REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
PRETORIA

CASE NO: A 67/2017)

DPP REF NUMBER: MA 20/2017

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

....
DATE SIGNATURE

In the matter between:

M[....]: S[....] S[....] **APPELLANT**

and

THE STATE **RESPONDENT**

CORAM: HUGHES J AND DLAMINI AJ

J U D G M E N T

This judgment is handed down electronically by circulation to the parties' representatives by way of electronic mail and by uploading it to the electronic file of this matter on the application called Caselines. The date for handing down judgment of this matter is 31 May 2021.

DLAMINI AJ

[1] This is an appeal against both conviction and sentence. On 06 May 2016 at the Regional Court sitting at Balfour, Mpumalanga Province, convicted the Appellant on the charge of rape. He was then sentenced to ten years imprisonment. The Appellant was represented throughout the trial.

[2] His application for leave to appeal both the conviction and sentence was dismissed on 1 June 2016.

[3] The Appellant then filed a petition application against the dismissal of the leave to appeal application. On 29 October 2016 the petition was successful. The Honourable Mothle and Bam J granted leave to appeal against both the conviction and sentence.

[4] The general principle is that the court of appeal will be hesitant to interfere with the factual findings and evaluation of the evidence by a trial court.

[5] In the court *a quo* the state led the evidence of the Complainant, Sergeant Mngomezulu, the Complainant's boyfriend, K[....] and Sergeant Bongani Joseph Radebe. The Appellant testified in his own defence and did not call any witnesses.

[6] The Complainant testified that on 14 March 2015 she was at Mavis' Tavern at Grootvlei in the company of K[....] and the Appellant. It was late at night and they were drinking. She was looking for transport to go back home to Balfour. The Appellant then requested her not to leave as it was late and he offered to accommodate her and K[....] at his shack.

[7] All three of them went to the Appellant's shack. On arrival,the Appellant left them at the shack, she and K[....] went to bed and had sexual relations.The Appellant returned an hour later to the shack and advised them that he was looking for his jersey. He went to a bath that had clothes, he took out the jersy and left. K[....] then asked her to go check if all her belongings were still in order.When she searched her clothes , she discovered that one of her two phones was missing. She told K[....] about her missing phone. He then advised her to stay behind as he was going to look for the Appellant to check if he did not take her phone. However K[....] did not return. It was only the Appellant that returned to the shack. She asked the Appellant where K[....] was, he told her that he did not know his whereabouts.

[8] The Appellant then ordered the Complainant to get into bed, which she complied. Whilst lying in bed the Appellant undressed both her trouser and panties.He then undress himself. He inserted his penis in her vagina and raped her. After he finished, he laid down and told her that he would never ejaculate inside her. She then sat in the shack from about three in the morning until around five in the morning, because she did not know where the police station was. She got out of the shack, since she was not familiar with the area, she asked a gentleman that she met where the police station was. He gave her directions, she found the police station and she laid a charge of rape.

[9] Under cross-examination she admitted that she had consensual sex with her boyfriend K[....]. When asked why the DNA result excluded the Appellant, the Complainant replied that the Appellant had told her that he was not going to ejaculate inside her.

[10] K[....] K[....] also testified. In short, he confirms that he is the Complainant's boyfriend. On the day, he was in her presence and the Appellant. The Appellant then offered them a room at his shack to sleep as it was late at night. They left for the Appellant's room. He and the Complainant had sex and slept. The Appellant returned to the room during the night as he wanted to collect his jersey. After the Appellant had left, the Complainant told him that her cell phone was missing.

[11] He then left to look for the Appellant to check whether he took the cell phone. When he returned the following morning, he discovered that the Appellant was arrested.

[12] Sergeant Mngomezulu testified that he was attached to the Grootvlei police station. He confirmed that on the morning of 4 March 2015 he was on duty when the Complainant came to the police station and reported that she has been raped. That the Complainant appeared to be confused, her clothing was dirty, nevertheless she appeared calm. She made a statement and informed him that the Appellant had raped her in his shack in the early hours of that morning.

