

SOUTH AFRICA / JUDGMENT

Msiza and Another v S - Appeal (A223/22)

[2023] ZAGPPHC 729 (16 August 2023)

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COURT

North Gauteng High Court, Pretoria

BEFORE

Mabuse, Tshombe

CASE / FILE NUMBER

A223/22

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NUMBER: A223/22

DATE: 16 August 2023

REPORTABLE: YES/NO

OF INTEREST TO OTHER JUDGES: YES/NO

REVISED

JOHANNES SIYABONGA MSIZA First Appellant

KABELO DONALD MOTHLAPE

Second Appellant

V

THE STATE

Respondent

JUDGMENT

MABUSE J (Tshombe AJ concurring)

[1] This is an appeal by the Appellants against their conviction and sentence.

[2] The Appellants appeared before the Regional Court Magistrate in Soshanguve where they were charged as follows:

[2.1] The First and Second Appellants (the Appellants) were charged in count 1 with contravention of s 3 of the Sexual Offences Act 32 of 2007 (SOA), Rape:

This count was read subject to the provisions of s 51(1) of the Criminal Law Amendment Act 105 of 1997 (the Minimum Sentence Act).

[2.1.1] The allegations against the two Appellants in this count were that on or about 12 December 2017 and at or near a road in Soshanguve, in the regional division of Gauteng North, the Appellants did unlawfully and intentionally commit an act of sexual penetration with a female person, to wit, A[...] B[...] M[...] (the complainant) who, at the time was twenty years old, by inserting their penises into her vagina, without her consent;

[2.1.2] S 51(1) of the Minimum Sentence Act was made applicable to this count by reason of the fact that the complainant was raped by more than one person.

[2.2] Count 2, theft:

According to this count, it was alleged by the State that the Appellants were guilty of the crime of theft, read with the provisions of s 264 of the Criminal Procedure Act 51 of 1977 the CPA. The allegations of the charge were that on or about the date and at the place mentioned in count 1, the two Appellants did unlawfully and intentionally steal a handbag, a Hisense mobile phone and an undisclosed amount of money, the property, or in the lawful possession, of the said complainant.

[3] The First Appellant was charged, in count 3, with contravention of s 3 of the SOA, rape and in count 4 with theft:

[3.1] In count 3, it was alleged by the State that on or about 24 July 2017 and at or near a road in Soshanguve, in the regional division of Gauteng North, the First Appellant did unlawfully and intentionally commit an act of sexual penetration with a female person, namely P[...] M[...], (the complaint), who at the time was 21 years of age, by inserting his penis into her vagina, without her consent:

[3.2] the provisions of s 51(1) of the Minimum Sentence Act were applicable to this count 3 under the following circumstances:

[3.2.1]

(i) in circumstances where the victim was raped more than once, whether by the Appellants or any other person by penetration or accomplice;

(ii) by more than one person where such person acted in the furtherance of a common purpose of conspiracy;

(iii) where the victim is a person under the age of 16 years;

(iv) where the rape involved the infliction of grievous bodily harm;

(v)

where the victim is a person who is mentally disabled or as contemplated in section 1 of the Criminal Law Amendment Act 32 of 2007.

[3.3] Count 4

In count 4 the First Appellant was charged with theft, read with section 264 of the CPA, it being alleged by the State that on the date and at the place mentioned in count 3, the First Appellant did unlawfully and intentionally steal a bag containing a wallet and a mobile phone, the property, or in the lawful possession, of P[...] M[...] (the complainant).

[4] The Appellants enjoyed legal representation by a certain Mr Makama throughout the whole trial. The Appellants both pleaded not guilty to the counts they were facing. Their pleas were confirmed by their legal representative.

[5] Both Appellants made written plea explanations in terms of s 115 of the CPA:

[5.1] In respect of count 1, the First Appellant made a plea explanation that included the following admissions, that:

[5.1.1] he was the driver of the Toyota Quantum in which the complainant was conveyed;

[5.1.2] he loaded the complainant as a passenger near McDonald restaurant in Wonderpark;

[5.1.3] he had sexual intercourse with the complainant;

[5.2] the First Appellant's defence regarding count 1 was that he had sexual intercourse with the complainant with her consent and had paid her R100.00, R50.00 for himself and the other R50.00 for the Second Appellant.

In respect of count 1, the only dispute between the First Appellant and the State was whether sexual intercourse between the First Appellant and the complainant took place by consent as stated by the Appellant in his s 115 plea;

[5.3] there is a hidden admission that the First Appellant made in his plea explanation, that hidden admission is that he paid R100.00 for his sexual intercourse with the complainant. That admission follows in a statement or explanation that "/ paid R100.00 for sexual favours with the complainant, R50.00 for myself and another R50.00 for Kabelo." Kabelo is the Second Appellant in this appeal;

[5.4] the foregoing admission, the veracity of which must be determined by the evidence was the following:

[5.4.1] the complainant was penetrated more than once;

[5.4.2] by at least two people.

