IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: A205/2019

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: YES/NO

2.OF INTEREST TO OTHER JUDGES: YES/NO

3.REVISED

25/08/2020 .....

DATE **SIGNATURE**

In the matter between:

NKABINDE SHELDON Appellant 1

BOTHA CHARLES Appellant 2

and

THE STATE Respondent

JUDGMENT

Heard: This appeal was, by consent between the parties, disposed of without an oral hearing in terms of s 19(a) of the Superior Courts Act 10 of 2013.

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 25th of August 2020.

Dippenaar J

[1.] The two appellants were each arraigned in the regional court at Protea, on one charge of rape in contravention of s3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 ("the Act"). On 22 July 2010, both appellants were convicted as charged and each sentenced to ten years imprisonment. They were further declared unfit to possess a firearm under s103(2) of the Firearms Control Act 60 of 2000.

[2.] Leave to appeal against their conviction and sentence was granted by the trial court to the first appellant on 28 July 2010 and to the second appellant on 13 August 2010. Both appellants are presently on bail pending the appeal, such bail having been extended by the trial court at the time of the applications for leave to appeal. The condition attached to the appellants' release on bail pending appeal, was in each instance that the first and second appellant should surrender himself within 48 hours to the Johannesburg Correctional Services to serve his sentence in the event of the appeal failing.

[3.] The appellants' heads of argument were late and a memorandum was filed explaining the delay. Condonation was sought which was not opposed, but supported by the respondent. Considering the reasons provided, condonation for the late heads of argument is granted.

[4.] Each of the appellants was legally represented throughout the trial. It was also brought to their attention that a minimum sentence was applicable if they were to be convicted.

[5.] Both appellants pleaded not guilty to the charge. The first appellant denied all the allegations levied against him. The second appellant gave no plea explanation.

[6.] Three state witnesses testified during the trial. A trial within a trial was also held pertaining to the admissibility of a statement made by the first appellant in which he and one state witness, Superintendent Shibambo testified. The first appellant testified on the merits of the case. The second appellant did not. He applied for a discharge in terms of s174 of Act 51 of 1977, which was refused. Second appellant then elected to close his case without testifying.

[7.] Turning to the relevant principles in criminal proceedings, the State bears the onus to prove the accused's guilt beyond a reasonable doubt. The accused's version cannot be rejected only on the basis that it is improbable, but only once the trial court has found, on credible evidence, that the explanation is false beyond a reasonable doubt.[1] The corollary is that, if the accused's version is reasonably possibly true, the accused is entitled to an acquittal. Equally trite is that the appellant's conviction can only be sustained if, after consideration of all the evidence, his version of events is found to be false.[2]

[8.] The State must lead evidence linking the appellant to the crime, which evidence must be sufficient and credible. As stated by the Supreme Court of Appeal in *S v Combrinck*[3]:

> *'It is trite that the State must prove its case beyond reasonable doubt and that no onus rests on the accused person to prove his innocence. The standard of proof on the State and the approach of a trier of fact to the explanation proffered by an accused person has been discussed in various decisions of this Court and of the high court (see R v Difford 1937 AD 370 at 373; S v Van der Meyden 1999 (1) SA 447 (w) at 448F-I). It suffices for present purposes to state that it is well settled that the evidence must be looked at holistically.'*

[1] *S v V* 2000 (1) SACR 453 (SCA) at 455B.
[2] Tsiki v The State (358/2019) [2020] ZASCA 92 (18 August 2020) para 13
[3] [2011] ZASCA 116; 2012 (1) SACR 93 (SCA) para 15

[9.] Regarding an appeal court's powers to interfere with the findings of fact made by a trial court, the court stated the following in S v Francis[4]:

> *"The court's powers to interfere on appeal with the findings of fact are limited. Accused No 5's complaint is that the trial court failed to evaluate D's evidence properly. It is not suggested that the court misdirected itself in any respect. In the absence of misdirection, the trial court's conclusion, including its acceptance of D's evidence, is presumed correct. In order to succeed on appeal, accused No 5 must therefore convince us on adequate grounds that the trial court was wrong in accepting D's evidence – a reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage which a trial court has of seeing, hearing and appraising a witness, it is only in exceptional cases that this court will be entitled to interfere with a trial court's evaluation of oral testimony."*

