REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: A20/2019

(1) REPORTABLE: Y/ N
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

SIGNATURE **DATE: 02/03/2021**

In the matter between:

AK TOONS **Appellant**

and

THE STATE **Respondent**

DATE OF HEARING: This matter was enrolled for hearing on 10 SEPTEMBER 2020, and dealt with or determined on the basis of the papers or record and written argument filed on behalf of the parties, without appearance and oral argument. DATE OF JUDGMENT: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time of hand-down is deemed to be 02 MARCH 2021.

JUDGMENT

N V KHUMALO J (NEUKICHER J concurring)

Introduction

[1] On 20 February 2018 the Appellant was convicted by the Regional Court, Obelhozer (court a quo) on 3 counts, that is, kidnapping (Count 1), assault (Count 2) and rape in terms of s 3 of Act 32 of 2007 (Count 3). Sentences of 3 years and a warning and a discharge were imposed for Count 1 and 2 respectively. On count 3 a sentence of eight (8) years imprisonment was imposed. The sentences were ordered to run concurrently. The Appellant is with leave of the court a quo appealing against both conviction and sentence.

[2] The offences were according to the charge sheet committed against one Ntombifuthi Khohliso ("the Complainant") on 8 December 2016, when she was deprived of her freedom of movement (kidnapped), by being pushed into and locked in a car, driven and taken to a cemetery in Carletonville without her consent where she was slapped with open hands and an act of rape by insertion of a finger into her vagina without her consent was committed by the Appellant.

[3] The Appellant denies his involvement in the crime and he pleaded not guilty to all the charges. He was legally represented during the whole trial proceedings. He exercised his right to remain silent and refused to tender an explanation of his plea. However, he had put to the witnesses that although he was married and the Complainant had a boyfriend they had an affair. He denied that he kidnapped, assaulted and raped her. At the end of the trial the court found that the state had proven the Appellant's guilt on the three counts beyond reasonable doubt.

[4] The salient facts are that on the day of the incident, the Appellant, whom the Complainant got to know after a few encounters, had found the Complainant walking in the street on her way to see her boyfriend. The Appellant instructed the Complainant to get into the car, drove around with

her, making a stop at a petrol station then at a nearby B & B or pink house before driving with her to a cemetery where the Appellant allegedly raped her by inserting his finger in her vagina. Afterwards the Appellant left her at a nearby bridge that is on her way to her boyfriend's work. The Complainant, accompanied by her boyfriend, on the same day reported the incident to the police. She was examined by a doctor the following day.

[5] The court a quo convicted the Appellant on the evidence of the Complainant, her boyfriend Phumlani Kankweni (Phumlani), her sister Maria Kogiswa (Maria) and the medical doctor who examined the Complainant and completed the J88 report Dr Moosa (Moosa). The version of the Appellant and his witness Bongani Mahlanga (Bongani) was rejected as not being reasonably possibly true.

State's evidence

[6] The evidence on behalf of the state was first led by the Complainant. Her testimony on how she got to know the Appellant was that, she came across him at a filling station when she was on her way to Phumlani. The Appellant offered her a lift and asked her for her sister's numbers. Due to the fact that she had no permission from the sister to give the Appellant her number, she gave him her numbers. She knew the Appellant because he had proposed love to her sister. The Appellant passed by the stores and went inside, leaving her in the car. Whilst the Appellant was still in the store, she jumped out of the car and started walking. The Appellant caught up with her and gave her a lift again. He was not impressed by what the Complainant did, alighting from the car and wanted to know why she did it. He then dropped her off at Kokosi not far from Phumlani's work place. She told Phumlani, about her encounter with the Appellant and Phumlani informed her that the Appellant's name is Papi. The Appellant then send her messages by Whatsapp about that day's incident again wanting to know why she left him at the stores and why she looked disturbed. She told him it was because she did not know him that too well and therefore did not like being in his company. He wanted to know if the Complainant has anything against him, suggesting that they should meet

and talk. She asked him what he wanted to talk about that is when he told her that he was actually interested in her. According to the Complainant she was not interested as she has a boyfriend and the Appellant is a married man. She told him that meeting with him will not work.

