

SOUTH AFRICA / JUDGMENT

T.R v S (A36/2023) [2023] ZAGPJHC 1403 (4 December 2023)

[2023] ZAGPJHC 1403

COURT

South Gauteng High Court, Johannesburg

BEFORE

WJ Du Plessis, PJ Johnson

CASE / FILE NUMBER

A36/2023

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REPUBLIC

OF SOUTH AFRICA

IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG DIVISION,

JOHANNESBURG

CASE NO: A36/2023

NOT REPORTABLE

NOT OF INTEREST TO OTHER

JUDGES

NOT REVISED

04/12/23

In the matter between:

R,
T
appellant
And
THE STATE

JUDGMENT

DU PLESSIS AJ

Factual background

[1] Mr R was 43 at the time of his arrest in

2018. He was tried and convicted on the following counts in the Protea Regional Court, Mr Zakwe being the magistrate:

- i. Counts 1 to 4, rape, read with s 51(1) of the Criminal Law Amendment Act 105 of 1997;
- ii. Count 5, assault with intent to do grievous bodily harm;
- iii. Count 6, robbery with aggravating circumstances;
- iv. Count 7, kidnapping.

[2] The conviction was on 9 July 2021. He was sentenced on 13 October 2021 as follows:

- i. Counts 1: life imprisonment
- ii. Counts 2 to 4: 15 years imprisonment on each count
- iii. Count 5: 18 months
- iv. Count 6: 5 years imprisonment
- v. Count 7: 5 years imprisonment

[3] Mr R and the complainant had a romantic relationship for almost two years. Two months after the complainant avers the relationship ended, Mr R called her to ask if he could come and fetch his belongings from her room in Moletsane. They agreed to meet when she returned from work at 9 pm that evening.

[4] Mr R drove to her place in his motor vehicle, and the complainant opened the gate for him. Mr R entered the house and closed the kitchen door. After he greeted her, he instructed her to lie in bed and not to scream. She resisted until Mr R produced a container that said "Battery acid" on it, and poured it on the bed. He told her that he would kill her if she thought he was playing. The complainant hit the container, it fell, and she ran to the kitchen. The contents of the container had a strong smell.

[5] Mr R grabbed her as she was running to the kitchen. He told her again not to scream. He pulled her back to the bedroom, hit her with his fists until she fell on the floor, and said to her that he would teach her a lesson for ending their relationship.

- [6] She continued to scream until Mr R gagged her with a dirty piece of cloth smelling of paraffin and later replaced it with one of her underwear. He told her he would kill her and then kill himself after that.
- [7] She did not stop screaming, and Mr R then strangled her. He used a black tape he brought to shut her mouth with the underwear inside, used a brown rope to tie her hands together, and then tied the other end of the rope onto the burglar bar of the window so that she could not escape. She then sat on the bed.
- [8] Mr R then cleaned the acid with a mop and went to the kitchen to fetch a knife. He told her that he would remove the gag but would stab her with the knife if she screamed. She then kneeled on instruction; he removed the gag, unzipped his pants and forced her to have oral sex with him until he ejaculated into her mouth.
- [9] He then told her to get onto the bed and open her legs, he got undressed, and he raped her again with her arms tied in front of her chest. He lamented that she did not seem to enjoy it, and she answered that she could not do it as she did not consent. After he was done, he cleaned his penis and her vagina with a towel. He instructed her to say certain things that he recorded on the phone; she could not remember the words, but they related to the ending of their relationship.
- [10] He then cleaned the blood from the burglar bars and told her that he could kill her just to show what a monster he was. She tried to calm him down and asked him to make her some food, which he did after commenting that maybe he would put some rat poison on the food. She then only ate a small piece of the bread out of fear of being poisoned. He forced her to finish the bread, but she could not.
- [11] He then suggested they go to his place. Before untying her hands, he warned her that if she screamed, he would stab her. When he noticed the injuries to her face and her difficulty in walking, he forced her to make a recording that says that she fell and hurt herself after running to him out of happiness after a long absence.
- [12] He then took a duvet cover, a thrower, a towel and tape and put the items in the boot of his car.
- [13] They arrived at his house between 12 midnight and 1 am. He then told her to go to bed and undress, which she did. He then raped her again while telling her that she would love no one else, as he would cut her body in pieces, and throw the pieces away. He then moved around the house, returned later again, and raped her again until she lost consciousness.
- [14] She woke up at 6 am. He was already awake. She was in pain, she could not walk, and she started crying. He told her to shut up and raped her again, despite her informing him that she was in pain. He said he did not care. He was not charged with this count of rape; it is unclear why.

