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

APPEAL CASE NO: A61/2020

TRIAL COURT CASE NO:43/1717/11

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: YES

2022/11/28

In the matter between:

KHUMALO, MLUNGISI

APPELLANT 1

MNDEBELE, IAN

APPELLANT 2

And

THE STATE

RESPONDENT

JUDGMENT

Johnson AJ

CHARGES

[1] This appeal emanates from an incident in Soweto that started on 24 November 2011 when the complainant, who the State alleged was 15 years old at the time, was

abducted by two men and allegedly raped 12 times, and ended on 7 November 2011 when the complainant escaped her captors.

[2] The appellants are charged in the first count of kidnapping in that they deprived the complainant of her freedom of movement by taking her to a room in Zola where they kept her from 24 November to 7 December 2011.

[3] Counts 2 to 13 are 12 counts of rape in terms of section 3 of the Criminal Law Amendment Act (Sexual Offences and related Matters) 32 of 2007, where the two appellants are charged with 6 counts each of having had sexual intercourse with the complainant on different dates: on 24 November 2011 one time each, on 26 November 2011 twice each, on 27 November 2011 one time each, on 29 November 2011 one time each and on 30 November 2011 one time each without consent. We have noticed that the indictment mentions that count 2 is brought against appellant 2, whilst it was put to appellant 1. Appellant 1 has subsequently pleaded to the charge and not appellant 2. We accept that the reference in count 2 of the indictment to appellant 2 is an error, and that it should be appellant 1.

[4] Count 14 is a contravention of section 120(6)(b) of the Firearms Control Act 60 of 2000 in that they pointed a firearm at the complainant.

[5] They pleaded not guilty to all the counts but were ultimately convicted of the first count; 5 counts of rape each committed on the 24th (counts 2 and 3), 26th (counts 4 and 6), 27th (counts 8 and 9), 29th (counts 10 and 11) and the 30th (counts 12 and 13) and acquitted on rape counts 5 and 7 allegedly committed on the 26th November 2011; as well as count 14.

EVIDENCE FOR STATE

[6] The complainant took a taxi to home on 24 November 2011. When she alighted, an unknown person followed her. A second person, whom she knows through D [...], said that they were going to take her away as she owes them something. It was the two appellants. Appellant 1 pointed a firearm at her and ordered her into a stationary vehicle. They drove to Zola and went into a room. The house belonged to appellant

1's friend. There were other persons present who went to buy drugs. They smoked drugs, but she refused to smoke. They said that she would smoke whether she liked it or not. She and the two appellants remained behind when the others left. They told her to remove her clothing; where after both had sexual intercourse with her without her consent. The room wherein she was kept was always locked, except for the last three days.

[7] The next morning they locked the door and security gate and went to buy drugs. They came back and smoked them. She said she wanted to leave, but Mlungisi slapped her. He said that screaming will not help as no-one would hear her. She could not remember if anything else happened on the 25th.

[8] On the 26th at bed time both had sexual intercourse with her without consent. She could not say how many times each had sexual intercourse with her, but both slept with her. She could not remember if anything happened on the 27th after they smoked drugs, but in the evening they both had sexual intercourse without her consent. On a certain day they made a tattoo on her leg.

[9] On the 28th she had her periods and both assaulted her. When they woke up the following day, their attitude towards her had changed. On the 29th both slept with her without her consent. They did not have sexual intercourse with her on the 30th, but both had sexual intercourse with her on the day before she left, (which would seem to be the 7th December 2011 according the evidence) because she was not bleeding that much. She escaped on the 8th when she turned up at Ms M [...] 1's house, and taken to the police.

[10] She did not leave the premises earlier because she was scared. On the last day she jumped the wall and went to her grandmother.

[11] M [...] M [...] 1 is the complainant's grandmother's sister. She brought her up, but she was not staying with her during the incident. She opened the door for the complainant on the 8th after she knocked. She was crying, her clothes were torn and said that people were coming to kill her. She also said that she was raped. Her clothes were torn and in tatters. She told the other kids to take her to the police.

[12] Alan Vancadach is a medical doctor employed at Nthabiseng Thuthuzela Care Centre where he assesses sexually abused victims. He saw the complainant on 8 December 2011 at 12:15. She had no external wounds or injuries to her sexual organs, but did not exclude recent vaginal penetration. If she submitted herself because of fear, that would have prevented injuries. During cross-examination he testified that he would not always expect bruises from a slap, depending on the force of the slap. If the complainant menstruated, that would also have served as a lubrication to decrease injuries. That ended the State's case.

