REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: A190/2021

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

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In the matter between:

SIFISO WISEMAN MKHWANAZI Appellant

and

THE STATE Respondent

JUDGMENT

MALUNGANA AJ (MOSHOANA J concurring)

Introduction

[1] The appellant and two other accused were charged in the Benoni Regional Court with: (i) four counts of robbery with aggravating circumstances (counts 1 to 4) as contemplated in section 1 of the Criminal Procedure Act, 51 of 1977; and (ii) one count of sexual assault (count 5) in contravention of the provisions of sections 156, 157, 158, 159,160 and 161 of the Sexual Offenses and Related Matters, 32 of 2007 (the Sexual Offences Act).The latter count (count 5), was only proffered against the appellant.

[2] The appellant who was legally represented throughout the trial pleaded not guilty to all five of the charges. On 4 February 2019 the appellant was convicted as charged on counts 4 and 5 respectively, and was sentenced to an effective 15 years imprisonment. With the leave of this court, the appellant now appeals against his conviction and sentence.

[3] In his written heads of argument placed before us, the appellant raises a point *in limine* relating to the defect in the charge sheet put to him at the trial court.

[4] Due to the complexity of the matter, and in order to expedite the finalisation of the appeal in the event that we do not find for the appellant on the point *in limine,* we decided to hear argument on both the merits of the appeal and the point *in limine.* The point *in limine* raised in this appeal is to the effect that the annexures to the charge sheet indicated that the offences with which the appellant was charged including the charge put to the appellant were committed on 15 January 2017. Consequently, the appellant was found guilty as charged of robbery with aggravating circumstances which occurred on 15 January 2017.

[5] According to the appellant, the evidence of the complainant in counts 4 and 5 was that the offences were committed on the 2nd of November 2017. The charge was not amended to reflect the correct date of the offences. The appellant contends that he is entitled to the verdict on the charges that were put to him, and the failure to amend the charge sheet would have been prejudicial to him as his defence was that of an *alibi*. We propose to set out the contents of the charge sheet before considering the merits of the point in *limine*.

The Charge Sheet

[6] According to the charge sheet, the appellant faced a charge in respect of count 4 framed against him as follows:

> 'That the accused is guilty of the offence of Robbery with Aggravating Circumstances read with the provisions of Section 51(2) of the Criminal Law Amendment Act 105 of 1997 and further read with section 1 of Act 51 of 1977 (CPA).
>
> **IN THAT** on or about the **15/01/2017** and near ETWATWA in the Regional Division of GAUTENG the said accused and his co-perpetrators did unlawfully and intentionally acting in common purpose assault ZANELE PORTIA SIHLANGULELA and then and there and with force take the following items, to wit: HUAWEI CELL PHONE VALUED AT R4000-00 AND CASH AMOUNT OF R200-00 her property or property in her lawful from possession from him.
>
> AGGRAVATING CIRCUMSTANCES being: KNIFE/KNIVES WERE USED TO THREATEN THE COMPLAINANT."

[7] In respect of count 5, the charge sheet is framed as follows:

> 'THAT the accused is guilty of the crime of contravening the provisions of Section 5(1) read with Sections 1,56(1), 57, 58, 59, 60 and 61 of the Criminal Law Amendment Act 32 of 2007 (Sexual Offenses and Related Matters) as well as Sections 91(2) and 94 of the Criminal Procedure Act 105 of 1977.
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> **IN THAT** on or about the **02 NOVEMBER 2017** and at or near ETWATWA in the Regional Division of GAUTENG the said accused did unlawfully and intentionally sexually violate the complainant, to wit, NONHLANHLA FLORENCE MADONSELA (35 YEARS, FEMALE) BY TOUCHING HER BREASTS AND VAGINA WHILE SEARCHING HER without the consent of the said complainant.'

[8] In response to the point in limine, the State submitted that there is no basis for the convictions to be set aside in that, *firstly* the date of commission of the offence does not form part of the elements of the offence, *secondly* whilst the charges were read or put to the appellant during the trial the date of the 15th of November 2017 was mistakenly read instead of the 2nd of November 2017, but in respect of count 5 the correct date being the 2nd of November was read out.

[9] Moreover, the State further argued, the judgment of trial court referred to both offences being committed on the 2nd of November 2017 as testified by both complainants. Besides, the appellant's defence in respect of all the charges was that he was not present (*alibi*). His witness also gave evidence in respect of both dates, being the 15th of January and 2nd November 2017. The State submitted that there was no prejudice suffered by the appellant as a result of the discrepancy on the dates.

