REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: A128/2020
REPORTABLE:YES/NO
OF INTEREST TO OTHER JUDGES:YES/NO
REVISED
DATE:03 MAY 2021

In the matter between:

SIMELANE, BHEKI SITHEMBISO **APPELLANT**

and

THE STATE

JUDGMENT

DLAMINI AJ

[1] This is an appeal against both conviction and sentence by the Brakpan Regional Court on 12 April 2019, convicting the appellant on eight counts, namely;

i. Assault with intent to grievous bodily harm;

ii. Kidnapping;

iii. Attempted murder;

iv. Rape;

v. Attempted murder;

vi. Kidnapping;

vii. Attempted murder; and

viii. Kidnapping

The appellant initially pleaded guilty to the count of assault with the intent todo grievous bodily harm and the court *a quo* entered a plea of not guilty, in terms of section 113 of the Criminal Procedure Act 51 of 1977 ("CPA").

[2] The appellant was then sentenced as follows:

i. Assault with intent to cause grievous bodily harm - three (3)

years;

ii. Kidnapping - five (5) years imprisonment;

iii. Attempted murder - eight years (8) imprisonment;

iv. Rape - life imprisonment;

v. Attempted murder - eight years imprisonment;

vi. Kidnapping - five (5) years imprisonment;

vii. Attempted murder- ten (10) years imprisonment ;

viii. Kidnapping - five (5) years imprisonment.

The court ordered that counts one, three and five run concurrently with count seven, and counts two and six run concurrently with count eight. The effectivesentence was thus life imprisonment and fifteen (15) imprisonment.

[3] The appellant was legally represented throughout the trial. At the end of the state's case, the court a *quo* was satisfied that the state had proved its case beyond reasonable doubt. It accepted the state's case and rejected the appellant's version. After conviction it then sentenced the appellant as set out above. The appellant is now appealing against both his conviction and sentence, on numerous grounds as contained in his application for leave to appeal.

CONVICTION

[4] It is common cause that the complainant and the appellant had a

romantic love relationship. The state led the evidence of the complainant and five other witnesses to testify, Mosima Rainy Radaba, Dr Clement Ncuka, Dr Bongani Milton Myeni, Constable Prestige Chauke, and Warrant Officer Zanele Paulus Msibi. The appellant also testified in his own defence and did not call any witnesses to testify on his behalf.

[5] The complainant, Ms. T K[…], testified that she laid various criminal charges for injuries she sustained when she was assaulted by the appellant on 25 December 2017. She confirms that she had a romantic relationship with the appellant and referred to the appellant as her ex-boyfriend.

[6] She testified that on that day she was sitting with the appellant and few of their friends having fun and drinking alcohol. She then requested one of their friends, N[…], to accompany her to her shack to have a look at her computer's external hard drive that had a problem.

[7] N[…], after looking at her computer, told her that he was unable to fix the computer and he advised her to take it somewhere where they fixed computers. Soon after they left her shack, she was confronted by the appellant who accused her of having had sex with N[…]. She denied this accusation. However, the appellant got angry and aggressive. He assaulted her punching her with his fists and kicking her as well. She screamed for her help and some of their friends came to her rescue and stopped the assault.

[8] The appellant grabbed her and forcibly pushed her into her car. He drove her to a deserted spot at the corner of Hospital Road. There he continued assaulting and kicking her until she fell down. The appellant then picked up an empty beer bottle hit her on her back. He then told her to remove her clothes. He unzipped her jeans, he took out his penis

and inserted it in her vagina and raped her. After this rape he took the empty beer bottle that he assaulted her with and inserted it in her vagina and raped her with it. After the rape ordeal, he strangled her throat, to such an extent that she thought she was going to die.

[9] After these assaults, the appellant again forcefully dragged her to the car and drove them both to an apartment in Kempton Park, where he resides. As they went inside, he pushed her inside the bathroom and locked her inside. A while later he came back and unlocked the bathroom door. This time he was carrying a hot clothing iron. He attacked her and burned her with the iron on her breasts, hands and thighs. At this stage she was in so much pain and exhausted, she got in bed and fell asleep. The following day, she requested the appellant to take her to the hospital but he refused. She then got hold of a cell-phone belonging to one of the appellant's nieces and she called an ambulance. The ambulance arrived and took her to the hospital where she was admitted for five days.