EVIDENCE FOR DEFENCE

[13] Both the appellants testified in their defence, and denied that they had committed any of the offences. They also denied that they had seen the complainant on the days mentioned in the indictment.

EVALUATION

[14] It is common cause, or not in dispute, that two persons kidnapped the complainant, took her to a premises, deprived her of her right to freedom of movement and that each had sexual intercourse with her on numerous occasions without her consent. Although Ms Mpitso initially gave the impression that the complainant was never raped, she did concede later: "We are not saying that you were not sexually assaulted, but they are saying they never did anything to you from that date until the last day which you have just mentioned in the court". The only issue was therefore the identity of the perpetrators.

[15] The powers of a court of appeal in terms of section 322 (1) of the Criminal Procedure Act 51/1977, are set out as follows:

(1) *In the case of an appeal against a conviction or of any question of law reserved, the court of appeal may -*

(a) allow the appeal if it thinks that the judgment of the trial court should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a failure of justice; or

(b) give such judgment as ought to have been given at the trial or impose such punishment as ought to have been imposed at the trial; or

(c) make such other order as justice may require.....”

TRIAL COURT’S APPROACH

[16] It appears from the judgment of the court a quo:

16.1 that the evidence pertaining to counts 8 – 13 were not considered;

16.2 It referred to the fact that the complainant was a single witness, but the cautionary rule was not considered;

16.3 The cautious approach and the requirement that the reliability of an identifying witness should be tested, was overlooked.

16.4 It found in relation to counts 12 and 13 that: “.....*I find that they penetrated her on the 30th and they did so unlawful*”, despite her evidence that they did not sleep with her on the 30th, but on the day before she left, which was the 7th of December 2011.

16.5 The names of the appellants were entered into the register for sexual offenders without proof that the complainant was a child;

16.6 The provisions of section 103 (1) of the Firearms and Ammunition Act 60/2000 was ignored.

[17] If the trial court commits a misdirection on a point of law, the court of appeal must nevertheless establish whether the evidence proves beyond reasonable doubt that the accused is guilty. It is therefore a possibility that a point of law may be

decided in favour of an accused, and the conviction still upheld (*S v Bernardus* 1965 (3) SA 287 (A) at 299F). In view of the shortcomings in the judgement and the approach of the court a quo, considered in conjunction with the evidence, we are at liberty to make any order, if warranted, “as justice may require” (*R v Solomons* 1959 (2) SA 352 (A) at 360).

[18] The duty of a presiding officer was described as follows in *S v Thomo* 1969 1 SA 385 (A) 394 C-D:

“It is of importance first to determine what conduct was established ... Having thus determined the proper factual basis, the court can then proceed to consider what crime (if any) has [been] committed. The former enquiry is one of fact, the latter essentially one of law. When the presiding officer considers what one might call, a fact finding phase, it must be shown that the evidence was considered and evaluated. This phase forms an important element of each judgment and must appear as part of the judgment.”

[19] We have referred above to the evidence that the court a quo has not considered, which in our opinion, *prima facie* establishes the commission of the offences mentioned in the indictment. What is of further importance, is the fact that the complainant’s evidence in this regard was not disputed.

[20] In *S v Stevens* (417/03) [2004] ZASCA 70; [2005] 1 All SA 1 (SCA) (2 September 2004) the following was said regarding the evidence of a single witness:

“[16] Courts in civil or criminal cases faced with the legitimate complaints of persons who are victims of sexually inappropriate behaviour are obliged in terms of the Constitution to respond in a manner that affords the appropriate redress and protection. Vulnerable sections of the community, who often fall prey to such behaviour, are entitled to expect no less from the judiciary. However, in considering whether or not claims are justified, care should be taken to ensure that evidentiary rules and procedural safeguards are properly applied and adhered to.

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

'There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness (see the remarks of Rumpff JA in S v Webber. . .). The trial judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. The cautionary rule referred to by De Villiers JP in 1932 [in R v Mokoena 1932 OPD 79 at 80] may be a guide to a right decision but it does not mean "that the appeal must succeed if any criticism, however slender, of the witnesses' evidence were well-founded" (per Schreiner JA in R v Nhlapo (AD 10 November 1952) quoted in R v Bellingham 1955 (2) SA 566 (A) at 569.) It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense.'

