IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE HIGH COURT, CAPE TOWN

CASE NO: A453/10

DAVID SIGENU Appellant

vs

THE STATE Respondent

JUDGMENT DELIVERD ON THIS 25th DAY OF FEBRUARY 2011

FORTUIN, J:

[1] On 25 November 2009 the appellant, Mr David Sigenu, was convicted in the Parow Regional Court on one count of rape and one count of assault. The appellant was legally represented in the court *a quo* and pleaded not guilty to both counts. On the same day, the appellant was sentenced to ten years imprisonment in respect of the rape and six months imprisonment in respect of the assault. The sentences on both counts were ordered to run concurrently, resulting in an effective sentence of 10 years imprisonment.

[2] Leave to appeal was granted against conviction and sentence.

[3] The grounds of appeal are that the court a quo erred and misdirected itself in convicting the appellant and imposing the sentence.

[4] The state called four witnesses and the appellant testified for the defence.

[5] It is common cause that the complainant, Ms Mpindiwe Mkwane, a 50 year old woman, was in the company of the appellant on the evening of Sunday 31 August 2008 and that they consumed alcohol together in a nearby shebeen in Langa, where they both live in the same street. They know each other as he grew up in front of her. They were both intoxicated when they walked home together from the shebeen.

[6] On Sunday, 31 August 2008, the complainant walked past the appellant's house and invited him to accompany her to the shebeen around the corner where she bought two beers, which they shared.

[7] Later, when she wanted to go home, she could not see him and she left the shebeen. The appellant was waiting for her outside at the corner. He chased Xolile, a person who stayed with him and who was in his company earlier, away and wanted to force her to go into his shack with him. She refused and said she wanted to go home. He was stronger than her and pulled her into the shack and closed the door. She fought with him and shouted for him to leave her alone, but he strangled her and she fell to the

floor. While she was on the floor he undressed her. She fought with him throughout.

[8] He bit her little finger and scratched her in her face and on her breast where after he raped her. She shouted and screamed. While raping her, his uncle kicked against the door, but the appellant did not open the door. Only when he had finished and his mother called his name from outside, he opened the door.

[9] When she left his shack, she left her clothes there but took one of his jerseys to put around her. At home her son asked her where her clothes were, but she only cried and did not answer him. She went to sleep and told her son the next morning that the appellant raped her. When she went outside, she saw the accused and told him that she was going to report him, but he said he did not care. She went to her work in Parow and told them what happened and then laid a charge at Langa Police Station. She then went to the Somerset Hospital where she was examined by a doctor. She had sex with her boyfriend nine days before the incident.

[10] The complainant's son testified that the complainant told him, on her return from the appellant's shack, that she was raped by the appellant. She had scratch marks in her face and her neck and she was wearing an unknown jersey. Her lower body was not clothed.

[11] Mr Sibisu Supatshu is a neighbour of the appellant. He testified that he saw the complainant and the appellant together on the evening in question.

He observed them as they had a discussion about whether to go into the shack. When he enquired from the appellant whether something was wrong, the appellant told him that it was none of his business. The appellant and the complainant went into the appellant's shack where he heard voices and a noise. When the complainant's eldest son asked him whether he saw his mother, he told him that she was with the appellant inside his shack. When he woke between 4am and 5am, he saw the complainant run from the appellant's shack to her own house. She looked unhappy and was wearing only a jersey. Her lower body was naked.

[12] Dr Van Wyk who examined the complainant after the incident, testified that the injuries found on the complainant during examination, corroborated the complainant's version about the manner in which she was assaulted by the appellant i.e. the bite on her little finger and her breast, the scratch marks on her face and her breast. The doctor testified that the injuries to her genital area could not have occurred nine days earlier and later conceded that it could have been caused by consensual sexual intercourse. No semen was found.

[13] The appellant testified that the complainant did not only buy beer but also bought vodka with the result that she was more intoxicated than she maintains to have been. He left the shebeen without her and she followed him. He was injured when he tried to help her and then fell on his face. She followed him to his shack and asked him whether she could stay over at his place as she broke up with her boyfriend and did not want him to find her at her place. He refused and told her that she was going to infect him with Aids.

She became angry at him for insulting her and threatened to get back at him. He pushed her out of the shack. She was still wearing all her clothes when he closed the door, leaving her outside.