[10] In considering the substance of the point in *limine,* it is convenient, in our view, to have regard to the provisions of the section 84 of the Criminal Procedure Act (CPA)[1]. It reads:

> "84 Essentials of charge
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> (1) Subject to the provisions of this Act and of any other law relating to any particular offence, a charge shall set forth the relevant offence in such a manner and with such particulars as to the time and place which the offence is alleged to have been committed and the person, if any, against whom and the property, if any, in respect of which the offence is alleged to have been committed, as may be reasonably sufficient to inform the accused of the nature of the charge.
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> (2) Where any of the particulars referred to in subsection (1) are unknown to the prosecutor it shall be sufficient to state that fact in the charge.
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> (3) In criminal proceedings the description of any statutory offence in the words of the law creating the offence, or similar words, shall be sufficient."

[11] Section 35(3)(a) of the Constitution provides that every accused person has a right to a fair trial which, inter alia, includes the right to be informed of the charge with sufficient detail to answer it.

[12] Having set out the essentials of the charge sheet, the central issue which must be determined in relation to the point *in limine* is whether the

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[1] Act 51 of 1977 as amended.

appellant was sufficiently informed of the charge which he faced in the court *a quo*.

[13] On the objective analysis of the charge sheet, it seems to us that, despite the discrepancies on the dates of the of the commission of the offence, the appellant was well informed of the charges he had to answer at the trial with sufficient particularity. During argument counsel for the appellant submitted that both the defence and the prosecution were unaware of the defect in the charge sheet during the trial. In our view, this issue has been raised in this appeal as an afterthought considering that it was not even mentioned in the grounds of appeal. When asked by the Court if appellant suffered any prejudice as a result of the defect complained of in the charge sheet, counsel could not give a clear answer in that regard.

[14] In *Rex v Jones and More*[2],the court held that it is not necessary to state expressly that there has been prejudice, but it is sufficient if, on the face of the indictment, it appears from the facts set out that the person to whom the false representation were made must have been prejudiced.

[15] In *Moloi and Others v Minister of Justice and Constitutional Development and Others*[3], the Constitutional Court held at paragraph 20 as follows:

> "[20] The question whether an accused has been prejudiced by the defective charge in the proper conduct of his or her case speaks to the fairness of the trial. Section 35(a) of the Constitution guarantees every accused person the right to a fair trial, which

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[2] 1926 AD 354.
[3] 2010 (2) SACR 78 (CC).

includes the right to be informed of the charge with sufficient detail to answer it and the warranty to be presumed innocent until proven guilty."

[16] As contended for by the State, the appellant raised the defence of *alibi* in respect of all the charges put to him including the charges in respect of counts 4 and 5, in which latter counts it was clearly stated that the charge faced by the appellant occurred on 2nd of November 2017. We disagree with the appellant's counsel that the appellant suffered any prejudice as a result of the defect in the charge sheet. His witness also testified in respect of both counts 4 and 5, and without mentioning a specific date, his evidence was to the effect that the appellant is often at home to give him medication. It must be emphasised that the purpose of setting out the essential elements of an offence and the alleged misconduct of the accused person is to enable that the accused to be armed with sufficient information to make a decision concerning the conduct of his/her defence. In *casu* it cannot be said that the appellant was not properly informed of the essential elements of the offence which he faced. On the facts of this case even if the dates were correctly stated in the charge sheet that would not have changed his defence. We therefore find that there is no merit in the point in *limine* raised by the appellant. The point is accordingly dismissed.

The Evidence

[17] We now turn to merits of the appeal. The State led the evidence of the complaints in counts 4 and 5, Zanele Singulela and Florence Madonsela. Ms Singulela testified that on 2nd November 2017 she was coming from her sister's place in the company of Florence Madonsela when they came across the appellant and his two co-accused. Accused 2 pointed her with a firearm right on her waist whilst the appellant grabbed Florence and placed the

knife on her thigh. Accused 1 took out the phone and the amount of R200 from her pocket. They then walked away after they robbed them.

[18] Ms Singulela also testified that she knew the appellant as they live in the same neighbourhood. When asked about the value of the phone she replied that it was worth about R4000.00, and it was still new.

[19] In cross examination, she denied that the accused had been in their respective homes when the incident took place. She also refuted the appellant's allegations that she was part of the community members who assaulted him.

[20] By and large Ms Florence Madonsela corroborated the evidence of Ms Singulela. She testified that she was walking side by side with Zanele Singulela when accused 2 accosted Zanele with a firearm. He came on the side of Zanele and pointed it on her waist. As Zanele was being searched she felt something piercing her on her left hand side on the thigh. She then realized that the appellant (accused 3) was stabbing her thigh with the knife. He started searching her, and whilst searching her he inserted his hand into her bra and lifted her breast. He touched her private parts as well as her buttocks. She cried when she recounted the ordeal of being touched in her private parts. She also testified that she stays in the same area with the appellant and would often see him in the company of his co-accused.

