

SOUTH AFRICA / JUDGMENT

Olifant v S (A90/2022) [2023]

ZAFSHC 132 (17 April 2023)

[2023] ZAFSHC 132

COURT

Free State High Court, Bloemfontein

BEFORE

Van Zyl, Daniso

CASE / FILE NUMBER

A90/2022

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IN

THE HIGH COURT OF SOUTH AFRICA

FREE

STATE DIVISION, BLOEMFONTEIN

Reportable:

YES/NO

Of

Interest to other Judges: YES/NO

Circulate

to Magistrates: YES/NO

Appeal

no.: A90/2022

In

the appeal between:

MOJALEFA

HAMILTON OLIFANT Appellant

and

THE

STATE Respondent

CORAM:

VAN ZYL, J et

DANISO, J

HEARD

ON:

17 OCTOBER 2022

JUDGMENT

BY: VANZYL, J

DELIVERED ON: 17 APRIL 2023

- [1] The appellant was charged with 1 count of contravening section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007, read with, inter alia, the provisions of section 51(1) of the Criminal Law Amendment Act, 105 of 1997.
- [2] In terms of the said count it was alleged that on or about 13 - 14 November 2020 in the district of Excelsior the appellant unlawfully and intentionally committed an act of sexual penetration with the complainant, S[....] G[....] M[....], 26 years of age, by penial penetration more than once without her consent.
- [3] The appellant was legally represented during the trial.
- [4] The appellant pleaded not guilty, but on 1 September 2021 he was convicted as charged.
- [5] On 22 September 2021 the appellant was sentenced to life imprisonment.
- [6] The appellant has an automatic right of appeal, in terms whereof the appellant's appeal is directed against both the conviction and sentence.
- [7] In terms of the notice of appeal the grounds of appeal can be summarised as follows:

Ad conviction:

- 1. The court erred in finding that although the complainant was a single witness, her evidence was reliable in all material respects notwithstanding the fact that her version was not corroborated by the other state witnesses.
- 2. The Court erred in finding that the appellant was not a reliable witness, despite corroboration for his version.
- 3. The court erred in not finding that the medical evidence can be considered to also support the version of the appellant.
- 4. The court erred in finding that the complainant was a credible witness in all material respects.
- 5. The court erred in not finding that the version of the appellant is reasonably possibly true.

AD MERITS:

Summarised version of the evidence:

- [8] The complainant testified that she is 26 years old (at the date of her evidence on 17 March 2021), that she completed Grade 12, that she stays in W[....] and that she is unemployed.

- [9] On 13 November 2020 she was in the town of E[....] . She was at Mr T's tavern with her boyfriend, Mr Moferefere and a friend, Dikentsene Motuko. They were consuming alcohol and according to the complainant she was moderately under the influence.
- [10] At some stage during the night the complainant's boyfriend was banned from the tavern and he left.
- [11] Later that evening the complainant left the tavern building and went to the toilets, which were in a separate building, but on the same premises. After she relieved herself, the appellant entered the toilet, after having opened the door which she had closed. When she asked him what he wants, he said "hey bitch open". Thereafter he started assaulting her and drew a knife.
- [12] After the appellant entered the toilet, he closed the door and raped her by means of penial penetration. After he raped her, he assaulted her again, where after he left.
- [13] She ran out of the toilet and reported the incident to the security officers at the tavern. They were not known to her, but they were standing against the wall not far from the toilet. They, however, responded by keeping quiet.
- [14] According to the complainant the appellant was not known to her and she saw him for the first time that day.
- [15] Thereafter she reported to a friend of her boyfriend, known as Mamelo, that "there is this man who just had his way with me there in the toilet and I do not even know him, but he claims that I am his girlfriend". Mamelo then said that he would accompany her to her boyfriend's place. On the way when they got to the main tarred road, they saw that the appellant was following them and the complainant told Mamelo that he, the appellant, is the man who did that to her.
- [16] When the appellant got to them, Mamelo asked him what his story was and the appellant responded that the complainant was his girlfriend. Mamelo then asked the complainant what exactly was going on. The complainant testified that she responded by saying "I told him I do not even know this man, I only just met him today, I do not understand why he [indistinct]".
- [17] The complainant immediately thereafter testified as follows:
- "And then Mamelo just left me there and say that he had somewhere else to go and he does not ... he said he is not getting involved it is none of his business and I asked him how can he leave me like this and say it is none of your business and he said he does not ... how can you say that this is none of your business because I am telling you that I do not even know this man."
- [18] However, Mamelo then left her with the appellant and the appellant drew a knife and said that they should go.