[13] The investigating officer in the case Sergeant Bongani Joseph Radebe also testified. He is a member of the South African Police Service, stationed at Balfour Police Station in the Family Violence Child Protection and Sexual Offences Unit. He took the warning statement from the Appellant. He said he explained fully all his rights to the Appellant, including his rights to remain silent and that he is not compelled to answer any question or to make any statement. However, the Appellant despite his rights having been fully explained chose to make a statement. At this stage the defence objected and intimated that the Appellant's statement was not made freely and voluntary in

that the Appellant was at the time of the making of the statement intoxicated and under the influence of alcohol.

[14] The court *a quo* then ordered a trial within a trial be held to determine the admissibility of the statement. At the end of the trial within a trial the court *a quo* ruled that the statement was made freely and voluntarily by the Appellant and is admissible as evidence. I will deal with this aspect later.

[15] The Appellant testified in his defence and did not call any witnesses. He confirms that he had met the Complainant and her boyfriend K[....], the previous evening. Since it was late at night he offered the Complainant and her boyfriend a room to sleep at his shack. All three proceeded to his shack, he opened his room, and they all went inside.

[16] He left the Complainant and her boyfriend there and went to a night vigil. In the morning, he went back to his shack. He found the Complainant alone and K[....] was not around. He asked her where K[....] was, she advised that he left during the night and he did not come back. He told her that he also did not know where he was.

[17] He got into bed and slept. Two hours later he was awoken by the police and he was arrested. He denies that he raped the Complaint.

[18] At the end of trial, the court has to decide on the guilt or innocence of the accused after having assessed all the evidence presented. 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 the accused is entitled to be acquitted if it is reasonably possible that he might be innocent. This is not a separate test but an expression of the same test when viewed from the opposite perspective. This means that in order to be a reasonable possibility that an innocent explanation of an accused might be true, there must be, at the same time a reasonable possibility that the evidence implicating him might be false or mistaken.

[19] It was submitted on behalf of the Appellant that the court a *quo* erred when it allowed the warning statement of the Appellant as evidence against him. That the court *a quo* erred when it dismissed the DNA results excluding the Appellant as the donor of the DNA swaps taken from the Complainant. Further that the court *a quo* erred in dismissing the Appellant's version as not reasonably possibly true.

[20] It is common cause that the Complainant was the only witness that the state called to testify on the rape itself. 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 that the evidence of a single witness shall be approached

with caution. Section 208 of the Criminal Procedure Act 51 of 1997 provides that:

"an accused may be convicted of any offence on the evidence of a single witness, provided that it is satisfactory in all material respects."

[21] In **S v Sauls 1981(3) SA 172 at** para180 E-H, the court said:

"the absence of the word "credible" (as was the case before) is of no significance; the single witness must still be credible, but there are as Wigmore points out "the indefinite degrees in this character we call credibility." the court continues to say "there is no rule of thumb or formula to apply when it comes to a consideration of the credibility of a 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, <u>however slender of the</u> evidence were well founded."

[22] The Complainant in this case did not hesitate. She gave a clear description and chronology of the events of that night and how the Appellant raped her. She described in detail how the Appellant undressed her, took out his penis, inserted it in her vagina and raped her.

[23] She stuck to her version of evidence,in fact there is no evidence in the record that indicated that she contradicted herself under cross-examination. She is an honest witness and admitted that she had earlier in the night had consensual sex with her boyfriend, K[....]. She further admitted that she was angry at K[....], for leaving her alone at the Appellant's shack and never returned back. In fact, if she was malicious she could have simply laid a charge of rape against K[....] as she was angry at him, but she did not. There is no reason why the Complaint will falsely accuse the Appellant of the rape. This is the very man that helped her and provided her with accommodation for the night.

[24] I now turn to deal with the issue relating to the admissibility of the warning statement. The only witness who testified with regard to admissibility of or exclusion of the warning statement was Sergeant Radebe. During the hearing the parties advised this court that the original warning statement is no longer available and does not form part of this record.

[25] I concur with the court *a quo's* findings that Sergeant Radebe was an honest and credible witness. He gave a detailed account of how the interview occurred with the Appellant. That he has almost twenty years experience in the police service. His testimony was clear and concise, that he informed the Appellant of his rights before conducting the interview.