[10.] The background facts were not contentious. On the evening of 21 November 2008 a birthday party was held for Julia Bata ("Julia") in Klipspruit at the house where the complainant's cousin, Chaldeen was staying. Her other cousins Monique, Malinda and Rashida were at the party. The complainant and the two appellants were also present. The complainant had some alcoholic drinks at the party and later in the evening was very tired and drunk. The complainant was taken to a bedroom occupied by Julia and tucked in bed. There were two beds in the room. The complainant passed out and immediately fell asleep. She did not undress before she fell asleep and was wearing underwear, jeans, a top and a jacket. It was uncontested that she remained in an unconscious state until the following morning.

[11.] The complainant was woken the next morning by Megan who told her that the complainant's cousin Monique, was involved in a motor vehicle accident whilst chasing the second appellant, who had driven off when confronted by Rashida. The complainant woke up on the other bed in the room. Malinda, Rashida and Julia were also in the room. They told her that she had been raped the previous night. Two police officers attended the house to check on the complainant and to take a statement as

[4] 1991 (1) SACR 198 (A) quoted with approval in Maphana v S (174/2017) [2018] ZASCA 8 (1 MARCH 2018)

they had been informed she had been raped. The complainant was in a dazed state and fainted. She was later taken to the police station to make a statement. She informed the police of the names of the appellants as that was what she had been told that morning by Rashida and Julia. She knew the first appellant but not the second appellant.

[12.] At about 10h00 that morning, when she was fully awake, the complainant realised that she had been raped as the bedsheet was full of blood and there were blood stains on her underwear. She went to the toilet and experienced a burning sensation when urinating and realised that it felt different when she was wiping herself. Her arm and left hand were painful and her body was sore. She felt very unstable. The complainant did not know who had sexual intercourse with her and did not consent to any sexual intercourse.

[13.] The same day, the complainant was medically examined by a senior professional nurse at the Lenasia South Clinic. The examination confirmed that she had suffered certain injuries which were consistent with recent vaginal penetration with a blunt object.

[14.] It was not disputed at the trial that the complainant had indeed been raped. The main issue was whether the two appellants independently from each other, had performed sexual intercourse with the complainant without her consent.

[15.] The state relied on the evidence of Julia, who explained the circumstances under which the second appellant was found in the bedroom with the complainant.

[16.] Julia’s evidence was that she knew the first appellant who visited the house regularly. She knew the second appellant only by sight. On the night of the party she saw the second appellant on the street at the gate and told him to leave as he did not know anybody there. The second appellant laughed and walked away from her.

[17.] Later that night she was sleeping in the bedroom where the complainant was put to bed. She was not aware of this and could not state whether the complainant was put in the same bed as her, as the complainant had testified, or the other bed. During the night, she woke up and saw the second appellant in the room and confronted him. She saw the second appellant on top of the bed kneeling over the complainant where she lay on the other bed in the room. She observed that the complainant's jeans and panties were pulled down and that the second appellant was trying to pull up the complainant's jeans. The complainant was still "blacked out". She confronted the second appellant thus: "What are you doing here? How can you want to sleep with this child and you can see that this child is blacked out".

[18.] She further testified:

> "*He did dress her eventually while we were talking he dressed he pull her jeans up close the zip and then he stand on her because it his khakis (sic car keys) was laying on the side of the bed. And he said laat ek net my kar sleutels vat en hier uit gaan en hy zip sy zip op en hy maak sy oe toe nadat hy vir haar heeltemal aangetrek het en haar jean toegemaak het….Ja he just said let me take my khakis and then after …he had dressed J properly and then he also zipped his trouser and went out. Okay and just before he went out, he said to me look at you, you are sleeping alone there without a man there on the bed and you want to ….inaudible. "*

[19.] When asked how the second appellant was dressed when she saw him for the first time, her evidence was "*he had already had his jeans on only the zip was unzipped and the buttons. I do not know whether he had undressed it earlier*" .

