IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: **A112/21**

In the appeal between:

ALBRO MCLEAN **APPELLANT**

And

THE STATE **RESPONDENT**

JUDGMENT DELIVERED AND SUBMITTED ELECTRONICALLY ON 12 AUGUST 2021

GOLIATH DJP

[1] The appellant was convicted in Wynberg Regional Court on one count of the contravention of Section 3 read with sections 1, 55, 56(1), 57, 58, 59, 60 and 61 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. It was alleged that the appellant committed this offence on 28 August 2017 at Seawinds, by unlawfully and intentionally raping the complainant.

[2] Aware of the applicable Minimum Sentence Legislation, the appellant pleaded not guilty, but subsequently changed the plea after conclusion of the evidence of the complainant by making admissions in terms of Section 220 of the Criminal Procedure Act, whereby he admitted that he had sexual intercourse with the complainant without her consent on the relevant date. The appellant apologized to the complainant for

having to testify, and expressed his regret for the incident.

[3] The accused was also charged with assault with the intent to cause grievous bodily harm. Consequently , after the appellant had made admissions admitting he had raped the complainant, the State continued to lead evidence in respect of the count of assault. However, during his testimony, he later denied the charges. It therefore became apparent that the appellant contradicted and retracted the section 220 admissions and denied culpability in respect of the charges. On 16 February 2021, the Court convicted the appellant on the count of rape and sentenced him to life imprisonment. He was acquitted on the charge of assault. It was ordered that the appellant's particulars be included in the National Register for Sexual Offenders. The appellant exercised his automatic right of appeal against sentence only.

[4] The appellant and the complainant are long-standing neighbours. The complainant indicated that she had known the appellant since her childhood. The complainant was 21 years old at the time of the incident and the appellant was 41 years old. She testified that on 28 August 2017 she received a call from her neighbour, L[....], who had enquired about the appellant's sister's whereabouts. She subsequently went for a walk and saw the appellant's sister, M[....], on their stoep. She approached M[....] and informed her that L[....] was looking for her. The appellant arrived at the scene and told her that she should not stand outside the gate. He invited her in and she proceeded to sit on the stoep and smoked a cigarette. At some stage, M[....] invited her into the house, and she proceeded to the lounge. While

sitting on the couch, the appellant appeared. At some stage, M[....] disappeared and she enquired from the appellant as to the whereabouts of M[....]. He informed her that the latter had left to visit a friend.

[5] When the appellant's sister failed to return, she decided to leave. The appellant suddenly became aggressive and pushed her in order to prevent her from leaving the house. He threw her on the bed and said *"he could make her* a *woman".* He started to assault her. She testified that the appellant executed a physical attack on her by continuously hitting her, and punching her in the face several times. He held his hand over her mouth while assaulting her. He also smothered her with a pillow over her face and she became dizzy. Thereafter he had sexual intercourse with her without her permission. After the incident, she went home. She was crying, and her mother came to investigate why she was upset. She informed her mother what had happened, and her mother contacted the police.

[6] She explained that she was not a close friend of M[....] and rarely visited her neighbours. The main reason she went to the appellant's residence was because she wanted to relay L[....]'s message to M[....]. She trusted the appellant and considered him as an older brother. She testified that during her ordeal she had indicated to him that she was a lesbian , but he persisted with the attack on her. The complainant indicated that she had conveyed her sexual orientation to her family at a young age and they had accepted it. According to the complainant, the appellant was aware of her sexual orientation prior to the incident.

[7] The complainant received medical treatment at Victoria Hospital. Nodikozelo Patience Ntwana, a forensic assault nurse examiner at the hospital, testified that she examined the complainant on 29 August 2017 and completed a J88 report. In her report, she noted that the complainant was crying and very emotional. She observed injuries on the complainant namely, swelling on the upper and lower lip, and swelling on the left jaw. There was no clinical evidence of drugs or alcohol. She concluded that a high degree of force was applied to the lip and jaw area to sustain the relevant injuries. There were no other visible injuries.

[8] During her testimony, it was apparent that the complainant was traumatized by having to relate and relive the events that had transpired. The matter had to be postponed on the first day of the hearing due to her emotional state. A victim impact report was obtained relating to the complainant. The report concluded that as a result of the incident, she experienced nightmares, flashbacks, has difficulty trusting males, and has become introverted. She has regular emotional breakdowns and episodes of rage, which are uncharacteristic. The complainant also experienced constant feelings of fear and isolation, and her sense of security was violated. The complainant reported that the acts of the appellant have broken her as a person and she finds daily life extremely difficult to navigate. The medical examination and HIV testing that she had to be subjected to caused further trauma.

[9] The complainant also experienced suicidal ideation and attempted to commit suicide. Subsequent to the suicide attempt, she has engaged in self-harm due to

continued negative thoughts. Apparently, members of the community were aware of the incident and many passed negative remarks. Some members pressurized her to withdraw the case, and threatened to harm her if she does not comply. This further contributed to her inclination to withdraw from society. It is clear from the report that the incident had a significant impact on her normal physical, psychological and emotional well-being, as well as her cognitive behaviour and interpersonal relationships.

[10] A probation officer's report was also obtained relating to the appellant dated 12 February 2021. The personal circumstances of the appellant were set out in detail in the report. At the time of the trial, the appellant was 45 years old. He grew up in a disadvantaged community and completed grade 9 at school. He was unmarried and has three children with different women. The appellant worked from time to time, the longest period being four and a half years as a cleaner. The appellant conceded that he was addicted to drugs, and his drug of choice was crystal meth also known as "Tik". It appears that he was under the influence of mandrax at the time of the incident. It is significant that the appellant, when consulting with the probation officer, denied that he had raped the complainant as he had previously admitted.