[14] The issues to be determined are whether the appellant had sexual intercourse with the complainant on the evening of 31 August 2008 and if so, whether it was with the complainant's consent.

[15] It is trite that the state has to prove its case beyond reasonable doubt and not beyond any shadow of doubt. See in this regard **S v Phallo and Others**[1]. The evaluation of evidence should not be done in isolation, but the evidence should be evaluated in totality as stated in **S v Trainor**[2] by Navsa JA:

> *"A conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable, the quality of that evidence must of necessity be evaluated, as must corroborative evidence, if any."*

[16] In *casu*, we are dealing with a single witness with regard to the rape. It is trite that the evidence of a single witness should be considered with caution. The court a quo pertinently mentioned the fact that the complainant's evidence with regard to the rape should be considered with caution. In **S v**

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[1] 1999 (2) SACR 558 (SCA)
[2] 2003 (1) SACR 35 (A)

Sauls[3], it was held that the evidence of a single witness can only be relied on where the evidence is clear and satisfactory in every respect.

[17] A court of appeal will only interfere with a conviction when it is convinced that the evaluation of the evidence by the trial court is wrong[4] or the trial court made an erroneous factual finding and misdirected itself.[5]

[18] The trial court found the complainant to be an honest and convincing witness. The evidence of the other state witnesses, considered cumulatively, in addition to her emotional outburst while testifying, were found to be a guarantee for the reliability of her evidence. The trial court found the appellant not to be as convincing as the complainant. His version about her being fully clothed when she left his shack was contradicted, not only by the complainant, but also by the complainant's son and Mr Subatshu. His version that he did not see the complainant after she left his place the night before was changed later when he testified that she threatened him in the morning. The fact that his version in his statement after the incident was different to his version in court was also taken into account. The court a quo found that the version of the complainant is not only believable, but also reliable and found the appellant's version to be false.

[19] I am of the view that the trial court's factual findings were correct and that there was no misdirection in its evaluation of the evidence.

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[3] 1981 (3) SA 172 (A)
[4] **S v Mlumbi & n Ander** 1991 (1) SASV 235 (A)
[5] **S v Ntsele** 1998 (2) SACR 178 (SCA)

[20] It is accepted that the Minimum Sentence Act, No 105 of 1997, as amended, changed the approach to the consideration and evaluation with regard to sentence. In terms of section 51 (1) and (2), courts are now compelled to impose certain minimum sentences for specified crimes. A lesser sentence may only be imposed if a court is satisfied that substantial and compelling circumstances exist justifying a departure from the prescribed sentence.

[21] The court a quo found that there was no substantial and compelling circumstances and imposed the prescribed minimum sentence of 10 years for the rape.

[22] On behalf of the appellant it was submitted that the following factors should have been taken into account as substantial and compelling circumstances:

a. The appellant was 34 years old and was a first offender;
b. He does not appear to have a violent disposition;
c. He was economically productive immediately prior to the commission of the offence;
d. Because he is not a violent person, the interest of society would not require that he be removed from society for such a long period.

[23] In addition to the factors to be considered as substantial and compelling[6], the proportionality test should also be applied. Nugent J in **S v Vilikazi**[7] said the following:

> *"It is clear from the terms in which the test was framed in **Malgas** and endorsed in **Dodo** that it is incumbent upon a court in every case, before it imposes a prescribed sentence, to assess, upon a consideration of all the circumstances of a particular case, whether the prescribed sentence is indeed proportionate to the particular offence."* ...

[24] When assessing whether the cumulative circumstances of the Appellant amounts to substantial and compelling circumstances rendering the minimum sentence disproportionate and unjust, I am of the view that a period of 10 years imprisonment is indeed disproportionate and would interfere with the sentence.

[25] It follows that the appeal against sentence should succeed.

[26] In the circumstances I would propose the following order:

The appeal against conviction is dismissed;

The appeal against sentence succeeds and is substituted with the following:

10 (Ten) years imprisonment of which 3 (three) years is suspended for a period of 5 (five) years on condition that the

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[6] **S v Malgas** 2001 (2) SA 1222 (SCA)
[7] 2009 (1) SACR 552 (SCA) at 560

appellant is not found guilty of the offence of rape during the period of suspension.

This sentence is backdated to 25 November 2009.

FORTUIN, J

I agree and it is so ordered.

BLIGNAULT, J