REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: A225/2022
(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED: YES/NO
DATE 2023-08-03
SIGNATURE

In the matter between:

Sipho Lindokuhle Simelane Appellant

and

The State Respondent

JUDGMENT

Botsi-Thulare AJ

Introduction

[1] The appellant is seeking to appeal the conviction and sentence for two counts of robbery with aggravating circumstance, kidnapping and rape. The appellant was sentenced to 10 years on each count of robbery with aggravating circumstances, 3 years' imprisonment for kidnapping and a life imprisonment for the rape. The sentences were ordered to run concurrently. Pursuant to

sentence for life imprisonment the appellant had an automatic right to appeal in terms of section 309(1) of the criminal procedure act 51 of 1977.

[2] The Appellant argues that the conviction on rape should be set aside on the basis that the it is based on the evidence of a single witness and that such evidence was not reliable. The appellant further alleges that the complainant was his girlfriend and the sexual intercourse was by consent.

[3] The Appellant was charged together with two other accused who did not appeal the judgment.

Background

[4] The evidence led before the Court a quo was to the effect that on or about the 5 November 2020, in the vicinity of Benoni within the Regional Division of Gauteng, the appellant deliberately and unlawfully engaged in an act of sexual penetration with a female individual identified as Ms. S[...] N[...], aged 22 years, by forcibly having sexual intercourse with the complainant without her consent.

[5] The appellant was in the company of three other co-accused, namely Accused 2, 3, and 4, alongside other women, at the location where a truck driven by Mr. Tumelo Mahlangu experienced a mechanical breakdown and broke down near the Snake Road off-ramp from the N12 highway.

[6] The complainant, Ms. S[...] N[...], testified that she fell asleep in the cab of the truck and was later awakened by Accused number 2 and 3. They were subsequently robbed of their personal belongings, including their cell phones, at gunpoint. After the robbery, they were forced into an Avanza motor vehicle, with the appellant serving as the driver of the said vehicle. There were other women present in the motor vehicle, and these individuals were later dropped off at an undisclosed location.

[7] The appellant then took the complainant to another place, where he intentionally and unlawfully restricted her freedom of movement and detained her against her will throughout the night at an unknown location.

[8] Furthermore, the appellant perpetrated an act of sexual penetration by forcibly inserting his genital organ into the complainant's vagina without her consent, and the act was performed without protection. This entire incident occurred while the complainant was in distress, crying, and emotionally traumatized. Despite the complainant expressing her unwillingness, the appellant callously disregarded her objections.

[9] The appellant committed this act on two separate occasions, both times within a locked room where the complainant was unable to escape, thus further depriving her of her freedom of movement.

[10] Around 05h00 in the morning, the appellant abandoned the witness on the road, leaving her to find her own way home, despite previously asserting that she was his girlfriend. The circumstances prompt questions as to why he did not take her home and why he resorted to locking her up, brandishing a firearm, and engaging in sexual intercourse while Ms. N[...] was in distress and traumatized.

Issues to be determined

[11] The issue is whether the court a quo erred in convicting the appellant based on the single evidence of a single witness. Further that the court a quo erred in regarding the evidence of a single witness to be reliable in the circumstances. The appellant argues that he had sexual intercourse with the appellant with her consent. On the issue of sentence appellant ‘s argument is that the sentence of life imprisonment is shockingly harsh and in appropriate in the circumstances of this case. The appellant submits that his personal circumstances taken cumulatively were substantial and compelling reasons to deviate from the imposition of a life imprisonment sentence, namely-

(a) He was 38 years old when he was sentenced. He was in the middle ages and was not above rehabilitation.

(b) He was 37 years old when the offence was committed.

(c) He was single, not married.

(d) He cohabited with Ntombifuthi Nhleko.

(e) They had 2 minor children to maintain.

(f) They also maintained accused's minor T[...] K[...] who was also residing with them. His mother H[...] K[...] is late.

(g) He passed grade 12 and could not further huis studies due to financial constraints.

(h) He was employed as a taxi driver. He used his income to buy Toyota venture which he used to transport people to make a living.

(i) He was involved in a motor vehicle accident in 2003 which left him limping and with pains when it is cold.

