IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: 198/2020

In the matter between:

HAWUKANI MNTUKABONI XABA **APPELLANT**

and

THE STATE **RESPONDENT**

ORDER

On appeal from: Nkandla Regional Court (sitting as court of first instance):
The appeal against conviction and sentence is dismissed.

JUDGMENT

Mossop AJ:

[1] The appellant was convicted on six counts, one of which was a count of rape. The other counts included, inter alia, two counts of attempted murder and the unlawful possession of a firearm and ammunition. On the count of rape, he was sentenced to life imprisonment. After his conviction, the appellant applied for leave to appeal against his convictions and sentences from the court a quo, which application was unsuccessful in respect of all of the convictions and sentences. The appellant took no further steps to have his convictions and sentences considered by another court.

Nonetheless, by virtue of the imposition of the sentence of life imprisonment on the rape count, he has an automatic right of appeal in terms of the provisions of s 309(1)*(a)* of the Criminal Procedure Act 51 of 1977. This appeal accordingly only deals with the appellant's conviction and sentence on the count of rape.

[2] The complainant on the count of rape was a young lady who resided at the Ncanagazi area in this province. She knew the appellant as someone who lived in the general area where she resided but according to her she had never spoken to him. On the afternoon of 15 February 2005, she was at her homestead when she was informed by her younger brother that the appellant was outside calling for her. The complainant lived with her grandmother, who gave her permission to leave the homestead to speak to the appellant. At the time, the complainant was 17 years old. The complainant indicated that the appellant had previously tried to court her and had proposed his love to her. She, however, also testified that previously the appellant had previously uttered nasty words about herself, which did not endear him to her.

[3] When she went to the appellant to find out what he wanted, he stated that they should go up a nearby mountain on their own, an invitation which she forthwith declined. In response, the appellant drew a firearm which he pointed at her forehead and indicated that they were going to go up the mountain. When he turned the firearm away from her forehead, he discharged a shot from the firearm into the ground next to her. She was then herded up the mountain by the appellant. When they reached the top of the mountain, the appellant instructed her to sit down on the ground but she refused to do so. She was then pushed to the ground by him and, while seated, the appellant ordered her to remove her panties. The complainant refused to accede to the appellant's demand and the appellant then forcibly ripped the panties from her body. He then lay on top of her and forced his tongue into her mouth. She closed her eyes and cried whilst this was occurring. The appellant lowered his trousers, and then inserted his penis into her vagina and made some movements. Having ejaculated, the appellant got off the complainant and sat beside her. After an interval, he got back on top of her and had intercourse with her for a second time, all while still holding the firearm in his hand. He again ejaculated. He then got off the complainant and again

sat next to her. Finally, he got back on top of her again and inserted his penis into her vagina and had intercourse with her for a third and final time and again ejaculated.

[4] The complainant thereafter got to her feet and noticed that blood was running down her legs. She explained that she was in a great deal of pain which was emanating from her private parts. She realized that she was bleeding from her vagina and that it was this blood that was running down her legs. The appellant instructed her that she should not tell anybody at home, and she then found her way down the mountain and went home.

[5] Upon arriving at her homestead, the complainant ignored what the appellant had told her and immediately reported to her grandmother that she had been raped. She showed her grandmother her bloodstained panties. She had worn them on the way down from the top of the mountain by tying a knot on the side of the panties where they had been ripped. Her grandmother instructed her to bath and then to go to the local Inkosi, Mr Sithole. She did so but found that the Inkosi was not at home. Nonetheless, she received assistance in his absence and the police were summoned. She was taken by the police to the Ekombe Hospital at Nkandla the next day, where she was examined by Dr Manana.

[6] Dr Manana completed a J88 document as he examined the complainant, which document was later received by the court a quo as an exhibit. He recorded thereon what he observed upon examining the complainant, and indicated that there had been forced penetration of the complainant's vagina. The doctor described the complainant's labia majora as being erythematous, meaning they were reddened. They had become reddened as a result of a layer of skin having been abraded therefrom. The same was observed with the complainant's labia minora. The doctor also observed fresh tears of the complainant's hymen at the 5 and 7 position (the positions being identified by reference to a clock face). Dr Manana indicated that the removal of the outer layer of skin from the complainant's private parts would have hurt the complainant, and that enduring this injury would not have been a pleasant experience for her.

[7] The appellant testified in his defence and confirmed, as the complainant had stated, that he had previously proposed his love to her. The difference was that according to the appellant, the complainant had accepted his proposal. He indicated that on the day in question, he had been telephoned by the complainant and asked to come to her homestead. The appellant confirmed that on his arrival at the homestead, he had requested the complainant's brother to call her from inside the homestead. The complainant exited the homestead and came towards him along a path and indicated that she had some news to tell him. According to the appellant 'she then moved away from that path up until she stood in a hill, we then stood there'.