- [15] He then told her that she could not go to work because of her condition. She said she needed to go to work because she had training – she promised not to limp and to cover up the bruises on her face. She promised that she would not report him at work. He then agreed that she could go to work and told her that he loved her, that the acid was just to scare her, that he would never use it, and that she please make another recording that states that they reconciled.
- [16] While he was bathing, she sent a message to her boss but deleted it, as she was afraid that Mr R would see it. When the boss called back, she did not answer.
- [17] As they left the house, she noticed that one of his fingers was bleeding – he informed her that she had bitten him. They stopped at a spaza shop for a plaster. While he was there, she phoned her neighbour Lebo, but she did not answer. They then drove to her home. At home, Mr R told her to walk properly so that the builders at the premises don't get suspicious.
- [18] Once inside the house, he cleaned the floor again, ensuring it was cleaned of the acid. She then took out a blanket, intending to pretend to hang it up, but instead to escape. She could not run away, as he was following her. She then decided to tell him that she was taking R20 to Lebo to pay the boy who cleaned the rubbish bin, to which he agreed.
- [19] Once at Lebo's house, she told her to lock the door and the burglar bar. Once inside, she started to cry and asked Lebo to phone her sister, which she did. She struggled to talk to her sister and put the phone down. Her sister then called back, and she told her that T had raped her. At this point, Mr R demanded to come in; she told Lebo to open the door, Lebo opened the door, and he came inside and strangled her and took the phone forcefully from her. Lebo was not called to testify, with no explanation given.
- [20] Mr R then talked to her sister and returned the phone to her. Her sister told her her brother was on his way. When Desmond, the brother, arrived, Mr R was no longer there. He accompanied her back to her house and, once there, realised that her TV stand doors and wardrobe doors were wide open. She did not know what was missing besides her laptop and juice.
- [21] Her brother took her to the hospital and the police station to report the matter. Mr R was arrested. The next day, the police came to her place with Mr R, and then drove to his place, picking up his mother on the way there. The police looked for her laptop at his house. They found it behind a chest of drawers. They also found a pair of gloves in the toilet and battery acid in his car, along with a knife. Mr R's mother gave the police a storeroom key, where they found a plastic bag with a duvet cover, the panty used to gag the complainant, and the faceclothes he used to tie her wrists.
- [22] The complainant testified that the relationship ended in November 2017, but Mr R kept contacting her, asking if they could get back together until she blocked him on WhatsApp. However, some of his personal belongings were still in her room because he said he did not have space for them. Some of her belongings were also in his house, but she did not have

time to fetch them yet. They sometimes saw one another, also because they attended the same church. She admitted that he sometimes transferred R300 to her account during December or January. Mr R stated that he caught her having sex with another man twice, which she denied. She also denies biting his finger because, on his version, he did not give her attention. She admitted that she asked him to make her food and initiated sex after he made the food and took the plates to the kitchen.