- [19] According to the complainant she could not even scream, because she was scared of the knife.
- [20] The appellant took the complainant to the stadium where he again had sexual intercourse with her and assaulted her. When asked by the prosecutor whether she consented to the sexual intercourse, the complainant responded that
- "I did consent, but I was scared ... or because I was scared".
- [21] The complainant then told the appellant that she was not comfortable at that spot where they were, which remark was only for purposes of her planning to run away. The appellant believed her when she said that they should leave that particular spot and then, as he was getting dressed, the complainant got away and ran towards a tavern near to the stadium, with the intention of reporting the incident. However, the appellant chased after her and he managed to grab her and dragged her back to the stadium, where he raped her again. He also hit her with the knife on her head before he had sexual intercourse with her.
- [22] The appellant told her that
- "[She does] not want to have sex like a normal person [she] should be treated like a bitch."
- Then he had sexual intercourse with her again.
- [23] The complainant asked the appellant to let her go and told him that she would not lay a charge against him, that she wants to go to her boyfriend's place, since she had to leave for Welkom the following day.
- [24] The appellant responded that they should go to his place of residence where she should "give him one round at his place of residence" and then he would let her go to her boyfriend's place.
- [25] They then went to the appellant's place of residence, which they entered by climbing through the window. When asked by the prosecutor why they did not enter through the door, the complainant testified that it was locked
- "and I do not know who he said he had left the key".
- [26] The appellant had sexual intercourse with the complainant on a couch in the lounge. The complainant testified that she only agreed to the sexual intercourse because she was scared and she wanted him to let her go.
- [27] She further testified that she was scared that should she not have sexual intercourse with him at his residence, he would stab her to death.
- [28] After having had sexual intercourse, the appellant told the complainant that since she was not comfortable, they should proceed to the bed. She complained, stating that he said that she should give him one round and then he would let her go. However, he proceeded to rape her on the bed whilst he put the knife under the pillow.

- [29] After the said sexual intercourse, she begged him to let her go, but he stated that he knew that the moment she got out of the house, she would lay a charge against him. The complainant responded by stating that she would not lay a charge against him, all she was requesting was that the appellant let her go so that she can go to her boyfriend. However, the appellant told her that she was not going anywhere and then he slept, with the knife under the pillow, and told her that should she try to get away, she would see another side of him.
- [30] The complainant woke the appellant and begged him to let her go, stating that she would not do anything else, but to leave. The appellant then agreed and he let her out of the house through the window.
- [31] The complainant went to her boyfriend's house, where she was told that he was not at home since he went to Mamelo's house to get his phone. The complainant then proceeded to Mamelo's house, but she met with her boyfriend on his way from Mamelo's house. He was in the company of Mamelo.
- [32] When they got to her boyfriend's house, she narrated the events of the previous night, where after he called the police.
- [33] When the police arrived, they took the complainant to the police station to take her statement. After they obtained her statement, she was taken to a hospital in Thaba Nchu where she was examined.
- [34] The complainant testified that she sustained an injury on her left eye. The said eye was swollen and red. She further sustained bruises and scratches on her arms, which occurred when he pulled her at the stadium and placed her on some rocks. In this respect she also sustained some injuries at the back of her waist. The appellant was asked that since she stated that that night was the first time she saw the appellant, how she explained to the police as to who the perpetrator was. She explained that Mamelo gave her the appellant's names.
- [35] The complainant denied ever having had a love affair with the appellant and testified that she saw him for the first time on the day of the incident.
- [36] During cross-examination she confirmed that on Sunday, 15 November, she went to show the investigating officer where the house was where the rape took place. However, the appellant was not at home. The complainant testified that since she did not know the appellant, she did not know where he stayed. She only pointed out where the rape occurred at the house to where the appellant took her. Mamelo was the one who provided the police with the information as to where the appellant was residing, because the complainant did not know. According to the complainant Mamelo said that the appellant is a cousin of his and therefore he knew where the appellant was residing.

