OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

THE JUDICIARY

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

CASE No: A08/2020

In the matter between:

DENZIL CLINTON KING Appellant

and

THE STATE Respondent

JUDGMENT DELIVERED ON: 10 MAY 2021

Salie, AJ

INTRODUCTION:

[1] The appellant was arraigned in the regional circuit court, Oudtshoorn, on one count of rape and two counts of sexual assault. The charges are set out hereinbelow.

THE CHARGE OF RAPE:

[2] The appellant was charged with contravening section 3, read with the provisions of sections 1, 55, 56(1), 57, 58, 59, 60 and 61 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, No. 32 of 2007, read with sections 92(2), 94, 256, 257 and 281 of the Criminal Procedure Act, No. 51 of 1977, read with the provisions of sections 5(1) and/or (2)(b) and Schedule 2 of the Criminal Law Amendment Act, No. 105 of 1997, as amended:

a. that, on or about 21 April 2016 and at or near the sick bay of the South African National Defence Force ("SANDF"), Oudtshoorn, in the Regional Division of the Western Cape, the appellant unlawfully and intentionally committed an act of sexual penetration with the complainant, one G[....] D[....] D[....], (then 21 years old) by inserting his fingers into the complainant's vagina, without her consent.

THE SEXUAL ASSAULT CHARGES:

[3] The appellant was charged with two counts of contravening section 5(1), read with the provisions of section 1, 56(1), 57, 58, 59, 60 and 61

of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, No. 32 of 2007, read with sections 92(2) and 94 of the Criminal Procedure Act, No. 51 of 1977, as amended:

a. In that on or about 8 April 2016 and at or near the SANDF premises, Oudtshoorn, in the Regional Division of the Western Cape, the appellant unlawfully and intentionally sexually violated the complainant, namely, T[....] N[....], by rubbing her vagina without the consent of the complainant.

b. In that on or about 18 April 2016 and at or near the SANDF Oudtshoorn, in the Regional Division of the Western Cape, the appellant unlawfully and intentionally sexually violated the complainant, to wit, T[....] N[....], by rubbing her vagina without the consent of the complainant.

[4] The appellant preferred not to disclose the basis of his defence pursuant to section 115 of the Criminal Procedure Act No. 51 of 1977 (“CPA”).

[5] Following the evidence led by both the State and the defence:

a. the appellant was convicted on 28 May 2018 on all three counts;

b. on 28 June 2018; the appellant was sentenced to;

(i) eight (8) years' imprisonment on count one (1);

(ii) three years' imprisonment on count two (2), which the court a *quo* ordered to run concurrently with the sentence imposed on count one (1);

(iii) three years' imprisonment on count three (3), of which eighteen (18) months was ordered to run concurrently with the sentence imposed on count one (1).

[6] The appellant was furthermore declared unfit to possess a firearm, pursuant to the provisions of section 103(1) of the Firearms Control Act, No. 60 of 2000.

[7] The aforementioned offences were alleged to have occurred whilst the appellant was employed as a medical doctor, and the complainants as recruits in the service of the SANDF.

THE ISSUES ON APPEAL:

[8] It was submitted on behalf of the appellant that the court *a quo* erred in the following respects:

a. in failing to find that on a totality of the evidence, the State failed to prove its case against the appellant beyond reasonable doubt;

b. in failing to find that the complainants' evidence was credible, reliable and satisfactory in all material respects;

c. in failing to apply the cautionary approach in the evaluation of the evidence of both complainants.

[9] We shall contextualise the evidence of both complainants briefly, in order to determine whether any of the criticism levelled against the appellant's conviction and sentence, justifies upsetting the findings of the court *a quo*.

The evidence of D[....] D[....] G[....] ("the first complainant"):

[10] She testified that at the relevant time she was a 21-year-old recruit and on 21 April 2016 attended at the sick bay for a medical examination of her ear.

[11] Having briefly examined first complainant, the appellant enquired whether the complainant had any further medical concerns. She answered that she had previously sustained a knee injury. She was also asked by the appellant if she had a groin injury, to which she responded in the negative.

[12] The appellant then requested the complainant to remove her tights and panties and conducted an internal vaginal examination, without her consent, by inserting his two fingers into her vagina.

[13] The first complainant asked the appellant to stop inserting his fingers into her vagina, which he did. He thereafter proceeded to touch and massage her breasts without her consent.