[20.] On Julia's version she assumed that the second appellant had already had intercourse with the complainant because he was on the bed when she saw him and because she was undressed and he was half undressed as his zip was open.

[21.] Julia followed the second appellant out of the bedroom and went to the bathroom where she stood at the door and called for Malinda as she was wearing a short nightgown. Whilst she was standing in the bathroom door the second appellant was in the sitting room and she heard him saying: "*Hey guys I have already done my thing".* Julia understood that to mean that the second appellant was bragging that he already had sexual intercourse with the complainant.

[22.] Malinda came to the bathroom where Julia told her that the second appellant had slept with the complainant. She stayed with Malinda in the bathroom for about 20 to 30 minutes discussing "a lot of things in general". She then returned to the bedroom, covered the complainant with a blanket and went back to sleep.

[23.] Malinda in turn reported it to Rashida. When Rashida asked Julia what happened she responded "ask Charlie" (the second appellant). Upon being confronted by Rashida, the second appellant left the property and drove away.

[24.] In cross examination a version was put to Julia by the second appellant's counsel which she disputed. He did however not testify. The trial court correctly did not take such version into account in its judgment.

[25.] The trial court asked whether Julia had any reason to tell lies against the second appellant as to what she saw. Julia's response was *"No"*. When asked: *You never had any altercations before?* The response was: *"No I do not know".*

[26.] In cross examination Julia was confronted with the statement made by her to the police in which she stated that when she turned her head she saw Charlie busy raping the complainant. This did not accord with her evidence at the trial. In the statement Julia further said he "pulled his pants and went out saying to her he did not do anything to this girl". In evidence, Julia clarified that she meant closing his zip and buttoning his

trousers. She demonstrated such action by pulling up trouser and zipping it up. Her evidence pertaining to hearing the second appellant bragging about what he had done, was not contained in the statement. The statement further did not contain any evidence regarding Julia hearing the second appellant bragging about “doing his thing”.

[27.] The second appellant voluntarily submitted himself to DNA testing at the commencement of the trial. The DNA results excluded him.

[28.] Rashida Abrahams (“Rashida”) testified regarding the circumstances in which the first appellant was found in the bedroom with the complainant. From the evidence of both Julia and Rashida it is difficult to glean an accurate time line of the events which occurred that evening.

[29.] Rashida’s evidence was that after she received the report from Malinda that she had been told by Julia that the second appellant slept with the complainant, she and Malinda immediately proceeded to the bedroom where she saw someone standing in front of the bed on which the complainant was sleeping. She switched the on the light and identified the person as the first appellant. He was fully clothed. Rashida was upset and started shouting. Upon confronting him, the first appellant said that he was just helping the complainant. He was busy pulling up the complainant’s pants. Rashida smacked him and pushed him out of the room.

[30.] Rashida closed the door and tried to pull up the complainant’s pants, but failed to do so. At the time, the blanket was down by the complainant’s feet and her pants and panties were on her knees. She was not awake. The complainant was lying on her back and there was blood on the sheet and on her vagina. Rashida tried to wake the complainant up but could not do so. She could not get the pants up and became frustrated. She closed the complainant with a blanket and went out.

[31.] She started screaming and shouting. She asked the first appellant *"How could you"*. His response was *"I did not do it*". The second appellant was standing in the kitchen. Rashida confronted him. He ran out of the kitchen and ran away. Everyone at the party then knew what was going on and started reacting to it. She later saw first appellant in the yard saying he did not do anything.

[32.] The first appellant then testified in the trial within a trial pertaining to the admission of a statement made by him at the Kliptown police station. His evidence was that he was arrested on 23 November 2008. He was asked to make a statement but declined. The next day he was told by one of the police officers that the second appellant had made a statement in which he would be blamed, and thus he should make a statement as well. The second appellant would be released the next day in court. He was told that in order for him to be released on bail he had to make a statement and that if he did not do so he would remain in prison. He did not identify such police officer. In cross examination he conceded that he was not sure the person was a policeman He made a statement because he wanted to be released on bail and felt threatened by what he was told.

