IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A166/2019

Reportable No
Of interest to other Judges No
Revised: Yes_
Date: 25/01/2022

In the matter between:

BONGANI ARNOLD MZINYANE Appellant

and

THE STATE Respondent

J U D G M E N T

LEKOKOTLA AJ**:**

1 The appellant was charged with kidnapping, 4 counts of rape and assault with intent to do grievous bodily harm of N[....] M[....] on the morning of 27 April 2008. He appeared before the honourable magistrate Mpofu in the Protea Magistrates Court.

2 He pleaded not guilty to all six (6) charges and made a plea explanation in terms of section 115 of the Criminal Procedure Act, 51 of 1977 by making a statement through his attorney wherein he set out the basis of his defence.

3 At the conclusion of the trial, on 20 April 2009, the appellant was convicted of kidnapping and three counts of rape. He was acquitted on the charge of assault with intent to do grievous bodily harm. He was sentenced to 25 years imprisonment in terms of section 51 of the Criminal Law Amendment Act Sexual Offences and Related Matters Act, Act 32 of 2007 read together with sections 256, 257 and 281 of the Criminal Law Procedure Act, Act 51 of 1977 as well as the Criminal Law Amendment Act, Act 105 of 1997. All counts were taken as one for purposes of sentence.

4 On 25 February 2016 the appellant brought an application for leave to appeal against the sentence imposed by the learned magistrate. This application was granted by the learned magistrate.

5 The appeal against sentence was set down for hearing in 2020. However, the appeal was removed from the roll in order to allow appellant to apply for leave to appeal against conviction as well. Leave to appeal against conviction was granted by the court *a quo* on 12 October 2021. The present appeal thus lies against conviction and sentence.

6 The complainant's evidence was the following: On 27 April 2008 she had gone with her friends to a street bash or party in Diepkloof, which is near her home in Soweto. She then heard about and personally witnessed the appellant assaulting his girlfriend, Arlena, who is the complainant's friend. The complainant testified that she knew the appellant as the boyfriend of her friend Arlena and they also stayed in the same street. She took the appellant as a friend as he was Arlena's boyfriend.

7 Arlena escaped from the appellant's assault. Thereafter, the appellant, who was in the company of a male friend and who were both carrying golf sticks, approached the complainant who was with her friend Funani. The appellant embraced her and he forcibly pulled her to leave the street bash with him. When the complainant resisted, he hit her with a golf club on her knees. The appellant's friend was also pulling Funani, the second state witness in this case, who was likewise resisting him.

8 The appellant started dragging the complainant on the tar road. People were afraid to assist her, since they knew what kind of the person the appellant was. Simultaneously, the appellant's friend was grabbing Funani behind them and all of them were going to the same destination.

9 The appellant continued to drag the complainant on the tar road for approximately 50 meters until they reached a corner house that was opposite the garage, which the appellant stated was his maternal house. Throughout that time there were a lot of people at the party or street bash that observed this but none of them would help her because they were afraid of the appellant.

10 When they arrived at the corner house, she was crying and wanted to urinate. She then went to the toilet. The appellant entered inside the toilet before she could complete buckling her belt. When the complainant asked the appellant to leave the toilet, he hit her with his open hand. He told her to undress and she refused. The appellant then undressed her while hitting her and ordered her to climb on top of a toilet seat. She refused to comply.

11 The appellant started hitting her with a golf club and slapped her with an open hand in her face. She sustained injuries to her face and the head; her face was swollen and red with a slightly open injury on her head.

12 The appellant ordered her to climb onto a toilet seat and to face the opposite direction. He then inserted his penis in her vagina and had sexual intercourse with her. When he was finished, he said they must move out of the toilet as he did not 'feel it' properly. She was made to lie down on the lawn after the appellant had dragged her from the toilet to the lawn, as she was resisting. The appellant inserted his penis in her vagina for the second time on the lawn. The appellant appeared to be nervous while doing so and he then said they must move away from the lawn.

13 They subsequently moved to the *stoep* where he again inserted his penis into her vagina for the third time. He did not use a condom in any of those instances.

14 Thereafter, the appellant ordered the complainant to put on her clothes and ordered her to leave the house with him. The complainant managed to put on her

trousers but carried her panties and belt in her hands. They arrived at another house.

15 When they got to the second house (appellant's father's house) there was an elderly man, who was either the appellant's father or uncle who opened the door for them. This man saw the appellant crying but he said nothing. The appellant then pushed the complainant towards the bedroom.

16 Inside the bedroom at the appellant's father's house, the appellant ordered the complainant to put her panties and belt that she had been carrying in her hands down on the table and to take off her trouser. She put down the panties and belt but refused to take off her trouser at which stage the appellant hit her twice with a golf club in her head and she started bleeding from her head.

17 The appellant inserted his penis into her vagina and had sexual intercourse with her inside the bedroom. After that, the appellant informed the complainant that he had ejaculated. He never got off her after saying he had ejaculated. Instead, he ordered the complainant to stop making noise as she was crying at that stage. He then proceeded to have sexual intercourse with her for the fifth time, as the appellant did not take out his penis from her vagina. He eventually stopped. He allowed her to go to urinate and that is when she got a chance to run away from the house through the kitchen door and into the street. She was still naked, but kept running. She ran to her home. When she got there, she found her younger sister, who was 12 years old at the house. She could not tell her what had happened to her as she was too young.