[6] In respect of counts 2, 3 and 4 the First Appellant chose to make no plea explanation. This is in keeping with s 35(3)(h) of the Constitution which provides that:

"35(3) Every accused has a right to a fair trial which includes the right- '

(h) to be presumed innocent, to remain silent, and not to testify during the proceedings."

[7] S 35(1) of the Constitution gives the Appellant the right to remain silent. According to its provisions:

"35(1) Everyone who is arrested for allegedly committing an offence has a right-

(a) to remain silent.

This section does not indicate the stage at which this arrested person may remain silent. Is it when the police require him to make a statement about the offences arrested for; or when he appears before the court and the presiding officer requests him to make a statement or when his attorney approaches him to make a statement?"

[8] After Mr Makama had read the contents of his written plea explanation into the record, the First Appellant confirmed it. The written plea explanation was accepted by the Court as Exhibit '1'.

THE PLEA EXPLANATION ,OF THE SECOND APPELLANT

[9] In respect of count 1, the Second Appellant also made a written plea explanation in terms of s 115 of the CPA, which was accepted by the court a quo and marked Exhibit '2' after the Second Appellant's legal representative had read it into the record and the Second Appellant had confirmed it. In the lengthy plea explanation that he made, the Second Appellant made the following admissions which were recorded by the trial court:

[9.1] he admitted that on the date reflected in the charge sheet he was a passenger in the Toyota Quantum that was driven by the First Appellant, Johannes Msiza;

[9.2] he admitted that the complainant entered the motor vehicle at or near McDonalds restaurant in Wonderpark;

[9.3] he had sexual intercourse with the complainant, without a condom;

[9.4] Johannes, the First Appellant, had paid the complainant R100.00 for the sexual favours, R50.00 for himself, the Second Appellant, and the other R50.00 for himself, the First Appellant;

[9.5] he denied that he had threatened, assaulted, raped or kidnapped the complainant. He denied furthermore that he had forced the complainant to have sexual intercourse with him.

[10] The battlefield between the Second Appellant and the Respondent was consent. In other words, there was an onus on the Respondent to dispute, by way of evidence, the defence by the Second Appellant that he had sexual intercourse with the complainant with her consent.

OTHER ADMISSIONS

[11] Other admissions that emanated from the Second Appellant's plea explanation were that:

[11.1] the complainant was penetrated more than once;

[11.2] by at least two people.

[12] In respect of count 2 the Second Appellant chose to make no plea explanation. Instead, he chose to remain silent.

[13] The State then applied for the admission of the medico-legal report, the J88, to be handed in as evidence. There was an objection against the State's application. The court a quo then, brought the provisions of s 212(4) of the CPA to the attention of the legal representative and asked him to furnish his reasons why the medico-legal report should, and could, not be accepted by the court as evidence. The legal representative persisted with his objection in the face of the explanation of the provisions of s 212(4) of the CPA by the Magistrate. The State was asked to comment. The public prosecutor argued that since the legal representative had failed to furnish any reasons why the medico-legal report should not be handed in, he persisted with his application.

[13.1] The court a quo then explained the import of s 212(4) of the CPA to the Appellants; the duty of the person who objects to furnish the reasons or good cause or reasons why the medico-legal report should not be admitted into evidence and the consequences of failure to do so. She thereafter made a ruling in terms of which she admitted the medico-legal report into evidence as Exhibit 'C';

[13.2] Thereafter the DNA results, which positively linked the Second Appellant to the sexual intercourse with the complainant in count 3, was handed in into evidence without any objection. This was, as the court a quo pointed out, even though the Second Appellant had admitted having had sexual intercourse with the complainant on the date mentioned in the charge sheet.

[14] Despite their pleas of not guilty to the charges against them, the court a quo found the two Appellants guilty as charged and sentenced them, upon conviction, as follows:

[14.1] The First Appellant

Counts 1 & 3: life imprisonment;

Counts 2 & 4: each 5 years' imprisonment.

The court then made an order in terms of s 280(2) of the CPA that the sentences imposed on the First Appellant in respect of counts 2, 3 and 4 should run concurrently with the sentence of life imprisonment imposed on the First Appellant in respect of count 1.

[14.2] The Second Appellant

The Second Appellant was sentenced to life imprisonment in respect of count 1.

[14.3] The two Appellants were disgruntled by their convictions and sentences. So, they exercised their rights to appeal against both their convictions and sentences. That is how the matter came before us.

[15] Subsequent to their sentences, the two Appellants, still through their same legal representative, delivered their notice to appeal against both conviction and sentence on * August 2022. The Appellants had an automatic right to appeal, which was granted to them, by s 309(1)(a) of the CPA

ISSUES IN DISPUTE

[16] Conviction

[16.1] In respect of counts 1 and 3, we have pointed out somewhere above that, in the light of the admissions made by them in Exhibits 'A' and 'B', the only element that the State had to prove against the two Appellants in respect of counts 1 and 3 was that sexual intercourse between the Appellants and the complainant in count 1 was not with the consent of the complainant, as put forward by the Appellants.