[33.] He did not testify that he was told what to put in such statement. His evidence was that Superintendent Shibambo "*started writing down as I explained to him*". In cross examination, his evidence was : *"He asked me to start from the beginning and that is when I started from the time I arrived at that place till as far as I can remember".* He also provided his personal details and signed the statement at the bottom and at the end of it.

[34.] His evidence was that the set of forms was not explained to him and he signed them where it was marked "suspect". The set of forms were blank when he signed them. The set of forms were not explained to him.

[35.] Superintendent Shibambo testified that he was stationed at the SAPS Kliptown and has 28 years of experience. He was asked by a sergeant Searle to take a

statement from the first appellant as he was confessing to a crime. He asked the first appellant whether he wished to make a statement. The first appellant confirmed that he wished to do so. He asked the first appellant whether he was forced to make a statement. First appellant responded “No”. He took the first appellant to a separate room where he warned the first appellant that he was not compelled to give a statement but anything that he is going to state will be written down and that it will be taken to court for evidence against him. The first appellant said he did not have a problem with that. At the time the first appellant was sober and in a good emotional state. He also explained the first appellant’s right to legal representation. First appellant also confirmed to Superintendent Shibambo that he was voluntarily providing the statement and was not influenced, threatened or assaulted to do so.

[36.] In sum Superintendent Shibambo testified that he went through all the questions on the pro forma document with the first appellant and explained all his rights although he did not tick any of the first appellant’s responses. He was emphatic that the first appellant did not tell him he was not making the statement freely and voluntarily and that the first appellant signed the form that he understood the rights explained to him.

[37.] There are conflicting dates on the stamps affixed to the form reflecting dates of 23 and 24 November 2008 and 23 December 2008 respectively. The evidence established that the form was not correctly completed in that the first appellant’s responses were not noted on the form. Superintendent Shibambo in cross examination acknowledged that he had made mistakes in not noting the first appellant’s answers on the form. His explanation was that if the first appellant had wanted to exercise any of those rights he would have reflected such choice on the form and that he used it as a pro forma or guideline only in explaining the first appellant’s rights to him. That was the way in which he generally completed such forms and was of the understanding that he was completing the form in the correct way. He further admitted that he made a mistake in only signing one page of the form and not all the other pages as well.

[38.] It was common cause that the first appellant did not inform the Superintendent that he did not wish to make a statement and had been influenced to do so. First appellant's evidence was that he assumed the police officers were all working together. It was also not disputed that it was not brought to the attention of Superintendent Shibambo that undue influence was being brought to bear on the first appellant as he alleged. His own evidence corroborated that. The first appellant agreed in evidence that the Superintendent had obtained his personal information from him as well as the contents of the statement provided.

[39.] The trial court found the statement to be admissible. The statement did not constitute an admission by the first appellant that he had raped the complainant. The nub of the statement was that the complainant agreed to have sex with the first appellant and that they had consensual sex whilst the complainant was awake. One Bala entered the room looking for the first appellant, but he hid under the blankets. After leaving the bedroom Bala told him the second appellant was looking for him. Thereafter, the second appellant took him outside and told him he mustn't sleep with the complainant because it is rape. The first appellant undertook "not to do it again". He went back to the bedroom and told the complainant to get dressed. He helped her to get dressed by pulling up her pants. Whilst doing so, one of her friends came in and asked him what he was doing. He told her he was helping complainant to get dressed. He was told to go outside.

[40.] In his plea, the first appellant denied all the allegations levied against him. During the cross examination of Rashida the version put to her was that first appellant had used the bathroom and the door of the bedroom opposite was open. He saw complainant lying on the bed and went into the bedroom to try and cover her. This evidence contrasted with Rashida's version that when she went into the bedroom she found the first appellant inside with the light switched off. In his evidence the first appellant stated he decided to go into the bedroom as the room was never left open. He saw someone lying on the bed and it concerned him. However, no reason was given for such concern.