18 At no stage did the complainant consent to sexual intercourse with the appellant.

19 The following morning, around 7h30, the complainant's friend Lebogang came to her home to check on her. She told Lebogang about her rape the previous night after Lebogang enquired from her what was wrong after seeing that she was crying. Lebogang advised her to go to the police station. Even though she was reluctant at the beginning because of the identity of the appellant, she eventually went to report the matter to the police, accompanied by her friend Lebogang. She was then taken to the doctor at Nthabiseng Centre for examination. She testified that she had

reported her injuries to the doctor, including an open wound injury on her head, sustained as a result of being hit by the golf stick by the appellant.

20 After her examination, the police officer drove her home and informed her family about her rape and that she had attended the street bash the previous night. Her family never approved of her going to bashes. They never would have consented to her going to the street bash or party the previous night.

21 The complainant could not say whether the appellant ejaculated in any of the sexual encounters, except for the one occasion, after having sexual intercourse with the appellant inside the bedroom of his father's house, whereafter he had informed her that he had ejaculated. She testified that she could not say whether the appellant had ejaculated on the other occasions, as she did not know. .

22 The complainant testified that this incident had been her first sexual encounter. Her testimony in this regard was questioned in light of the fact that the doctor who had examined her after the rape had recorded in the J88, as confirmed by him during oral evidence, that during his examination of her in the afternoon of 27 April 2008, she had informed him that she had had a previous sexual encounter six months prior, on which occasion her partner had used a condom. The complainant denied having given this information to the doctor and stated that she did not know where the doctor got this information from.

23 Immediately after her testimony, the court, prosecutor and the defence observed that the complainant was well developed for her age and appeared slightly older than 16 years old.

24 She testified that she was 15 years old at the time the offences were committed, and that she was 16 years old at the time of giving evidence in court.

25 The state's second witness was Funani Matshikiri, who was with the complainant at the street bash or party on the day of the incident. She was 16 years old when she testified. Her testimony was that she knew the appellant through his girlfriend Arlena, who was also her friend. She therefore also considered the appellant her friend as a result. But she had not known the appellant for a long time

prior to 27 April 2008. In fact, she had known him since the previous year (2007) because Arlena only started attending her school in 2007.

26 She confirmed a lot of the complainant's testimony, which is that on 27 April 2008, she together with the complainant and other friends attended a street bash or party when they saw the appellant assault his girlfriend Arlena, in full view of the people who attended the party and who did not help Arlena or intervene in any way. Arlena subsequently managed to escape.

27 Immediately after Arlena's escape, the appellant and his male friend started pulling Funani and the complainant. The appellant's friend slapped Funani as she was resisting. Neither Funani nor the complainant were drinking.

28 The appellant and his friend, who were both carrying golf sticks or golf clubs, started pulling the complainant and Fuani away from the party, with the appellant and the complainant being ahead of Funani and the appellant's friend. The appellant was assaulting the complainant by hitting her with the golf stick on her knees and also on the head. The complainant started bleeding from the head and Funani witnessed this. He was dragging the complainant on the tar road. All of these events took place in full view of the street bash goers who never assisted the complainant or her friend at any stage.

29 The appellant and his friend took the complainant and Funani to the appellant's maternal home in Zone 5, Diepkloof. When they arrived at the house, the complainant indicated that she wanted to go to the toilet. She went. Before the complainant exited the toilet, the appellant entered the toilet. She then heard the complainant screaming, asking the appellant to leave her alone. The appellant's friend told Funani not to bother them as there was nothing going on inside the toilet.

30 The appellant's friend then got distracted by a friend of his whom he decided to go and speak to on the street, from whom he was asking for cigarettes. At that stage Funani managed to run away from that house and thus escaped the appellant's friend. She ran across the street and went to her friend's home, Mpumi, as it was close by. When they opened the door for her at Mpumi's home, she managed to sleep there. She never tried calling for help or calling the police because

there was no one in the street at that time and also because she was scared. In any event, when she got to Mpumi's home everyone there appeared drunk, so she simply found a place to sleep and she slept there.

31 She denied that she and the appellant's male friend never went to the corner house next to the garage (the appellant's maternal home) or that they disappeared to go elsewhere along the way. She confirmed that she did not see what happened inside the toilet when the appellant and the complainant were inside there. She only heard the complainant screaming asking the appellant to leave her alone.

32 Funani confirmed that the complainant has a boyfriend but stated that the complainant has not had sex with her boyfriend. The prosecutor raised an objection to this question, but the court allowed it as it had been raised by the court.

33 Funani testified that she next saw the complainant later that day after she returned from the police station. The complainant told her that when Funani heard her screaming from inside the toilet, the appellant was raping her inside the toilet and that she had laid a charge of rape against him at the police station. The complainant never told her about any other place where she was raped as Funani only saw them both inside the toilet and soon thereafter manged to escape from the house.