[7] One day he sent her a message that his wife is not at home she must come and visit him. She declined and went with her sister to BME, leaving her phone at home. When she came back she found several messages sent by the Appellant threatening her saying that as and when he finds her he was going to show her if she thinks he is a fool "she does not know who she is dealing with", using the word "shit." The Complainant responded that he cannot speak to her like that as she was not his girlfriend. The Appellant insisted that she tell him her whereabouts. When she told him she was at home he told her to come outside so that he can show her what he is going to do to her. They never communicated from that day although she used to see him when she was with her mother, he would not say anything.

[8] On 8 December 2016 Appellant, who was in a Municipality van, came upon her walking alone towards Kokosi. He instructed her to get into the car, as he wanted to talk to her about something. She refused and kept on walking. Appellant followed her and kept on asking her to get into the car as he wanted to discuss something with her. He disappeared and reappeared again, when she was walking near the hostel in Kokosi after passing the bridge. He stopped the van next to her and got out. He was very angry and accused her of making a fool of him. He grabbed her by the hand, took her umbrella and dragged her to the passenger door. He took her cellphone, switched it off and put it in his pocket. He ordered her to get inside the van and she refused and told him that there was nothing to talk about. He pushed her lower body into the van and locked the door. **He drove with her to Carletonville** and kept on threatening her warning her that she does not know who she is dealing with. He briefly stopped at the 007 garage after threatening and warning her not to get out. He then drove to a nearby B & B, asked her if she was on prevention as they were going to have sex. She protested. After briefly stopping there, he drove off **and stopped at a graveyard**. He ordered

her to get out and told her that he was going to punish her for how she made him feel when she refused to come to him. He put his hand under her trousers and touched her private parts. She pulled out his hand out of her trousers and he slapped her. He inserted his hand again trying to feel her vagina and she again pulled his hand out. He again slapped her on the face, opened the passenger door, sat inside, pulled her inside between his legs and then put his hand in her trousers between her legs penetrating her vagina with his fingers. She kept on fingering her whilst she was crying. He afterwards drove out of town and started apologizing to her. He stopped the van at a turn-off to Fochville and gave her back her cellphone after deleting messages between them. He drove away and left her by Phumlani's work. She immediately reported the incident to Phumlani who accompanied her to the police station on the same day. She was examined by a Doctor on the following day.

[9] Dr Moosa a Wits graduate with an MBBCH degree who was working at Carletonville Hospital at the time testified that he could not find any obvious injuries on the gynecological and specula examinations he conducted on the Complainant a day after the incident. He however was not in a position to exclude that she might have been sexually assaulted. She confirmed that she has a boyfriend and the last time she had sexual intercourse was a day before the incident on 7 December 2016. He wrote in his report that:

> *"most of the things were normal except for the posterior fourchette where we noted fresh bruises"*

[10] Phumlani's evidence corroborated that of the Complainant regarding that they had an arrangement that she would come to visit him that day. At about 11h00 he tried to get hold of the Complainant, her cellphone was off. The Complainant then phoned her between 13h00 and 14h00 reporting the incident to him, especially what happened at the graveyard and they reported the matter to the police. He also reported that the Appellant was not familiar to him even though he knew his name.

[11] The state closed its case.

[12] The Appellant testified that on the date of the incident he was with Bongani Mahlangu when at about 13h15 he received a “please call me” from the Complainant. He was driving the Municipality vehicle and on their way to collect stock from Carletonville. At the bridge he saw the Complainant he stopped the vehicle and asked her about the call back message. Complainant told him she wanted to talk to him in private. He asked her to join them in the vehicle and she did. Under cross examination he agreed that the Complainant was on her way to her boyfriend. They continued to drive to Carletonville where he left Bongane at the Municipality offices. He drove with the Complainant around Carletonville and ended up at the graveyard. He parked the car and got out and they started talking. The Complainant told him to communicate with her by sms otherwise Phumlani will kill her if he finds the communication as she had told him that the Appellant is her sister’s boyfriend. He then asked the Complainant about her other secret relationships and that is when she became angry and accused the Appellant of having spoiled the relationship between her and her boyfriend. The Complainant then started talking about his wife whereupon he decided to stop the relationship there and then. They drove back to the Municipality where Bongani was waiting for him. They drove to Kokosi where they left the Complainant at Tsatsong Street. He agreed that the Complainant did not direct him to the pink guest house. He said he did not answer her sms because he had no airtime.

