IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case number: A259/2020

In the matter between:

DERIL OERSON Appellant

and

THE STATE Respondent

Court: **Justice Fortuin *et* Acting Justice Nel**
Heard: **21 May 2021**
Delivered: **2 June 2021**

JUDGMENT

(Delivered by email to the parties' legal representatives and by release to SAFLII. The judgment shall be deemed to have been handed down at 10h00 on 2 June 2021)

NEL AJ:

1. On 27 September 2019 the appellant, who pleaded not guilty was convicted as charged in the Beaufort West regional court on two counts of rape. The two counts were taken together for purposes of sentencing and the appellant was sentenced on 21 October 2019 to an effective fifteen years imprisonment. He unsuccessfully applied for leave to appeal to the court *a quo* on 18 November 2019; however, his petition to this court for leave to appeal was successful and he appeals against both conviction and sentence.

2. The convictions pertain to two separate complaints but essentially arose out of one incident. It was common cause that the complainant and the accused grew up together in Nelspoort and have known each other since childhood. It is further common cause that they had on two prior occasions, had sexual relations with one another. The events which led up to the incident in the present matter were that in the early hours of 27 January 2018 the complainant and the accused were both at their local tavern. They had spoken to each other outside the tavern once or twice, and during one of these conversations the accused asked the complainant if they could kiss. The complainant testified that she had reminded the accused that she had a boyfriend who was in Cape Town at the time. This was denied by the accused.

3. The complainant and the accused thereafter walked together to her cousin's house. Complainant proceeded to have two glasses of red wine at her cousin's house, whilst the accused waited outside for her. She tried to wake her brother up to walk her home but he was too drunk to do so. Both the

complainant and the accused had consumed a fair amount of alcohol the evening of 26 January 2018 leading into the early hours of the morning on 27 January 2018. They left the house of the complainant's cousin and the accused continued to walk the complainant home. The complainant testified that during this walk the accused grabbed her arm and said that she should come with him to his grandfather's house where he resided. She declined. They then saw an individual who was identified as "Oom Tommy". The complainant testified that she managed to escape the accused's grip and ran to Oom Tommy and asked him for help. He was however too drunk to assist her. After briefly chatting to the accused, Oom Tommy was on his way again.

4. The complainant testified that after Oom Tommy's departure, the accused grabbed her neck and threw her down to the ground in Bloekomboom Street. She testified that she tried to scream to get help but no one heard her. The complainant testified that the accused threatened her and told her that if she tried to get away he would hurt her. He thereafter pulled down her pants and underwear (of which she was wearing two). He then inserted his fingers into her vagina followed thereafter by his penis. He did not use a condom. She testified further that he told her that no one would believe her if she reported the incident and that his mother had the best lawyers. When he was done he wiped her off with toilet paper, adding that now no one could find anything on her. He pulled her underwear and pants back up and proceeded to walk her to the corner of the street in which she lived. A photo album which was handed in as Exhibit "**A**" evidenced toilet paper at the scene as well as a panty liner which the complainant was wearing.

5. The accused on the other hand testified that after Oom Tommy's departure, he and the complainant went to go and sit in Bloekomboom Street and drank a further beer and smoked a cigarette. They then began kissing. The complainant requested for them to go to his grandfather's house however he informed her that it was too far. He then suggested that they go to her house, but she informed him that her mother and her mother's boyfriend were at home. They then continued kissing passionately, where they were sitting, which led to them having intercourse. He denies ever placing his fingers inside the complainant's vagina. He admits not making use of a condom, but testified that the intercourse was consensual. He testified that thereafter they sat and smoked another cigarette and he then walked with her until one house away from her home. He testified that at that time the complainant was "piekfyn".

6. The complainant's evidence, which was corroborated by the evidence of her mother was that when she got home, she was crying. Her mother, who had opened the door for her, asked her what was wrong. She informed her mother that the accused had raped her. Her mother then telephoned her father who came over immediately, and who called the police. The police arrived shortly thereafter and she gave them a statement at approximately 10am that morning, and was taken to the district surgeon for a physical examination at approximately 11:15am. She testified that her neck and vagina were sore.

7. It is evident from the medico-legal report (the J88) that the complainant was examined by Dr. Cornel Scholtz at the Beaufort West hospital. Dr. Scholtz was not available to testify, however, the medico-legal report was handed in, without objection, in terms of section 212 of the Criminal Procedure Act 51 of 1977 as Exhibit "**B**". The findings of Dr. Scholtz were, in summary, that the complainant had abrasions and bruising on her neck, that there was vaginal bleeding and tears, and that penetration most likely took place. This largely corroborated the version of the complainant.

8. The complainant testified further that she had wanted to withdraw the charges against the accused as it had taken up a lot of her time, she didn't want the accused's son growing up without his father, and the accused's grandfather spoke to her mother and requested that she withdraw the case. She testified that she wanted the accused to obtain psychological help, as she didn't want the same thing to happen to someone else. His grandfather had informed her mother that the accused had indeed obtained psychological assistance. She and the accused had also discussed the matter and he had asked for her forgiveness. These things all contributed to her wanting to withdraw the charges. The State however elected to proceed.