[41.] The first appellant testified in his defence. In such evidence he deviated substantially from the contents of his statement. The first appellant testified that he was at the Kliptown party and saw the complainant there. He went to the toilet opposite the bedroom where the complainant was and saw someone lying on the bed, naked with her pants at ankle height and the blankets off her. He attempted to cover her when four girls including Rashida rushed into the room shouting at him asking what he was doing. He said he was covering the complainant. He had just got into the room and found her like that. The girls violently pushed him out of the room and he left. He disputed having intercourse with the complainant. He included the intercourse in the statement because he was threatened by the policemen. In cross examination he said Julia was awake and refused to help him. He tried to pull up her pants but could not get that right. He wanted to take the blankets and cover then the girls rushed into the room. He heard Julia telling the other girls he had nothing to do with that.

[42.] When pressed why he said in his statement that he had consensual sex with the complainant, the first appellant amended his previous evidence by stating that it was a made up story and the police told him to make a statement “along these lines” in order to get bail.

[43.] The first appellant’s version in the statement and in his evidence at trial in various respects corroborated that of Rashida regarding the circumstances under which he was found in the bedroom with the complainant.

[44.] In cross examination the first appellant further referred to a conversation with Julia in which he asked her to help him with the complainant but that Julia responded it was not her concern. This was never put to her in cross examination and is in contrast with her own evidence. Rashida’s evidence was that she found the first appellant trying to pull up the complainant’s pants in the dark.

[45.] The complainant’s state of intoxication was not challenged in evidence by either of the appellants in cross examination, nor that she was “passed out”. The evidence

overwhelmingly indicated that the complainant was not in a state to consent to any sexual intercourse.

[46.] There was no evidence that the first appellant submitted himself for DNA testing. The second appellant had voluntarily submitted himself for DNA testing at the commencement of the trial. The DNA results excluded him.

[47.] The appellants argued that the trial court erred in convicting each of the appellants considering (1) the inability of the complainant to identify who had raped her; (2) the lack of DNA evidence against them; (3) the fact that neither Rashida nor Julia observed the respective appellants doing anything wrong to the complainant; (4) as single witnesses, a cautionary rule had to be applied to the evidence of Rashida and Julia, which failed to be satisfactory in all material respects.

[48.] The State argued that the trail court correctly considered all the evidence and there was no misdirection justifying interference with the factual findings of the trial court. It was further argued that the trial court correctly accepted the evidence of Rashida and Julia, although circumstantial and correctly concluded that the only inference to be drawn is that each of the appellants had intercourse with the complainant to which she did not consent.

[49.] Relating to the second appellant, the State further argued that an adverse inference should be drawn against the second appellant for his failure to testify as Julia's evidence surrounding the compromised situation in which he was found with the complainant linked him to the crime. Thus, it was argued a reasonable expectation existed that if there were an explanation consistent with his innocence, it would have been proffered.[5]

[5] S v Monyane 2008 (1) SA SACR 543 (SCA)

[50.] In Tsiki v The State[6], the Supreme Court of Appeal explained the principles surrounding the evidence of a single witness thus:

> *"[14] Section 208 of the CPA provides that 'an accused may be convicted of any offence on the single evidence of any competent witness.' The litmus test of a single witness was laid down in R v Mokoena[7] and succinctly set out in S v Sauls and Others[8] as follows:*
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> > *'The absence of the word "credible" is of no significance; the single witness must still be credible, but there are. . . "indefinite degrees in this character we call credibility. . . There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness. . . 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 trial court should have been mindful that it can only convict on such evidence if it is satisfactory in all respects. At the same time this Court, as a court of appeal, is reticent to interfere with the credibility findings of the trial court as well as the evaluation of the oral evidence, unless there is a material misdirection.*

[51.] The trial court accepted the evidence of Julia and found that there was insufficient animosity between her and the second appellant to fabricate false allegations against him. In considering her evidence, he concluded that it was sufficient to convict the second appellant on this basis.

