REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NO: A18/2016

In the matter between:

KENNETH BANKUNA NKUNA **APPELLANT**

And

THE STATE **RESPONDENT**

JUDGMENT

MOKGOHLOA DJP

1. Arising out of an incident that occurred on 26 November 1999 at Phalaborwa police station, the appellant was arraigned on charges of rape and defeating the ends of justice before the regional court sitting in Phalaborwa.

2. The appellant who was legally represented pleaded not guilty to the charges and denied all allegations levelled against him. At the conclusion of all the evidence, the appellant was convicted as charged and sentenced to twelve (12) years' imprisonment on 22 November 2002. He now appeals against both his conviction and sentence with leave of the trial court.

3. The appeal was initially served in the Gauteng High Court Pretoria on 5 August 2004 and it was struck off the roll. It appears that when the appeal was heard in the Pretoria High Court in 2004, the appellant was on bail. For 12 years the appellant never reinstated the appeal. It is only after a warrant of his arrest was issued and he was arrested for purpose of him having to start his sentence, did the appellant place the matter on the roll for 2 September 2016. The appeal was heard by Kgomo J who struck it off the roll due to appellant's failure to prosecute his appeal timeously.

4. Before us, the appellant did not bring an application for condonation for the late prosecution of the appeal. We adjourned the matter to enable the appellant's counsel to consider the application for condonation, no such application was brought. Instead, the appellant's counsel made an application for condonation from the bar. We decided to grant condonation and deal with the appeal in the interest of justice.

5. The facts upon which the appellant's conviction is based can be summarized as follows:

   During November 1999 the complainant, an adult female was detained in the Phalaborwa police cells. She was detained in cell number 7. On 26 November 1999 she made a request earlier in the day to be allowed to phone her home. Later that evening, the appellant, who was a police officer at Phalaborwa police station and on duty came to her cell and took her to the telephone booth for her to make a call. Thereafter he took her back to her cell.

6. Later that evening, the appellant returned to her cell and invited her to come with him to the visitor's place. The complainant who was already asleep, woke up and accompanied the appellant to the visitor's place. She was walking in front. The appellant grabbed her on her shoulders and told her that he wanted to have sexual intercourse with her. The complainant refused but the appellant pushed her to the floor undressed her and raped her. Thereafter the complainant returned to her cell crying but did not report the rape

incident to her cell mate. The following day in the morning she made a report to one of the police officer Mashaba. She was then taken to the hospital for examination. Swaps were taken from her and put in the crime kit.

7. The next day which was a Sunday, she was taken to the telephone booth to attend a call that came through for her. She was seated in the community service centre (charge office) when a certain young man came in and reported that he came to pay for her bail. The complainant informed the police officer in charge that she cannot accept money from strangers. In fact the complainant testified that there was no bail granted to her because she was serving her sentence.[1]

8. The young man the complainant referred to was Mr Sipho Mnisi who testified that on 28 November 1999 he proceeded to Phalaborwa post office to make a telephone call. He met the appellant who introduced himself to him as Mashele. The appellant requested Mnisi to go to the police station to pay bail for his relative, M. (the complainant). He gave Mnisi R1 000.00. Indeed Mnisi proceeded to the police station to pay bail but was advised that the money was not sufficient. He returned to the appellant who withdrew another money from the ATM and handed to Mnisi. Mnisi returned to the police station where he made payment and the appellant thanked him by giving him R20.00.

9. On 3 December 1999 an identification parade was held and the complainant who was moved from Phalaborwa police cells to Tzaneen police cells was able to identify the appellant as her rapist. Mnisi as well identified the appellant as the person who introduced to him as Mashele. It was only after the appellant was positively identified at the identification parade that he was arrested. The appellant was then taken to hospital where Dr Khoza extracted blood and sperms from him.

10. Evidence of the DNA test result was led which proved positive in that the profile of the appellant was read into the sample found in the complainant.