- [37] In further cross-examination the complainant testified that her boyfriend was asked to leave the tavern, because he was drunk, caused a commotion and picked a fight with the complainant. In this regard she explained that they pushed each other and grabbed each other by the clothes.
- [38] She was asked in what manner she was assaulted in the toilet. She testified that the appellant hit her against her head with the side of the blade of the knife, although not with much force. He also slapped her with open hands on her face and she suffered one blue eye.
- [39] The complainant denied that she was with the appellant in the yard of the tavern after she came out of the toilet.
- [40] The complainant confirmed that her nickname is Slender. It was put to her that the appellant will testify that he met her in September 2020 and that they exchanged cell phone numbers, which she denied. It was further put to her that after September she met with the appellant on numerous occasions, but mostly over weekends. The complainant denied the statement. It was further posed to her that the first time she and the appellant had consensual intercourse was approximately two weeks after they met for the first time in September 2020. The complainant again denied the statement and repeated that she saw the appellant for the first time on the day of the incident. She first saw him at another tavern where they were before they went to the tavern where the incident occurred. The appellant was selling cigarettes there.
- [41] The appellant's version was put to the complainant during cross-examination. According to the said version the appellant went

to the tavern with friends of his. After a while he saw the complainant crying whilst she was talking to a male person and the

appellant approached her. The male person who she was talking to, then left and the appellant asked her what was wrong, to which the complainant explained that her boyfriend had assaulted her. She requested a cigarette from him and he gave her one. At that stage Solly, the tavern owner, said that the tavern was closing, where after the appellant left. The complainant denied the aforesaid

version.

- [42] It was further put on behalf of the accused that even after he left the tavern, the complainant still approached him and told him that her boyfriend left her there and that she did not want to go home and sleep with her boyfriend. Thereafter the complainant walked along with the appellant on the tarred road to his home. Having arrived at home, he opened the door and they entered the house. After they ate some food, they both undressed their own clothes and got into bed where the appellant had consensual intercourse with the complainant. They had consensual intercourse about three or four times before the complainant fell asleep. The complainant denied the aforesaid version.

- [43] It was further put to the complainant that the next morning the complainant woke the appellant and asked him for R400.00. He indicated to the complainant that he only had R100.00, but she refused to take the R100.00. After the complainant refused to take the R100.00, she left. This part of the appellant's version was also denied by the complainant.
- [44] Mr TP Mohanwe, also known as Mamelo and to whom I shall refer as such, testified that the night of the incident he was leaving the tavern on his own. As he was leaving the tavern, he met the complainant and the appellant. The complainant screamed. Mamelo approached them and then the complainant told him that "this man wanted to rape her, told her that he was going to rape her". The appellant, however, responded that they were actually in a relationship as lovers. Mamelo then told them that he did not want to get involved in their business and he left.
- [45] The next morning Mamelo met with his friend, Moferefere, who was with the complainant. The complainant then told him that she had been raped by Mojalefa Olifant, the appellant. She was in shock when she told him this. Mamelo advised her that she should go to the police.
- [46] During cross-examination Mamelo confirmed that he met Moferefere at the tavern the night of the incident. He knew that Moferefere and the complainant were in a relationship. Moferefere was drunk and there was an altercation between Moferefere and the complainant. When it was put to him that Moferefere grabbed the complainant and hit her, Mamelo testified that he did not witness that. He did, however, confirm that Moferefere was chased out of the tavern.
- [47] Mr Moferefere was also called as a witness. He testified that the evening of the incident he was with his girlfriend, the complainant, a friend of hers and Mamelo at the tavern. He left before the others, since he was too drunk and caused a commotion.
- [48] The following morning he met Mamelo in a street. Mamelo and Mr Moferefere then walked to the house of Mr Moferefere. On their way they met the complainant. Thereafter the three of them walked together to the house of Mr Moferefere. Mamelo then said to the complainant that she should tell Mr Moferefere what had happened. Mr Moferefere looked at the complainant and he was shocked to see that her one eye was bruised, since he did not leave her in that condition the previous night. The complainant went into the shack of Mr Moferefere and got into bed. Mr Moferefere and Mamelo went to buy some beers, which they consumed, whereafter Mamelo left. The complainant then told Mr Moferefere what had happened the previous day at the tavern. She told him that she had been raped in the toilet, whereafter she ran to seek help from a security officer at the gate. Mamelo walked her home and as they were walking, there was a man following them. Mamelo then told her that he is not going to get involved.
- [49] Mr Moferefere testified that the complainant told him that it was Mojalefa who raped her. Mr Moferefere then called the police.