- [23] She was cross-examined about the version that she initiated sex, which he did not want because she was sleeping with many men, but eventually, he agreed on the condition that it was with a condom. She, however, inserted his penis in her vagina before he could put on the condom. She denied all this and stated that he climbed on top of her and raped her without a condom. It was also put to her that she wanted to go to his house to fetch some documents, which she denied – she was forced to go there. It was also put to her that she agreed to the laptop and juice being taken to his place, which she denied.
- [24] Her brother testified arriving at Lebo's place, with her limping and in pain. He took her to the doctor and police station, and he agreed on the phone with Mr R to meet him at the police station.
- [25] Dr Dawood testified to bloodstains on her dress, and fresh multiple injuries and scratches on her face, and fresh bodily and vaginal injuries. The evidence, the doctor found, was consistent with forceful vaginal penetration. She reached this conclusion based on the fact that because she was not ready for sex, her vagina had not lubricated, and she thus sustained injuries.
- [26] The investigating officer testified that she booked out Mr R the next day to go to his place and search his house. She found all the items described above at his house.
- [27] Mr R's version is that they were in a love relationship, also at the time of the incidents. He, however, caught her sleeping twice with another man. When he caught them, they attacked him. The complainant told him she wanted to speak to him after the second time it happened. She started to apologise for the incident. The boyfriend then arrived, and he left.
- [28] The next day, the complainant called him to come and fetch his belongings, and that is how he ended up at her place at 21:00. When he arrived, she asked for an apology. He forgave her. He denied having acid at her house – the acid was for him to use at his house in the garden.
- [29] Once in the house, she asked him to make food, which he dutifully did. As he started packing his things, a scuffle broke out for no reason; the complainant bit his finger, and he bled profusely. She then apologised profusely, they hugged, they ended up on the bed; he lowered his pants, she held his penis and asked him to kiss her, but he stopped because his finger was painful, and he did not want what she asked for.

- [30] He wanted to leave because it was late. She asked if she could go with him, as she needed documents from his house. He did not want any problems, and she offered to record herself on her phone, offering to go with him. He could not collect his things because his finger was painful.
- [31] They arrived at his place and ended up in bed. She got up the following day and removed a plastic bag with a duvet from his car. She wanted to wash it because there were bloodstains. They then left for her place, where she saw her neighbour Mpho. She took a long time to return, and he was concerned because she was late for work. When he got there, he heard her telling Mpho, crying, that he had raped her. He found the complainant inside, spoke to her sister, and left because he had too much to do on the day. He took the laptop with him because they shared a laptop. He did not steal it.
- [32] He admitted to all the items found in his house and car and offered various explanations for it. He denies assaulting her, stealing her items, and kidnapping her.
- [33] His attorney then withdrew from the matter, and a new attorney was appointed. The new attorney then led evidence where he denied that they had oral sex and that they had any sex on the day or in the morning, as his finger was bitten. She lied about the sex because he caught her with another man in the bed, and he phoned her sister in Durban informing her of this, and the complainant did not like this. She told him that she would get back at him for that. This version was, however, never put to the complainant. Mr R thus, in his plea explanation, stated they had consensual sex, but then, in his evidence in chief, denied having had any sex.
- [34] He asked for an acquittal: his reason is reasonably possibly true, she could have screamed at any time when she was raped, and there would have been people to assist her.

Judgment of the court a quo

- [35] In its judgement, the court a quo correctly set out the onus the State must meet. It noticed that the complainant is a single witness and that her evidence must be clear and satisfactory in all material aspects.
- [36] The court then did an extensive analysis,[1] stating that she made a favourable impression and was clear and credible – especially concerning the details she gave, which would otherwise be absent if she was fabricating her evidence. Not only this, but the court correctly found that the evidence of the Investigating Officer and the doctor corroborated her evidence in respect of the injuries on her body. Especially the doctor's evidence that there was recent, forceful vaginal penetration substantiated her version. Mr R's version that they did not have sex was then compared with this – his explanations for every item found.

