IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISON, PRETORIA

CASE NO: A102/2021

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

01/07/22

SIGNATURE DATE

In the matter between:

ANDREW SIMPHIWE SANGWENI **Appellant**

AND

THE STATE **Respondent**

JUDGMENT

SARDIWALLA J

INTRODUCTION:[1]

[1] At the outset of this appeal the court granted the appellant's application for condonation for the late delivery of his heads of argument for the leave to appeal to this court. The application was opposed by the representative of the State who sought an order striking the matter from the roll.

[2] The appellant pleaded not guilty in the Regional Court Benoni. The appellant was convicted on 19 January 2019 by the presiding Magistrate Mveli on one count of rape and was sentenced to ten (10) years imprisonment. The appellant brought an application for Leave to Appeal in respect of both conviction and sentence.

ISSUES ON APPEAL:

[3] It is in dispute that the State proved the commission of the crime which featured in the trial. The central issue arising, however, is whether the court *a quo* erred in concluding that the State had proved beyond a reasonable doubt that the appellant had sexual intercourse with the alleged victim. It was the appellant's grounds of appeal that:

3.1 By finding that the State has proved their case beyond a reasonable doubt in respect to when and how penetration took place;

3.2 By finding that the witness Lerato Joyce Ntsani could be relied upon to convict the appellant;

3.3 By irregularly allowing evidence during the trial and thereby allowing the magistrate's judgement to be clouded;

3.4 By using the inadmissible evidence as part of the reasons for his conviction;

3.5 By imposing a sentence in respect to count 1 which is shockingly harsh and inappropriate having light of the circumstances of the case;

3.6 By over-emphasizing the seriousness of the offence and the interest of

---

[1] *This judgment deals with the appeal against the judgment in the court a quo. It therefore proceeds on the premise that the reader is familiar with that judgment, the full details of the individual charges against the accused as per the indictment and the categorisation of the charges adopted by the learned Magistrate. In the interest of brevity evidence led before the court a quo will not be repeated in this judgment in any great detail unless material to the conclusions reached. Readers of this judgment are referred to the judgment of the court a quo and the record if any additional details are required. To facilitate reading, the same terminology as adopted in the court a quo will be followed to ensure consistency and hopefully ease of understanding.*

society;

3.7 By failing to take into account the prospects of rehabilitation;

3.8 By finding that the appellant is a second offender for purposes of the Minimum Sentence Act, Act 32 of 2007 and that the minimum sentence applicable in the present matter is 15 years' imprisonment in respect of a second offender and not 10 years' imprisonment.

3.9 By taking into account aggravating factors which were not presented to the court through evidence by the State.

3.10 The Court erred in not applying the determinative test as laid down in **S v MALGAS 2001 (1) SACR 469 (SCA)**, and therefore erred in not finding substantial and compelling circumstances to deviate from the prescribed minimum sentence of life imprisonment.

[4] The case was advanced by two witnesses for the State, the complainant Lerato Joyce Ntsani who was allegedly raped by the appellant on 9 March 2019 and the arresting officer Ms Queen Mahlangu.

[5] The defence's submission is that there was no corroboration of the evidence as the complainant was the sole witness. The defence submits that there was also no evidence before the court as to how much alcohol the complainant had consumed and as such the court erred in finding that both the appellant and the complainant had consumed equal amounts of alcohol. Further that the complainant alluded to other witnesses in her testimony that were present at the tavern but that the State did not call those witnesses to corroborate the complainant's version. The appellant also alleges that the court did not object to the complainant referring to his previous convictions in her testimony and or object to cross-examination of such evidence. The appellant submits that this resulted in an irregularity of inadmissible evidence that impaired the judgment of the presiding officer and led to an unfair hearing. Further that the court erred in taking this into account when making its judgment. The defence averred that it was not clear from the complaint's evidence how she identified him as her attacker and therefore failed to prove beyond a reasonable doubt that he indeed committed the offence alleged.