- [50] During cross-examination Mr Moferefere testified that when he had an altercation with the complainant the night at the tavern, he grabbed her by the clothes and pulled her. He did not tear her clothes.
- [51] Mr Moferefere testified during further cross-examination that the complainant also told him that after Mamelo left her the previous evening, she was also raped at the stadium.
- [52] Mr Ramokanakhi, also known as Solly, testified that he runs the tavern where the incident occurred. The night of the incident as he was closing the tavern he saw two people in the yard of the tavern, being Mojalefa Olifant, the appellant and a lady whose name is not known him, but he will be able to identify her. The lady reported to him that the appellant had assaulted her and that he wanted to leave with her. Mamelo was close by and he indicated that he will leave with her. At that stage the lady was crying and she was hurt. He testified that he knew her as a person who would come to the tavern to drink, but that she was not from there. He has known the appellant for a very long time. He has never had any problems with him at his business.
- [53] During cross-examination he testified that she did not report to him that she had been raped.
- [54] Dr PM Mofubetswana, who performed a medical examination on the complainant on 14 November 2020 at 17h45 was also called as a state witness. He duly placed his qualifications and experience on record.
- [55] The J-88 report pertaining to the aforesaid medico-legal examination was handed in as exhibit "A".
- [56] I do not intent dealing with the detailed evidence of Dr Mofubetswana. I will, however, later in the judgment refer to certain aspects of his evidence.
- [57] The appellant testified in his own defence.
- [58] He testified that he met the complainant on 15 September 2020, where after they normally met during weekends at the tavern. It was normally at Amelia's Tavern and he once met her at Mr T's tavern. According to the appellant they were romantically involved. They had consensual sexual intercourse for the first time two weeks after 15 September 2020 at the home which he was renting. They had consensual intercourse twice at his rental place before the day of the incident.
- [59] On the day of the incident he met the complainant at Amelia's Tavern where he was selling cigarettes. The complainant bought cigarettes from the appellant. She asked him why he is so scarce, to which he responded that he was kept busy by his studies, but that he would make time for her. The complainant did not respond, she just turned and walk away.