[16.2] In respect of the rest, the State had an onus to prove all the elements of the offences. In terms of our law, a person accused of having committed an offence is presumed to be innocent until his guilt has been proved. State has a common law duty to prove beyond reasonable doubt that the person has committed the offence with which he is charged. The duty to prove the case beyond reasonable doubt includes, with reference to the current matter, the duty to prove that the sexual offence did not take place with the consent of the complainants, as pleaded by the Appellants.

[16.3] As early as 1883 in *R v Benjamin* 3 EDC 337 at 338, Buchanan J, stated that:

"But in criminal trial, there is a presumption of innocence in favour of the accused, or which must be rebutted. Therefore, there should not be a conviction unless the crime charged has been proved to have been committed by the accused. Where the evidence is not reasonably consistent with the prisoner's innocence, or where reasonable doubt as to his guilt exists, there should be acquittal."

[16.4] It will be recalled that in *R v Ndlovu* 1949 AD 369 the court gave an authoritative support of the fundamental principle of our law that the onus rests on the State to prove its case. Davis AJA, as he then was, had the following to say:

"In all criminal cases it is for the Crown to establish the guilt of the accused, not for the accused to establish his innocence. The onus is on the Crown to prove all the elements necessary to establish its guilt."

Consequently, on a charge of rape, the State must prove that the sexual intercourse was unlawful and intentional. In other words, it must prove that the sexual offences did not take place with the consent of the complainant. The State can discharge the onus either by direct or evidence or by the admissions made by an accused person or by the facts from which the reasonable inference may be drawn.

THE EVIDENCE OF THE RESPONDENT'S WITNESSES

[17] The evidence of A[...] B[...] M[...]

[17.1] The first witness who testified for the Respondent in this matter was A[...] B[...] M[...] ("Ms M[...]"). She was the complainant in count 1- which involved both the First and Second Appellants. She also was the complainant in count

2. As on the date of the incident, Ms M[...] was employed at Parrots, a food selling dealer in Wonderpark. On that evening she worked alone until after 21h00. As a result of that, she knocked off late because, before going home, she had to tidy up the restaurant.

[17.2] After knocking off, she walked to the taxi station where, while waiting, a white quantum minibus arrived. Inside this minibus, were two male persons. These two male persons were the First and Second Appellants. According to her testimony, she did not know them before but started knowing them on the occasion that took place on

[17.3] She was looking for a taxi that would take her to Itsoeng, in Erasmus where she was going. A certain strange boy asked the two Appellants if the taxi was going to Itsoeng, and they said "yes".

[17.4] Because of their response, she got into the taxi, and it drove off. Along the way the taxi took a different turn into the direction she was not going to. She became unsettled.

She asked the Appellants if the taxi was going indeed to Itsoeng, because she had paid the full price for the trip to Itsoeng. They reassured her that they would take her home by telling her that they were first going to buy liquor somewhere in the direction they had taken, whereafter they would drive to Itsoeng. They stopped the taxi at a certain tavern, and both got off, leaving her alone in the taxi. They returned to the taxi and drove off, taking the route that led them to Itsoeng.

[17.5] Along the way there was a Sasol tank station at a T-junction where they were supposed to proceed straight, if they were in truth driving to her destination. Instead of proceeding straight at that T-junction, they made a turn. She again became concerned. She asked them again if they were going to Itsoeng. Instead of answering her, the First Appellant produced a firearm, showed it to her and thereafter slapped her and ordered her to look down. Because of that order, she did not look at the road anymore as she had been ordered to face down. She did not know where the taxi was heading to. The taxi drove for quite a long distance.

[17.6] She could hear them talking. She heard them saying that after they had finished with me, they would throw or drop her at Tradeway. The taxi continued until it stopped among some shacks. She could only see shacks around the taxi.

[17.7] Then the Second Appellant came to sit with her where she was sitting, just behind the driver's seat. The First Appellant ordered her to take off her trousers and underwear. They instructed her to lie on the seat. The Second Appellant was the driver of the taxi. He was the one who came to sit with her on the seat just behind the driver's seat. It was the First Appellant who had instructed her to take off her clothes and to lie on the seat she was sitting on.

[17.8] The Second Appellant unzipped his trousers, pulled down his trousers up to the upper thigh, and inserted his penis inside her vagina. Thereafter he informed the First Appellant that he was done having had sex with the complainant.

[17.9] Thereupon the First Appellant came to her, unzipped his trousers, pull them down, and inserted his penis into her vagina.

[17.10] She noticed that they started panicking. They looked scared. They ordered her to put on her clothes. They drove off from where they had stopped and intermittently looking back. They took money and a cell phone inside her purse. At this stage she was sitting up. As they looked back, she also looked back. She saw a motor car. It looked like this car was chasing them. It was switching its headlights dim, bright, dim, bright repeatedly. The two Appellants stopped the taxi, got off it and fled on foot.

[17.11] She got a chance to get out of the taxi. She ran to the motor vehicle and informed the people in the motor vehicle that she had been raped. The people in the motor car took her to the police station where she made a statement about the incident. She was also taken to a health centre at Block BB, Soshanguve, where she received medical treatment to prevent her from getting HIV and also from falling pregnant.