11. The appellant testified in his own defence. Although he admitted that there was a time when he fetched the complainant from her cell and escorted her back from her cell, he denied that he raped her. His version was that he was doing nightshift on 26 November

[1] Sentence of R15 000 or 10 months imprisonment

1999 and was a leader of the nightshift group. At about 22:30 he went out of the community service centre where he met a man who claimed to be the complainant's husband. This man requested to see the complainant concerning their sick child. Although it was late at night, he fetched the complainant from her cell to meet her husband. At some stage he noticed that the complainant and this man were kissing each other and this man appeared to be drunk. He then decided to intervene and chased the man away and escorted the complainant back to her cell. The complainant was very angry and told the appellant that she 'will see him'. Regarding the evidence of Mnisi, the appellant denied that he was ever at the post office at that day. He denied ever meeting and sending Mnisi to pay bail for appellant. According to him he first saw Mnisi at the identification parade.

12. The appellant stated that both Sergeant Malatji, who made entries in the cell book regarding visits to the cells on the night of the incident, and Captain Lumbe the investigating officer in this case, influenced the complainant to falsely implicate him of rape as there was bad blood between him and them.

13. In evaluating all the evidence, the trial court made positive findings regarding the complainant's and Mnisi's credibility and the reliability of their evidence.

> "It was never taken up with the witness and this only came out at the time when the accused testified. All what was raised was that Malatji absented himself from duty and he told the court that he absented himself from duty when he had to attend the funeral of his brother's wife and that he came back and explained the situation and the matter was resolved amicably. There is therefore nothing to suggest that M. M. and Sergeant Malatji connived to make a case against the accused. One can take it from there that Sergeant Malatji therefore had no grudge against the accused.
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> Same applies to Captain Lumbe. Though she admitted having had grudges with people in the past, but she never told the court that she had any specific grudge against the accused. And I do not think that by merely refusing to enter the CAS number into a computer can result in one deciding to embark on making a case against the accused of this serious nature. I therefore hold that there is no basis to suggest that Captain Lumbe fabricated a case against the accused or club with Sergeant Malatji and the complainant to make a case against the accused. The court therefore rejects any notion that Captain Lumbe, Sergeant Malatji and complainant connived to make a case against the accused.

14. As regards the identity parade, the trial court held:

As far as the identification parade is concerned, there is nothing to suggest that the complainant M. M., made a mistake in pointing out the accused or that she first made some mistake in pointing out the accused. Though the accused was wearing a uniform and had his name tag placed on his police uniform, there is no basis to suggest that M. pointed out the accused by reading on his name tag. This is because there is no evidence at that stage, M. knew who the accused was. Safe to know him facially. So I take it that M. pointed out the accused by mere looking at him and not by reading from the name tag.

There is also no evidence to suggest that the accused name was revealed to M. before the identification parade was conducted. Captain Lumbe, even though she was present at the identification parade, there is no evidence to suggest that she influenced M. in pointing out the accused. She was not even part of the people who organised the identification parade. If she played any role in the ID parade, that role was only limited to her interpreting for the person who was conducting the ID parade. In the whole, the court could not find any irregularity in the conducting of the ID parade.

Mnisi came in as an outsider and he had nothing to do with this case. He told the court that on Sunday 28 November 1999, he left his place of employment and proceeded to the post office to go and phone his home at Bushbuckridge. There he met a person who introduced himself as Mashele. And that person asked him to go and pay bail for a person whom he only knew as M., without even knowing her surname. He proceeded to the police station and made some attempts to pay bail for M.."

15. Before us, the appellant's counsel unleashed a three-pronged attack against the judgment of the trial court. First, he submitted that the trial court erred in relying on the evidence of the DNA test results which was incomplete in that the chain evidence was broken.

16. Second, it was argued that the trial court erred in relying on the identification parade evidence when the parade was not properly conducted.

17. Thirdly, that the trial court erred in not finding that the appellant established sufficient grounds for suspecting that the state witnesses had motive to falsely implicate him particularly taking into consideration that: Captain Lumbe attended the identification parade with Mnisi and acted as an interpreter for Mnisi as well as the person in charge of the parade.