- [60] At around midnight the appellant went to Mr T's Tavern with two friends of his and after he bought liquor, he saw the complainant crying. She was not inside the tavern, but inside the yard of the tavern. She was with a male person whom he could not recognise.
- [61] The appellant approached the complainant, whereupon the said male person left. The appellant asked her why she was crying and she told him that her boyfriend had assaulted her. He, however, could not see any injuries.
- [62] Solly then told them to leave the tavern, since it was closing at that stage. The appellant left the tavern premises, leaving the complainant behind.
- [63] After he left, the appellant sold cigarettes outside the tavern premises. The complainant approached him and told him that she did not want to go to her boyfriend, because he had assaulted her. The appellant told her that he would give her a place to sleep, whereupon she agreed that she would go home with him. When they arrived at his residential home, he unlocked the place and she entered voluntarily with him. After they entered the house, she requested a cigarette from the appellant, whereupon he handed her one, which she smoked. Thereafter she said that she was hungry. He gave her food and after she had eaten the food, she went into the bedroom and climbed into bed. The appellant followed her and also got into bed. They started touching each other, kissing and then they had consensual sexual intercourse. According to the appellant they had intercourse three times that night. Thereafter they slept.
- [64] In the morning the complainant woke him at around 7h00, told him that she wanted to leave, to which he agreed. However, she then told him that she wanted some money. In this regard she told the appellant the previous night already that she needed money to return home the following day. According to the appellant she requested R500.00. He told her that morning that he did not have that much money on him and that he had about R100.00 with him. In response thereto, the complainant told him that she was going to lay a charge against him. Thereafter the complainant left his place.
- [65] The appellant denied the allegations of rape which the complainant testified about.
- [66] During cross-examination it was posed to the appellant that his attorney put it to the complainant that she requested R400.00, whilst the appellant was now testifying that she demanded R500.00. The appellant explained that some of the aspects of the incident have since slipped his mind.
- [67] He was cross-examined on whether he made arrangements with the complainant when he sold cigarettes to her at Amelia's Tavern, to the effect that she would be sleeping at his place that night, to which the appellant responded that he did not make any arrangements. However, according to the appellant he told her that they would meet in the days to come.

Legal principles:

[68] The approach to be followed in evaluating the evidence in a criminal case has been authoritatively set out in *S v Mattioba* 1973 (1) PHH 24 (N):

"The proper approach in a criminal case is to consider the totality of the evidence, that is to say, to examine the nature of the State case, the nature of the defence case, the probabilities emerging from the case as a whole, the credibility of all the witnesses in the case including the defence witnesses, and then to ask oneself at the end of all this whether the guilt of an accused has been established beyond reasonable doubt."

See also *S v Claassen* 2012 JDR 1091 (FB) at para [9].

[69] With regard to the consideration of the appellant's version, the following dictum in *S v V* 2000 (1) SACR 453 (SCA) at para [3]

(i) is applicable:

It is trite that there is no obligation upon an accused person, where the State bears the onus, 'to convince the court'. If his version is reasonably possibly true he is entitled to acquittal even though his explanation is improbable. A court is not entitled to convict unless it is satisfied not only that the explanation is improbable but that beyond any reasonable doubt, it is false. It is permissible to look at the probabilities of the case to determine whether the accused's version is reasonably possibly true but whether one subjectively believes him is not the test. As pointed out in many judgments of this Court and other courts the test is whether there is a reasonable possibility that the accused's evidence may be true."

[70] The complainant was a single witness in relation to the alleged rape and consequently her evidence has to be approached with caution as set out, inter alia, in *Stevens v S*

[2005] 1 ALL SA 1 (SCA) at para [17]:

"[17] As indicated above, each of the complainants was a single witness in respect of the alleged indecent assault upon her. In terms of section 208 of the Criminal Procedure Act 51 of 1977, an accused can be convicted of any offence on the single evidence of any competent witness. It is, however, a well-established judicial practice that the evidence of a single witness should be approached with caution, his or her merits as a witness being weighed against factors which militate against his or her credibility (see, for example, *S v Webber* 1971 (3) SA 754 (A) at 758G-H). The correct approach to the application of this so-called "cautionary rule" was set out by Diemont JA in *S v Sauls and others* 1981 (3) SA 172 (A) at 180E-G as follows:

"There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness (see the remarks of Rumpff JA in *S v Webber* ...). The trial judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. The cautionary rule referred to by De Villiers JP in 1932 [in *R v Mokoena* 1932 OPD 79 at 80] may be a guide to a right decision but it does not mean 'that the appeal must succeed if any criticism, however slender, of

the witnesses' evidence were well-founded' (per Schreiner JA in *R v Nhlapo* (AD 10 November 1952) quoted in *R v Bellingham* 1955

(2) SA 566 (A) at 569.) It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense."