[10] She was subjected to a lengthy cross-examination. She stuck to her evidence and admitted that the appellant did assault her on 16th December 2017, but she did not lay any chargers against the appellant. However, she was steadfast and insisted that the various assaults, kidnappings, rape and burning her with the iron by the appellant, occurred on 25 December 2017 and she was then hospitalized the following day. She admitted that she withdrew these chargers against the appellant. However, she testified that she was afraid of the appellant and that the withdrawal was a tactical move, as the appellant was threatening her, and he was running away from the police. She wanted to lure him into a false sense of thinking that she has withdrawn the charges, he could then relax and the police could then arrest him, as they did.

[11] Mosima Rainy Radaba (Ms Radaba) testified that she is employed as a professional nurse by the Ekurhuleni Clinical Forensics based at the Far East Rand Hospital. She consulted and examined the complainant on 30 December 2017, and completed the J88 form. She noted various injuries on the complaint's body amongst others, the back of her head had some scars, right eye had inside redness and was bruised. Scars on the neck, burn wounds on both breasts. She concluded that the complainant's injuries were in keeping with being physically assaulted, with a blunt object used with force.

[12] She further conducted a gynaecological examination on the complainant and noticed that there were clefts, at six o'clock, seven o'clock and five o'clock at the complainant's vagina. She concluded that these findings were consistent with being forcefully penetrated by a blunt object used by force.

[13] The state then called Doctor Clement Ncuka (Dr Ncuka). He testified that he is a qualified medical doctor presently stationed at the Far East Rand Hospital. He confirmed that he consulted and examined the complainant on 26 December 2017. His observation of the complainant following the examination was that she had a puffy face, her eyes were swollen and she had various burn marks on her hands and breasts. The burn marks were severe and life threatening. He stabilised the complainant and referred her to a specialist burn surgeon for further attention and treatment. Under cross examination he was adamant that the complainant had fresh wounds.

[14] Dr Bongani Milton Myeni (Dr Myeni) testified that he is medical doctor stationed at Far East Rand Hospital. He consulted and examined the complainant on 26 December 2017, as he was the surgeon on call on that day. His observations after the examination were that the

complainant had partial thickness burns of the body, the abdomen and the thigh. There were also bruises on the face, neck and upper back.

[15] The state then called Constable Prestige Bongani Chauke (Constable Chauke) to testify. He was on duty on 30 December 2017, when the complainant came to lay the charges against the appellant. He approached the complainant to enquire whether she had been helped. Another police officer than requested the complainant to take pictures or photographs of the appellant. He then realized he knows the appellant.

[16] Around 30 January 2018 he came across the appellant driving a vehicle. He then questioned the appellant about this pending case. The appellant advised him that this case was withdrawn by the complainant. He then called the complainant who replied that this case was not withdrawn and was still pending. He averred that the reason it took them so long to arrest the appellant, is that he was told by the investigating officer that the appellant wasevading arrest.

[17] The last witness to be called by the state was Warrant Officer Zanele Paulus Msibi (W/O Msibi) . He testified that he has been in the police force for the past thirty years. He avers that he visited the place of the appellant several times but the appellant was nowhere to be found. He confirmed that he was aware that the complainant had filed a withdrawal statement, but he insisted that he did not accept the withdrawal statement as he wanted same to be decided by the court.

[18] The appellant took to the stand and testified in his own defence. He confirmed that he was in a romantic relationship with the

complainant. According to him, he admits to assaulting the complainant. However, he insists that the assault occurred on 17 December 2017 and not on 25 December 2017, as alleged by the complainant. He says on the day of the assault, he was in the presence of the complainant at the squatter camp of Old Location and in the company of their friends consuming alcohol. Later, he followed the complainant to her shack.

[19] There he discovered that the complainant was having sexual intercourse with one N[..]. He got angry and started to assault the complainant with clenched fists. The friends who were around stopped the assault and calmed the situation. He and the complainant got into her car and drove to his flat. They got into the flat and went to bed. He was woken up by the omplainant who was attacking him with a hot clothing ing iron. He took the iron and in revenge ,burned the complainant on her breast, thighs and arms.