That he informed the Appellant of his rights to remain silent and that the Appellant had a right to legal representation. According to him the Appellant voluntarily waived his rights and selected to make a statement.

[26] Further, the Appellant selected not to testify during the trial within a trial. As a result I cannot find fault in the court *a quo* ruling that the Appellant made this statement freely and voluntarily and admitted it as evidence.

[27] It is common cause that the DNA results excluded the Appellant as the donor of the DNA swaps taken from the Complainant. This DNA result does not amount to a defence or dismisses the evidence of the Complainant. I concur with the court *a quo* findings that a number of possiblties exist to explain the absence of the appellant DNA from the samples that was recovered. The possiblity exits that the Appellant could have used a condom, that he withdrew before ejaculating. Having said that in my view the most logical and credible explanation of these results, comes from the testimony of the Complainant herself. She was adamant that the Appellant told her during the rape that he was not going to ejaculate inside her, hence the DNA excluded the Appellant.

[28] Having regard to all the above, I am satisfied that all the state witnesses evidence was beyond reproach. They all testified in a consistent and chronological manner. There were no material contradictions in their evidence. That, there were no improbabilities, contradictions or anything that raises suspicion in their evidence. As a result it is my finding that the court *a quo* correctly rejected the Appellant's evidence as improbable and not the truth, and that the state has proved its case beyond reasonable doubt. Therefore the appeal on conviction is dismissed.

SENTENCE

[29] It is trite that the imposition of sentence is a matter for the trial court's discretion. The court of appeal may only interfere with such discretionary imposed sentence, if it is vitiated by misdirection or startlingly inappropriate or if there is a striking disparity between the sentence imposed and the sentence the court of appeal could have imposed.

[30] In determining the appropriate sentence regard must be had to the well-known trial factors, namely the seriousness of the crime, the offender's personal circumstances as well as the interests of society. In **S v Malgas 2001 (1) SACR 469 at 478 D** the court laid down the principles applicable to an appeal on sentence:

"a court exercising appellate jurisdiction cannot, 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. 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 be 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 inappropriate. It must be emphasised that in the latter situation the appellate court is not at large in the sense in which it is at large in the former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned."

[31] The following personal circumstances of the Appellant were put on record. He was 25 years old at the time of the commission of the offence. He is single and has one minor child, who is four years old. The child is staying with the Appellant's girlfriend. Although not legally married, Appellant was staying with his girlfriend as husband and wife. He was employed and earned a monthly salary of R3 200.00. He used this income to support his mother, two sisters and two brothers. Taking the above into account so says the Appellant, in particular his relative youth, he was gainfully employed and further that he was a first time offender, that these are substantial and compelling circumstances to deviate from the prescribed minimum sentence.

[32] The Appellant was sentenced in terms of Section 51(1) of the Minimum Sentences Act, Act 105 of 1997. Substantial and compelling circumstances must exist to justify a lesser sentence. In **S v Nkomo 2007 (2) SACR 198** at 201 E-F the court said the following:

"But it is for the court imposing the 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 factors-that less an accused 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 should be exceptional."

[33] The court *a quo* did not find any compelling or substantial circumstances present to deviate from the prescribed sentence. I cannot find any. The rape of the Complainant was perpetrated by the Appellant a person she trusted as he had provided her with accommodation at his room. He took advantage that she was alone in his room and she was in area that was unfamiliar to her.

[34] The court in **S v Ndlovu [2017] ZASC 19** at para 53, describes rape as:

"one of the most harrowing and malignant crime confronting South Africa today. Rape is perhaps the most harmful and dehumanising violation that a person can live through and is a crime that not only violates the mind and body of a Complainant, but also that vexes the soul. This crime is an inescapable and seemingly ever-present reality and scourge on the nation and collective conscience of the people of South Africa."

[35] I have considered the nature of crime, the Appellant's personal circumstances, and the interests of society. I am satisfied that I should not interfere with the sentence of the court *a quo.*

[36] For these reasons the appeal against sentence cannot be tampered with.

[37] Accordingly, the following order is made:

The appeal dismissed

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DLAMINI AJ

ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree

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HUGHES J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date of hearing:	8th March 2021
Date of judgment:	Electronically transmitted on 31 May 2021
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