34 The third state witness was Lebogang Baloyi, who was 17 years old at the time of her testimony. She testified that she knows the complainant because at the time of the incident, she was living at her (Lebogang's) home. The complainant had been living with Lebogang for two months and was not living with her grandmother at that time. She also knew the appellant because he was Arlena's boyfriend. Arlena was also her friend.

35 She testified that she did not go to the street bash that the complainant and her friends went to. However, when the complainant arrived back home in the early hours of 27 April 2008, she (Lebogang) had just woken up. She only managed to speak to the complainant later that morning. The complainant, who appeared heartbroken, told her that the appellant had raped her four times the previous night, (i) on top of the toilet [roof]; (ii) on the lawn [garden]; (iii) on the *stoep*; and (iv) and (v) twice in the bedroom.

36 In her statement to the police Lebogang had written that the complainant told her that she was raped three times, without specifying the areas where the three rapes had occurred. From her testimony, it appeared that she initially forgot the rape on the *stoep* but she soon remembered it afterwards.

37 Lebogang then accompanied the complainant to the police station where they made a statement.

38 Lebogang noticed that the complainant's clothes were dirty, similar to those of a person who had been dragged on the floor. However, she did not see any injuries on the complainant.

39 The fourth state witness was Doctor Lekhibi, who examined the complainant at the Nthabiseng Support Centre at the Chris Hani Baragwanath Hospital.

40 The doctor's testimony was that he examined the complainant who was 15 years old at the time around 14h00 on 27 April 2008. He observed that she had dirty blood on her clothes. The complainant informed him that the appellant had taken her from the street bash to Zone 5 Diepkloof and had raped her around 2h00 in the morning. Also, that the appellant had assaulted her many times on her face.

41 The doctor testified that the complainant had no clinical evidence of drugs or alcohol and that he did not observe any injuries on the complainant, such as an open wound injury, which he would have been able to see when he examined her and would have attended to it first before completing the rest of his examination of her. The complainant's testimony was that she did not know why the doctor did not see or record the injury on her head.

42 The complainant's testimony was that she did not get injured on her private parts. However, the doctor testified that the complainant's posterior fourchette had a fresh tear; that her hymen was gapping and had swelling and also had a cleft at three o'clock and five o'clock and was bruised. All of these injuries were consistent with forceful and recurring penetration. The fresh tear indicated recent sexual intercourse and not the one which she had indicated to the doctor that she had experienced six months prior.

43 The complainant had testified that the first sexual encounter with the appellant was her first time, which she confirmed under re-examination, meaning that she had never had sexual intercourse before. This again is in contrast to what she told the doctor since she, according to the doctor, had told him that she last had sexual intercourse six months before the incident involving the appellant.

44 The doctor's testimony was that the fresh tear on the complainant's posterior fourchette, a gapping hymen with a swelling and a cleft that was bruised at three o'clock and five o'clock are all indicative of recent trauma to the tissues and suggested a lack of lubrication by the female which is also suggestive of a lack of consent to sexual intercourse and more than one round of sexual intercourse, possibly four or five rounds of sex, although he could not give the exact number of rounds. In short, these injuries were indictive of recent repeated acts of sexual intercourse.

The appellant's version in terms of the Plea Explanation

45 The appellant's version in terms of the Plea Explanation made by him in terms of section 115 of the Criminal Procedure Act, 51 of 1977 is that on 27 April 2008 he agreed with the complainant to leave the street party. At all times, he thought that the complainant was 16 years old and could give valid consent to sex. He only had sex once with the complainant. He denied having sex with her on more than four different occasions or without her consent. He also denied ever assaulting the complainant.

46 In his testimony, the appellant confirmed what he had stated in his plea explanation. He confirmed that he attended a street bash and testified that he did not drink alcohol on 27 April 2008. Neither did the complainant N[....], her friend Funani or his friend Stompie, who was with him at that time. He denied assaulting Arlena on the day in question and in fact did not even speak to her because she was in her brother's company at the same street bash. He testified that he had been friends with the complainant since 2006 even though the complainant had testified that she was still living in KwaZulu Natal in 2006, which evidence was confirmed by her friend Funani. The accused testified that he also considered Funani a friend.

47 After having spent three hours at the bash, his friend Stompie and Funani stated that they were leaving. He then asked the complainant if she wanted to come with him and she agreed. Stompie and Funani then went their separate ways to Stompie's home.

48 He testified that the complainant went to his father's home with him out of her own volition. It took them twenty minutes to walk there. When they got to his father's house, he (the father) opened the door for them and asked the complainant who she was and where she lives, and she replied to the questions.

49 The appellant's testimony was that when they reached his bedroom, he and the complainant had consensual sex once in his bedroom.

50 When asked why the complainant would have accused him of rape, the appellant testified that that was possibly because he had asked her not tell his girlfriend Arlena that he had had sex with the complainant. When asked how this could be the case, given that he testified that he and the complainant had had a discussion prior to engaging in sexual intercourse that because they both had their own partners, they were going to keep their sexual intercourse a secret. This was prior to the sexual intercourse taking place, on the appellant's version.

