IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO. AR111/2019

In the matter between:

NGCEBO THOKOZANI KHUMALO **APPELLANT**

and

THE STATE **RESPONDENT**

This judgment was handed down electronically by circulation to the parties' representative by email, and released to SAFLII. The date and time for hand down is deemed to be 10 July 2020 at 09h30.

ORDER

An appeal from the Regional Court, Nongoma (sitting as court of first instance):

The appeal against the conviction and sentence is dismissed.

JUDGMENT

Chetty J (Jappie JP concurring):

[1] The appellant was convicted in the Regional Court, Nongoma, on 25

September 2014 of rape and robbery with aggravating circumstances. The count of rape was framed in terms of Schedule 2 of the Criminal Law Amendment Act 105 of 1997, on the grounds that the complainant, Ms N H[….], was raped more than once by the appellant on 23 March 2013. In respect of the count of robbery, the State contended that aggravating circumstances were present in that the appellant was armed with a knife during the commission of the offence. The appellant was sentenced to life imprisonment on the count of rape and fifteen years imprisonment on the robbery count, with the sentences ordered to run concurrently. The appellant comes before this court in terms of s 309(1)(a)(ii) of the Criminal Procedure Act 51 of 1977 (the CPA) by way of an automatic right of appeal against conviction and sentence.

[2] The appellant was legally represented at his trial, where he pleaded not guilty to both counts. In his plea explanation the appellant admitted to having sexual intercourse with the complainant, a nursing sister employed at the Benedictine Hospital, but contends that this was consensual. In respect of the count of robbery with aggravating circumstances, he contends that the complainant gave him her cell phone as security for an amount of RB00 which she owed him. The complainant testified that in the early hours of 23 March 2013 she was asleep and awoke to find a man standing in her bedroom with a knife in his hand. He told her not to make a noise and asked her for her cell phone. She informed him that she did not have one, after which he demanded money from her. He then ordered her onto the bed and to lie on her stomach, and proceeded to cover her head with a blanket. He then proceeded to have sexual intercourse with her. After finishing, he again demanded money from her. He eventually found her cell phone, at which stage she pleaded with him to leave her memory card behind. The intruder then had sexual intercourse with the complainant for a second time. After he finished, he began searching the house. The complainant took this opportunity to flee from her house to that of her neighbours, shouting for help. The intruder fled. The police were then summoned, and on their arrival the complainant reported to them what had transpired. She was then taken to a hospital where a vaginal swab was taken for the purpose of DNA testing. It is significant that the report, recorded by the doctor who attended to the complainant and which is recorded in the J88, refers to 'an alleged assault by an

unknown person, who broke into her house, intimidated her with a knife, raped her twice, didn't use a condom and then took her phone.

[3] The complainant further testified that although she did not see the intruder gaining access to her house, she confirmed that the glass from a window pane had been removed. She believed that he gained access to her house in this way. Under cross examination it was put to her that she was in fact the girlfriend of the appellant, and that the sexual intercourse with her was consensual. She was adamant in her response that she did not know the intruder. It was further put to her that the appellant had visited her home on previous occasions, which contention she denied. She denied that he visited her to collect RB00 which she allegedly owed him, that she initiated the intercourse or that she chose to falsely charge him for rape to avoid her boyfriend finding out that she was cheating on him. The DNA evidence confirmed a positive correlation to the appellant.

[4] The State called the sister of the appellant, Ms Sizakele Khumalo, as a witness. Prior to commencing her testimony, the attorney for the appellant confirmed that the appellant would not dispute that the cell phone had been taken from the complainant was found by the police in the possession of his sister, Sizakele and that he had given the phone to her. In regard to the contention that the appellant was involved in a love relationship with the complainant, Ms Khumalo stated that she knew of the appellants other girlfriends, but was not aware of any relationship between him and the complainant.

[5] The appellant testified that he was in a relationship with the complainant and had decided to visit her as he had been unable to reach her by phone for some time. He last saw her in February 2013 and visited her at the end of March 2013. I find it most improbable that he would have had no contact with his supposed girlfriend for over a month, only to arrive unannounced at her home to collect an amount of money. When asked by the prosecutor exactly why he had decided to visit the complainant, the appellant replied '*I* was *just going to* see *her'.* He made no mention of her owing him money. The appellant's version is that he had consensual intercourse with the complainant on one occasion only and then left her home. He was unable to provide any explanation why he took the complainant's cell phone as security for R800, despite being in a romantic relationship and having just had consensual intercourse with her. Although it was

put to the complainant that she falsely laid a charge of rape against the appellant, this version was recanted by the appellant who said that he never gave those instructions to his attorney. There is nothing on record to reflect that the appellant sought to correct this misperception at the time of the question being posed.