[20] A day later, the complainant told him that she was in pain and wanted to go to the hospital. He denied all the kidnapping charges, the two rape counts, and attempted murder. He denies that he threatened the complainant to withdraw the charges against him. Under cross-examinaiton, he could not explain why his evidence that he only assaulted the complainant on 17 December 2017, was sharply contradicted by the complainant, the three medical doctors who treated her and the hospital records.

[21] It is trite that in a criminal trial that the onus is on the state to prove the case against the accused beyond reasonable doubt. There is no such onus on the accused. In determining the guilt of the appellant beyond reasonable doubt, the correct method of approaching evidence as a whole was set out in **S v Chabalala 2003 (1) SACR 134 (SCA),** at para 15, where Heher AJA remarked:

"[15] The correct approach is 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 patty 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. Once that approach is applied to the evidence in the present matter the solution becomes clear."

[22] It is so that the Complainant was the only witness that the state called to testify on all the charges. The question therefore is whether the court a *quo* was correct in convicting the Appellant on the evidence of a single witness. It is trite law that the evidence of a single witness be approached with caution. Section 208 of the Criminal Procedure Act 51 of 1977 provides:

"(208) An accused may be convicted of any offence on the evidence ofany competent witness."

[23] In **S v Sauls 1981 (3) SA 172 (A), at 180E-H,** the court said:

"The absence of the word "credible" is of no significance; the single witness must still be credible, but there are, as *Wigmore points out, "indefinite degrees in this character we call credibility". (Wigmore on Evidence vol III para 2034 at 262.)*

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 1971 (3) SA 754 (A) at 758). 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 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"."*

[24] The appellant, in his grounds of appeal, did not put much challenge to the evidence of the complainant, except to submit that his version of the incident is reasonably possibly true. Further that the various charges emanate from one continuous incident that occurred on the same day and the state should not have split the various charges. I will deal with this aspect later.

[25] I concur with the court a *quo* findings that the complainant's evidence is beyond reproach. She gave a consistent and chronological order of how she was brutally attacked by the appellant on that day. She testified in detail about the assaults that occurred at the shack, the deserted spot and at the appellant's flat. She gave a full account of how the various kidnappings occurred. She was dragged, threatened and forced into her car and the appellant drove her to the deserted spot. After being assaulted, the appellant again forced her into her car and drove to his flat. There he locked her in the bathroom and she was unable to leave.

[26] Further, she gave a clear testimony of how the appellant raped her

and soon thereafter also raped her using an empty beer bottle. The rape incidents are corroborated by independent medical evidence. Mrs Radaba testified that when she examined the complainant, she discovered that she had clefts at six o'clock, seven o'clock and five o'clock in her vagina. Mrs Radaba confirmed that the clefts were consistent with being forcefully penetrated by a blunt object used by force.

[27] The appellant admitted that he burnt the complainant with the hot iron, but says he did so in self-defence. His plea of self-defence is untenable and is dismissed. If the complainant attacked him first he could have grabbed the iron, as he did, and simply put it away. Instead he burnt her on her hands, continued on her breasts and her thighs. His actions are consistent with the complainant's testimony that the appellant indiscriminately burnt her and told her that he wanted to kill her.

[28] The complainant's evidence is furthermore corroborated by other various state witnesses, in particular the doctors of Far East Rand Hospital. They confirmed that the complainant was seriously injured when she came to thehospital on 26 December 2017. They said she was bleeding, had red eyes and burn wounds.

[29] From the record, I align myself with the court a *quo* finding that the appellant was not a good witness He avoided answering questions mostly because he was not able to give plausible explanations for various improbabilities in his version. His version that this incident occurred on 17 December 2017 and not 25 December 2017, cannot stand and is dismissed. His evidence is further dismissed by the hospital records, the two doctors who admitted the complainant and the charge sheet.

[30] Also his evidence that the complainant had later on withdrew the charges, in my view, does not take this matter further, it is no defence to the charges that he is facing. The complainant's version is that she only temporarily withdrew the charges as she was afraid of the appellant, and he was running away from the police. She wanted to calm him and assure him that the case is withdrawn, so as to not run away, is accepted and reasonably possibly true. Indeed he stopped running and the police arrested him. Overall, the appellant's evidence is so improbable that it cannot be said that it is reasonably possibly true.