The Magistrates Judgment

51 The learned magistrate correctly recorded all five incidents of sexual penetration in line with the evidence given by the complainant, but in her judgment, she only found the accused guilty of three counts of rape without specifying which one was excluded from the four counts with which the appellant was charged.

52 The learned magistrate held that she could not brand the complainant a reliable witness, however, stating that this did not mean that she should reject her evidence wholly. She found that the complainant was likely assaulted but had exaggerated her injuries, particularly concerning being hit by a golf stick on the head and bleeding as a result. Even though Funani confirmed the assault on the complainant's head, Lebogang, to whom the report of rape was first made, did not

see any injuries on the complainant. Neither did the doctor who examined her. However, the doctor did observe blood on the complainant's clothes.

53 In relation to the complainant's testimony in court that she had never had sexual intercourse prior to the rape, while the doctor had recorded in the J88, as confirmed in his testimony, that the complainant had informed him that she had indeed had sexual intercourse six months prior, the magistrate found that the complainant's version on this aspect was not true.

54 Even though the magistrate concluded that the complainant had lied about the head injury and her sexual history, she had to weigh this against the totality of the evidence, including the many allegations made by the complainant which were left unchallenged by the defence. These included, amongst others, the evidence that the complainant and Funani were both taken by the accused and his male friend from the party to a corner house next to the garage; the fact that the complainant's clothes were dirty, as observed by the doctor; the fact that the complainant was sober, as confirmed by the doctor; the fact that the complainant was crying after leaving the street bash whilst in the appellant's company; what the interaction was with the man that the complainant and the appellant found at the second (paternal) house, with the complainant arriving there in a distressed state, crying; and the fact that the appellant had entered the toilet at the first (maternal) house whilst the complainant was still inside the cubicle and the complainant's reaction thereto by shouting at him to leave her alone or to leave the toilet, which de declined to do.

55 As far as the complainant's lie about her virginity is concerned, the magistrate observed that some young girls wanted to come and appear chaste before everyone, which could be the reason why she testified that this had been her first sexual encounter. This aspect of her evidence did not, however, destroy the pivotal evidence that she was violated by the appellant. The other aspect that the magistrate found not true about the complainant's testimony was that she had been beaten by the golf stick on her head and had bled as a result. That is no doubt why the magistrate acquitted the appellant on the charge of assault with intent to do grievous bodily harm.

56 Despite her having concluded that the appellant had lied about being assaulted with the golf stick on the head, the magistrate accepted her evidence about being violated sexually against her will. The magistrate however found that the appellant had raped the complainant three times and not four times. She did not specify the specific counts of rape that she found the appellant guilty of, nor on which count on the appellant had been acquitted. The magistrate also found the accused guilty of kidnapping.

57 The learned magistrate sentenced the appellant to 25 years imprisonment, instead of life imprisonment that is statutorily prescribed where an accused is convicted of more than one count of rape. When the magistrate asked the appellant's counsel to address her on substantial and compelling circumstances for deviating from the minimum sentence of life imprisonment, he indicated that he could find none.

58 It was the prosecutor who in fact asked the learned magistrate to deviate from the prescribed minimum sentence on the basis of the appellant's youth at the time of the offence, as he was only 19 years old; and that despite the appellant specifically testifying that he had not consumed alcohol that day, the prosecutor still asked the court to factor in that alcohol may have heavily influenced the appellant's actions.

59 The learned magistrate also found that the socio-economic circumstances of the appellant had a role to play on how he conducted himself. Instead of imposing the statutorily prescribed minimum sentence of life imprisonment, she imposed 25 years imprisonment on the appellant.

The Appeal

60 As stated above, the appellant initially appealed against sentence only, but by the time the matter was heard, the appeal lay against conviction as well.

61 The appellant sought condonation for the late filing of the appeal, which was caused by the lack of timeous legal representation as a result of a lack of financial resources that had to be obtained from his family to pay for a legal representative to assist him with the appeal.

62 The application for condonation was not seriously opposed and considering that no prejudice was shown, it is in the interests of justice to grant condonation for the late filing of the appeal.

Appeal on conviction

63 The appellant raised five grounds of appeal on conviction. These are that:

63.1 The age of the complainant was not proven through documentary evidence and therefore amounted to hearsay evidence;

63.2 The trial court erred after concluding that the complainant was not a reliable witness, but continued to convict the appellant on three counts of rape based on her evidence;

63.3 That despite a number of contradictions in the evidence of the complainant and that of Funani against that of the doctor and Lebogang Baloyi regarding the injuries sustained by the complainant and the history of her previous sexual encounter, the accused was still convicted;

63.4 The trial court erred in finding that the complainant knew what ejaculation is and that the appellant had ejaculated in all the instances where he had sexual intercourse with the complainant;

63.5 The court erred in finding that the doctor found that there was forced penetration.

64 I deal with each of the grounds of appeal in turn below.

Age of the Complainant

65 In his heads of argument as well as at the hearing, counsel for the appellant contended that it was hearsay evidence that the complainant was 15 years old at the time of the incident. This is after the complainant had testified that she was born on 11 February 1993 and that she was 16 years old at the time of her testimony on 20 January 2009. Furthermore, the doctor who examined the complainant found that

her pelvis was not well developed at the time of the incident, in line with a person who was 15 years old at the time.