- [37] Despite that, the court was satisfied that the complainant told the truth. Mr R's version of going back time and again to his girlfriend, whom he caught twice having sex with another man, and who turned violent on him, and then fetching his furniture at 21:00 was found to be riddled with improbabilities. Yet, he returns home without the furniture.
- [38] The random attack by the complainant where his finger was bitten, his story about refusing to have sex with her and not having sex at all – that all was found to be far-fetched, also because it is not what he said during his plea explanation, namely that they had consensual sex.
- [39] The court dissected his testimony and explanations one by one, and the magistrate found his version "false and improvable beyond any doubt", rejecting his version entirely.
- [40] During sentencing, the court heard about his childhood – even if he grew up in an abusive environment, his mother described him as a lovable person. Still, she was heartbroken and begged the court for forgiveness for what he had done. He is the only breadwinner, and if he will go to jail, she will struggle. Mr R himself was also heartbroken. He described that he helps out in prison – in the kitchen and with new prisoners, is the head of the Christian church in prison, and does counselling. He then testified how he and the complainant planned their wedding before the incident.
- [41] The court considered his testimony, his personal circumstances, how he was brought up, and the roles he played in prison. The court balanced this with the gravity of the offences and the impact this, in all likelihood, had on the victim. The rape, the gravity of how the rape was executed, all were aggravating, as he acted with no humanity towards the complainant. He then finds no substantial and compelling circumstances to deviate from the prescribed minimum sentences. Still, relying on *S v Vilakazi*,^[2] the magistrate stated that a court is entitled, if it is of the opinion that the imposition of the prescribed minimum sentence would be unjust or disproportionate due to the facts of the case, may deviate from the imposition of the prescribed minimum sentence, which it did for count 2, 3, and 4 of rape.

Appeal

- [42] The appeal is before this court in terms of s 308 of the Criminal Procedure Act 51 of 1977, an automatic appeal for life imprisonment. However, it is not only the conviction and the sentence regarding life imprisonment that is appealed but all convictions and sentences. Recently this court^[3] had to decide whether an automatic right of appeal in terms of s 309(1) (a) is only entitled to appeal the conviction and the sentencing in terms of s 51(1) of the Criminal Law Amendment Act,^[4] or whether it includes all convictions and sentences. After discussing the current caselaw on the issue, the court concluded that in cases “where the determinative sentences are based on convictions that rely on the same evidence as the convictions that led to the life sentences, [it should] be interpreted to include the appeal against the non-life sentence convictions, too”. The principle will thus be applied in this case, too.

- [43] The appellant mostly takes issue with the complainant as a single witness, stating that the trial court did not consider the cautionary rule. The appellant makes the argument that she was not honest in her testimony based on the following facts:
- i. She invited him into her house late in the evening;
 - ii. She opened the gate and the kitchen door and then left the kitchen to go to the bedroom;
 - iii. After the forced oral sex, she was comfortable enough to ask him to make food;
 - iv. She conceded that the appellant deposited money into her bank account in December and January, although she claims that the relationship ended in November – why would the appellant deposit money into her bank account if the relationship ended?
- [44] In short, in the heads of argument, the argument is made that the factors mentioned above are "incongruent with the behaviour of a person who claimed to have ended the relationship with her partner two months prior to the night of the incident".[5]
- [45] The factors listed above, however, do not speak to the elements of the crime of rape: namely sexual intercourse without consent. He was not charged and convicted for ending the relationship. Even if she invited him, even if she went to the bedroom after opening the kitchen door, even if he deposited money into her bank account, even if she asked for food, and lastly, even if all this indicated that they were still in a relationship, this does not suggest that she consented to sexual intercourse, nor does it explain any of the physical injuries sustained while being raped. The line of reasoning confirms the pre-sentence report finding that failing to take responsibility for anything is in his nature.
- [46] The appellant also takes issue with the finding of the doctor who testified that the J88 shows that the clinical evidence is consistent with forceful vaginal penetration but that such clinical evidence can also support a claim of consensual sexual intercourse. It seems that he now argues his plea explanation again, rather than the denial that they had any sex at all, as he did towards the end of the trial.
- [47] His argument that there was a serious misdirection from the court a quo on the factual findings and a misdirection in finding that the appellant's version is false and to be rejected in its entirety cannot stand. Not only does a court of appeal have limited powers to intervene in the trial court's finding of fact, but it can only do so if the recorded evidence shows it to be clearly wrong.[6] There is nothing in the record to show that it was clearly wrong.
- [48] The court found the complainant's version to be corroborated mainly by the medical evidence of Dr Dawood, the evidence of the arresting officer Sgt Brenda Nlangothi, the brother of the complainant Desmond and the DNA report.