[52.] It is however important to bear in mind that all the evidence must be considered by a trial court to determine whether to acquit or convict an accused person. As stated by Nugent J in *S v van der Meyden* [9]1991 (1) SACR 447[10] (W) :

> "*[A] court does not base its conclusion, whether it be to convict or acquit, on only part of the evidence. The conclusion which is arrived at must account for all the evidence. Although the dictum of Van der Spuy AJ was cited without comment in S v Jaffer 1988 (2) SA 84 (C), it is apparent from the reasoning in that case that the Court did not weigh the "defence case" in isolation. It was only by accepting that the prosecution witness might have been mistaken (see especially at 89J-*

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[6] Fn 2 supra para 14-
[7] [1956] 3 All SA 208 (A) at 212-213.
[8] *S v Sauls and Others* [1981] 4 All SA 182 (AD); 1981 (3) SA 172 (A) at 180E-F.
[9] 1991 (1) SACR 447 (W)
[10] 1991 (1) SACR 447 (W)

90B) that the Court was able to conclude that the accused's evidence might be true.
I am not sure that elaboration upon a well-established test is necessarily helpful. On the contrary, it might at times contribute to confusion by diverting the focus of the test. The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored." [11]

[53.] In this respect the trial court misdirected itself in relation to the weighing up of all the evidence pertaining to the second appellant. Whilst accepting that there was no DNA of the second appellant found on the body of the complainant, the trial court went further and found *"DNA can only suggest or prove that indeed he is the person who penetrated if at all he ejaculated and left his bodily fluids in her. But if he did not ejaculate then there will be nothing like that."*

[54.] In doing so, the trial court disregarded that the second appellant had voluntarily submitted himself to DNA testing at the commencement of the trial and that such DNA results excluded the second appellant as the person who raped the complainant. These facts which should have carried considerable weight in an evaluation of the evidence.

[55.] The qualifications found by the trial court pertaining to the DNA evidence were not canvassed in evidence and there was no evidence before him justifying the conclusion reached, which appears to unjustifiably limit the ambit and reliability of such evidence.

[56.] Moreover, Julia's evidence contained certain inconsistencies and improbabilities, including differences between the statement she provided to the police and her

[11] S v Van der Meyden 1999 (1) SACR 450 (WLD)

evidence at the trial. In her original statement Julia emphatically stated she observed the second appellant raping the complainant contrasted to her evidence at trial that she assumed the second appellant had raped the complainant because of how she found him in the bedroom. The statement did not contain the evidence that Julia had heard the second appellant bragging about “doing his thing”.

[57.] Julia’s evidence further contained various inconsistencies and improbabilities such as her reaction after confronting the second appellant in the bedroom, which amounted to having a discussion with general things with Melinda in the bathroom and only thereafter covering the complainant with a blanket and going to sleep. Such conduct contrasted sharply with that of Rashida when she found the first appellant in the bedroom with the complainant.

[58.] Even accepting that the second appellant was found in a compromising position, this cannot be equated to conclusive proof that he committed a rape, more so in light of the evidence presented and his exclusion by the DNA evidence.

[59.] If all the evidence against the second appellant is considered, the trial court misdirected itself in finding on all the evidence presented that the guilt of the second respondent was proved beyond a reasonable doubt.

[60.] For this reason, the State’s contention that an adverse inference must be drawn against the second appellant for his failure to testify, lacks merit. The evidence against the second appellant did not establish a prima facie case and his failure to testify did not bolster the State’s case.

[61.] It follows that the second appellant’s appeal must succeed.

[62.] The position of the first appellant stands on a different footing. Although there was no DNA evidence linking the first appellant to the rape of the complainant, there

was no evidence that he submitted himself to DNA testing. Other than the DNA report which dealt with a comparison of the samples taken from the complainant and that of the second appellant, the record contains no evidence of the first appellant having submitted himself to DNA testing.

[63.] On behalf of the first appellant it was argued that although determined admissible by the trial court, the statement was to be excluded in accordance with the accused's right to a fair trial[12]. It was argued that the prejudice of the statement outweighed its evidential value.