66 It is common cause that when the court, prosecutor and the defence observed the complainant, they recorded that she was well developed for her age and that she appeared slightly older than 16 years old. This, counsel for the appellant used to support the contention that there was no proof that the accused was younger than sixteen years old.

67 During the hearing, counsel for the appellant rightfully conceded that since the issue of the complainant's age was never challenged during the trial, little purpose is served by questioning it on appeal. In any event, this argument takes the matter no further since multiple counts of rape attract a sentence of life imprisonment irrespective of the age of the complainant.

Reliability of the Complainant

68 On the issue of whether or not she had had previous sexual intercourse, the learned magistrate found that even though this is inconsistent with the evidence presented by the doctor concerning what the complainant had disclosed to him, namely, that she had indeed had sexual intercourse prior to the incident involving the appellant, she may have lied in order to present herself as chaste. Counsel for the respondent correctly argued that the circumstances under which the complainant testified and the identities of those who were present when she testified at trial, remain unknown. But more significantly, counsel for the respondent also correctly conceded that the complainant's previous sexual history is in any event irrelevant in a matter of this nature and hence in this appeal.

69 The only remaining issue of relevance in respect of which the learned magistrate found the evidence of the complainant to be unreliable, is in relation to the complainant's evidence that she was hit by the golf stick on the head, suffering an open wound on the head and resultant bleeding on the head. The magistrate held that this did not necessarily render the rest of her evidence unreliable. In any event, the learned magistrate acquitted the appellant on the charge of assault with intent to do grievous bodily harm. Therefore, this ground of appeal lacks merit.

70 The idea that where a court makes a credibility finding and rejects a witness' version as unreliable, it has the effect of the evidence being disqualified from further consideration, consequent to which no evidential weight can be attached to such witness's evidence, was considered and rejected in the majority decision of the Full Court in Molaza v S[1] where the court affirmed what was stated in Sithole v S[2] concerning the proper approach to the adjudication of evidence, as follows:

> "[8] The State bears the onus of establishing the guilt of an accused beyond reasonable doubt and he is entitled to be acquitted if there is a reasonable doubt that he might be innocent. The onus has to be discharged upon a consideration of all the evidence. A court does not look at the evidence implicating the accused in isolation to determine whether there is proof beyond reasonable doubt nor does it look at the exculpatory evidence in isolation to determine whether it is reasonably possible that it might be true. The correct approach is set out in the following passage from *Mosephi and others v R* LAC (1980 – 1984) 57 at 59 F-H:
>
> > 'The question for determination is whether, in the light of all the evidence adduced at the trial, the guilt of the appellants was established beyond reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a useful guide to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a

---

[1] **[2020] 4 All SA 167 (GJ), para 85.**

[2] **[2011] ZASCA 85, para 8.**

pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees'.

In weighing the evidence of a single State witness a court is required to consider its merits and demerits, decide whether it is trustworthy and whether, despite any shortcomings in the evidence, it is satisfied that the truth had been told. It must state its reasons for preferring the evidence of the State witness to that of the accused so that they can be considered in the light of the record. In applying the onus the court must also, where the accused's version is said to be improbable, only convict where it can pertinently find that the accused's version is so improbable that it cannot be reasonably possibly true." (Emphasis provided)

71 The magistrate correctly weighed the totality of the evidence, the merits and demerits of each side's versions in determining whether the appellant's guilt was proven beyond reasonable doubt.

Number of Contradictions on the Evidence of the Complainant

72 Other than the complainant's previous sexual history, the other contradictions that were present in the complainant's testimony related to her alleged assault by the golf stick on the head, suffering an open wound as a result and bleeding on the head. For reasons set out above, this ground of appeal should also be dismissed.

73 In terms of s 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… 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"

74 The correct approach to the evaluation of evidence in a criminal trial was enunciated by the Supreme Court of Appeal in S *v Chabalala* 2003 (1) SACR 134 (SCA), at paragraph 15, as follows:

> "The trial court's approach to the case was, however, holistic and in this it was undoubtedly right: S v Van Aswegen 2001 (2) SACR 97 (SCA). The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt. The result may prove that one scrap of evidence or one defect in the case for either party (such as the failure to call a material witness concerning an identity parade) was decisive but that can only be an *ex post facto* determination and a trial court (and counsel) should avoid the temptation to latch on to one (apparently) obvious aspect without assessing it in the context of the full picture presented in evidence... ."

75 Higher courts have cautioned that an accused's claim to the benefit of a doubt, when it may be said to exist, must not be derived from speculation but must rest upon a reasonable and solid foundation created either by positive evidence or gathered from reasonable inferences which are not in conflict with, or outweighed by, the proved facts of the case.[3]

76 In the determination of its verdict, the trial court considered the totality of the evidence. See: S v van der Meyden[4]. Secondly, the trial court accepted that the onus was on the prosecution to prove its case beyond reasonable doubt.

