IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: A303/2020

In the matter between:

V[…] M[…] M[…] APPELLANT

and

THE STATE RESPONDENT

JUDGMENT

STRIJDOM AJ

1. The Appellant was convicted and sentenced in the Regional Court Pretoria North on 4 (four) counts of contravention of section 3 of Act 32 of 2007 read with section 51 of Act 105 of 1997, and 1 (one) count of kidnapping. He was sentenced to life imprisonment on the count of rape and 5 (five) years imprisonment on the count of kidnapping.

2. The Appellant was not legally represented during the trial. He gave Pretoria Justice Centre power of attorney to argue the appeal against his convictions and sentence.

3. The Appellant approached this court by virtue of an automatic right to appeal against his conviction and sentence in terms of section 10 of the

Judicial Matters Amendment Act, No 42 of 2013.

4. It needs to be noted that this section of the Judicial Matters Act Amendment Act, amended section 309 of the Criminal Procedure Act, No 51 of 1977 in that it provides for an automatic appeal in circumstances like the case we have to decide today.

5. In the heads of argument , the Appellant claims that ad the merits of the case, the trial court erred on the following grounds of fact and law:

a) The Appellant was not afforded a fair trial. He was not given copies of the docket to prepare himself for trial as he was conducting his own defence;
b) The complainant was a single witness. Her evidence was not satisfactory in all material respects;
c) Material evidence could not be obtained to corroborate the evidence of the Complainant. The failure of the Appellant to testify and to call witnesses did not strengthen the State's case.

6. Regarding the merits it was held in **S *v* Van der Meyden**[1]**:** "The onus of proof in the 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 entitled to be acquitted if it is reasonably possible that he might be innocent. These are not separate and independent tests, but the expression of the same test when viewed from opposite perspectives. A court does not look at the evidence implicating the accused in isolation in order to determine whether there is proof beyond 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."

7. It is settled that a Court of Appeal will not interfere easily with a finding of fact and credibility made by the trial court and I refer to **R *v* Dlumayo and**

[1] 1999(1) SACR 447 (W) at 448 F-H

Another .[2] 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 discarded if, the recorded evidence showed them to be clearly wrong. The reason for this is simply that the trial court sees and hears, the witnesses and is steeped in the atmosphere of the trial. Other than the court of appeal who considers only the mute trial record of first instance is in a position to take into account the witness' appearance, demeanor and personality.

8. In the absence of factual error or misdirection on the part of the trial Court, its finding is presumed to be correct. This was also held to be *the* position in S v Bailey[3] and Minister van die Suid-Afrikaanse Polisie en 'n ander v Kraatz en 'n ander[4]. This principle has been confirmed and properly enunciated in S v Hadebe and others .[5] The Court cautions that one must guard against a tendency to focus too intently on -

"separate and individual parts of what is after all a mosaic of proof. Doubts about one aspect of the evidence led in the trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the available evidence."

9. The evidence given in the trial court was fairly and accurately summarised in the judgment. The Appellant had issue with the trial Court accepting the evidence of the complainant, who at the occurrence of the incidents was 16 years old. Appellant advances the argument that this witness is a single witness and that her evidence should have been "satisfactory in all material respects" and ought to have been treated with the necessary caution.

10. The trial Court adequately reflects on the witness' testimony. It is clear from the judgment that the trial court considered the complainant's testimony

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[2] 1948(2) SA 677 (A) 705-6
[3] 2007(2) SACR 1(C)
[4] 1973(3) SA 490 (A)
[5] 1997(2) SACR 641 (SCA)

with the necessary caution.