[17.12] As she testified, she told the court that at the tavern to which they had driven, it was the First Appellant who got off the taxi while the Second Appellant, who was the driver at all material times, remained in the motor vehicle.

[17.13] She does not know whether the First Appellant was wearing a condom when he penetrated her. It was the First Appellant who took her cell phone and money. She has not recovered her cell phone.

[18] The evidence of Tumelo Joseph Khoza (Khoza)

[18.1] He was the State's second witness. He knew both Appellants. He and them are in the taxi industry. He testified that in the morning of 12 December 2017, he asked the First Appellant to drive the Quantum as the usual driver had, because of being indisposed, failed to come to work. He gave the motor vehicle to the First Appellant around 9h00 and instructed him to return the taxi at Moosa's place before 20h00.

[18.2] He realised at 22h00 that the First Appellant had not returned the motor vehicle. He became concerned and called him on his mobile phone. He did not get hold of him. His phone was off. He then called the owner of the Quantum so that he could track it. The owner promised to come back to him, which he did. They tracked the Quantum and located it somewhere next to Phutanang Police Station, which is situated in Block PP, in Soshanguve. They decided to drive to that spot. Just before they could arrive at Shell Tank Station in Block GG, Soshanguve, they spotted the motor vehicle. They turned around and followed it. As they were following it, it approached a place that is referred to as "Stout School".

[18.3] As they were following it and were expecting it to turn right at Stout School, it turned left instead. They then decided to pursue it whilst they were at the same time flashing their headlights, indicating that it should stop. It did not stop. They followed this motor vehicle until they caught up with it and drove parallel to it. They then lowered the driver's passenger's window and screamed at Johannes, the First Appellant, to stop. The driver of the Quantum slowed it down after the witness had told him that they were looking for the motor vehicle. They moved to the front of the quantum so that they could park there. To their surprise, the driver made a u-turn and sped off. Two persons then alighted from the motor vehicle and ran into the bush. They also alighted from their motor vehicle and pursued the two on foot and whilst he was running after them, he at the same time was screaming at them to stop. When he could not catch up with them, the stopped, turned, and walked back to their motor vehicle.

[18.4] As he was walking towards the Quantum, he saw a girl. This girl was crying. She was, in fact, screaming. He arrived where this girl was. He realised that this girl was walking barefooted and furthermore that she was shaking. He said that the girl, the complainant in this in this charge, told him that these people, referring to the Appellants, picked her up in a taxi at Wonderpark, pointed her with a firearm and raped her. It is for that reason that they took the complainant to the police station.

[18.5] Before they left the police station, the police took the statement of the owner of the taxi Quantum. The First Appellant was supposed to bring the taxi back by 20h00. This taxi was normally parked at Trott's place at Block DD in Soshanguve and the First Appellant knew this. But in terms of the arrangements, he was supposed to bring the taxi to him at Moosa's place.

[18.6] During the time in which he was trying to stop him, the First Appellant was aware that it was him who was trying to stop him. He saw him because the windows of their motor car had been rolled down.

[18.7] In terms of the rules of the Taxi Association to which the Quantum taxi belonged, it was not allowed to pick up passengers at Wonderpark. That area falls under Erasmus Taxi Association. It was also not supposed to drop passengers in and around Erasmus. The First Appellant did not even give him the takings for that particular day.

[19] The evidence of Andries Matlala

[19.1] This witness was the owner of the Quantum motor vehicle that was involved in this case; the Quantum motor vehicle in which the complainant in count 1 was raped; the Quantum motor vehicle that the second state witness, Mr Khoza, gave to the First Appellant on 12 December 2017 to go and convey passengers.

[19.2] On the morning of 12 December 2017, he received a report from Khoza that one of his motor vehicles, HD4[...], did not have a driver. He requested him to decide with someone to take over.

[19.3] Around 20h00 he received another report from Tumelo that the HD4[...] motor vehicle had not been brought back as it should have been and that it was not where it was supposed to be parked; that he tried to call the person he gave the motor vehicle to, but his phone was off. He then activated the tracking device on his mobile phone to locate the motor vehicle. He was able to do so. After a terrific struggle, twists and turns, the Quantum stopped and two people got off it and fled into the bushes.

[19.4] A woman came out of the motor vehicle. She was walking barefooted. She started to cry. She looked scared. She informed him that she had been raped. He then decided to take the woman to the police station so that she could lay charges against those who had raped her. They drove to Rietgat Police Station where the matter was reported.

[20] The evidence of Obed Malope

[20.1] This witness was a sergeant stationed at Temba Police Station. He was the investigating officer of these cases. He assisted by arresting the two Appellants. He told the court that when he arrested both Appellants, firstly the First Appellant and later the Second Appellant, on the same day and that before arresting them he informed them each of the reasons for their arrests and that both told him that they remembered the cases because he, the First Appellant, had consensual sex with the complainant.

[20.2] The First Appellant was arrested during the day while the Second Appellant was arrested later in the evening.