[13] Bongani’s testimony was that he was travelling with the Appellant in a Municipality vehicle going to Carletonville doing work errands when they encountered the Complainant at the bridge. The Appellant stopped the vehicle and enquired from the Complainant why she sent him a sms. The Complainant wanted to speak to the Appellant in private and asked if she can join them. She sat between them and they drove back and the Appellant left him at the Municipality offices. He was requested by the Appellant to take a certain book to the manager for signature**.** It took about 15 minutes, the Appellant and the Complainant were back to collect him and they drove to Tsetsang Street where they left the Complainant. He testified that when the Appellant came back to collect him he did not notice anything strange in the

behaviour of the Complainant. Under cross examination he denied that they picked up any stock that day because when they left the store was already closed. He also indicated that he was not there to testify but to listen to the Appellant's case.

[14] Maria Kogiswathe who is the sister of the Complainant was called by the court to testify. Her version was that the Appellant was known to her as he has given her a lift twice when she was in the company of her friend. They used to call the Appellant "Yaris." The bulk of her evidence was hearsay as pointed out by the court.

APPEAL: AD CONVICTION

[15] The Appellant has submitted that the onus of proof in a criminal case is discharged by the state if the evidence establishes the guilt of the Accused beyond reasonable doubt. The corollary is that he is acquitted if it is reasonably possible that he might be innocent. The Appellant's appeal must thus be upheld if it is found that the trial court erred in finding that the guilt of the Appellant has been established beyond reasonable doubt, in the light of the explanation that has been put forward by the Appellant during his trial. Further that:

> [15.1] The court a quo erred in finding that, as it is satisfied as to the credibility of the state's witnesses, therefore the evidence of the defence witness including that of the Appellant must be rejected.
>
> [15.2] The court also erred in finding that the evidence of the Complainant's version is more probable than that of the Appellant and therefore Appellant's version must be rejected. When the Appellant's version as corroborated by his witness is just as probable, if not more probable, than that of the Complainant.

[15.3] There were minor discrepancies and no material differences between the evidence of the Appellant and that of Bongani. Therefore, the court erred in rejecting the version of Bongani on the balance of probabilities, the court must be able to find as a matter of probability, that the Appellant's version is simply not reasonably possibly true referring to *S v Shakel* 2001 (2) SACR at 194 (SCA). It also argued that Bongane's evidence was not properly evaluated, referring to *S v Van Aswegen* (327/2000) [2001] ZASCA 61 (17 May 2001) at par [8]

"A court does not base its conclusion, whether it be to convict or acquit on only part of the evidence. The conclusion that it arrives at must account for all of the evidence."

[16] Finally the court is alleged to have erred in not evaluating the evidence of the Complainant, mindful of the cautionary rule applicable on a single witness taking into consideration that the Complainant had a motive to incriminate the Appellant. She had a boyfriend but had given the Appellant her cellphone number. She was also on the day of the incident supposed to meet with her boyfriend. The further allegation is that there is a material contradiction between the Complainant and Phumlani's evidence as she testified that Phumlani told her the name of the Appellant but Phumlani denies knowing the Appellant or telling the Complainant the Appellant's name.

[17] It is trite that if an appeal is directed against a *court a quo*'s findings of fact, the court of appeal must be mindful that the *court a quo* was in a better placed position than itself to form a judgment. When inferences from proven facts are in issue, the court *a quo* may also be in a better placed position than the court of appeal, because it is better able to judge what is probable in the light of its observation of witnesses who have testified before it. Therefore, where there has been no misdirection of fact, a court of appeal must assume that the *court a quo*'s findings are correct and will accept these findings,

unless it is convinced that they are wrong; see *S v Dlumayo* 1948 (2) SA 677 (A) at 705-706.