[21] The court a quo said: *I trust the evidence of this little girl because she did not hide the fact that she was not going for the first time to Mlungisi's house and that they smoked.....*". Whether the complainant was trusted or not, is beside the point. What was essential, especially where the presiding officer saw the complainant in the witness stand, was to make a credibility finding.

[22] The cautionary rule could also have been satisfied by further facts, for example: that she had no apparent motive to falsely implicate the appellants, and that no motive for her to do so, was put to her; the fact that she did not try to exaggerate and conceded when she could not remember, or conceded that nothing was done to her on certain days; and that her evidence regarding the rapes were not disputed and that there existed no reason to reject it.

[23] Ms M [...] 1, the complainant's aunt, obviously had no motive to falsely implicate the appellants, or give evidence that would put them in a bad light. Her evidence that the complainant was crying when she saw her on the 8th was undisputed. In our opinion the credibility of Ms M [...] 1 is not of real importance as it is not in dispute that the complainant was sexually assaulted. What did stand out in her evidence, is that the complainant told her that people are coming to kill her.

[24] The doctor's evidence to explain the lack of injuries, and the fact that the J88 had gone missing, is also not of real importance as it is not in dispute that sexual intercourse did take place. In his opinion the lack of injuries could have been the result of the complainant submitting to her attackers. There is no reason to reject his evidence.

[25] As far as identity is concerned, the following was held in *State v Mthethwa* 1972 (3) SA 766 (A) 768A–C: *“Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested.”*

[26] It is common cause that the complainant spent 2 weeks with her captors, before she escaped. During this time, day, and night, they spent a considerable time together. Her captors did not conceal their faces. There is no doubt that she had enough time and opportunity to make a reliable identification of the persons who attacked her.

[27] When her credibility is considered, it is important to note that she admitted to smoking drugs and did not try to evade responsibility. She did not scream to attract

attention because her captors said it would not help, as no-one would come to her rescue, and that they would shoot her if she screamed. She believed them. Despite the door being unlocked for the last three days, she did not dare escape as she was afraid of finding the perpetrators outside.

[28] There is some doubt as to the incident of the 27th, concerning counts 8 and 9. During her evidence in chief, she testified that she could not remember if anything happened on the 27th. This would have been a viable answer in light of the facts that there were so much to remember, the fact that she took drugs and her young age. Upon pressure by the prosecutor when the question was repeated, she said yes, they slept with her. This is a material contradiction.

[29] One must keep in mind that not all contradictions necessarily lead to the fact that the evidence of the witness is rejected *in toto*. It is quite possible that one part of a witness's evidence is rejected, while the other part may be accepted as credible. This will be the case where for example, where the evidence regarding the contradicted version, is not in dispute. One must assess the facts of each case. (*S v Mkhohle* 1990 (1) SACR 95 (A) at 98 f-g.).

[30] In this case the complainant gave her initial answer and there was no reason for the prosecutor to repeat it. The repeat would in no doubt have confused the complainant and left the impression that the prosecutor was not satisfied with the first answer, and that she was obliged to give another answer. That is the danger of working with young children, and one should never leave room for suggestions. In any event, her evidence about the sexual intercourse that did take place, was not in dispute. The confusion was merely about the number of times that it happened.

[31] As for the lack of visible injuries and marks after she was hit with a wooden axe handle and assaulted, one must keep in mind that a couple of days lapsed between when the assault took place, and the medical examination by the doctor. The fact that the doctor did not find injuries, is not sinister or strange at all.

[32] Her evidence that she did not try to escape earlier because of fear, is corroborated by her aunt, whom she told that people are coming to kill her. Although

the defence tried to portray her as an untruthful witness, we are satisfied that upon the reading of the record, her evidence had a ring of truth to it, despite negative aspects that were referred to. There seems to be no apparent reason for her to want to falsely accuse the appellants. Our *prima facie* finding is that the appellants are the ones who abducted her and had sexual intercourse with her without consent.

[33] As for the evidence of the appellants, *“in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, 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.”* (S v Shackell 2001 (4) SA 1 (SCA) para 30).

[34] The trial court found only slim reasons to reject the evidence of the appellants. It found as follows:

“The accused version is not convincing. They have actually provided no version. All they are saying is that accused number one says I saw the complainant, she came with M D [...]. Accused number 2 says I saw her on the 20th. That is not a version. Hence their version does not hold water. There is no version as in comparison to her version where she says she was taken by force.”