11. The learned Regional Court magistrate stated on page 118-119;

"When the Court evaluates the evidence that was *presented, firstly that the evidence of the complainant is, that of a single witness and thus her evidence will be subject to the cautionary rules applicable to the evidence of* a *single witness … The complainant's version* is *supported by the following to* a *certain extent by the accused 's version that he did have consensual sexual intercourse with her as per his warning statement to the police;*[6] *by the evidence of the grandmother and T[…] with regard to the preceding and following events, and the objective facts of the medical examination and Doctor Ntuli's conclusion that the secretions from the vagina is semen and an indication of penetration. The complainant 's version* is *further supported by the evidence of the circumstances and the time and the condition the complainant* was *found by the police."*

12. This Appellant decided to close his case without placing any evidence before the court *a quo.*

13. It was stated in **S *v* Mthethwa** that:[7]

"Where however there is prima facie evidence implicating the accused in the commission of the offence, his failure to give evidence, whatever his reasons, may before such failure, in general ipso facto, tends to strengthen the state's case *because there is then nothing to gainsay it, and therefore less reason for doubting its credibility on reliability."*

14. The accused does have the right to remain silent but that does have certain consequences and adverse consequences to his case. In **S *v* Brown**

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[6] Vide: exhibit "D" pp 183

[7] 1972 (3) SA 766 (A) 769 0-F

& Another.[8] it was held that:

"No adverse inference could be made against an accused merely by virtue of the fact that he had exercised his right to silence. The exercise of the right to silence had however certain consequences, for instance, that it left the prima facie evidence on behalf of the State uncontradicted. This uncontradicted prima facie evidence could in appropriate circumstances constitute sufficient evidence against the accused. Whether this occurred would depend on the facts and circumstances of every case."
In certain cases, the exercise of the right of silence in terms of section 25 (3)(c) could therefore have prejudicial consequences for an accused.

15. The cross examination of the Appellant did not raise any significant issues. In my view mainly left uncontested or agreed with.

16. On 24 July 2017 the Appellant requested a copy of the J88,

Vide: Record: Volume 1: p4 para 16

He was duly supplied with a copy of the J88 as requested by him.
Vide: Record: Volume 1 p 5 para 1-9

During the evidence of Dr Ntuli, it was clear that the Appellant was in possession of a copy of the case docket.

Vide: Record: Volume 1 p 57 para 26.

Volume 1 p 58 para 1-3

On page 60 para 19-21 the Appellant admit that he had a copy of the case docket. The prosecution also placed on record that a copy was supplied by the State to

[8] 1996 (2) SACR 49 (NC)

the Appellant. The Appellant did not deny this.

Vide; record Volume 1 p 80 para 17-22.

17. In my view there is no merit in the Appellants' submission that he was not afforded a fair trial because he was not given copies of the docket to prepare himself for trial.

18. After scrutinizing the record and applying the test explained in **S v Hadebe** supra, this court cannot find a justifiable reason to interfere with the trial court's decision to accept the evidence of the complainant. The trial court did not summarily decide the case on the basis of the Complainant's version alone. The Court *a quo* analysed the testimony of all the State witnesses and accepted the evidence proffered.

19. When the whole mosaic of evidence is considered , there is no basis for this court to step in and interfere with the trial court's evaluation of the evidence.

20. Pertaining to the sentence , a court of appeal does not have an unfettered discretion to interfere with the sentence imposed by a trial court. The Court of Appeal may only interfere where it is clear that the trial court did not exercise its discretion judicially or reasonably. Where there is no clear misdirection the question is whether there exists such a disparity between the sentence imposed and the sentence the appeal, Court would have imposed as to warrant interference.

21. It was stated in **S *v* Gquabi**[9] that an accepted test for determining whether a sentence is so severe as to be unjust is to enquire whether the sentence gives the Court of Appel a sense of shock.

22. It was submitted by the Appellant that the trial Court did not explain the

[9] 1964 (1) SA 261 (T)

consequences of the provisions of section 51 (1) of the Criminal law Amendment Act to the Appellant before he could plead and/or after he had pleaded.

23. It was further submitted that the minimum sentence on each Count is 10 years' imprisonment for a first offender.

24. On each of the four rape counts it is alleged in the charge sheet that the accused raped the victim more than once.

25. On 11 April 2017 the Appellant was informed of the implications of section 51 of Act 105 of 1977. In his judgment of the sentence the presiding Officer also referred to the fact that he extensively explained to the Appellant the consequences of Act 105 of 1977.