77 The appellant's version at trial was that he had consensual sexual intercourse with the complainant on one occasion only. The trial court rejected the defence of consensual sexual intercourse relating to this single admitted act. Consensual sex occurred once, on the appellant's version, at his paternal home (i.e., the second house mentioned in the evidence of the relevant state witnesses). This version, when weighed against the totality of the relevant evidence – (such as: (i) the complainant's prolonged state of emotional distress and her continual crying throughout the ordeal to which she was exposed, which crying, on the appellant's own version, was at one stage so loud that he told her to stop making a noise; (ii) the complainant's resistance of the appellant's advances, as corroborated by the state witness; (iii) the fact that the complainant's version of a first house (at which she was raped), was corroborated by Funani who had herself been taken to the first house and who was present when the appellant entered the toilet with the complainant still inside; (iv) her running away from the appellant at the second house as soon as she was able to, where further acts of penetration occurred; (v) her visible and prolonged state of emotional distress, which endured until the time that she reported the incidents of rape to her friends; (vi) the doctor's evidence of vaginal injuries, which were consistent with more than one instance of forceful penetration) – was correctly rejected by the magistrate as false. The magistrate considered all the evidence holistically, and weighed up elements which pointed towards the guilt of the appellant against those which were indicative of his innocence (as evidenced by the

---

[3] See: *S v Sauls and Others* 1981 (3) SA 172 (A) at 182G - H; *S v Rama* 1966 (2) SA 395 (A) at 401; *S v Ntsele* 1998 (2) SACR 178 (SCA) at 182b-h.

[4] 1999 (2) SACR 79 (W)

appellant's acquittal on the charge of assault GBH), taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides in concluding that the state had discharged its onus in proving the guilt of the accused beyond reasonable doubt.

Whether the Complainant knew whether ejaculation occurred

78 It is clear from the complainant's evidence that she did not know whether the appellant had ejaculated after each instance of penetration, save for the one instance mentioned earlier in the judgment.

79 In her judgment, the magistrate alluded to the question asked by the trial court, namely, how the complainant differentiated between the five sexual encounters described by her. In the judgment, the learned magistrate incoorectly recorded the complainant's answer as follows:: "*she* [the complainant] *indicated that she knew about ejaculation and that each time he* [the appellant] *would ejaculate before he came on her again."* In this regard, the magistrate committed a misdirection. She appeared to be swayed by an incorrect understanding of the complainant's evidence, which was to the opposite effect, as indicated earlier in the judgment. [5] The misdirection aforesaid does not, however, affect the outcome of this appeal, as indicated later in the judgment.

---

[5] In ***S v Blaauw*** **1999 (2) SACR 295 (W) at 299 C-D and 300 A-D,** the following was said:

> "Ejaculation is not an element of rape, though it would seem to me that if the rapist had indeed ejaculated, withdrawn from the victim and then shortly thereafter again penetrated her, he would on the second occasion be guilty of raping her for the second time. Not only is there a second act of penetration, it would be reasonable to infer that the rapist had formed a new intent to have intercourse for the second time…
>
> Mere and repeated acts of penetration cannot without more, in my mind, be equated with repeated and separate acts of rape. A rapist who in the course of raping his victim withdraws his penis, positions the victim's body differently and then again penetrates her, will not, in my view, have committed rape twice.
>
> Each case must be determined on its own facts. As a general rule the more closely connected the separate acts of penetration are in terms of time (i.e. the intervals between them) and

80 Counsel for the appellant conceded that ejaculation is not a prerequisite for rape.

81 The vexed question of when an act of rape starts and when it ends was considered in Molaza[6] in the light of various authorities that were conveniently summarised in the majority judgment.

82 In the present case, the complainant testified that the appellant had "raped" her five times, three times at the first house, each instance in a different area on that property, and two times at the second house, both of which occurred in the bedroom of the second house where ejaculation occurred on one such occasion. As was the case in *Molaza supra*, in the present case, the facts underpinning a conclusion of rape each time that penetration occurred, were not placed on record with sufficient particularity.[7] The magistrate convicted the appellant on three counts of rape even though the evidence established that five acts of sexual penetration took place. There is no indication in the evidence of how the third act of penetration at the first house is to be separated from the second act at the first house, such as may have enabled the trial court to determine whether they were distinct acts or part of the same course of conduct.

83 The trial court found that three distinct acts of rape occurred. In terms of Part 1 of Schedule 2 (read with s 51(1)(a)) of the Criminal Law amendment Act of 1997, as amended (specified in the charge sheet in respect of each count of rape with which the appellant was charged), rape attracts a minimum sentence of life imprisonment when committed: (i) in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice; (ii) by more than one person, where such persons acted in the execution or furtherance

---

place, the less likely a court will be to find that a series of separate rapes has occurred. But where the accused has ejaculated and withdrawn his penis from the victim, if he again penetrates her thereafter, it should, in my view, be inferred that he has formed the intent to rape her again, even if the second rape takes place soon after the first and at the same place."

[6] Quoted in fn 1 above.

[7] The sentiments expressed by the court in *Molaza* at para 81 ought to be seriously heeded by prosecutors involved in presenting evidence in rape cases in future.

of a common purpose or conspiracy; and (iii) by a person who has been convicted of two or more offences of rape or compelled rape, but has not yet been sentenced in respect of such convictions'.