18. It is trite that as a court of appeal we have to show deference to the factual and credibility findings made by the trial court. This is so as the trial court has had the advantage which an appeal court never had of hearing and observing the witnesses as they testify and

under cross-examination. As stated in *R v Dhlumayo & Another*[2] 'the trial court is steeped in the atmosphere of the trial'. A court of appeal may only interfere where it is satisfied that the trial court misdirected itself or where it is convinced that the trial court was wrong.[3]

19. Confronted with a similar argument, the SCA in *S v Hadebe & Others*[4] with reference to Moshesi & Others v R (1980-1984) LAC 57, enunciated the correct approach to resolving such a problem as follows:

> "The question for determination is whether, in the light of all the evidence adduced at the trial, the guilt of the appellants was established beyond reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees."

20. It should be clear from the above cases that the powers of this Court sitting as a court of appeal are clearly circumscribed. It does not have carte blanche to interfere with the factual and credibility findings properly made by the trial court.

21. It is indeed correct, as the appellant's counsel pointed out that there are aspects of the DNA evidence which are unsatisfactory. It is further correct that the person who received the package at the forensic laboratory did not mention sufficiently how the package was marked. It appears from the record of the proceedings that the Cas number on some of the exhibits appeared to have been tampered with or made as a late entry on the crime kit.

22. Be that as it may, it has to be noted that the DNA evidence on its own may not be sufficient to establish the guilt of the appellant; it has to be weighed against the totality of the evidence presented before the court.

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[2] 1948 (2) SA 677 (A) at 705
[3] R v Dhlumayo supre, S v Artman & Another 1968 (3) 339 (A) at 341 G-H
[4] S v Hadebe & Others 1998 (1) SACR 426 F-G

23. In order to avoid falling into a trap of failing to see the wood for trees as per the warning expressed in Hadebe *supra*, I propose to take a step back and consider the entire evidence as a mosaic, consider the strength and weaknesses in the evidence and consider the merits, demerits and probabilities.[5]

24. I am alive to the fact that the state bore the onus to prove the guilt of the appellant beyond a reasonable doubt and that there is no onus on the appellant to proof the truthfulness of any explanation which he gives not to convince the court that he is innocent. Any reasonable doubt regarding his guilt must redound to the appellant's benefit.[6]

25. However, as it was stated in *S v Phallo & Others*[7]

> "On the basis of this evidence it was argued that the State had, at best, proved its case on a balance of probabilities but not beyond reasonable doubt. Where does one draw a line between proof beyond reasonable doubt and proof on a balance of probabilities? In our law, the classic decision is that of Malan JA in R v Mlambo 1957 (4) SA 727 (A). The learned Judge deals, at 737F-H, with an argument (popular at the Bar then) that proof beyond reasonable doubt requires the prosecution to eliminate every hypothesis which is inconsistent with the accused's guilt or which, as it is also expressed, is consistent with his innocence. Malan JA rejected this approach, preferring to adhere to the approach which 'at one time found almost universal favour and which has served the purpose so successfully for generation' (at 738A). This approach was then formulated by the learned Judge as follows (at 738A-C)
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> > 'In my opinion, there is no obligation upon the Crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the Crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged. He must, in other words, be morally certain of the guilt of the accused.
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> > An accused's claim to the benefit of a doubt when it may be said to exist must not be derived from speculation but must rest upon a reasonable and solid foundation created either by positive evidence or gathered from reasonable inferences which are not in conflict with, or outweighed by, the proved facts of the case'
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> (See also S v Sauls and Others 1981 (3) SA 172 (A) at 182G-H; S v Rama 1966 (2) SA 395 (A) at 401; S v Ntsele 1998 (2) SACR 178 (SCA) at 182b-h.)