[8] This would seem to indicate that it was the complaint's idea to climb the mountain or, at least, that she was not averse to going up the mountain with him. The news that the complainant wished to impart to the appellant was that two women, whose maiden names were Magubane and Ndlovu respectively, had come to her homestead and stated that they had heard that she was in love with the appellant. She was allegedly taken to task over this because the appellant was apparently poor and, as the appellant put it, the complainant was supposed to fall in love with his brother's son and not the appellant. The appellant stated that the complainant then allegedly revealed to him that she was, indeed, in love with him, kissed him and they then had consensual intercourse.

[9] The appellant testified further that during the first episode of consensual intercourse, he came to the conclusion, on grounds that were never revealed by him, that the complainant was not a virgin. The complainant disputed this when he informed her of his belief and said they should have further intercourse. This, so the appellant explained, was so that the appellant could prove that she was a virgin. However, in having sex with her for a second time, the appellant 'experienced again that she was not a virgin'. How the appellant determined this was also not revealed.

[10] The appellant disputed that there was a third episode of intercourse as described by the complainant. He also disputed that she bled from her private parts.

His explanation for why the person who he professed to love, and who had apparently expressed her reciprocal love for him a short while before having consensual intercourse with him, would immediately thereafter falsely allege that he was a rapist, was that the two women who had previously been to the appellant's homestead returned to her homestead and instructed the complainant to lay a charge against him.

[11] By virtue of the fact that there are only two persons who were present on the top of the mountain on the day in question, it is necessary that their evidence should be thoroughly scrutinized and evaluated.

[12] The defence criticized the complainant's evidence, arguing that it was not consistent and that she had contradicted herself. It was drawn to the court a quo's attention that there were two aspects of her oral testimony that were not mentioned in the complainant's statement made to the South African Police Services (SAPS) and she was questioned on these omissions by the appellant's legal representative whilst under cross-examination. The first instance was that she testified that she had been raped three times, whereas her statement only recorded two episodes of rape having occurred. The second instance was that she testified that the appellant had fired his firearm into the ground before compelling her to ascend the mountain, which was also not mentioned in her statement. It was argued by the appellant's legal representative that by virtue of these differences, the complainant had contradicted herself.

[13] It must be accepted that the two points of criticism are valid. This is because the complainant's statement was not handed in as an exhibit, as the regional magistrate indicated that a previous consistent statement was not admissible. It was, of course, not a previous consistent statement: it was the opposite of this as the defence relied upon it to demonstrate an inconsistency in the complainant's version.[1] Despite the pressure to which she was subjected to under cross-examination, the complainant was resolute in her version, namely that she was raped three times and that she told this to the policeman who recorded her statement. She also insisted that

[1] Even if the statement had amounted to a previous consistent statement, it was still capable of being received as an exhibit in terms of the provisions of section 58 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

she told the policeman about the appellant discharging his firearm and was at a loss to explain why this fact was not mentioned in her statement.

[14] Comparing the oral evidence of a witness against an earlier extra curial written statement made by that witness is a legitimate method of cross-examination regularly employed by defence counsel in criminal trials. Where a difference is perceived to exist between the two versions, however slight that difference may be, it is seized upon and exploited to its maximum benefit.[2]

[15] Statements taken from witnesses by the SAPS are notoriously lacking in detail and are often inaccurate and incomplete and 'not taken with the degree of care, accuracy and completeness which is desirable. . .'.[3] They are not recorded by the policeman involved in the case, with a view to the potential evidence later being given by the witness at trial. The policeman does not possess the forensic skills of a prosecutor, and he or she may not have the insight to know what may or may not be relevant at the later trial. The statement is primarily taken to permit the prosecuting authority to consider and determine whether there is sufficient evidence to justify a prosecution. The statement also alerts the prosecuting authority to what evidence is available and which witness will give that evidence if the matter proceeds to trial. It is unrealistic to expect that a witness will record in his or her witness statement exactly what will be said in oral evidence months or even years later. The witness in all probability has no knowledge of what should be in the statement, and responds to questions posed by the policeman. The witness may filter out aspects of his or her version that are perceived by him or her as being unimportant, but which later at trial are revealed to be crucial. The fact that such details do not appear in the statement do not mean that they did not occur. The witness is not expected to record every fact in the minutest detail.