9. The complainant and her mother were the only witnesses called on behalf of the State, and the appellant is the only witness who testified in his defence.

10. The first issue in this appeal is whether the sexual intercourse was consensual. The trial court gave a comprehensive and well-reasoned

judgment and correctly found that, notwithstanding that the complainant was a single witness, her testimony was clear and satisfactory in every material respect, and that corroboration could be found in the report made by the complainant to her mother as well as the injuries she sustained as recorded in the medico-legal report. It furthermore correctly found that the probabilities supported her version. In my view the only reasonable inference to be drawn is that the complainant had not consented to the appellant inserting his fingers into her vagina and having sexual intercourse with her. The appellant's version was not reasonably possibly true. There was accordingly no misdirection by the trial court and the appellant was correctly convicted of rape.

11. The second issue in this appeal is whether the state proved that there were two separate incidents of rape.

12. In *S v Tladi* 2013 (2) SACR 287 (SCA) the appellant was charged with two counts of rape. He overpowered the complainant in his room. She fell onto a sponge. He unzipped his trousers, removed her panty and had sexual intercourse with her twice without her consent. He was convicted on both counts and sentenced to life imprisonment. Saldulker AJA found that, on the evidence only one act of rape had been proved beyond reasonable doubt. At para [31] the learned judge held that:

> *There is no evidence from the complainant as to how the appellant raped her for the second time. The complainant's evidence does not*

suggest that there was an interruption in the sexual intercourse to constitute two separate acts of sexual intercourse and, therefore, two separate acts of rape. The complainant's evidence suggests that the sexual acts were closely linked and amount to a single continuing course of conduct. There is no suggestion in her evidence that there was any appreciable length of time between the acts of rape to constitute two separate offences. The evidence against the appellant is therefore limited and is insufficient to establish his guilt on two separate counts of rape. The trial court should have analyzed the state's evidence and should have concluded that only one act of rape had been proved beyond a reasonable doubt.

13. Moreover, in the matter of *S v Ncombo* 2017 (2) SACR 683 (ECG) at para [14] Bloem J held that:

Mr. Mtsila submitted that the first rape occurred when the appellant inserted his fingers into the complainant's vagina and that the second rape occurred when he inserted his penis into her vagina after the withdrawal of his fingers. Applying the principles that emanate from the above authorities to the facts of this case, I conclude that the complainant's evidence described one continuing course of conduct consisting of the insertion of the appellant's fingers and, upon the withdrawal thereof, the almost immediate insertion of his penis into her vagina. That evidence does not suggest that there was an interruption in the appellant's conduct between the time that he withdrew his fingers

and the insertion of his penis, sufficient to constitute two separate acts of rape. Mr. Mtsila's submission, that the two separate rapes had occurred when the appellant inserted his fingers and thereafter his penis into the complainant's vagina, can accordingly not be sustained.

14. I am of the view that on the facts of the present matter and applying the principles set out above, there was no interruption in the appellant's conduct which would constitute two separate acts of rape, nor did the appellant have the requisite intention of raping the complainant twice. Consequently, there was no basis for the conviction on the first count of rape and it falls to be set aside.

15. Regarding sentence, the trial court took into account the fact that the appellant had been convicted of two counts of rape and formed the view that the offence accordingly fell within the parameters of Part I of Schedule 2 of the Criminal Law Amendment Act 105 of 1997, which prescribed a sentence of life imprisonment. In that regard the court erred.

16. In light of the appellant being convicted of only one count of rape, which falls within the ambit of Part III of Schedule 2, the prescribed minimum sentence, in section 51(2)(b)(i) of the Criminal Procedure Act, for a first offender is a period of 10 years imprisonment.

17. The trial court found that there were substantial and compelling circumstances that warranted a deviation from life sentence which it incorrectly found was applicable.

18. I am of the view that there are indeed substantial and compelling circumstances for deviating from the prescribed minimum sentence of 10 years imprisonment as well.

19. In *S v Malgas* 2001 (1) SACR 469 (SCA) at para [22] to [25] the court set out the approach to be taken in assessing the existence of substantial and compelling circumstances for the purposes of section 51 of the Act. The judgment made clear that, although the legislature ordained that the prescribed minimum sentences are to be regarded as "ordinarily appropriate" in the absence of weighty justification to the contrary when crimes of the kind specified are committed, an individualized response to sentencing a particular offender has not been dispensed with by the Act. Accordingly, if a court is satisfied for objectively convincing reasons that the circumstances of a particular case render the prescribed sentence unjust, that is disproportionate to the crime, the offender and the legitimate needs of society, it is entitled to characterize them as substantial and compelling. This has subsequently been referred to as the "determinative test".

20. The Constitutional Court in *S v Dodo* 2001 (1) SACR 594 (CC) at para [40] approved the approach set out in Malgas as "undoubtedly correct".