THE EVIDENCE IN RESPECT OF COUNTS 3 AND 4; 8 MARCH 2021

[21] The evidence of P[...] M[...].

[21.1] This witness was the complainant in count 3, the count of rape. At the time when this incident took place in Soshanguve, she was staying in Mamelodi. She was chasing nice time in Soshanguve. On 24 July 2017 she and some friends of hers looked for a place where they could carousel. They found it in Soshanguve. Having enjoyed themselves, around 03h00 or 04h00 they sought transport to take them back to Mamelodi. She found a gentleman who volunteered to take them to Mamelodi for a fee. That was the time when the taxis were beginning to operate.

[21.2] At the same time her friends were also engaged in negotiations with someone to take them back to Mamelodi. So, she left this gentleman she wanted to decide with and went to join her friends. The six of them got into a Quantum motor vehicle, three males and three females-. The Quantum drove off. She was sitting on the seat behind the driver's seat with Nthabiseng. She fell asleep.'

[21.3] A male passenger who was seated with her in the Quantum suddenly produced a firearm. He ordered them to alight from the motor vehicle. As they were alighting from the motor vehicle, he ordered her to remain inside. He pointed at her and said, "I will shoot you". She wanted to get off the motor vehicle by force but the man with the firearm struck her with the firearm on the forehead. But still she continued to struggle to get out of the motor vehicle. She grabbed Nthabiseng so as to make it difficult for the gunman to separate them. This time, the gunman hit her with the firearm on the mouth and broke one of her teeth. As a result of the blow, she left Nthabiseng. The rest went out of the motor vehicle, and she was left behind.

[21.4] The gunman then ordered her to go to the second row of the motor vehicle. In fact, he pushed her to that seat and once she was there, ordered her to bend over. She was supposed to stand on her haunches. She obliged. The gunman then took his trousers off, fished his penis out of his zip and inserted it into her vagina and raped her. After finishing, he gave her a piece of cloth and ordered her to wipe herself with it.

[21.5] After he finished, he moved over to the driver seat and the driver came over to the second row. When he came over to the second row, he, the driver, asked her if she had a condom. She said that she did not. This second man, the driver, wanted her to give him a "blow job". She injured this person. He then said that she should leave him. The motor vehicle continued. They drove past a squatter camp and as they were proceeding, police officers' motor vehicle appeared. When the police appeared the men in the Quantum instructed her to hide so that the police could not see her.

[21.6] She was then ordered to get off the motor vehicle. When she got off the motor vehicle, she asked for her handbag. They refused to give her the handbag. Instead, they simply closed the door of the motor vehicle. Inside the bag were her cell phones and ID. As the motor vehicle pulled away, she was unable to see its registration numbers and letters as the number plate had been removed. As she was walking, she met someone who guided her to where the police station was.

[21.7] She reached the police station and there she explained to the police what had happened to her. She made her statement. A certain Mr Lekalakala then took her to the clinic at Block BB, Soshanguve, where she was examined and received medical treatment.

[21.8] The person who raped her removed her pants forcibly and, in the process, tore them. He did not use a condom. This is so because he ejaculated into her vagina and gave her a cloth thereafter to wipe herself with it. The First Appellant is the one who produced a firearm and hit her with it.

[21.9] After an argument between the Appellants' legal representative and the public prosecutor and after the court had intervened to explain the law about DNA and J88 medico-legal reports, the DNA medical report was accepted by the court as Exhibit 'E', while the J88 medico-legal report was accepted as Exhibit 'F'.

[21.10] According to the legal representative of the Appellants, the First Appellant, who was driving the Quantum, saw the complainant and a certain Long through the rear-view mirror having sexual intercourse in the

Quantum. The witness denied this. She testified that that statement was not true. Further, according to the legal representative, the said Long ejaculated and he instructed the First Appellant to come and sit with her where the witness was sitting. On a question by the court, she testified that the "blow job" did not continue because the person who wanted it complained that it was hurting him. During cross-examination of this witness, after she had been recalled to the witness box, Exhibit 'G', which is an Adult Sexual Assault Evidence Collection Kit, was handed in.

[22] The evidence of N[...] M[...]

[22.1] She was the State's sixth witness. Up to the point where she and P[...] parted ways, the point where P[...] was prevented from going ff the quantum, their evidence is the same and it is therefore not necessary to repeat it here. She was adamant with her evidence and never contradicted herself. She never prevaricated.

[22.2] After the testimony of N[...] M[...], the public State applied to the court to hand in the chain statement of sexual intercourse by a medical doctor and the statement of Obed Malope into evidence as Exhibit 'K'. The application was granted. Thereafter he informed the court that it would lead no further evidence.

[23] The evidence of Johannes Şiyabonga Msiza (The First Appellant).

[23.1] He testified that on 12 December 2017 he was the taxi driver of a Toyota Quantum with registration number HD 4[...]. On that day, he saw a lady waiting at a bus stop at Wonderpark. It was raining and there were not many motor vehicles at the time. It was around 22h00. He asked her where she was going, and she told him that she was going to Erasmus. They told her that their motor vehicle was not going to Erasmus, but she said that she would get other taxis where they would drop her off along the way.