[14] The appellant furthermore provided her with a certificate wherein he prescribed that the first complainant was restricted to light duties work only.

[15] In cross-examination it was not disputed that the appellant had conducted a vaginal examination by inserting his fingers into the first complainant's vagina, however, it was alleged that the first complainant had consented to the examination as she had complained of vaginal discharge. The first complainant vehemently refuted this suggestion.

[16] It was contended on behalf of the appellant that the mere fact that the first complainant had returned to collect the knee guard which the appellant had prescribed, showed that she had consented to the internal examination and was not afraid of the appellant. This contention can swiftly be dealt with, in that the first complainant clearly stated that she had been accompanied by another person to ensure her personal safety when she returned for the collection of the knee guard. Her testimony in this regard was as follows: "*Ek het een van my medekollegas gevra Edelagbare om saam met my te gaan. Ons was toe na die dokter toe Edelagbare maar toe ons daar kom Edelagbare by die dokter toe sien ek die dokter het 'n ander pasient*

nou daar. Ek het toe die knee cap gaan haal Edelagbare en ek het toe geloop." This evidence was not contested.[1]

[17] It was also suggested in cross-examination, although not vigorously pursued in argument, that the first complainant had falsely implicated the appellant because he had not booked her off sick from work as follows: "*Ek gaan dit verder aan u stel om aan te beweeg dat die rede hoekom u sê die dokter die beskuldigde, het nie toestemming gehad en dat u die, als ontken van die discharge en die toestemming om u te ondersoek is dat omdat die dokter u nie af siek wou boek nie.*" To which she responded as follows: "*Dit is nie so nie Edelagbare.*"[2]

[18] It was furthermore contended that the first complainant had not cried out for help whilst the internal examination was conducted by the appellant. This contention too can be disposed. The first complainant's evidence supported her assertion that she had trusted the appellant whilst the examination occurred without her consent. Her brief testimony was as follows: "***…*** *en tydens daardie tyd het ek vir hom vertrou en ek het geglo Edelagbare hy doen wat hy weet omdat hy nou die dokter is.*"[3]

[19] The first complainant was questioned further: "*Nou hoekom het jy nie opgespring en uitgehardloop nie.*" to which she responded: "*U edele,*

[1] Record, Vol 1, p 29 (5 – 10) – 20 - 25
[2] Record, Vol 1, p 70 (1 – 5; 15)
[3] Record, Vol 1, p 65 (18 – 20)

ek weet mos nie, ek was nie seker wat hy gedoen het, Edelagbare, dit is hoekom ek hom gestop het."[4]

[20] The State called Innocent Maswangani, the first complainant's supervisor who testified that on 22 April 2016, (the day after the medical examination) the first complainant reported to her the alleged vaginal penetration and sexual assault committed by the appellant. She, in turn, informed her immediate superior, whereupon arrangements were made to lay a charge with the South African Police Services.

THE EVIDENCE OF T[....] N[....] ("THE SECOND COMPLAINANT"):

[21] The second complainant testified that she had attended at the sick bay on 8 and 18 April 2016. The reason for her first attendance at the doctor's rooms, was as a result of her having suffered a pubic rami fracture. She complained of pain in the groin. She too was requested to remove her clothing and to lie down on the examination table.

[22] Whilst examining her groin, the appellant proceeded to rub her vagina. He told her that that was the only way to cure her pain. Despite a knock at the door of the examination room, the appellant continued rubbing her vagina and only once there was a third knock at the door,

[4] Record, Vol 1, p 66 (20 – 25)

did the appellant stop. He provided the second complainant with a prescription for a scan and she returned the scan disc to the appellant.

[23] On 18 April 2016, the second complainant returned to the appellant's rooms for further examination of her groin injury. Again the appellant rubbed her vagina. Oddly, he requested her to lay on her stomach and started rubbing her buttocks.

[24] The second complainant was cross-examined at length on both counts. It was denied that the appellant had rubbed the second complainant's vagina.

[25] It was put to the second complainant that, in examining her groin, the appellant had only touched her pubic hair. This she strongly denied. She maintained that the appellant had touched her vagina. In this regard she testified as follows: "*That is why I am complaining rubbing … rubbing with his hands if I may correct it.*"[5] It is worth quoting the evidence of the second complainant in this regard: "*Your question is correct, but the problem is that when I went to the doctor, I went to complain about my groin, not him putting his fingers, his hand on my vagina. That is why I am complaining.*"[6]

[26] She explained that she had not called out for help because the appellant had told her that if he rubbed her vagina she would feel better.