[18] In order to succeed on appeal, the appellant must therefore convince the court of appeal on adequate grounds that the trial court was wrong in accepting the witness' 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 circumstances that the court of appeal will be entitled to interfere with a trial court's evaluation of oral testimony; see *Dlumayo supra.*

[19] Furthermore, in the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong.

[20] It is not the duty of this court to re-evaluate the evidence afresh as if it is the trial court, but to decide whether patently wrong findings and or misdirection by a magistrate led to a failure of justice; see *S v Francis* 1991 (1) SACR 198 (A) at 198J- 199A.

[21] The meaning of the criminal standard of proof, that is proof beyond reasonable doubt, is articulated by the courts in a number of different ways. Nugent J and Schwartzman J in *S v Sithole* 1999 (1) SACR 585 (W) stated that:

> "There is only one test in a criminal case, and that is whether the evidence establishes the guilt of the accused beyond a reasonable doubt. The corollary is that the accused is entitled to be acquitted **if there is a reasonable possibility that an innocent explanation which he has proffered might be true…"** (my emphasis).

[22] In *S v Van der Meyden* 1999 (1) SACR 44 (W) 448 Nugent J elaborated on the above mentioned test by stating that:

> "In order to convict, the evidence must establish the guilt of the accused beyond a reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward may be true. The two are inseparable, each being the logical corollary of the other. In whichever form the test is expressed, it must be satisfied upon consideration of all the evidence. A court does not look at the evidence implicating the accused in isolation in order to determine whether there is proof beyond a reasonable doubt and so too does it not look at the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true."

[23] The contention raised about the court having assessed the facts incorrectly, regarding the testimony of the defence witnesses, alleging that there were no material differences but only minor contradictions between their testimony or that it was assessed in isolation, has no merit. Considering the fact that the Complainant never mentioned the presence of Bongani, whilst the Appellant alleged to have been with Bongani driving to Carletonville to fetch stock, and Bongane's testimony that it was late, the shops were already closed when they drove to Carltonville, disputing that they were going to fetch any stock, moreover that at the Municipality the Appellant sent him to get a book signed by a manager and when Appellant spoke about picking Bongani from the Municipality he did not mention anything about the stock they were supposed to collect, the court was right in rejecting the defence's version as being not reasonably possible true.

[24] Furthermore when Bongani was cross examined on his version that he told the court (in his evidence in chief) that the Complainant wanted to speak to the Appellant in private, he could not repeat the allegations or respond to the interrogation related to that. It also does not make sense that whilst Complainant wanted to speak to the Appellant in private she would jump in the vehicle when Bongani was in the vehicle. Bongani also pointed out that he came to court not to testify but to listen to the proceedings and ended up being called to testify. It is apparent that the allegation that Bongani was with the Appellant on that day is fabricated. The allegation was rightly and

seriously considered and rejected by the court a quo for being not reasonably possibly true, accepting the version of the Complainant that Bongani was not in the picture to be reasonably possible true.

[25] The Appellant, further, to justify his strange conduct of driving around with the Complainant alleged that she said they needed to speak in private. He therefore after he dropped Bongani at the Municipality, drove around looking for a place where they can talk. It does not make sense as they were in the vehicle alone and any conversation between them would have been private. Whereas the Complainant's version is that they have been alone in the car, when he stopped at the garage, pink lodge and the graveyard. There was no talking privately but Appellant was intent on having sex with her asking her about prevention measures she was taking, and when they were at the graveyard that is exactly what he did, by inserting his fingers in her vagina. The court had rightly surmised that if she wanted to be nasty or vindictive she would have alleged that the Appellant penetrated her with his penis. Her evidence even though of a single witness was clear and satisfactory with no contradiction in any material respect.