[35] There was in our opinion a clear misunderstanding of the appellants' defence. They denied that they were the perpetrators and placed identity in issue. That is the version that the court a quo had to evaluate to determine whether it was reasonably possible true or not. We are once again at a disadvantage as we did not see the

appellants in the witness stand. All we can go by to make any credibility finding, if possible, is the record.

[36] Appellant 1 obviously did not make a favourable impression. When he was asked in evidence-in-chief whether he wanted to say anything regarding the charges against him, he gave no answer. His attorney tried to repeat the question, but the court intervened and asked whether the appellant heard what was going on. He again did not answer. The court followed up with whether he wanted to say anything regarding the allegations, to which he replied: "No, there is nothing that I can say." We have no doubt that he attempted to avoid any responsibility.

[37] We have already found that the complainant was in an excellent position to make a reliable identification of the perpetrators, and if the perpetrators were not the appellants, she would most certainly exactly know what their identities are. The immediate question which comes to mind, is why the complainant would then point out the two appellants, who according to them had done her no wrong, and not the real perpetrators of the crime? Why would she allow the real, dangerous criminals to roam around freely, and accuse two innocent persons of the crimes? It is so inherently improbable that it cannot reasonably possibly be true.

[38] To a question by his attorney on why the complainant would make these false allegations against him, appellant 1 answered that she was scared to tell the adults where she had spent the night. That makes no sense. Why would she implicate him and his co-appellant if she was scared, and not the real culprits, if there were such culprits?

[39] Both appellants conceded that they did not know of any reason why the complainant would tell the court what she did and that they never did anything to her. This points to the fact that the complainant had no motive to falsely implicate them.

[40] During cross-examination appellant 1 said that: "*Both of us never raped the complainant*". This is a suspicious defence of the appellant 2. He knew that the complainant alleged that appellant 2 was one of two attackers who raped her. According to appellant 1, he neither saw appellant 2 nor the complainant for two

weeks after they parted ways. The question is, how did he know that appellant 2 was not one of the complainant's attackers who raped her? Why does he defend appellant 2? Furthermore, how can he say that the complainant did not jump a wall to escape as she alleged, if he was not there?

[41] During cross-examination of appellant 2 by the prosecutor, he alleged that they went to M D [...]’s place after his arrest, where M D [...] said that the complainant slept at his place for weeks. This allegation is nothing else than a fabrication. His attorney never put this to the complainant, and he never mentioned it in his evidence in chief.

[42] The evidence of the appellants was correctly rejected as false and not reasonably possibly true. The *prima facie* evidence therefore became conclusive proof of the allegations against them.

[43] The court a quo’s finding that the offences referred to in counts 12 and 13 were committed on the 30th, while the evidence proved that it was not, was an incorrect and irregular finding. The complainant testified that her attackers did not sleep with her on the 30th. No offence was committed on the 30th. The State failed to prove counts 12 and 13. There was no application for an amendment of the charges or an allegation in it. They were furthermore not charged with any offence committed on the day before the complainant escaped. We also have doubts whether the complainant was raped as alleged in counts 8 and 9 for the reason mentioned above.

[44] In spite of the shortcomings that we have referred to, we are nevertheless satisfied that the guilt of both the appellants had been proved on count 1, on counts 2, 4, 8 and 10 in respect of appellant 1, and on counts 3, 7, 9 and 11 in respect of appellant 2.

Sentence

[45] Section 51 (1) of the Criminal Law Amendment Act 105 of 1997 determines that, subject to subsections (3) and (6), a regional court shall sentence a person who has

been convicted of an offence referred to in Part I of schedule 2, to life imprisonment. One of the offences mentioned in Part 1 of schedule 2, is rape as contemplated in section 3 on the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, when committed in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice. The Appellants have raped the complainant more than once on the different dates mentioned in the charge sheet. The court a quo was therefore obliged to impose life imprisonment, unless substantial and compelling circumstances exists to impose a lesser sentence.

[46] In an appeal against sentence we must determine whether the trial court exercised its discretion properly, and not whether another sentence should have been imposed (*S v Farmer* [2002] 1 All SA 427 (SCA) par 12).