84 Counsel for the appellant submitted that at best, the appellant ought only to have been convicted of two counts of rape, one rape having occurred at the first house and another after the appellant left the first house to go to the next house, where he formed a new intention to rape the complainant. In **S *v Maxabaniso***[8] the evidence showed that the appellant had raped the complainant twice during the course of one encounter with her. The two incidents of rape were separated by an interruption when the appellant went to the toilet. It was held that the rape was not one continuous course of conduct. In *Molaza supra,* the majority judgment found that the evidence established that the complainant was raped twice in circumstances where there was a lapse of between 20 to 25 minutes between the two acts. The first intercourse was with a condom. The appellant went to the bathroom, he asked his friends to boil water for the complainant to drink and then had intercourse again with the complainant without a condom. In both these cases, the evidence suggested that there was an interruption in the sexual intercourse to constitute two acts of rape. Further that the interruptions were initiated by the accused himself. In *Maxabaniso's* case, the interruption between the first and second incidents, when the appellant went to the bathroom (regardless of whether he ejaculated or not) was sufficient to conclude that two distinct acts of penetration occurred and therefore two rapes. The same reasoning leads to the same result in this case. Whilst the complainant in the present matter described separate instances of penetration at both houses, in my view, the evidence established that the first act of sexual intercourse was completed inside the toilet at the first house. The fact that the appellant was dissatisfied with the quality of the performance, stating afterwards that he did not 'feel it properly', does not derogate from the fact that nothing interrupted the act once it began until it was finished. The second act of intercourse commenced on the lawn, however, the evidence suggested that it was interrupted by the accused, who wanted to change locations as he was nervous to continue on the lawn, hence he caused the complainant to move to the stoep, where he re-entered her and completed the act of

---

[8] **2015 (2) SACR 553 (ECP)**

sexual intercourse on the stoep. Thus, two acts of rape occurred at the first house. As regards the second house, the evidence of the complainant was that the appellant informed her that he had ejaculated after sexual intercourse. The appellant admitted to having a sexual intercourse once with the complainant at the second house. The complainant's evidence suggests that there was no interruption between the start and the finish of the sexual intercourse, precisely because the appellant did not withdraw his penis from her vagina when pausing to speak to her. That he ejaculated during sexual intercourse, was not disputed in evidence. On these facts, only one act of rape was proven in evidence. The learned magistrate accordingly correctly convicted the appellant on three counts of rape.

The Court Allegedly Erred in Finding that the Doctor Found that there Was Forced Penetration

85 The doctor's evidence was that the fresh tear on the complainant's posterior fourchette, a gapping hymen with a swelling and a cleft that was bruised at three o'clock and five o'clock are all indicative of the expression of recent trauma to the tissues and more than one round of sexual intercourse or penetration, possibly even four or five rounds of sex even though he could not give the exact number of rounds.

86 In short, these injuries were indictive of a repeated sexual intercourse in a recent period. The doctor's testimony was that he did not write the word "forced" on the medical report because that is for the court to determine but these injuries and bruises demonstrated lack of lubrication, which may be associated with lack of consent.

87 Even though consensual intercourse may be 'forceful', as conceded by the doctor, the point was made that such trauma to the tissues was consistent with more than one instance of forceful sexual penetration having occurred at a time when the complainant was not lubricated. It was common cause that the complainant was crying and upset during the ordeal, which is not consistent with consensual sex. Consequently, this ground of appeal also lacks merit.

Appeal against Sentence

88 It is trite that the imposition of sentence is pre-eminently a matter that falls within the discretion of the trial court. Consequently, a court of appeal can only interfere with the sentence of the trial court where it is satisfied that the trial court's sentencing discretion was not judicially properly exercised. That is, where there is a misdirection on the part of the trial court in the imposition of the sentence.[9]

89 In S v Malgas[10] it was held in relation to substantial and compelling circumstances, that *"it suffices that they are ordinary circumstances which do not qualify as cogent or sufficiently weighty to offences for which the appellant was convicted."* At paragraph 26, the SCA however cautioned that::

> "The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances."

90 In Radebe v S[11] the court held as follows:

[9] S v Blank 1995 (2) SACR 62 (A); S v Kgosimore 1999 (2) SACR 238 (SCA); S v Obisi 2005 (2) SACR 350 (SCA) and S v Moswathupa 2012 (1) SACR 259 (SCA)

[10] 2001 (1) SACR 469 (SCA) p 481, paras 20-22, 25 and 26

[11] 2019 (2) SACR 381 (GP) p 399, para 53

> "If substantial and compelling reasons are present in cases of the rape of an under-aged child then it cannot be found only in the absence of physical injury. If regard is had to the triad of factors (which must also accommodate the impact on the·victim) then I would venture that something sufficiently extraordinary would have to be demonstrated by an accused in respect of his reduced moral blameworthiness, other personal circumstances the circumstances surrounding the rape or as unlikely as it may seem possibly even the victim's circumstances in order to displace the opprobrium and moral turpitude which Informs the interests of society to punish in the manner reflected in the legislation in cases involving the rape of an under-aged child.