[71] Considering that we are sitting as a court of appeal, it is important to be mindful of the following trite principles as set out in *S v Mayisela* 2013 (2) SACR 129 (GMP) at para [10]:

[10] Before I consider the submissions in this regard, it is helpful to restate the approach to be adopted by a court of appeal when it deals with the factual findings of a trial court. The proper approach is found in the collective principles laid down in *R v Dhlumayo* and *Another* by the then Appellate Division. They are the following. A court of appeal will not disturb the factual finding of a trial court, unless the latter has committed a misdirection. Where there has been no misdirection on fact by the trial judge, the presumption is that his conclusion is correct. The appeal court will only reverse it where it is convinced that it is wrong. In such a case, if the appeal court is merely left in doubt as to the correctness of the conclusion, then it will uphold it."

The judgment of the court a quo:

[72] When the judgment of the court a quo is considered, it is evident that the crux of the issues was correctly identified by the court to be the following:

"Whether the accused had sexual intercourse with the complainant without her consent and whether the accused had sexual intercourse with the complainant in the toilet and at the stadium."

[73] In evaluating the evidence in order to consider the aforesaid issues, the court referred to the applicable principles, supported by relevant case law. In this regard the court a quo referred to the approach to be followed in considering the evidence as a whole, the caution which is to be applied considering that the complainant is a single witness "on the crucial aspect of rape and the fact that the State bears the burden to prove its case beyond reasonable doubt and that if there is a reasonable possibility of the accused's version being true, he is entitled to be acquitted".

[74] Mr van der Merwe, who appeared on behalf of the appellant, submitted that, based on his instructions, the court a quo erred in finding that there were no material contradictions in the complainant's version.

[75] The court a quo duly dealt with the contradictions and inconsistencies between the evidence of the complainant and that of Mamelolo and Solly. In this regard the following was stated in the judgment at p. 179, line 9 -

p. 180, line 1:

"This is not a natural behaviour of someone who had had consensual sexual intercourse. It makes even less sense that being the one who did not want to leave with her boyfriend, she proceeded to report immediately after she had left the accused's house. The complainant's version has been attacked on the basis that it contradicts that of the other witnesses, who in turn also contradicted each other. This is in particular as to how the complainant, Mamelo and Solly interacted at the tavern. These contradictions are inconsistencies and not material and the sort of thing that should be expected from a honest, but imperfect,

recollection, observation and reconstruction. If anything the evidence of Solly and Mamelo reinforces the suggestion by the complainant that she did not want to leave with the accused. Mamelo testified that the complainant had screamed. Solly further testified that the complainant reported that the accused wanted to leave with her by force and that she was crying and hurt, that is what he observed. That then re-enforces the golden thread that the complainant did not in fact willingly leave with the accused."

[76] Although it is correct that there were inconsistencies in the State's case with regard to the circumstances under which the complainant left the tavern, the versions of the respective witnesses do correspond with regard to the fact that the complainant did not want to leave with the accused and in fact left with Mamelo. The court a quo was, in my view, consequently correct to have made the finding with regard to "the golden thread" in this regard.

[77] There are also contradictions with regard to how the complainant met up with Mamelo and/or Moferefere the morning after she left the appellant's house. In my view those contradictions are not material either. The fact of the matter is that the complainant reported the rape at the first opportunity after she left the appellant's house.

[78] Being mindful of the fact that the complainant is a single witness and the consequent cautionary approach with regard to her evidence, the court a quo found as follows in its judgment at p. 177, line 11 - line 23:

"She testified before this court in a clear manner, she gave a detailed and a lengthy version on each of the rape incidents. The incident in the toilet was described in some details, so were the incident at the stadium and the one at the house, both in the lounge and the bedroom. She was cross-examined by the defence at length and she did not deviate from her version. She struck the court as a honest witness and an intelligent one with a near perfect recollection and chronology. She further explained her injuries and aligned each one with each of the incidents. The complainant reported the rape at the first opportunity after leaving the accused's place, which shows consistency on her part."

[79] When the medical evidence is considered, the following is evident from the evidence of Dr Mofubetswana, considered in conjunction with the J-88 medico-legal report, exhibit "A":

1. The "clinical findings" which were recorded in section C of the report under "General Examination", read as follows:

"1. Haematoma below left eye.