[47] The discretion to impose a sentence is that of the trial court. A court of appeal does not have an unfettered discretion to interfere with the sentence imposed by the trial court (*S v Anderson* 1964 (3) SA 494 (A) 495; *S v Whitehead* 1970 (4) SA 424 (A) 435; *S v Giannoulis* 1975 (4) SA 867 (A) 868; *S v M* 1976 (3) SA 644 (A) 648 et seq; *S v Pillay* 1977 (4) SA 531 (A) ; *S v Rabie* 1975 (4) SA 855 (A)).

[48] A court of appeal will only interfere where it is apparent that the discretion of the trial court was not exercised judicially or reasonably.

[49] The court erroneously accepted the hearsay evidence of the complainant about her age and date of birth without applying the provisions of section 3 of the Law of Evidence Amendment Act 45 of 1988. Hearsay evidence is evidence of which the probative value depends upon the credibility of a person other than the person giving that evidence, which the evidence of the complainant clearly was. Having not seen the child ourselves and only dependent on the record, we are at a complete disadvantage to determine the complainant's age, and to ascertain whether she is a child in terms of the Criminal Law (Sexual Offences and related matters) Amendment Act 32 of 2007

[50] Both the appellants testified in mitigation of sentence and Mr Ndebele for appellant 2. The court did not mention all the facts that it considered regarding their evidence. We accept that the lack of such mentioning does not mean that the facts mentioned in the evidence, were not considered.

[51] What is unsettling is that the presiding officer ignored the search for substantial and compelling circumstances. It referred to these circumstances as “anything extraordinary” which it is not. Such a description would give new meaning to the legal approach to substantial and compelling circumstances. We are therefore tasked again to see if the appellants had proved on a balance of probabilities that such circumstances exist.

[52] Appellant 1 is 29 years of age and stays with his aunt. He has 5 siblings and is not married. He has 1 child of the two who stays with his mother, and is supported by his parents. He is not a priM [...] caregiver. He had a temporal job working as a packer at Clearwater Builders Warehouse. His parents also supported him. He had to leave school in Standard 6 as his parents could not afford it. He has no previous convictions.

[53] Appellant 2 is 32 years of age and stays with his uncle and brother. He fixes phones for an income. He is not married and has no children. He attained Standard 8 at school. He is a first offender.

[54] The court a quo remarked about the seriousness of the offences, but we want to stress it. In *S v Chapman* 1997 (3) SA 341 (SCA) 344 the Court said 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 civilization”*.

[55] Although 4 of the convictions are to fall away, it does not change the fact that on each day, the complainant was raped more than once by the appellant 1 and his co-perpetrator, which calls for the mandatory sentence. Both appellants still deny their involvement in the commission of these crimes. They showed no remorse. We find

that they have no chances of rehabilitation. Having considered all the relevant factors, we find that the appellants' personal circumstances, cumulatively taken, do not amount to substantial and compelling circumstances warranting a deviation from the imposition of the prescribed minimum sentences.

[56] Section 103 of the Firearms Control Act provides as follows:

“(1) Unless the court determines otherwise, a person becomes unfit to possess a firearm if convicted of -

(g) any offence involving violence, sexual abuse or dishonesty, for which the accused is sentenced to a period of imprisonment without the option of a fine;”

[57] As these provisions were ignored, we are of the view that it should be addressed here, and that we should make the order that the court a quo should have made.

[58] Section 50 (1) of Criminal Law Amendment Act (Sexual Offences and related Matters) 32 of 2007, determines that the particulars (and not only “names” as the court a quo has ordered) of a person who has been convicted of a sexual offence against a child, must be included in the National Register for Sex Offenders (and not the “register for child molesters” as the court a quo had ordered).

[59] As the State has failed to prove that the complainant was a child in terms of the act, it was not competent for the court to make such an order.

ORDER

[60] The following orders are proposed:

60.1 The appeal in respect of the convictions on counts 8, 9, 12 and 13 is upheld and the convictions are set aside;

60.2 The appeal against the convictions on counts 1, 2, 3, 4, 6, 10 and 11 is dismissed;

60.3 The sentence of life imprisonment is confirmed;

60.4 The court makes no determination in terms of section 103 (1) of the Firearms Control Act in respect of each appellant;

60.5 The order that the particulars of the appellants be included in the National Register for Sexual Offenders is set aside.

**PJ JOHNSON A.J.
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION**

I agree and it is so ordered.

**MMP MDALANA-MAYISELA J
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION**

Heard on: 17 October 2022

For the Appellants : Adv. Y.J. Britz

For the State : Adv. N. Tyeku

Date of Judgment: 28 November 2022