[31] It is therefore my finding that the court a *quo* was correct in rejecting the appellant's version and the finding that the state had proved its case beyond a reasonable doubt. The appeal on conviction fails.

DUPLICATION OF CHARGES

[32] I now turn to deal briefly with the question whether there was a duplication of convictions. Section 83 of the Criminal Procedure Act 51 of 1977 grants the state the right to put an accused as many charges as may be justified by the facts in the form of main or alternative charges. I have shown above that the evidence tendered by the complainant proved that the assaults occurred in three different places, there were two rape incidents and the kidnapping also occurred in different places. As a result, the appellant's submission that there was a duplication of convictions is dismissed.

SENTENCE

[33] There are recognised grounds in our law on the basis of which an appeal court may interfere with the sentence imposed by the trial court. The court of appeal may only interfere if the sentence has not been judicially and properly exercised.

[34] In the case of **Director of Public Prosecutions v Mngoma,**[3] Bosielo JA stated that:

> *"[11] The powers of an appellate court to interfere with* a *sentence imposed by* a *lower court are circumscribed. This is consonant with the principle that the determination of an appropriate sentence in* a *criminal trial resides pre-eminently within the discretion of the trial court.* As *to when an appellate court may interfere with the sentence imposed by the trial court, Marais JA enunciated the test* as *follows in* S *v Malgas 2001 (1)* SACR *469 (SCA) at p 478 d-g:*
>
> 'A *court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence* as *if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate Court* is *of course entitled to consider the question of sentence afresh. In doing* so, *it* assesses *sentence* as *if it were* a *court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate Court is at large. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do* so *when the disparity between the sentence of the trial court and the sentence which the appellate Court would have imposed had it been the trial court* is so *marked that it can properly be described as "shocking", "startling" or "disturbingly in appropriate".*"

[35] On count four, the appellant was sentenced to life imprisonment, in terms of Section 51(1) of the Minimum Sentence Act 105 of 1997. In terms of the provisions of Section 51(3) of the Minimum Sentence Act, the legislature has indicated that the prescribed minimum sentence can only be deviated from when there are substantial and compelling circumstances.

[36] Further in **S v Vilakazi 2009 (1) SACR 552 (SCA),** at para 15, it was held thus:

> *"[15] It is clear from the terms in which the test was framed in Malgas and endorsed in Dodo that it is incumbent upon a court in every* case, *before if imposes a prescribed sentence, to assess, upon a consideration of all the circumstances of the particular case, whether the prescribed sentence is indeed proportionate to the particular offence. The Constitutional Court made it clear that what is meant by the 'offence' in that context* consists *of all factors relevant to the nature and seriousness of the criminal act itself,* as *well* as *all relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence and the culpability of the offender."*

[37] At the time of the commission of these offences the appellant was 34 years old. He is single and had two minor children. He was employed as a driver and earned approximately R3 000.00 per month. He never finished school and he dropped out in Grade 7. He was kept in custody as an awaiting trial prisoner for a period of about 18 months. The court *a quo* did not find any substantial and compelling circumstances present in this matter with regard to count

four. I cannot find any. These factors taken cumulatively do not justify a departure from the prescribed minimum sentence.

[38] The offences that the appellant was convicted are undeniably serious. The attacks on the complainant were most brutal and vicious. The complainant expected love, caring and support from the appellant. Instead the appellant assaulted her, raped her twice, burned her with an iron cloth and he nearly killed her.

[39] In this case, society demands rightly so that courts should impose very harshsentences that would serve as punishment and also serve as a deterrent fromthose would be offenders.

[40] Mathopo AJ, writing for the majority in the matter of **S v Tshabalala [2019] ZACC 48,** when dealing with the crime of rape, observed;

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

[41] I am therefore satisfied that this court should not interfere with the sentence imposed.

[42] The following order is made: 16

42.1. The appeal on both conviction and sentence is dismissed.

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J DLAMINI

ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree

_____

MOSOPA J

JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances

For the Appellant: Adv JL Kgokane

Instructed by: Legal Aid SA

For the Respondent:	Adv SD Ngobeni
Instructed by:	Director of Public Prosecutions
Date of hearing:	10 March 2021
Date of judgment:	Electronically transmitted: 03 May 2021.