2. Linear bruise anterior service of right upper arm.
3. Bruise anterior to medial service of left upper arm.
4. Bruises lower back.
5. Small tear vaginal vulva."

2. The "conclusions" noted at paragraph 8 in section C of the report, are the following:

"1. General body examination suggestive of assault.

2. Vaginal examination suggestive of penetration."
3. In section E of the report, being the "Gynaecological Examination", at paragraph 20, the following was recorded:

"Tears on vaginal vulva."

4. The "conclusion" in section F of the report, was recorded to be the following:

"Clinical findings are suggestive of penetration."

5. The aforesaid clinical findings were also indicated on the sketches which form part of the J-88 report.
6. With regard to the vaginal vulva tears, Dr Mofubetswana explained in his evidence that with any means of penetration, the causation of tears will depend on whether the vagina was lubricated or not and also depending on the size of the opening and on the size of the penetrating object. During cross-examination he conceded that it is possible that such a tear can occur as a result of consensual intercourse, but also from non- consensual penetration.
7. With regard to the "General History" reflected on the J-88 report, Dr Mofubetswana testified that he concentrates on the "medical history" provided for under the aforesaid heading on the J-88 report. Therefore, he does not enquire about the forensic history such as how many times the complainant was raped, who the perpetrator was, where it happened and how it happened. In his view the last-mentioned issues form part of a forensic examination to be done by a forensic specialist person and not by him.

[80] The court a quo found corroboration for the complainant's version in the aforesaid medical evidence, in my view, correctly so.

[81] With regard to the version of the appellant, the court a quo referred to the fact that according to the appellant he had sexual intercourse with the complainant two or three times before the incident. The court then further stated as follows at p. 178, line 8 - line 16 of the

judgment:

"Further testified that the relationship was good to the extent that, it was the complainant who accused him of being scarce at Amelia's Tavern. In all the previous encounters she never laid charges against the accused. She never demanded money from him before or accused him of rape. It is obviously a strange and unnatural behaviour on the part of the complainant to suddenly, because accused is unable to give her R500.00, lay a charge of rape with all the serious consequences that flow therefrom."

[82] It was further stated that the accused was unable to account for the injuries on the complainant. In fact, he testified that he did not observe any injuries on her.

[83] The court a quo concluded as follows with regard to the appellant's version in its judgment at p.180, line 1 - line 14:

"The accused denies that he raped the complainant in the toilet, he further denied that they even went to the stadium ... If the complainant wanted to falsely implicate the accused, it would have been enough to sustain a rape charge to cite the incident at the house. It makes no sense that she would manufacture evidence, other than what happened in the house. If the version of the defence is accepted, it would mean that the complainant manufactured the whole story. Viewed holistically the version of the defence is untenable, the accused's version flies in the face of probabilities and I may venture to say it is farfetched and is accordingly rejected as not being reasonably possibly true."

[84] With regard to the evidence of the complainant, the court a quo found that it met the threshold in section 208 of Act 51 of 1977 in that it was satisfactory in all material respects. It further found that the complainant was a credible witness whose version was corroborated by the medical evidence.

[85] The court a quo consequently found that the State proved its case beyond reasonable doubt against the appellant to the effect that he had sexual intercourse with the complainant without her consent more than once.

[86] In my view there is no basis upon which we can interfere with the aforesaid findings of the court a quo. The court a quo did not commit a misdirection with regard to its factual findings. In fact, in my view the factual findings made by the court a quo were correct and properly substantiated by the evidence.

[87] In addition to the aforesaid, the court a quo clearly also applied the applicable legal principles in its evaluation of the totality of the evidence.

[88] The appeal against the conviction can consequently not succeed.

AD SENTENCE:

[89] It is trite that the imposition of sentence is pre-eminently a matter which falls within the judicious discretion of the trial court.

[90] The circumstances in which a court of appeal will interfere with the sentence imposed by a court a quo were again confirmed in *S v Rabie* 1975 (4) SA 855 (A) at 857C - F:

"1. In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal –

- (a) should be guided by the principle that punishment is 'pre-eminently a matter for the discretion of the trial Court'; and
 - (b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been 'judicially and properly exercised'.
2. The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate."