[23.2] They were going to use the road to Vic's Pub at Block TT via Extension. They asked her where she would get off and she said she would get off at the garage at Extension 2.

[23.3] As they were proceeding, Kabelo, the Second Appellant spoke to her. He asked her who she was, but she did not want to speak to him. He asked her whether she could buy him cold drink or two beers. He asked her what she would drink. She said she did not mind if he bought her alcohol. She also said that she did not mind if he bought her cold drink.

[23.4] He asked her if she did not mind if he went and sat with her at the back.

[23.5] He asked her where she was from and what she was doing and what type of work she was doing.

[23.6] He was with Kabelo, and they had to drop the motor vehicle at Tumelo, at Block XX, Soshanguve, and they were going to 'chill out' (township language for 'to cheat time') at a certain place. He and Tumelo were going to buy or pay for her services. She agreed.

[23.7] He testified furthermore that he said he would give her R100.00 and Kabelo was going to give her another R100.00 and they would take her home the following day.

[23.8] He asked the complainant what was in the bag. There were condoms, lipsticks, and a comb in the bag. He asked her if there was any problem if they started sleeping together. Then she said no, let us jump to the back seat.

[23.10] She took off her clothes and he also took off his clothes and then she took out a condom. Thereafter, she climbed on top of him, and they had sexual intercourse with the complainant.

[24] The First Appellant's evidence on P[...] Mkize

[24.1] The first Appellant testified that he was involved in the social club at Block KK, Soshanguve. He was a member of that social club. He saw P[...] M[...] fight with her husband.

[24.2] P[...] would not leave with her husband because she had found someone new.

[24.3] As members of the social club, they proceeded there to enquire what was happening. They were told that there was a fight.

[24.4] He was the driver of the motor vehicle (the Quantum) in which there were three males and three females when the motor vehicle left the party or club.

[24.5] After Thapelo had alighted, he left the driver's seat and went to sit with a certain lady, not a witness in this case, at the back. He then asked this lady that he had heard that they were from Mamelodi. They went to sit on the front seat and had an agreement that they were going to his place. They were going to sleep together, all five of them.

[24.6] As this motor vehicle was moving, and Long was driving and he was sitting on the front seat, the females in the Quantum, opened the door of the motor vehicle. He asked Long to stop the motor vehicle. Long stopped the motor vehicle and the complainant opened the door and fled into the township.

[24.7] The girls who ran away were two. P[...] was still asleep. P[...] called them back. Still, they fled into the build-up area. She then said: "no let us leave them, let us proceed".

[24.8] He did not want to have sex with P[...]. He wanted a 'blow job'.

[24.9] He said P[...] burst out of the motor vehicle without taking her bag. He disputed that the statement that they forced her and furthermore that when she asked for her bag, they refused to give it to her.

[24.10] The First Appellant challenged the correctness of the DNA on the ground that he never had any sexual intercourse with the complainant. According to him he only had a 'blow job' with the complainant and ejaculated into her mouth. According to her it was Long that the complainant had sexual intercourse with.

[24.11]

The crucial question now is, if it was Long that had sexual intercourse with her why did the DNA results point to the First Appellant as the person whose DNA was found in the analysis?

[25] The evidence of the Second Appellant

[25.1] He testified that on the day in question they were driving a white motor vehicle and it was being driven by Johannes Msiza and himself, Kabelo Mothlape, who was a passenger. They met a person at a bus stop at Wonderpark. That person was standing or waiting near the bus stop. It was a woman. They stopped the motor vehicle. He opened the door on the left side and asked her where she was going.

[25.2] That person said that she was going to Erasmus and the driver said to her that they were not going to Erasmus. After she had said that she was going to Erasmus, the driver told her that they will drop her off somewhere else. She said that she would not mind it.

[25.3] That person opened the sliding door, entered inside the motor vehicle, and sat behind the driver's seat on the passenger's seat. They then drove off. While the motor vehicle was in motion, he turned and asked her who she was. She answered him by saying that she was L[...]. He proposed love to her as her name meant 'love' and she answered by smiling, showing her dimples. Then he asked her where she came from? The woman said she was from work. He asked the woman about the kind of work she was doing, because it was late, and she knocked off late. The woman said that she was a prostitute. He said to her, because she said that she was a prostitute, if he wanted to have one round of sex with her, how much would one round cost him? The complainant told him that one round would cost him R50.00. That woman was the complainant. He stopped asking the complainant any more questions when she said, "hey brother, you ask too much, leave me alone". Upon that point the complainant started having a conversation with the First Appellant.