21. Furthermore, in *S v Vilakazi* 2009 (1) SACR 552 (SCA) the court emphasized that rape is a repulsive crime, humiliating, degrading and brutally invasive of the privacy, dignity and person of the victim, but continued to say that punishment must always be proportionate to the deserts of the particular offender, no less but also no more.

22. The appeal court's judgment in *S v SMM* 2013 (2) SACR 292 (SCA) is also instructive. I thus quote extensively from that judgment as follows:

> *[14] Our country is plainly facing a crisis of epidemic proportions in respect of rape, particularly of young children. The rape statistics induce a sense of shock and disbelief. The concomitant violence in many rape incidents engenders resentment, anger and outrage…. The public is rightly outraged by this rampant scourge. There is consequently increasing pressure on our courts to impose harsher sentences primarily, as far as the public is concerned, to exact retribution and to deter further criminal conduct. It is trite that retribution is but one of the objectives of sentencing. It is also trite that in certain cases retribution will play a more prominent role than the other sentencing objectives. But one cannot only sentence to satisfy public demand for revenge – the other sentencing objectives, including rehabilitation can never be discarded altogether, in order to attain a balanced, effective sentence. The much quoted Zinn dictum remains the leading authority on the topic.*

Rumpff JA's well-known reference to the triad of factors warranting consideration in sentencing, namely the offender, the crime and the interests of society, epitomises the very essence of a balanced, effective sentence which meets all the sentencing objectives…

[17] It is necessary to reiterate a few self-evident realities. First, rape is undeniably a degrading, humiliating and brutal invasion of a person's most intimate, private space. The very act itself, even absent any accompanying violent assault inflicted by the perpetrator, is a violent and traumatic infringement of a person's fundamental right to be free from all forms of violence and not to be treated in a cruel, inhumane or degrading way…

[18] The second self-evident truth (albeit somewhat contentious) is that there are categories of severity of rape. This observation does not in any way whatsoever detract from the important remarks in the preceding paragraph. This court held in S v Abrahams that 'some rapes are worse than others, and the life sentence ordained by the Legislature should be reserved for cases devoid of substantial factors compelling the conclusion that such a sentence is inappropriate and unjust'. The advent of minimum sentence legislation has not changed the centrality of proportionality in sentencing. In Vilakazi Nugent JA cautioned against the danger of heaping 'excessive punishment on the

relatively few who are convicted in retribution for the crimes of those who escape or in the despairing hope of that it will arrest the scourge'.

23. Returning to the facts of the present matter, the aggravating features are that the complainant and the appellant had grown up with each other and there was accordingly a degree of trust between them which had been broken. The accused also showed no remorse by denying in court that he had inserted his fingers into the complainant's vagina and alleging that he had consensual intercourse with her. Instead of taking responsibility for what he had done, he sought to portray the complainant as a liar and thus in effect victimizing her again. Although the evidence of the consequences of the rape to the complainant were superficial, she undoubtedly suffered a traumatic experience which had (at least) a substantial adverse psychological affect.

24. The mitigating factors are that the appellant was a first offender, only 20 years of age at the time of the rape, was employed, and had a one-year-old son. These point to a realistic possibility of rehabilitation and a low risk of re-offending. This is further supported by the fact that even prior to his conviction and sentencing the appellant attended a 3 month residential programme offered by an organization called The Chrysalis Academy. In a "Character Reference" for the appellant, handed up in the trial court as Exhibit "**C**", Dr. Lucille Meyer, who appears to be the Chief Executive Officer of Chrysalis confirmed that the appellant attended the programme from 12 January 2019 to 6 April 2019. She states that Chrysalis is a youth

development organization as well as a social crime prevention initiative, who empower young people to take responsibility for their personal growth. She states further that the appellant's behaviour was positive during his time there and he was a good-natured young man always open to supporting and motivating his peers. A further mitigating factor is that other than the bruises and abrasions on her neck, no physical injury was caused to the complainant other than the physical injuries inherent in the offence.

25. In a pre-sentencing report prepared by the Department of Social Development, dated 21 October 2019 (the same date that the appellant had been sentenced by the trial court), it was recommended that a sentence of correctional supervision would be appropriate in the present matter, although reference is made to section 276(1)(i), and not section 276(1)(h) of the Criminal Procedure Act.

26. Having regard to all of the above, I am of the view that a sentence of 8 years imprisonment would be appropriate.

27. In the result, the following order is made:

i. The appeal against the conviction on count 2 is dismissed.
ii. The appeal against the conviction on count 1 is upheld and the conviction is set aside.
iii. The appeal against the sentence of 15 years imprisonment is upheld.

iv. The sentence imposed upon the appellant on 21 October 2019 is set aside and replaced with the following:

> "***The accused is sentenced to 8 years imprisonment, antedated, in terms of section 282 of the Criminal Procedure Act, to 21 October 2019***".

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NEL AJ

I agree and it is so ordered.

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FORTUIN J