[11] The appellant had numerous previous convictions committed as from 1992 to 2012 with crimes ranging from drug related offences, various instances of theft, housebreakings with intent to steal and theft, as well as robbery. The court emphasized the previous conviction in 2015, where the appellant was found guilty of

committing an act of sexual penetration with a minor. He was sentenced to 5 years imprisonment, suspended for a period of 5 years on certain conditions. The offence in this matter was committed during the period of suspension. Clearly, the suspended sentence and opportunity to rehabilitate himself did not deter the appellant from committing another sexual offence. The court correctly found that as time progressed, the offences committed by the appellant became more serious.

[12] Counsel on behalf of the appellant argued the case is significantly less serious than the cases ordinarily encountered by the court and, having regard to the various graduations of seriousness of the offence, the sentence is disproportionate to the offence. Counsel therefore submitted that the court overemphasized the seriousness of the offence at the expense of the personal circumstances of the appellant. Counsel further argued that the court had failed to attach sufficient weight to the substantial factors placed on record, including those factors mentioned in the probation officer's report. Counsel on behalf of the State contended that the court had due regard to all the relevant factors, that there was no disproportionality in the sentence imposed, and that there are no grounds to interfere with the sentence. The State emphasized that the circumstances of the case involved the phenomenon known as *"corrective rape"* where a victim is targeted out of prejudice against her sexual orientation. The State reminded the court that this particular crime is more complex than a mere breaking of the law.

[13] The Magistrate gave a very detailed judgment dealing with all aspects relating

to sentence in the matter before court. The personal circumstances of the appellant were assessed and taken account of, as well as the factors relating to the crime and the effect of the crime on the victim. The latter are aggravating factors to be given appropriate weight in consideration of the sentence. The court also considered the fact that the appellant had been incarcerated for approximately three years at the time of sentencing. The Magistrate dealt with the contradictions in the version of the appellant, who subsequently made admissions and admitted that he had raped the complainant. The Magistrate pointed out that the appellant disputed the complainant's version during her testimony, then admitted culpability for a short time, then again denied it during the course of the trial.

[14] It is evident that notwithstanding the DNA evidence, the appellant persisted that no sexual intercourse took place and the complainant had to endure humiliating accusations regarding being a drug addict, a liar and jealous of his relationship with his girlfriend. It is therefore evident that the court cannot be blamed for being skeptical about the accused's remorse for his actions. The court found that the appellant lacked empathy and showed no remorse for his actions. There is no doubt from his testimony during the trial and the probation officer's report that the appellant showed no remorse.

[15] It is a trite principle of our law and it has repeatedly been stressed by our courts, that the imposition of sentence falls pre-eminently within the discretion of a trial court. The powers of the court of appeal are relatively limited to those instances where the sentence is vitiated by misdirection or where the sentence imposed is

startlingly inappropriate and induces a sense of shock or where there is a striking disparity between the sentence imposed, and that which a court of appeal would impose. It has become an established principle since the advent of the Criminal Law Amendment Act 105 of 1997 that the sentences specified in the Act are not to be departed from lightly or for flimsy reasons, and speculative hypotheses favorable to the offender, undue sympathy or an aversion to long-term imprisonment are excluded. The existence of substantial and compelling circumstances means that there has to be *"truly convincing reasons"* to depart from the imposition of a prescribed minimum sentence. (See: **S v Malgas** 2001(1) SACR 469 (SCA).

[16] The aggravating features of the crime are overwhelming. The appellant was in a position of trust as her neighbour and flagrantly abused that trust. He opportunistically launched a vicious attack on the complainant who fortuitously visited his residence to deliver a message to his sister. Although the physical injuries in general were not life threatening, the act of placing a pillow on her face mirrors his intention to lower her defences and force her into submission. The mere fact that she became dizzy is indicative of the extent of the force used, which just falls short of asphyxiation. The manner in which he had executed the attack on the complainant was cruel and degrading. The appellant was aware of the sexual orientation of the complainant and indicated to her that he intended to *"make her* a *woman"* in the belief that rape can cure or correct her sexual orientation. Ultimately, corrective rape constitutes a hate crime, and is endemic in our country. Courts should send out a clear message that these type of attacks would not be tolerated. The complainant was severely traumatized by the incident, which was still evident when she testified in

court three years after the incident.

[17] The Magistrate's assessment and conclusions cannot be faulted. No aspects relating to sentence were not considered by the Magistrate, who found, in due course, that there were no substantial and compelling circumstances to deviate from the prescribed minimum sentence of life imprisonment. The Magistrate in my view mentioned all the relevant mitigating and aggravating circumstances and I am unable to find that the sentence imposed was the result of a material misdirection or induces a sense of shock, or that *the* sentence is totally out of proportion to the gravity or magnitude of the offence, or that the sentence is grossly excessive. I am satisfied that on a consideration of all relevant factors cumulatively, there are no substantial and compelling circumstances to justify an interference with the sentence imposed.

[18] In the result the following order is *made:*

The appeal against sentence is dismissed.

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GOLIATH, DJP

DEPUTY JUDGE PRESIDENT

I agree.

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PANGARKER , AJ

ACTING JUDGE OF THE HIGH COURT