[26] Additionally, on the issue of a single witness, the fact that the court a quo did not mention or set out in its judgment that her evidence was assessed as that of a single witness, it does not mean that the court was not aware of that fact or cautious in arriving at a conclusion on its reliability and her credibility. It mattered most that it was satisfied beyond reasonable doubt that her evidence is true. As it was the approach of the court in *R v Abdoorham* 1954 (3) SA 163 (N) at 165 E-F that:

> "The court is entitled to convict on the evidence of a single witness if it is satisfied beyond reasonable doubt that such evidence is true. The court may be satisfied that the witness is speaking the truth notwithstanding that in some respects he is an unsatisfactory witness."

[27] The issue of whether or not certain things were left out from the police statement should be weighed against what the parties agreed upon that it also depends on the person asking the questions as to what a witness will testify about as well as the fact that the police statement is taken for the purpose of reporting an offence and for investigative purposes. At common law the previous statement, if inconsistent, is only admissible to discredit the witness, but not as the evidence of the facts stated therein; see *Hoskisson v Rex* 1906 TS 502 at 504.

[28] The Appellant has not proven any discrepancies in any material respect or on any material aspect of the state's evidence that entitles the court of appeal to consider an acquittal of the Appellant. Also given the totality of the evidence presented, we could find no misdirection with the evaluation of the evidence by the court a quo or its findings. Accordingly, the appeal on the conviction must fail.

AD SENTENCE

[29] It is the Appellant's contention that the court a quo in sentencing him erred in that:

> [29.1] it overemphasized the seriousness of the offence and the interest of society and under emphasized his personal circumstances which was that he was 39 years old, married and with two children, his wife was divorcing him, employed as a caretaker at the Municipality and currently studying B. Com Accounting with Unisa.
>
> [29.2] It never considered other available sentencing options such as correctional supervision in terms of s 276 (1) (i) Act 51 of 1977.
>
> [29.3] It imposed a sentence in respect of count 3 (rape) which is under the circumstances disturbingly or shockingly inappropriate.

[30] It is indeed trite that in an appeal against sentence a court of appeal should be guided by the principle that punishment is preeminently a matter within the trial court's province and guard against the erosion of that discretion. Therefore the power of an appeal court to interfere with the sentencing courts discretion is limited unless the sentencing court's discretion was exercised improperly. The essential inquiry in an appeal against sentence is not whether the sentence was right or wrong, but whether the sentencing court exercised its discretion properly and judicially. If the discretion was exercised improperly, the appeal court will interfere with the sentenced imposed; see *S v Malgas* 2001 (1) SACR 469 (SCA); *S v De Jager and Another* 1965 (2) SA 616 (A) at 628H-629B.

[31] In order to ascertain that an appropriate sentence is imposed, the courts are guided by the *Zinn* triad (*S v Zinn* 1969 (2) SA 537 (A) that refers to the offender, the offence committed and the interest of society being the factors to be considered in determining a proper sentence. The court looks at the circumstances surrounding the nature and extent or degree of each of these three factors, keeping in mind the purpose for sentencing that is retribution deterrence, prevention and rehabilitation.

[32] Countered to this is what was submitted by the Appellant: he also had a previous conviction of assault with intent to do bodily grievous harm on 23 November 2010 for which he was sentenced to a fine for R6 000.00 or four months. Also that of common assault in 2017 for which he was sentenced to a wholly suspended sentence.

[33] The court *a quo* in its judgment on sentence weighed all the circumstances presented including the presentencing report which covered both the victim and the perpetrator's circumstances through the social worker's perspective and took into consideration as mitigating factors (constituting substantial and compelling circumstances for deviating from the prescribed minimum sentence) that there were no serious injuries, the offence was committed with a finger not a penis even though it still amounts to rape and that there are other two counts, that of assault and that of kidnapping. It

as a result, deviated from the prescribed sentence and also ordered that the sentences run concurrently. We therefore cannot find that in passing sentence court's exercising of its discretion fell short, since the offence committed, the offender and the interest of society were extensively and properly deliberated upon and clearly influenced the court's decision.