[16] In my view, '[t]here will have to be indications other than a mere lack of detail in the witness's statement to conclude that what the witness said in court was

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[2] *S v Govender and others* 2006 (1) SACR 322 (E) at 326c-j.
[3] *S v Xaba* 1983 (3) SA 717 (A) at 730B-C.

unsatisfactory or untruthful'.[4] The court will in the final analysis consider the evidence as a whole in order to determine in what respects the witness's evidence may be accepted and in what respects it should be rejected. The test is whether the differences were material,[5] 'always bearing in mind that a witness's testimony in court will almost without exception be more detailed than what the witness said in his written statement'.[6] Deviations which are not material will not discredit the witness.

[17] The court a quo was impressed with the complainant's evidence and described her as giving a very clear, precise explanation of what transpired on the day in question. It is difficult to criticize this finding. Based on the discussion above it does not strike me as being improbable that the policeman recording the complainant's version may have misunderstood what she said or inaccurately recorded it for some other reason. The complainant was consistent in her evidence that she did not consent to intercourse with the appellant on the mountain top. What is in dispute is not whether intercourse occurred, or even how many times it occurred. What is in issue is the question of consent. The complainant's evidence was that she did not consent and her subsequent conduct reinforced that evidence: she immediately reported what happened to her grandmother and reported the matter to the Inkosi.

[18] There was also collateral evidence which supported the complainant's version. Her evidence was that she was a virgin, notwithstanding what the appellant had to say about this matter. As evidence of this, she testified that she had actually been a participant in virginity testing at the Inkosi's homestead. This could not be denied by the appellant, nor was it, and it accordingly went unchallenged. The complainant remained adamant that she was a virgin and resolutely rebuffed suggestions to the contrary. There was, furthermore, medical evidence on this point. Dr Manana testified that he saw fresh tears in her hymen when he examined the complainant. The fact that there was still a hymen in place to be torn meant there could not be any truth in the appellant's allegations that he had determined that she was no longer a virgin.

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[4] *S v Mahlangu and another* [2012] ZAGPJHC 114.
[5] *S v Bruiners en 'n ander* 1998 (2) SACR 432 (SE) at 437E-F; *S v Mafaladiso en andere* 2003 (1) SACR 583 (SCA) at 593E.
[6] *S v Mahlangu and another supra*.

[19] The complainant gave a good account of herself in the witness box. Her narrative had the ring of truth to it, and was recounted in a logical sequence that explained exactly what happened.

[20] Whilst the complainant fared well in the witness box, the same cannot be said for the appellant. The first difficulty for him was that in his plea explanation delivered by his legal representative, the following was stated:

'Your worship, specifically with regards to count 6 the accused instructs me that the complainant in that matter was his girlfriend at the time, however he did not have any sexual intercourse with her on the alleged date.'

Count 6 in the court a quo was the count of rape.

[21] There were two falsehoods in that plea explanation: firstly, the complainant was not the appellant's girlfriend and secondly, the appellant did have intercourse with the complainant on the day in question. The latter fact he later freely admitted and gave great detail about his experience in having intercourse with the complainant and his conclusion that she was not a virgin. As was pithily remarked by the learned regional magistrate, he and his legal representative appear simply to have forgotten what had initially been pleaded. He clearly and unequivocally changed his version.

[22] There were, in addition, a number of imponderables in the appellant's version. The alleged involvement of the two women, Mrs Magubane and Mrs Ndlovu, needs some scrutiny. They play two roles: they allegedly chastised the complainant for falling in love with the appellant, and they later pressurized her into laying a charge against the appellant. The most obvious question is how could they have known of the complainant's affections for the appellant? The appellant himself did not know this and mentioned that he was informed of the complainant's love for him on the top of the mountain. As regards the laying of the charge, how could the two women have come to know of the events that had transpired on the top of the mountain? On the complainant's unchallenged evidence, she returned home, bathed, and went to the Inkosi's home. There simply was no opportunity for the two women to become involved in the narrative and insist on the complainant laying charges against the appellant. But

perhaps the most baffling aspect of this part of the appellant's version is how he came to know of the alleged involvement of the two women in the laying of the charge. It was never suggested that the complainant told him of this, so how did he come to receive this information? This was never revealed.

[23] As regards the events that unfolded on top of the mountain, the appellant's version again raises more questions than answers. How did he conclude that the complainant was not a virgin? This was also never stated. How could having intercourse with the complainant a second time reveal that she was, indeed, a virgin? The proposition simply has to be stated to be rejected. How could the appellant not have noticed the injuries sustained by the complainant? They were, after all, capable of being observed the next day by Dr Manana.

[24] The State's case against the appellant was credible and reliable and the regional magistrate found that the appellant's exculpatory version, on the totality of the evidence, was not reasonably possibly true. In my view, he was correct in so finding and he was correct in accepting the evidence of the complainant, supported by the objective facts discovered by Dr Manana when he examined the complainant. The appeal against conviction must therefore fail.