[25.4] He testified that when they arrived at Block M, Soshanguve, he started noticing L[...] doing a 'blow job' on Johannes, that is the First Appellant. He saw the complainant climb\ng on top of the First Appellant. Then he saw L[...] lying down on the seat. While she was lying down on the seat, the First Appellant came on top of her. He said thereafter he focused on the road ahead while the First Appellant and the complainant were having sexual intercourse until they finished their sexual intercourse. He testified furthermore that after leaving Block XX, he asked the complainant if there would be any problem if he also paid an equal amount so that he could have sex with her. The complainant said there was no problem. She told him that the First Appellant had given her R100.00. The First Appellant confirmed that indeed he had paid R100.00 and asked her if that included a contribution for him. The First Appellant said they were together. So, he

turned to the complainant and asked her "madam would you have a problem?". She said "no, there is no problem." she undressed herself and he also undressed himself and they had sexual intercourse.

THE CONVICTION OF THE APPELLANTS

[26] The court a quo was satisfied that the State had proved its case against the First Appellant in respect of counts 1, 2, 3 & 4 and against the Second Appellant, the court a quo ruled in respect of count 1.

[27] The Appellants were disgruntled by their convictions by the court a quo. So, on 8 July 2022, they lodged their notice to appeal against the conviction by the court a quo on 10 December 2022 on the following grounds:

[27.1] In respect of count 1 it is stated in paragraph 2.4 of their notice of appeal that:

"The court erred in failing to properly evaluate the Appellants' oral evidence by sympathising with the complainants due to the fact that she was crying whilst giving evidence and during cross-examination."

This ground is not clear, this court will, however, accept or assume that the Appellants had planned to frame their ground of appeal as follows:

"The court erred in failing to properly evaluate the evidence of the complainants.

[27.2] The court a quo erred in over-emphasising the complainants' evidence due to the fact that she was crying while giving evidence and during cross-examination. In terms of the notice of appeal this is the one and only ground of appeal raised by the Second Appellant against their conviction in count 1.

[28] The grounds of appeal against the conviction of the First Appellant in ground 3 was that: "The court erred in convicting the Appellant for gang rape even though no such evidence was led. The DNA results was to the effect that the semen of Appellant 1 is the only the semen found by the medical practitioner."

[29] Additional grounds of appeal were also set out in the heads of argument, a practice that should be discouraged. Heads of argument are not notices of appeal.

[30] This court, being an appeal tribunal sitting as it was, was guided by the principle according to which a court of appeal should consider an appeal as set out in *R v Dhlumayo* 1948 (2) SA 677 (A), 686. When an appeal is lodged against a trial court's findings, the trial court, like the present one, considers the fact that the trial court was in a more favourable position than itself to form a judgment because the trial court was able to observe the witnesses during their testimony and was absorbed in the atmosphere of the trial from the beginning to the end. At the outset the Appeal Tribunal must therefore assume that the trial court's findings are correct. Unless a trial court misdirected itself on the points of law or fact, the Appeal Tribunal will accept those findings. See in this regard *S v Tshoko en Andere* 1998 (1) SA 139

(A) at 142.

- [31] The court a quo was aware that the duty to prove its case beyond reasonable doubt lay on the State. It was aware, furthermore, that no duty lay on the Appellants to prove their case or their innocence. It accepted the principles that it was enough if their versions were reasonably possibly true.
- [32] It is quite clear that the court a quo, and quite correctly so, in our view, accepted the evidence of the complainants or of the State witnesses. The court a quo even made favourable remarks about the evidence of the complainants. In accepting the complainants' evidence, the court a quo stated that the single evidence of a competent witness must be approached with caution. This is no longer part of our law. The court a quo pointed out that to be acceptable for the purposes of conviction, such a witness must be credible and reliable. Quite correctly so, the court a quo referred to the two authorities on the fact that the cautionary rule is no longer part of our law. These are *S v Jackson* 1998 (1) SACR 470 (SCA) where the court stated that: "The cautionary rule in sexual assault cases was based on an irrational and outdated perception. It unjustly stereotyped complainants in sexual cases."
- [33] The court a quo was satisfied with the evidence of the complainants. It made favourable remarks about the complainants as witnesses. About the complainant in counts 1 and 2, the court a quo observed that at the time these offences were committed, she was only 20 years old but at the time she testified in the matter, she was 23 years old. It observed further that when she testified, she gave an impression of a matured and sensible lady who testified in a straightforward and forthright manner. She answered all the questions put to her by the public protector, the defence attorney, and the court. It observed furthermore that she was cross-examined extensively and vigorously by the Appellants' legal representative. She withstood such questioning and never prevaricated or contradicted herself in any manner. The court was satisfied with her evidence. It had no valid grounds to reject it. It was satisfied that the State had successfully proved that the complainant had not consented to sexual intercourse with the Appellants.
- [34] With regard to the complainant in counts 3 and 4, the court remarked that the complainant impressed it as an honest witness. It pointed out that during her testimony, she admitted that she was heavily under the influence of alcohol. She conceded that she fell asleep in the motor vehicle up to the stage where a male passenger was dropped off. She again fell asleep and woke up when her friends were being forced out of the motor vehicle. The court a quo saw that she was honest by saying that she was unable to identify the man who hit her. The court a quo made favourable remarks about her evidence. There was no valid basis on which her evidence could be rejected. It was credible in almost all respects.
- [35] The court a quo made adverse remarks about the evidence of the Appellants. The evidence of the Appellants was a complete fabrication. It also came to the fore after all the State witnesses had testified. For inexplicable reasons it was never put to the State witnesses while they were testifying. The court a quo, quite correctly, rejected it. Mr Botha, who appeared

for the appellants in the appeal, acknowledged, when the court asked for his view, that the Appellants' evidence in the court a quo was riddled with problems. He could not support it. In our view, the Appellants were correctly convicted. We are satisfied that the appeal against conviction cannot succeed, must therefore fail.