[64.] It is trite that an appellate court should not interfere with the conclusions on primary facts of the lower court, unless satisfied that they are plainly wrong. Put differently, the appeal court would only interfere, in exceptional and very limited circumstances, with the findings of facts of the lower court if it is satisfied that the decision could not be reasonably explained or justified.

[65.] I am not persuaded that the trial court misdirected itself directing the first appellant's statement to be admissible. There is no basis to interfere with the trial court's finding that Superintendent Shibambo was an honest and truthful witness and that the statement was made freely and voluntarily. The contents of the statement, which traversed substantial detail, was dictated freely by the first appellant and no evidence was led that its contents were in any way prescribed to him. The trial court correctly found that Superintendent Shibambo did make mistakes in not recording what option appellant chose when having been read his rights. Such mistakes however do not vitiate the evidence that the first appellant's rights were explained to him.

[66.] I am further not persuaded that the trial court erred in accepting Rashida's evidence. The first appellant's evidence in various respects corroborate her version regarding the circumstances under which he was found in the bedroom. His evidence

[12] S v Khan 1997 (2) SACR 611 (SCA)

regarding his concern and desire to help the complainant was unconvincing and improbable. The evidence that the complainant was awake and consented to intercourse, was in direct contrast to all the other evidence presented.

[67.] In *Shackell v S*[13] *2001 (4) ALL SA 279 (SCA)* Brand AJA (as he then was) stated the following:

> *"A Court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true."*

[68.] Measured against these principles, it is my considered view that the trial court did consider the whole conspectus of the evidence before it pertaining to the first appellant and correctly found that the State has proved its case against him beyond reasonable doubt. The trial court correctly found that the first appellant did have sexual intercourse with the complainant without her consent and did not misdirect itself on the facts.

[69.] It follows that the first appellant's appeal against his conviction must fail.

[70.] It is trite that sentencing is pre-eminently the domain of the trial court. The court of appeal may only interfere with the sentence imposed by the trial court if it is of the view that the trial court did not exercise its discretion judiciously and correctly.

[71.] In *S v Malgas*[14] *2001 (1) SACR 496 (SCA)* the Supreme Court of Appeal stated the following:

> *"A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it was the*

[13] 2001 (4) ALL SA 279 (SCA)
[14] 2001 (1) SACR 496 (SCA)

trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would usurp the sentencing of the trial Court."

[72.] It is on record that the first appellant was charged of the crime of rape read with the provisions of section 51(1) of the Criminal Law Amendment Act, 105 of 1997 which the Legislature promulgated to provide for minimum sentences for certain crimes, unless it is demonstrated that substantial and compelling circumstances exist which obliges the court to deviate therefrom. Such substantial and compelling circumstances should be considered including the usual triad being considered in the imposition of sentence.

[73.] It is trite that a court of appeal will only interfere with the sentence imposed by the trial court where the sentence imposed is disturbingly inappropriate, out of proportion to the magnitude of the offence, sufficiently disparate, vitiated by misdirection illustrating that the trial court exercised its discretion unreasonably or is otherwise such that no reasonable court would have imposed it.

[74.] The trial court considered all the relevant circumstances in his judgment, including that there was no conspiracy or common purpose between the appellants and that each of the appellants committed the rape separately. He further considered the triad consisting of the crime, the offender and the interests of society.

[75.] The first appellant was a first offender who was 22 years old and had passed grade 12 at school. He was employed by Goldquest Hydraulics as a sales coordinator. He was single and living with his grandmother and younger brother as his mother has passed away. They are financially dependent on him. The first appellant did not have a firearm nor intended to obtain one. It is clear from the record that both appellants showed no remorse for what they have done and that a custodial sentence is the only reasonable sentence in this case.

[76.] It is on record that the complainant, the victim, was a twenty year old virgin at the time of the offence, which occurred a few days before her twenty first birthday. She was a student at the University of Johannesburg studying towards a bachelor's degree in administration. She was raped in circumstances where she was not conscious and especially vulnerable. According to her evidence, the complainant was physically and emotionally damaged as a result of the ordeal she endured and her studies have been negatively impacted. She required counselling and does not feel like the same person as it was not her decision to sleep with anyone.