[21] During cross examination she testified that she knew the appellant's co-accused by sight as they are often in the appellant's company. She refuted the appellant's version that there was a break in at Zanele's house, hence he was being implicated in the offence of robbery.

[22] The appellant version was that he was at home at Mandela, Etwatwa Section on the dates of the incident where he lived with his grandfather. He confirmed that he knew the complainants in counts 4 and 5 and he grew up in their presence in the same area. When asked about the event that happened on the 2nd November 2022, he replied that he was not present. Specifically, he testified that he was mostly at home. He further testified that he and Zanele do not get along since the incident in which she accused him of breaking into her house.

[23] He denied that accused 1 and 2 were his friends. According to appellant he often meets the accused when he visited Emapopeni. He just greets them and there is no relationship between them. The appellant testified that he normally went home after school to help his grandfather to take medication.

[24] The appellant led the evidence of his grandfather, Mr Elias Mkwanazi who testified that he stays with the appellant whom he raised from birth. He stated that the appellant hardly stays away from home as he helps him to take his medication. He at times feel dizzy and would just collapse and faint. He could not remember the dates of the incidents. He further testified that he is forgetful and would often forget if the appellant was around the house.

[25] It is trite that this Court cannot interfere with the findings of the court *a quo* regarding its impression of the truthfulness of a witness unless the record clearly reveals a misdirection or some other basis showing that such findings were misplaced. It is also trite that even a good and truthful witness can be mistaken. The net effect is that the accused 's participation

in the crime is fully confirmed unless the witness was mistaken in her identification. That she could be mistaken is intrinsic to this type of situation. Much will depend on the evidence proffered on both sides.

Overview of the Evidence

[26] The court below rejected the appellant's evidence and accepted the State's evidence. It found that it was not in dispute that the complainants were robbed of their items. It also found that the evidence of the appellant's grandfather could not take the matter any further, as he could not corroborate the *alibi* of the appellant.

[27] The incident in question took place in a broad day light. The appellant and his co accused were known to the complainants. There is nothing to suggest that they were mistakenly identified by the complainants. The magistrate at the trial court also found that there was an ample opportunity for the complainant, Zanele, to identify the appellant.

[28] The alleged burglary at Zanele's house was correctly dismissed as the motive for implicating the appellant in the offence with which he was convicted. It was not in dispute that the appellant searched the complainant in count 5 and also touched her private parts. The magistrate in the Court a *quo,* correctly found that the appellant's conducted constituted a sexual offence.

[29] In the circumstances of this case there is nothing, in our view, that warrants the interference with the factual findings of the court below.

[30] The only remaining issue therefore is whether the prescribed minimum sentence of 15 years is justifiable under the circumstances. It is trite that the powers of the court to interfere with the sentencing discretion of a trial court is limited. The limits were set out in *S v Malgas*[4].

[31] In its judgment, the court below had regard to the pre-sentencing report. Relating to the appellant, it found that there were no substantial and compelling circumstances which justified the imposition of lesser sentence. It took into consideration the appellant's personal circumstances. His mother passed away in 2007 and was residing with his grandfather. During his mother's life time she would visit him over the weekends and holidays. He dropped out of school at grade 11 when he was arrested. He was a first offender. They maintained their innocence throughout the proceedings at the court *a quo*.

[32] We are in no way persuaded by anything that the appellant had shown remorse. He robbed the vulnerable women who knew him in broad day light. He had the audacity to sexually violate the complainant in count 5 and not even felt the need to take responsibility. The court *a quo* considered the aggravating factors to be that the appellant knew the complainants, the appellant and his accomplices were armed with deadly weapons, and the incident could have had traumatic impact on them.

Order

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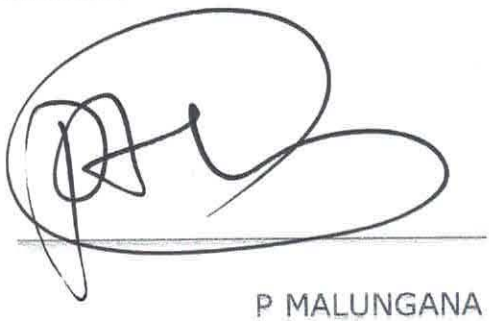
[4] 2001 (1) SACR 469 (SCA).

[33] In the result the following order is made:

1. The appeal against convictions and sentences is dismissed;

2. The convictions and sentences are confirmed.



P MALUNGANA

Acting Judge of the High Court, Pretoria

(I concur) G N MOSHOANA

Judge of the High Court, Pretoria.