[5] S v Chabalala 2003 (1) SACR 134 at [15]
[6] S v V 2000 (1) SACR 453 (SCA)
[7] 1999 (2) SACR 558 (SCA) [10] – [11]

The approach of our law as represented by R v Mlambo, supra, corresponds with that of the English Court. In Miller v Minister of Pensions [1947] 2 All ER 372 (King's Bench) it was said at 373H by Denning J:

> 'The evidence must reach the same degree of cogency as is required in a criminal case before an accused person is found guilty. That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the cause of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence "of course it is possible, but not in the least probable", the case is proved beyond reasonable doubt, but nothing short of that will suffice.'

26. The trial court was aware that the complainant and Mnisi were single witnesses and that their evidence has to be treated with caution. However it found corroboration of the complainant's evidence in the evidence of the appellant that on the night of the incident, he escorted the complainant from her cell to the community services centre and back to her cell. Furthermore, the trial court found that this evidence proved that there was contact between the appellant and the complainant on that evening. I may add that it is highly improbable if not impossible for a police officer to allow a detainee to have visitors late at night (22:30).

27. In the same breath, the trial court, referring to the evidence of Mnisi, stated:

> "The court can therefore safely say that Sipho Mnisi identified the accused because he knew him as the person who send him to go and pay the bail for M.. One other interesting aspect of Sipho Mnisi's evidence is that he paid money at the police station for Mabis Mahlatji, the person he did not know, the person he is and to whom he had no interest whatsoever. And one can therefore as a question of what interest did Sipho Mnisi have in M. Mahlatji to extend that he went to pay bail for her. Paying such a lot of money for someone he did not know. I take it therefore that his evidence, that he was send by the accused to go and pay the bail for M., should be accepted as the truth.
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> So if one looks at the evidence as it stands, the evidence of M. Mahlatji regarding the rape and the subsequent pointing out of the accused at the identification parade, and the evidence of Mnisi regarding the mandate he had to carry to go and pay the bail for M., and the pointing out, the court can safely say therefore that the evidence of both M. Mahlatji and Sipho Mnisi can be accepted as reliable and credible in all material respect".

28. I am mindful of the salutary warning expressed in *S v Snyman*[8] that even when dealing with the evidence of a single witness, courts should never allow the exercise of caution to displace the exercise of common sense. Equally important is what the SCA stated in *S v Sauls*[9] that:

> " Section 256 has now been replaced by s 208 of the Criminal Procedure Act 51 of 1977. This section no longer refers to " the single evidence of any competent and credible witness"; it provides merely that "an accused may be convicted on the single evidence of any competent witness". The absence of the word "credible" is of no significance; the single witness must still be credible, but there are, as Wigmore points out, "indefinite" degrees in this character we call credibility". (Wigmore on Evidence vol III para 2034 at 262). 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 demerit and, having 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. The cautionary rule referred to by DE VILLIERS JP in 1932 may be a guide to a right decision but it does not mean that the appeal must succeed if any critism, however slender, of the witnesses' evidence we well founded
> (per SCHREINER JA in R v Hlapo (AD 10 November 1952) quoted in R v Bellingham 1955 (2) SA 566 (A) at 569). It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense.
> The question then is not whether there were flaws in Lennox's evidence – it would be remarkable if there were not in a witness of this kind. The question is what weight, if any, must be given to the many criticisms that were voiced by counsel in arguments".

29. This is how the trial court approached and assessed the complainant and Mnisi's evidence. Based on this, I am unable to say that the trial court erred in its acceptance of their evidence as truthful and reliable more so that the complainant's evidence was corroborated to a certain extent by the appellant's evidence. I am therefore satisfied that their evidence established the guilt of the appellant beyond reasonable doubt. Accordingly, I can find no fault with his conviction on the two counts i.e rape and defeating the ends of justice. It follows that this court sitting as a court of appeal cannot interfere with the findings of the trial court.