[77.] The first appellant argued that insufficient weight was attached to his personal circumstances as well as the fact that the complainant was not physically harmed. It was argued that the psychological harm was mitigated by the fact that she was unconscious and not aware of what was happening to her. It was also argued that the event did not affect her relationship with men or that she was seriously affected by the rape. On this basis it was argued that there were substantial and compelling reasons to deviate from the minimum sentence imposed. The trial court was also criticised for not expressly dealing with such compelling and substantial reasons. It was argued that a lesser sentence would serve all the purposes of punishment.

[78.] Under Part III of Schedule 2 of the Criminal Law Amendment Act 105 of 1997, the minimum sentence applicable for the crime of rape is imprisonment for a period of not less than ten years. The sentence imposed by the trial court a quo accorded with such minimum sentence.

[79.] It is trite that a court may only deviate from the prescribed minimum sentence if substantial and compelling reasons were present[15] which would entitle the trial court to do so.

[15] S v Malgas 2001 (1) SACR 469 (SCA); S v Mhlangu and Others 2012 (2) SACR 373 (GSJ) 377 g-h

[80.] Although the trial court did not expressly address the absence of any substantial or compelling reasons, the trial court did consider all the relevant factors, none of which would constitute a substantial or compelling reason to deviate from the prescribed minimum sentence.

[81.] In *Tshabalala and Another v S*[16] the court stated the following:

> *"Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, to privacy, and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilisation. Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives".*

[82.] It is trite that a court of appeal will only interfere with the sentence imposed by the trial court where the sentence imposed is disturbingly inappropriate, out of proportion to the magnitude of the offence, sufficiently disparate, vitiated by misdirection illustrating that the trial court exercised its discretion unreasonably or is otherwise such that no reasonable court would have imposed it. The trial court did not misdirect itself in failing to take any of the relevant factors into account.

[83.] The Courts have been enjoined in a number of decisions not to shy away from imposing appropriate and harsh sentences where justice so demands. It is my considered view therefore that the aggravating circumstances outweigh the personal circumstances of the first appellant in this case. I am not persuaded that there are indeed substantial and compelling reasons to deviate from the prescribed minimum sentence. Therefore, I conclude that the trial court was correct in imposing the minimum prescribed sentence.

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[16] ZACC 48 2020 (3) BCLR 307 (CC) (11 DECEMBER 2019)

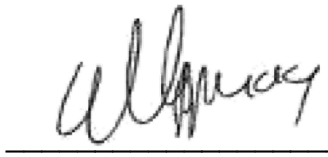
[84.] Considering all the facts and circumstances, there is no basis to interfere with the conviction or sentence imposed by the trial court in respect of the first appellant. It follows that his appeal must fail.

[85.] The following order is granted:

[85.1] The appeal against both the conviction and sentence of the first appellant is dismissed.

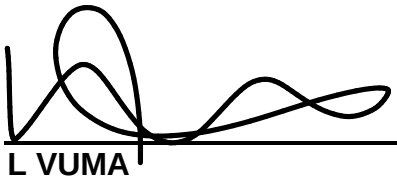
[85.2] The appeal against both the conviction and sentence of the second appellant is upheld and the conviction and sentence are set aside.

[85.3] The first appellant is directed to present and surrender himself to the Johannesburg Correctional Services within 10 (ten) days of date of this order, failing which the registrar is authorised and directed to issue a warrant of committal.



EF DIPPENAAR
JUDGE OF THE HIGH COURT,
JOHANNESBURG

I CONCUR



L VUMA
ACTING JUDGE OF THE HIGH COURT,
JOHANNESBURG

APPEARANCES

DATE OF HEARING	:	17 August 2020
DATE OF JUDGMENT	:	25 August 2020
APPELLANTS' COUNSEL	:	Adv W Karam Legal Aid South Africa
RESPONDENT'S COUNSEL	:	Adv JH Spies State Advocate