[25] On the question of an appropriate sentence, it is so that punishment is pre-eminently a matter for the discretion of the trial court and a court of appeal should be careful not to erode that discretion. Interference is only warranted if it is convincingly shown that the discretion has not been judicially and properly exercised by the trial court. The test is whether the sentence is vitiated by irregularity, material misdirection or is disturbingly inappropriate.[7]

[26] On any version, the complainant in this matter was raped more than once: the appellant on his own version admitted to having had intercourse with her twice. This brings the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997

[7] *S v Rabie* 1975 (4) SA 855 (A) at 857D-E; *S v Malgas* 2001 (2) SA 1222 (SCA) paras 12-13.

into play.[8] Unless the regional magistrate was satisfied that substantial and compelling circumstances existed,[9] which justified the imposition of a lesser sentence, he was statutorily obliged to impose the prescribed minimum sentence of imprisonment for life for the appellant's conviction of rape.

[27] The appellant's personal circumstances were placed before the regional magistrate by his legal representative in mitigation of sentence. He was gainfully employed, was 38 years of age and had eight children. He supported his parents who are still alive, and he suffered from a kidney complaint that left him walking with a crutch. He was a first offender and had no pending cases. When he was sentenced, he had already been in custody for three years.

[28] In addressing the question of sentence, the regional magistrate took into account the traditional considerations of the appellant's personal circumstances, the seriousness of the offence as well as the interests of the broader community. He found that, in considering all the offences for which the appellant was convicted, the appellant was an extremely violent person. Moreover, the regional magistrate found that the appellant was blasé as regards those offences and appeared to demonstrate no remorse for his actions. The court accordingly found that there were no substantial and compelling circumstances which justified the imposition of a sentence other than the prescribed sentence of life imprisonment.

[29] In *Malgas*[10] the court stated that:

'B. Courts are required to approach the imposition of sentence conscious that the Legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should *ordinarily* and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.

[8] The section prescribes a minimum sentence of life imprisonment for an offence defined in part 1 of schedule 2 to the Criminal Law Amendment Act. Rape, when committed in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice, falls into this schedule.
[9] Section 51(3)*(a)* of the Criminal Law Amendment Act.
[10] *S v Malgas supra* at 1235F-H.

C. Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts.'

[30] The serious and horrendous nature of rape and violence against women in our society simply cannot be over-emphasised. In *S v Chapman*[11] it was acknowledged that:

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

[31] The rights to dignity, to the integrity of every person, and to privacy in this country are basic to the ethos of our Constitution.[12] Women in this country are entitled to the protection that these rights offer. It is insufficient that lip service is merely paid to the fact that women enjoy the same rights as men and are the equal of men in our country. There must be obvious steps taken when the integrity of a woman is violated and the message must resonate that such conduct will not be tolerated. One way of doing this is to ensure that appropriate sentences are imposed in cases where the bodily integrity of a woman has been violated. The courts are under a duty to send a clear message to the appellant, to other potential rapists and to the community that all are equal in this country and that all enjoy the same rights, which were fought for in the past for all our citizens at an enormous cost, and that those who disrespect the rights of others will be dealt with most severely by the courts.

[32] It is beyond question that the appellant showed no respect for the complainant's rights. She was forced up the mountain against her will and was injured in the act of the rape, which was carried out at gunpoint. The fact of the injury was callously denied by the appellant. Humiliatingly, the complainant was made to walk down the mountain with blood from her private parts running down her legs. That made no impression at all upon the appellant. The regional magistrate, correctly in my view, emphasised the terrible torment which the complainant must have experienced, and the lack of remorse shown by the appellant.

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[11] *S v Chapman* 1997 (2) SACR 3 (SCA) at 5A-B.
[12] See sections 10, 12 and 14 of the Constitution.

[33] I am unpersuaded that the regional magistrate did not judicially exercise his discretion when imposing sentence on the appellant on the count of rape. I can discern no irregularity or material misdirection nor does the sentence appear to me to be disturbingly inappropriate. There are no compelling circumstances that make the imposition of a lesser sentence than life imprisonment possible. To do so, in the circumstances of this case, would simply serve to attenuate the horror of the complainant's experience and the baseness of the act of rape.

[34] I would accordingly propose that the appeal against conviction and sentence be dismissed.

Mossop AJ

I agree and it is so ordered.

Madondo J
Deputy Judge President

APPEARANCES

Counsel for the appellant	:	A. Hulley
Counsel for the respondent	:	T. Ramkilawon
Date of Hearing	:	21 May 2021
Date of Judgment	:	21 May 2021