In this respect see: *R v Mokoena* 1956

(3) SA 81 (A); *S v Webber* 1971 (3) SA 754 (A) at 758G; *S v Sauls and Others* 1981 (3) SA 172 (A) at 179G180G; *S v Stevens*

[2005] 1 All SA 1 (SCA) at 5 and *S v Gentle* 2005 (1) SACR 420 (SCA) para 17.

[26] Section 35(1)(a) of the Constitution of the Republic of South Africa, 1996.

[27] 1998 (11) BCLR 1362 (CC); 1998 (4) SA 1224 (CC).

[28] *R v Mokoena* 1956

(3) SA 81 (A); *S v Webber* 1971 (3) SA 754 (A) at 758G; *S v Sauls and Others* 1981 (3) SA 172 (A) at 179G – 180G; *S v Stevens*

[2005] 1 All SA 1 (SCA) at 5 and *S v Gentle* 2005 (1) SACR 420 (SCA) para 17.

[29] Cupido v The State (1257/2022)

[2024] ZASCA 4 at para 19.

[30] S v Matyityi 2011

(1) SACR 40 (SCA).

[31] Section 51(3)(a)(aA)(ii)

[32] 2001 (1) SACR 469 (SCA).

[33] At paragraph [7] to [9] and [25].

[34] Vilakazi v The State (576/07)

[2008] ZASCA 87 as para 20.

[35] Vilakazi v The State (576/07)

[2008] ZASCA 87 at para 58.

[36] Malgas para 23.

[37] Vilakazi v The State (576/07)

[2008] ZASCA 87 as paras 14 – 15.

[38] ZANWHC 114 (16 April 2024).

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