[6] I turn now to the merits of the appellant's conviction. In convicting the appellant, I cannot find that the magistrate committed a number of fundamental misdirections. However, I will refer to once such instance that I find of paramount importance to the State's case.

[7] Firstly, it is common cause that the complainant and the accused were well known to each other. In this matter the arresting officer was called to give evidence of the complainant's version regarding the identity of the accused and she confirmed that the complainant identified a person that she was with as the man she left the tavern with that night and whom she walked home with in the early hours of the morning and that he pushed her into the bushes and raped her. The evidence of the form J88 dated 10 March 2019 was not objected to. The complainant was coherent in material aspects regarding the identity of the accused as a person known to her and her interaction with him on the day in question. She was also not contradictory in her evidence even under cross-examination when questioned about previous interactions with the appellant in December 2019 and during the day of the incident.

[8] However, the one thing that the court *a quo* did not do, was question the State on why the husband or his friend that were present at the tavern to verify the sequence of events were not called as witnesses in corroboration of the complainant's testimony. This especially so as the complainant submitted that her husband was at the tavern when she was with the accused, or called other witnesses that were at the tavern to corroborate her version that she left the tavern around 2am alone and that the appellant followed her. The Court correctly in terms of section 186 of the Criminal Procedure Act 51 of 1977 called Ms Lekhutu as a court witness albeit that she was not cooperative. I see no reason why the court did not take the same approach when the complainant referred to witnesses in her evidence. I agree with the defence Counsel that they should have been called as witnesses especially because caution must be taken in cases were the complainant is the sole witness.

I accept that the complainant's husband and friend could not necessarily corroborate the complainant's version of the alleged rape but could lend support to her credibility. The Magistrate's failure is in this regard inexplicable and a plain misdirection as the onus is on the State to prove its case beyond a reasonable doubt. The same must be

said for one Ms Lienkie who found the complainant the morning after the alleged rape and no evidence as to her interaction with the complainant was placed before the Court. Although the complainant's version may be reasonable, I am not satisfied that the court established the complainant's version was true beyond a reasonable doubt.

[9] The State's representative on appeal submitted that there was no misdirection by the court as the complainant's identification of the appellant could not be faulted and that the defence did not prove any motive by the complainant to mislead the court or falsely accuse the appellant. It was also submitted that the issue of the appellant's previous convictions was only canvassed as a rebuttal to the appellant's version that he was hospitalized. I am satisfied that her evidence was clear in all material respects and that the Magistrate was aware of the cautionary rules applying to evidence of a single witness. However, the State avers that the appellant's testimony that he was with the complainant during the day of the incident only serves to reaffirm that the appellant was with the complainant as indicated by her evidence and therefore if someone else had raped her, there would be no reason to falsely accuse the appellant.

[10] The complainant's evidence has very little probative value. The magistrate did consider that a cautionary approach was necessary. In *S v Jackson* 1998 (1) SACR 470 (SCA) at 474f-475e Olivier JA surveyed the history of the cautionary rule and the position in other jurisdictions, and concluded at 476e-f:

> *'The evidence in a particular case may call for a cautionary approach, but that is a far cry from the application of a general cautionary rule.'*
> *The learned judge then quoted with approval from the decision of the English Court of Appeal in R v Makanjuola, R v Easton [1995] 1 All ER 730 (CA), including the following passage at 477c-d:*

'In some cases, it may be appropriate for the judge to warn the jury to exercise caution before acting upon the unsupported evidence of a witness. This will not be so simply because the witness is a complainant of a sexual offence nor will it necessarily be so because a witness is alleged to be an accomplice. There will need to be an evidential basis for suggesting that the

evidence of the witness may be unreliable. An evidential basis does not include mere suggestions by cross-examining counsel.'

The evidence in this case certainly did call for a cautionary approach. Quite apart from her contradictory evidence to which I have already referred, the complainant had been seen by Barnard, her son and some of his friends in an extremely compromising situation. The lower half of her body was naked when her sister-in-law arrived on the scene. Her husband and her family would undoubtedly have called for an explanation. Rape was an obvious answer. These facts alone provide an evidentiary basis for the suggestion that the version of the complainant that she was raped may be unreliable and such evidence accordingly had to be approached with caution'.