SENTENCE

- [36] In their appeal against sentence imposed on them by the court a quo, the Appellants mentioned several grounds. There are eight grounds on which the Appellants challenge their sentences. At the hearing of the appeal, no reference was made to any of such grounds by their legal representative, Mr Botha, a seasoned legal practitioner. This was, in our view, an indication of the correctness of the sentences imposed on the Appellants by the court a quo. The challenge to the sentences imposed on the Appellants faded away during the hearing of the appeal.
- [37] Mr Botha, however, raised two other grounds. That was that the court a quo did not do enough to obtain the relevant personal information of the Appellants. According to him, that prejudiced the Appellants because it implied that the Appellants did not receive a fair trial. It will be recalled that at the trial, the Appellants were fully represented by an attorney who placed their personal circumstances before the court for purposes of their sentence. Neither of them testified in respect of sentencing. Their personal circumstances were placed on record from the bar, which is not unusual. What is of supreme importance though, is that the court a quo had before it pre-sentencing reports that augmented whatever shortcomings there would have been in the information of the two Appellants placed before the court a quo by the legal representative.
- [38] The Appellants' representative informed the court that while he would place the Appellants' personal circumstances on the record, he also relied on the social worker's reports. So, in our view, the court a quo had before it all the information it required to determine whether there existed any substantial and compelling circumstances to force it not to impose a lesser sentence.
- [39] While we accept that there is no definition of substantial and compelling circumstances, we acknowledge that one circumstance or two circumstances may amount to substantial and compelling circumstance or circumstances. The court a quo was correct in finding that there were no substantial and compelling circumstances. Under such circumstances, the Court a quo was not at large to deviate from imposing the ordained sentence for flimsy reasons. It was under an obligation to impose the prescribed sentence. In *S v Shikunga and Another* 1997 (2) SACR 470 (NmSC) at page 486, the court had the following to say:

"It is trite law that the issue of sentencing is one which vests a discretion in the trial court. An appeal court will only interfere with the exercise of this discretion where it is felt that the sentence imposed is not a reasonable one, or where the discretion has not been judicially exercised. The circumstances in which a court of appeal will interfere with the sentence imposed by the trial court are where the trial court has misdirected itself on the facts or the law (S v Rabie 1975

- (4) SA 855(A), or where the sentence that it imposed is one which is manifestly inappropriate and, induces a sense of shock (S v Snyders 1982 (2) SA 694(A)); or is such that a patent disparity exists between the sentence that was imposed and the sentence that the court appeal would have imposed; or where there is an over-emphasis of the gravity of the particular crime and under-emphasis of the accused's personal circumstances."

In this regard, See S v Maseko 1982 (1) SA 1999 (A) at page 102 and S v Corlet 1990 (1) SACR 469 (A).

[40] The personal circumstances of the Appellants were fully placed on record by the attorney before the court a quo so that the court a quo could assess the appropriate sentence it would impose on the Appellants. The court a quo had to decide whether such personal circumstances or any other factors constituted substantial and compelling circumstances that would have enabled it to deviate from imposing the prescribed sentence. The court a quo could only deviate from imposing the ordained sentences if it was satisfied that substantial and compelling circumstances existed. The court a quo thoroughly considered the Appellants' circumstances but could find no such substantial and compelling circumstances. We agree with the Respondent's counsel that the court a quo correctly found no substantial and compelling circumstances when it assessed the information placed before it.

[41] Any Appellant who appeals against sentence must satisfy the court that the appeal court is justified to interfere with the sentence imposed by the court a quo. This he can do by showing the appeal court that the Judge or Magistrate has committed a misdirection; or that the Judge or Magistrate misdirected himself on the law or the facts or has exercised a discretion capriciously or upon a wrong principle or so unreasonable as to induce a sense of shock. The discretion is exercised improperly if it is predicated on a reasonable misdirection. We place reliance on the case of S v Shikunga above in this regard.

[42] On the facts before us, we have looked in vain for any misdirection. The appeal against sentence too cannot succeed.

[43] In the result, the following order is hereby made:

The appeal, against both conviction and sentence, is hereby dismissed.

PM MABUSE

JUDGE OF THE HIGH COURT

NL TSHOMBE

ACTING JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Appellants: Mr MG Botha Instructed by: Pretoria Justice Centre, legal Aid Board

Counsel for the Claimants/Respondents: Adv KM Mashile Instructed by: Director of Public

Prosecution, Pretoria Date heard: 16 May 2023 Date of Judgment: 16 August 2023

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Prepared on 11 October 2026 · Esheria