[91] In this particular instance where the complainant was raped more than once, life imprisonment is the prescribed minimum sentence in terms of section 51(1) of the General Law Amendment Act, 105 of 1997. The court a quo was consequently compelled to have imposed life imprisonment, unless it found that there were substantial and compelling circumstances that justify the imposition of a lesser sentence than the prescribed minimum.

[92] A victim impact statement was handed in as exhibit "D".

[93] The court a quo took the following personal circumstances of the appellant into consideration:

1. He was 31 years old at the time.
2. The appellant is not married, but he has a life partner with whom he has three minor children. The children are being maintained by means of child support grant which is received by their mother.
3. The appellant's highest level of education is Grade 12.
4. At the time of this arrest, the appellant was trying to earn a living through various jobs for which he earned between R2 000.00 and R2 500.00 per month.
5. The appellant used the aforesaid income to assist with the maintaining of the household and the children.
6. The appellant has tried to improve himself by means of correspondence studies.
7. The appellant is a first offender.

[94] The court a quo took the following aggravating factors into account:

1. The seriousness of the offence rape and its prevalence throughout the country.
2. The complainant was attacked and raped when she was in the restroom, which is indicative of a certain degree of planning by the appellant.

3. The complainant was taken at knifepoint to the stadium where she was raped on a rocky surface and when she attempted to escape, she was caught and dragged back to the stadium and raped again.
 4. At the appellant's house she was raped twice, first in the lounge and then in the bedroom. Thereafter she was threatened not to attempt escaping.
 5. The appellant had ample time to reconsider his conduct, which he failed to do, despite the fact that the complainant was begging to be released.
 6. The complainant suffered physical injuries as reflected on the J-88 medico-legal report.
 7. In terms of the victim impact report, it is evident that the complainant needs psychological intervention as a result of the incident. The incident had a life changing negative effect on the complainant.
- [95] The court a quo dealt with the submission by the defence in the court a quo that the cumulative effect of the appellant's personal circumstances constitutes substantial and compelling circumstances which justify the imposition of a lesser sentence than life imprisonment. However, the court a quo correctly stated that the prescribed minimum sentence should not be deviated from lightly or for flimsy reasons.
- [96] The court a quo concluded that there are no substantial and compelling circumstances which justify a deviation from the prescribed minimum sentence. The court a quo further concluded that the degree of seriousness of the present matter is indeed of such a nature that it constitutes one of the more serious crimes for which life imprisonment is reserved.
- [97] Mr van der Merwe indicated that based on his instructions, he submits that the court incorrectly found that there are no compelling and substantial circumstances present. He contended that in terms of the case law it is evident that there has to be a differentiation in degrees of seriousness in rape matters and that the present matter cannot be considered to be one of the most serious rape matters which necessitates life imprisonment. In this regard Mr Van der Merwe relied on the judgment in *S v SMM* 2013 (2) SACR 202 (A). He consequently submitted that based on his instructions, the sentence of life imprisonment should be reduced to 15 to 20 years imprisonment.
- [98] In my view it is evident that the court a quo duly considered the elements of sentencing, being the personal circumstances of the appellant, the nature and seriousness of the offence and the interest of society. He also correctly stated that in instances of such serious crimes as the present one, the elements of retribution and deterrence as two of the purposes of sentencing, come to the fore.
- [99] In my view the court a quo exercised its discretion regarding sentencing judicially and properly and the sentence is not disturbingly inappropriate in the circumstances. There is no basis upon which we can interfere with the imposed sentence.

[100] The appeal against the sentence consequently stands to be dismissed.

Order:

1. The appeal against the conviction and the sentence is dismissed.

C. VAN ZYL, J

I concur:

N.S. DANISO, J

On behalf of the appellant: Mr P. L. van der Merwe

Instructed by: Bloemfontein Justice Centre

BLOEMFONTEIN

On behalf of the respondent: Adv. A. M. Ferreira

Instructed by: Office of Director: Public Prosecutions

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