[11] In *Hammond v S* (SCA case 500/03 in which judgment was delivered on 3 September 2004) it was held that the facts and contents of the evidence of a complaint in a sexual misconduct case can be used only to show that the evidence of a complainant who testifies that the act complained of took place without her consent, is consistent. It is relevant solely to her credibility. The complaint cannot be used as creating a probability in favour of the State case i.e. it cannot be argued that because the complainant complained shortly after the incident, it is probable that the incident took place without her consent or that the converse is true.

[12] The fact that the complainant was bleeding is of no significance as it is clear from the medical evidence that she was menstruating. As is the reference that was made to the alleged injury sustained by the complainant to her eye as a result of the strangulation and a sore throat which the complainant indicated that she told the nurse about but the medical report indicated that there were no obvious injuries. What does compel further scrutiny is that the complainant by her own version testified that after the alleged rape by the appellant occurred, they continued to walk home together and that he even carried her shoes. When cross-examined the complainant offered an explanation that she did not run away or call for help as she was too weak and that the accused threatened that if she told anyone what had happened he would kill her. However, she did not allude to any means of any weapons used but indicated that she was scared and that the appellant was a man and therefore larger in built than she was.

[13] Nugent J said in *S v Van der Meyden* 1999 (2) SA 79 (W) 82D-E, in a passage subsequently approved by this court in *S v Van Aswegen* 2001 (2) SACR 97 (SCA) at 101e:

'What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence may be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored.'

[14] The appellant was a satisfactory witness. He persistently denied that he raped the complainant but did not deny that they interacted with each other on that day or previously and even alluded to a Ms Lekhutu who could corroborate his version that they had gone to Kempton Park together but that the witness as mentioned earlier was unwilling. The appellant offered a reasonable explanation of the events and did not leave a poor impression of his credibility.

[15] The State's representative submitted in argument that the appellant's version is so improbable that it cannot be true because the complainant had no motive to falsely implicate him. But the complainant was drunk. So was the appellant. Their conduct cannot accordingly be evaluated according to rational norms. It is quite possible in the circumstances that the complainant's version is unreliable as much as her reasoning of not running away or calling for help is possibility false. This is also quite possible as the complainant does not explain why she was with the appellant in the tavern and not her husband even though she indicated he was also there or why she did not leave with her husband when she indicated he had left at around 20h00. There is no explanation why when she arrived home did not alert anyone about what had happened as the accused was no longer with her and the perceived threat of her life being in danger was no longer present.

There is also no explanation why the state whose responsibility is to ensure that the version placed before the court is proved beyond a reasonable doubt would not call the witnesses mentioned in the complainant's testimony to corroborate even a fraction of her version. This fact cannot simply be ignored.

[16] Considering the evidence on the record as a whole I am not satisfied that the guilt of the appellant was proved beyond a reasonable doubt. The appellant was a satisfactory witness. On the other hand, the complainant's evidence was also satisfactory in certain respects, except for the aspects I have just mentioned, uncorroborated; and she was furthermore unreliable on two important aspects of her evidence, namely, why she had not called for help and why there was no mention of the throat injury or red eye in the medical practitioner's report. A cautionary approach is called for in the circumstances of this particular case for the reasons I have given. The natural sympathy which one has for a woman who says that she has been raped, cannot be allowed to play any role in deciding whether the onus of proof in a criminal case has been satisfied. In the present case, it has not.

[17] Accordingly, the following order is granted:

1. The application for leave to appeal is upheld;
2. The appeal on conviction succeeds and is set aside;
3. The appeal on sentence is set aside.

_____

SARDIWALLA J

I agree

_____

MOKOSE J

APPEARANCES

For the Applicant	:	M G BOTHA
Instructed by	:	LEGAL AID SOUTH AFRICA
For the Respondents	:	S D NGOBENI
Instructed by	:	NDPP
Date of handing down of judgment	:	