- [49] Dr Dawood's report contained information about physical injuries to her face and bloodstains on her dress. This corroborates the assault. There was evidence of injuries to the genitalia. She stated that consensual intercourse will unlikely cause the same type of injuries. The DNA indicated sexual intercourse.
- [50] The arresting officer found the knife and acid in the back of Mr R's vehicle, a pair of gloves inside his home, and a bed cover, facecloths, and tape in a plastic bag at his residence. This corroborates the rape described by the complainant at her house.
- [51] Her brother testified about how fearful she was when he met her after the ordeal. The appellant also said he took her phone away when she spoke to her sister.
- [52] I am therefore satisfied that the evidence of the single witness was corroborated by other evidence[7] and that the trial court correctly held that her version is the truth.

Sentence

- [53] In an appeal, the appeal court must consider whether the trial court exercised its discretion properly and judicially in imposing a sentence, not whether it was right or wrong.[8] This is because sentencing is mainly the task of the trial court. The court of appeal should only interfere if the trial court has

misdirected itself, where the sentence is inappropriate or induces a sense of shock, or where there is a striking disparity between the imposed sentence and the sentence the court of appeal would have imposed.[9]

- [54] The appellant contends that the life sentence is shocking and inappropriate with regard to the circumstances of the case. This is because the probation officer's report portrayed a good image of Mr R, and that life imprisonment will potentially destroy him and his endeavours to become a valuable and productive person. This is not a matter that deserves maximum punishment.
- [55] I disagree. Not only did the report state, with reference to programs in jail that "there is no guarantee that these programs will have a positive contribution in his rehabilitation considering that he continues to distance himself, thus his prognosis to

rehabilitation becomes negative".[10] The complainant suffered torture at the hands of Mr R, clearly responding to his own unresolved childhood trauma instead of dealing with and processing it.

- [56] The court deviated from the minimum sentence regime in respect of counts 2 to 4 of rape, even after having found that no compelling and substantial circumstances exist. This might not be a finding I would have made, but it is not a material mistake, specifically not because those sentences run concurrent to the life sentence already imposed in count 1.

[57] I am therefore satisfied that the magistrate considered all the circumstances when sentencing was considered and was compelled to impose a life sentence as no substantial and compelling circumstances were present. There are no misdirection or irregularities committed by the trial court that would warrant a court of appeal to interfere with the sentence.

Order

[58] I, therefore, make the following order:

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

WJ DU PLESSIS

Acting Judge of the High Court

I agree, and it is so ordered

PJ JOHNSON

Gauteng division

Counsel for the appellant: Mr S Hlazo

Instructed by: Legal Aid South Africa

Counsel for the respondent: Mr D van Wyk

Date of the hearing: 30 October 2023

Date of judgment: 04 December 2023

[1] CaseLines 004-268.

[2]

[2008] 4 All SA 396 (SCA).

[3] Nalushama v S (A150/2012) 17 November 2023.

[4] 105 of 1997.

[5] Heads of argument, paragraph 24 CaseLines 013-11.

[6] S v Hadebe

[1997] ZASCA 86.

[7] Khambule v S

[2008] JOL 22539 (T).

[8] S v Obisi 2005

(2) SACR 350 (W).

[9] S v Kgosimore 1999

(2) SACR 238 (SCA).

[10] Report, CaseLines 005-28.

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