[34] It should not escape our minds that we are dealing with an unabated continuous violation of women's dignity and right to be free. Effective sentencing therefore forms the core of legal endeavours to eradicate the scourge of the violations. In *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) (2002 (1) SACR 79) para 45, the court pronounced that:

> "Sexual violence and the threat of sexual violence goes to the core of women's subordination in society. It is the single greatest threat to the self determination of South African Women."

[36] CMV Clarkson's Understanding Criminal Law 2001 at 208 expanded on the observation stating that *'The intimate and personal nature of this act makes this a particularly reprehensible form of assault, involving not only the application of force to the body of the victim but, by ignoring the woman's unwillingness to engage in sexual intercourse, also a serious invasion of a woman's privacy and autonomy.'*

[37] In *casu* it is of concern that the Complainant was treated with contempt by alluding to the fact that she had a lot of boyfriends as if that automatically disentitles her to any form of dignified treatment or right to choose as to whom does she form relationships with and or to be intimate with. It also displays the absence of any remorse and an arrogance of entitlement but most of all the intention to humiliate the victim. This cannot be perpetuated by our courts, by imposing sentences that are more sympathetic or informed by the personal circumstances of the perpetrator that effectively tramples on the victims' right to be efficiently protected by the law.

[38] The Supreme Court of Appeal in the words of Ponnan AJ in *S v Matyityi* 2011 (1) SACR 40 SCA at par 23 remarked as follows:

> "[23] Despite certain limited successes there has been no real let up in the crime pandemic that engulfs our country. The situation continues to be alarming. It flows that, to borrow from *Malgas*, it still no longer business as usual." And yet one notices all too frequently a willingness on the part of sentencing courts to deviate from the minimum sentence prescribed by the Legislature for the flimsiest of reasons – reasons as here that do not survive scrutiny. As Malgas makes plain, courts have a duty despite any personal doubts about efficacy of the policy or personal aversion to it, to implement those sentences. Our courts derive their power from the Constitution and, like other arms of the State, owe their fealty to it. Our Constitution can hardly survive, if courts fail to properly patrol the boundaries of their own power by showing due deference to the legitimate domains of power of the other arms of state. Here Parliament has spoken, it has ordained minimum sentences for certain specified offences. Courts are obliged to impose those sentences unless there are truly convincing reasons for departing from them. Court are not free to subvert the will of the legislature by resort to vague, ill-defined concepts such as "relative youthfulness" or other equally vague and ill-founded hypothesis that appear to fit the particular sentencing officers' personal notion of fairness. Predictable outcomes, not outcomes based on the whim of an individual judicial officer, is foundational to the rule of law which lies at the heart of our Constitutional order."

[39] In *S v Vilakazi* 2009 (1) SACR 552 at p 554 f-g it was stated that:

> "Once clear that substantial jail term appropriate, questions of whether or not accused married, or employed or of how many children he had, largely immaterial. However, they remain relevant in assessing whether the accused was likely to offend again."

[40] The mere fact that the Appellant suggests that the court should have considered sentencing options such as correctional supervision in terms of s276 (1) (i) Act 51 of 1977 notwithstanding that the legislature had ordained

prescribed minimum sentences to be imposed for these specific crimes indicates further how much he trivializes the offence he has committed and the low esteem in which he holds the Complainant. Interfering with the sentence of the court a quo already way lower than the prescribed sentence would be setting a dangerous precedent to the would be perpetrators who may have the same attitude towards women.

[41] The court had due regard to the object of punishment, namely; retribution, rehabilitation and deterrence and set to find a balance when it imposed the eight years' imprisonment sentence, which is accordingly appropriate. Having regard to the transcribed record, the sentencing court did not over-emphasised one part of the triad over another.

[42] For the reasons alluded to above, we conclude that the appeal on sentence must also fail.

[43] It is therefore ordered that:

1. The appeal against conviction and sentence is dismissed;

N V KHUMALO

JUDGE OF THE HIGH COURT

I agree

B NEUKICHER

JUDGE OF THE HIGH COURT

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