Vide: Record: Vol 1 p "L"

Vide Record: Vol 2 p 135 para 12-16

26. Section 51(1) of Act 105 of 1997 provides that a Regional Court or a High Court shall sentence a person it has convicted of an offence referred to in part 1 of Schedule 2 to imprisonment for life. Rape is contemplated in section 3 of the Criminal law (sexual offences and related matters) Amendment Act 2007 as-

(a) when committed where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice, falls within the ambit of part 1 of Schedule 2.

27. In **S *v* Mtembu** [10] it was stated that it is enough that an accused person is informed that section 51 of Act 105 of 1997 is applicable. It is not necessary that an accused is informed whether it is subsection 51(1) or 51(2) of the said Act.

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[10] 2012 (1) SACR 517 SCA

28. In my view the Appellant was properly informed of the provisions of section 51 of Act 1997.

29. In the present case the Appellant was found guilty of raping the complainant a 16- year-old girl more than once. The gravity of the offence is enormous. In addition, the prescribed sentence on each count is life imprisonment.

30. Unless the court finds that there are substantial and compelling circumstances present to deviate from the prescribed sentence, this is the sentence that must be applied.

31. The following personal circumstances of the Appellant were considered by the court a quo.

31.1 The Appellant was 18 years and 4 months old- when he committed these offences. He was 28 years old when he was sentenced
31.2 He completed grade 6 in 2003.
31.3 He was not married and had no minor children to maintain.
31.4 The court also considered the fact that the Appellant is currently serving two life sentences for rape. At the time of the commission of these offences , the Appellant was not yet convicted of any offence. He was a first offender. He was only convicted on the 28th September 2011. However, the court a quo, stated, that, "it indicates a clear path with regard to what your future intent was and indicates similar offences on which you were convicted."

32. The following can be viewed as aggravating circumstances.

32.1 The complainant was 16 years when she was raped by the Appellant.
32.2 The Appellant raped the complainant numerous times.
32.3 The Appellant held the complainant captive, until she was rescued by the boyfriend and police.
32.4 The complainant was severely traumatized by the ordeal.

32.5 The Appellant showed no remorse.

33. In **S *v* Hewitt**[11] it was stated that:

"Our court has, in countless cases *of this nature, consistently expressed society's abhorrence of sexual offences, which once earned South Africa the shameful title of being the rape capital of the world, and the devastating effect they have on victims, and society itself The courts have aptly described rape as* 'a *horrifying crime' and* a *cruel and selfish act in which the aggressor treats with utter contempt the dignity and feelings of the victim, and as* a *very serious offence which is a humiliating, degrading and* a *brutal invasion of the privacy, the dignity and the person of the victim."*

34. From an analysis of the Appellant's personal circumstances seen in the context with the severity of the crimes and the aggravating circumstances, properly alluded to by the respondent's counsel in the heads of argument, it is evident that no compelling and or substantial circumstances exist to deviate from the minimum prescribed sentence. It is evident that there is no misdirection on the trial court's side that would warrant interference with the sentence, neither do these sentences indicate a sense of shock.

35. The Appeal on both conviction and sentence is dismissed.

STRIJDOM JJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

I agree, it is so ordered.

MOKOSE J

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[11] 2017 (1) SACR 309 (SCA) page 313 para D-F

JUDGE OF THE HIGH COURT

GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

Date of hearing: 18 MAY 2021

Date of judgment: 17 JUNE 2021

Delivered: This judgement was *prepared and authored by the Judge whose name is reflected and* is *handed down electronically by circulation to the parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 17 June2021.*

Appearances:

For the Appellant: Adv S MOENG
(Instructed by: PRETORIA JUSTICE CENTRE.)
For the Respondent: Adv A ROOS
(Instructed by: DIRECTOR OF PUBLIC PRESECUTION , PRETORIA.)