Applicable law and facts

[12] It is trite law that the appeal court not lightly, interfere with the findings of a trial court, especially findings of facts. see S v Francis **1991 (1) SACR 198** (A) at 204c-e:

*"This Court's powers to interfere on appeal with the findings of fact of the trial Court are limited (R v Dhlumayo and Another **1948 (2) SA 677** (A)). ... In the absence of any misdirection the trial Court's conclusion... is presumed to be correct. ...In order to succeed on appeal... a reasonable doubt will not suffice to justify interference with its findings... Bearing in mind the advantage which a trial Court has of seeing, hearing and appraising a witness, it is only in exceptional cases that this Court will be entitled to interfere with the trial Court's*

*evaluation of oral testimony (S v Robinson and Others **1968 (1) SA 666** (A) at 675G-H)''*

[13] In this instance the appellant found the complainant in the company of her boyfriend while stuck on the truck and robbed them their belongings. This was an indication that the appellant and the complainant did not know each other but started to see each other when the robbery was taking place along the road. This refutes the allegations that the complainant was a girlfriend of the appellant. Further that it is a clear fabrication that the complainant summoned the appellant to come to the place where she and her boyfriend were parked. After the rape, the appellant did not show intimacy or expression of love as he professes to be in a love relationship with the complainant. He dumped her at 5: 00 am along the road and did not care to take her to her house. Therefore, the evidence that there was consent to sexual intercourse is improbable and false. The court a quo did not misdirect himself when it rejected the evidence of the appellant and accepted the evidence of the complainant.

[14] Regarding the single evidence of the complainant the case of *S v Sauls and another* 1981(3) SA 172 (A) at para 180E-G said that:

"There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of a single witness… The trial judge will weigh his evidence, will consider its merits and demerits and, having done so will decide whether there are shortcomings or defects or contradictions in his testimony, he is satisfied that the truth has been told. The cautionary rule referred to by De Villiers JP in 1932 (in R v Mokoena), 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 where well founded …." It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense".

[15] The complainant had been consistent in her evidence, she did not contradict herself even under cross examination. Her narration of the events of the date in question shows that she was not fabricating her evidence. She was only

surprised to see people robbing them of their belongings, kidnapping her and locking her inside the house until early hours of the morning. She was a credible and reliable witness. The mere fact that Simelane had authority over the complainant, and in possession of a firearm inhibited her from indicating her unwillingness or resistance to the sexual act and the unwillingness to participate in such. As a result, the evidence of a single witness was satisfactory in all material respects and the cautionary rule was satisfied. Therefore, the court a quo did not misdirect itself when it accepted the evidence of a single witness and convicted the appellant on rape based on the evidence of a single but reliable witness.

Sentence

[16] The appellant was sentenced to life imprisonment for rape and 20 years for robbery with aggravating circumstances. The sentence on count 3 is running concurrently with count 1 of robbery with aggravating circumstances. The counsel for the appellant argued that the sentence imposed on the appellant is shockingly harsh and inappropriate and that the trial court erred in concluding that there are no substantial and compelling circumstances present justifying deviation from the prescribed minimum sentence. Further that the personal circumstances of the appellant should be regarded cumulatively as substantial and compelling circumstances justifying deviation from the minimum sentence.

[17] In S v Vilakazi 2009 (1) SACR 552 (SCA) at para 58 Nugent JA said that in cases of serious crimes as the ones the applicant was change with, the personal circumstances of the offenders by themselves will necessarily recede into the background, once it becomes clear that the crime is deserving of substantial period of punishment. The question whether the accused is married or single, whether he has two children or three, whether he is in employment are themselves largely immaterial to what the period should be and those seems to be the kind of flimsy reasons, or flimsy grounds that *Malgas*' case said should be avoided.

[18] Considering that the appellant raped the victim repetitively on the night in question the sentence of life imprisonment is an appropriate sentence. Rape is

a humiliating degrading and brutal invasion of the privacy and dignity of the victim, as such the victims should be protected and their rights be respected. In S v Chapman 1997 (3) SA 341 (SCA) at 344I the Supreme Court of Appeal said that:

"rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, and dignity of the victim."

[19] The main concern is whether the court a quo imposed a sentence which is shockingly harsh and inappropriate. We do not agree with the appellant's argument that the sentence for life imprisonment is shocking on the basis that the rape which occurred was brutal in nature. The complainant was first kidnapped and then locked in the room and repeatedly raped the whole night while the appellant was in possession of a firearm. That on its own is aggravation of sentence and the sentence is appropriate in the circumstance. The court a quo did not misdirect himself when he imposed the life sentence against the appellant.

[20] Having considered the above, I proposed that the following Order be made.

Order

[21] The appeal against the conviction and sentence is dismissed

MD BOTSI-THULARE
ACTING JUDGE OF THE HIGH COURT
PRETORIA

I agree and it is so ordered.

SELBY BAQWA
JUDGE OF THE HIGH COURT
PRETORIA

APPEARANCES

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