[6] Improbabilities proliferate the appellant's version, including his explanation that, although he was unemployed and made a living at the time by selling cigarettes, he was able to loan R800 to the complainant. He was also unable to explain why the cell phone, which had supposedly been handed over as security for a loan, was given to his sister. The complainant testified that she had been raped by an intruder, who did not use a condom. The appellant contends that he did use a condom, but was unable to explain the presence of his semen in her vagina.

[7] It was submitted on behalf of the appellant that the State had failed to prove its case beyond reasonable doubt on the ground that it relied on the evidence of a single witness, which the court ought to have treated with caution. It was also submitted that the complainant failed to shout for help despite living in close proximity to other houses. On that basis it is contended that it is more probable that she had consensual sexual intercourse with the appellant. This, in my view, simply ignores the evidence of the complainant that the intruder had a knife in his hand and threatened her not to shout.

[8] To the extent that the complainant's evidence is that of a single witness, I am satisfied that the court a quo properly evaluated her evidence against the improbabilities of that of the appellant and applied the necessary caution. She was a clear and satisfactory witness in all material respects. Important in this regard, is her insistence that she did not know the appellant, that she saw him for the first time when he was standing over her bed. Had the appellant been in a relationship with her, as he had contended, and that she had a motive to falsely implicate him, she would have immediately informed the police of his identity. On the contrary, what is known is that the police traced the appellant as a result of the use of the cell phone which he had taken from the complainant. The charge sheet reflects that he was only arrested on 24 June 2013, three months after the incident. The complainant's evidence that she saw the appellant for the first time when he broke into her house finds correlation in what is recorded in the J88, that

she was attacked by an unknown person who raped her twice.

[9] It is an established principle that the trial court's evaluation of the evidence and acceptance thereof is presumed, in the absence of a material misdirection, to be correct. As such an appeal court will not lightly interfere with those factual findings, particularly where credibility findings have been made. The trial court has had the advantage of seeing the witnesses in person and being able to observe their demeanour whilst testifying. An appeal court will interfere with such findings only when it is evident that there are demonstrable and material misdirections by the trial court. See *S v Hadebe & others* 1998 (1) SACR 422 (SCA); *S v Monyane & others* 2008 (1) SACR 543 (SCA); *R v Dhlumayo & another* 1948 (2) SA 677 (A). The appellant has been unable to demonstrate any misdirection by the court a quo in evaluating the evidence before it and accepting the evidence of a single witness. In *S v Sauls & others* 1981 (3) SA 172 (A) at 180E-G the court held that the proper approach in such matter was the following:
'There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the 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.'

[10] I am satisfied that on an evaluation of all of the evidence, the trial court correctly found that the State had proved the guilt of the accused beyond reasonable doubt. *S v Van der Meyden* 1999 (1) SACR 447 (W). In *S v Mahlangu & another* 2011 (2) SACR 164 (SCA) at para 22 it was held that in relation to a single witness, that corroboration can also be found 'in the improbability of the appellant's version'. I accordingly find no basis to interfere with the conviction of the appellant.

[11] With regard to sentence it was submitted that the court misdirected itself, as the sentence of life imprisonment was disproportionate to the crime which was committed, the personal circumstances of the appellant and the interest of society. The appeal court's power to interfere with a sentence is circumscribed to

instances where the sentence is vitiated by an irregularity, misdirection or where there is a striking disparity between the sentence and that which the appeal court would have imposed had it been the trial court. *S v Petkar* 1988 (3) SA 571 (A); *S v Snyders* 1982 (2) SA 694 (A) at 697G-H; *S v Sadler2000* (1) SACR 331 (SCA). The minimum sentencing legislation has been the subject of much discussion in our courts and I do not propose to repeat what has been said by the SCA in *S v Ma/gas* 2001 (1) SACR 469 (SCA) and *S v Vilakazi,* 2009 (1) SACR 552 (SCA) and any of the other cases. The court a quo accepted the version of the complainant that she had been raped twice, thereby bringing into operation the minimum sentence provisions. It took into account the gravity of the offence and the reasons for the legislature prescribing life imprisonment in such circumstances. There is nothing in the personal circumstances of the appellant that suggest he acted out of immaturity or that he did not appreciate the gravity of his actions. The complainant was fortunate to have escaped from her house when she did. As the appellant was armed with a knife, one has no idea as to what further harm could have befallen the complainant.

[12] The sentence imposed is consistent with what has been ordained by the legislature. Women and children look to the courts to protect them from violent crime. See *S v Chapman* 1997 (2) SACR 3 (SCA); *S v Nchenche* 2005 (2) SACR 386 (W). I am satisfied that the court a quo was correct in finding that there were no substantial or compelling reasons to deviate from the minimum sentence of life imprisonment on count one. No reasons have been advanced before for us to interfere with the sentence imposed in respect of count two.

[12] Accordingly, the following order is made:

The appeal against conviction and sentence is dismissed.

CHETTY J

I agree