[8] 1968 (2) SA 582 (A) at 585 G
[9] 1981 (3) SA 172 (A) at 180 C-H

Sentence

30. It is equally trite law that the issue of sentencing is one which vests a discretion in the trial court. The trial court considers what a fair and appropriate sentence should be. The circumstances entitling a court of appeal to interfere in a sentence imposed by a trial court were revisited in *S v Malgas*[10] where Marais JA held:

> "The mental process in which courts engage when considering questions of sentence depends upon the task at hand. Subject of course to any limitations imposed by legislation or binding judicial precedent, a trial court will consider the particular circumstances of the case in the light of the well-known triad of factors relevant to sentence and impose what it considers to be a just and appropriate sentence. A court exercising appellant jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate Court is of course entitled to consider the question of sentence afresh. In doing so it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate Court is at large. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trail court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as 'shocking', 'startling' or 'disturbingly inappropriate'. It must be emphasised that in the latter situation the appellate court is not at large in the sense in which it is a large in the former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned. No such limitation exists in the former situation.

31. The starting point in sentencing in respect of rape is in the *Criminal Law Amendment Act*[11]. This Act prescribes a sentence of 10 years' imprisonment in these circumstances. A court can only deviate from the prescribed sentence if it finds that there exist substantial and compelling circumstances that justify the imposition of a lesser sentence.

32. Counsel for the appellant submitted that the trial court misdirected itself in failing to consider the appellant's personal circumstances as substantial and compelling

[10] 2001 (1) SACR 469 (SCA [12]
[11] 105 of 1997

circumstances that would have justified the deviation from the prescribed sentence of 10 years. I do not agree. The trial court was alive to the personal circumstances when it held:

> "The fact that he is a married person and has children and he is a caring father and a responsible father for that matter. This in my understanding and my understanding is that it is expected of each and every father to be responsible towards his family, his wife and children in particular. This to me does not clearly illustrate compelling and substantial circumstances which may cause the court to deviate from the minimum sentence. The offence the accused has committed is very serious taking into account the position he held at the time when the offence was committed. This is a clear illustration of a case where a person in a high position abused his powers". (My emphasis)

33. *In S v PB*[12]

> "Not having found substantial or compelling circumstances to be present, the trial court found no justification to depart from the prescribed minimum sentence. Clearly there are none. To find otherwise would be to fall into trap of doing so for 'flimsy reasons' and '(s)peculative hypotheses favourable to the offender', as was cautioned against in Malgas. This the trial judge did not do, and consequently did not err in that regard. It follows that the appeal must fail".

34. I am in total agreement with the judge in S v PB above. In my view, the trial court was correct in finding that the personal circumstances of the appellant are far outweighed by the aggravating circumstance. I am therefore satisfied that the sentence imposed by the trial court in respect of rape is not excessive and disproportionate. I find the sentence imposed to be just and fair and there is therefore no need for us to interfere.

35. In conclusion, the question is: did the trial court misdirect itself in failing to order the sentences to run concurrently? Section 280 (2) of the *Criminal Procedure Act*[13]permits a sentencing court to order one or more sentences to run concurrently, either in whole or in part. An order that sentences should run concurrently is called for where the evidence shows that the relevant offences are 'inextricably linked in terms of locality, time, protagonists and, importantly, the fact that they were committed with one common intent'.[14]

[12] 2011 (1) SACR 448 (SCA) at [21]
[13] 51 of 1977
[14] S v Mokela 2012 (1) SACR 431 (SCA) at [11]

36. In *casu,* there was indeed inextricable link between the offences in terms of the locality and the protagonist. This justified an order of concurrence in the sentences.

In the circumstances, the following order shall issue:

1. The appeal against both convictions is dismissed.
2. The appeal against sentence is upheld to the extent that:
   The sentence imposed by the trial court is retained, but it is ordered that the sentence imposed on Count 2 shall run concurrently with the sentence imposed on Count1

MOKGOHLOA DJP

I concur

MG PHATUDI J

REPRESENTATIONS

1.	Counsel for the Appellant	: Mr. M.E Kgatle
	Instructed by	: Polokwane Justice Centre
2.	Counsel for the Respondent	: Adv. JJ Jacobs
	Instructed by	: Director of Public Prosecutions Polokwane
3.	Date of hearing	: 16 March 2018
4.	Date handed down	: 11 May 2018