91 The principles set out above are what should guide this court on whether to interfere with the sentence imposed.

92 When it comes to the sentence, counsel for the appellant acknowledged that the appellant *"got lucky"* with the sentence of 25 years imprisonment and not the mandatory sentence of life imprisonment. I agree with this sentiment for the following reasons:

> 92.1 The statutory rape of a minor child attracts life imprisonment as the minimum sentence. It was applicable in this case as I have demonstrated above that there was no basis for the appellant's attack on the age of the complainant;
>
> 92.2 Multiple rapes also attract the statutorily prescribed minimum sentence of life imprisonment. Counsel for the appellant conceded during the hearing that there were at least two counts of rape involved.

93 On these bases, there were sufficient grounds for the learned magistrate to impose a sentence for life imprisonment in the absence of substantial and compelling circumstances having been shown.

94 Despite counsel for the appellant stating that he could find no substantial and compelling circumstances for the learned magistrate to deviate from the prescribed

minimum sentences, the prosecutor asked the learned magistrate to deviate from the prescribed minimum sentence on the basis of the appellant's youth at the time of the offence, as he was only 19 years old; and that despite the appellant specifically testifying that he had not drunk alcohol that day, the prosecutor still asked the court to factor in that alcohol may have heavily influenced the appellant's actions. The learned magistrate also found that the socio-economic circumstances of the appellant had a role to play on how he carried himself. Further, the appellant had no previous convictions. These were the facts that were relied on by the learned magistrate in making a value judgment as to whether or not there were substantial and compelling circumstances in order to deviate from the statutorily prescribed minimum sentences of life imprisonment.

95 The learned magistrate granted leave to appeal against the sentence on the basis that she may have overlooked the appellant's age as he was 19 years old at the time of the commission of the offences.

96 In essence, this means that the age of the accused was considered twice, i.e. as part of the substantial and compelling circumstances for deviating from the prescribed statutory minimum sentence of life imprisonment. It was also considered as the sole basis for granting leave to appeal against sentence. Since the state has not cross-appealed the finding of the learned magistrate on sentence imposed on the appellant, I do not take this issue further.

97 I agree with the respondent's contention that even though the age of the appellant should be considered but it should not be over emphasised as it needs to be considered in the context of other factors, including the seriousness of the offence and the interests of the community.[12] The impact of the crime upon the complainant and the lingering emotional scars (unseen as they may be) caused by the acts of rape upon her psyche, cannot be underestimated and should also properly be considered when imposing a sentence. The effects of the rapes were testified to by the complainant. The magistrate was mindful that a lengthy term of imprisonment should be imposed, notwithstanding that, in her judgment, there were substantial and

---

[12] S v Obisi 2005 (2) SACR 350 (SCA), p 355, para 14

compelling circumstances that justified a departure from the statutorily prescribed minimum sentence of life imprisonment.

98 An appeal court can only interfere with the sentence imposed by the court *a quo* if a demonstrable misdirection on the part of the learned magistrate is shown or where the sentence imposed is vitiated by irregularity or is disturbingly inappropriate.

99 In S v GK[13] Rogers J pointed out that whether or not there exists substantial and compelling circumstances, is not a discretionary issue but rather a value judgment which judgment a court of appeal is obliged to bring to bear on the facts presented in the court *a quo*.

100 In S v Nkomo[14] Lewis JA at held as follows:

> "But it is for the court imposing sentence to decide whether the particular circumstances call for the imposition of a lesser sentence. Such circumstances may include those factors traditionally taken into account in sentencing - mitigating factors - that lessen an accused's moral guilt. These might include the age of an accused or whether or not he or she has previous convictions. Of course these must be weighed together with aggravating factors. But none of these need be exceptional."

101 In my view, no misdirection on the part of the learned magistrate in imposing 25 years' imprisonment. was shown to have been committed by the sentencing court. The magistrate made a value judgment in deviating from the prescribed sentence. She imposed a sentence, taking the three counts of rape and one count of kidnapping on which the appellant was convicted, as one for purpose of sentence. The various mitigating and aggravating factors on the facts of the matter were summarised in the respondent's heads of argument and need not be repeated herein. Having regard to such factors, it cannot be said that the magistrate committed a misdirection or irregularity or that the sentence imposed induces a sense of shock. Therefore, the sentence should stand.

---

[13] ***S v GK*** **2013 (2) SACR 505 (WCC)**

[14] ***S v Nkomo*** **2007 (2) SACR 198 (SCA) at 201e-f.**

102 In all the circumstances and for the reasons given, I propose that the appeal against conviction and sentence be dismissed.

_____

B. LEKOKOTLA
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

I agree and it is so ordered:

_____

A. MAIER-FRAWLEY
JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, JOHANNESBURG.

Date of hearing: 23 November 2021
Judgment delivered: 25 January 2022

This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on Caselines and release to SAFLII. The date and time for hand-down is deemed to be have been at 10h00 on 25 January 2022.

APPEARANCES:
For Appellant: Advocate IB Mthembu
Instructed by: Legal Aid South Africa

For Respondent: Advocate C Mack
Instructed by: National Prosecution Authority