[5] Record, Vols 1 &2, p 103
[6] Record, Vols 1 &2, p 103 (8 – 11)

Her evidence was: "*I did not scream because he told me that if he rubs I am going to feel better and I trusted him because he is a doctor.*"[7]

[27] When asked why she had returned on 18 April 2016 for a second examination, she unequivocally testified that she had trusted the doctor and that she attended the appellant's rooms for a medical examination although she had doubts whether to return. She replied unequivocally as follows: "*By that time. … I went back with my doubts because I wanted help. I did not judge him.*"[8]

[28] It was put to the second complainant that a possible motive for her laying a false charge was because he had not given her extended leave and she was asked: "*You were not happy about the five or six days now that you were given on that sick note*", to which she responded as follows: "*That is a lie.*"[9]

[29] The state further called E[....] M[....] who confirmed that the second complainant shortly after the second incident had reported to her the appellant's sexual alleged misconduct.

[30] The state finally called Doctor Charlton Andrew Dreyer who examined both complainants and completed the J88 medical reports. The most pertinent aspect of Dr Dreyer's evidence was that he did not find any

[7] Record, Vols 1 &2, p 108 (10 – 12)
[8] Record, Vols 1 &2, p 112 (18 – 19)
[9] Record, Vols 1 &2, p 128 (22 – 25)

vaginal discharge in respect of the first complainant, contrary to the version put to the complainant.

THE CONTENTION THAT THE COURT A QUO HAD NOT APPLIED THE NECESSARY CAUTION:

[31] Where there is an allegation of sexual misconduct and the complainant is a single witness, the courts have developed a rule of practice that requires the evidence of a single witness to be approached with caution.[10]

[32] An accused may of course be convicted of an offence on the evidence of a single competent witness [11] and the exercise of caution in evaluating such evidence must not be allowed to displace the exercise of common sense.[12]

[33] Inasmuch as the cautionary rule in rape cases has been abolished in *S v Jackson*,[13] the trial court was required to evaluate the evidence of both complainants with the necessary caution.

[10] *Viveiros v S* [2000] 2 All SA 86 (A)
[11] See the provisions of Section 208 of the Criminal Procedure Act 51 of 1977 (as amended)
[12] *S v Artman* 1968 (3) SA 339A at 341B-C
[13] 1998 (1) SACR 470 (SCA)

[34] We have carefully considered the evidence and are satisfied that the trial court had properly considered the evidence (*ex facie* the record) and find no improbabilities in respect of the versions proffered by both complainants. We can find no reason why the complainants would falsely implicate the appellant. So much was conceded by the appellant's counsel in argument.

[35] Both complainants gave simple, logical and consistent accounts of the horror they had experienced at the hand of the appellant and no material contradictions were elicited. In addition hereto, neither complainant strayed from their core evidence that the appellant had, respectively, sexually penetrated the first complainant and sexually assaulted the second complainant.

[36] During argument, appellant's counsel, correctly in our view, conceded that there was no manifest reason why both complainants would falsely implicate the appellant. They were previously unknown to each other and met only after their complaints had been reported. In a real way, the correspondence between their experiences testified to a *modus operandi* of the appellant. If anything is certain, this feature of their evidence strengthens the state's case.

[37] We are accordingly satisfied that the court *a quo* had applied the necessary caution in evaluating the evidence of both complainants in view of the totality of the evidence.

THE COURT A QUO'S FINDINGS:

[38] In evaluating the evidence, both the probabilities and improbabilities are to be carefully considered. This issue was considered in *S v Chabalala 2003 (1) SACR 134 (SCA)* at para [15] where Heher AJA (as he then was) held:

"The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt."

[39] The court *a quo* correctly concluded that a court had to view the evidence in its totality, and it is worth quoting the relevant portion of the judgment:

"*Die hof moet oorweeg ten einde te kan beslis of al die besondere voorvereistes ten opsigte van die misdrywe wat hier te sprake is aanwesig is of nie en of die skuld van die beskuldigde bo redelike twyfel bewys is of nie. Hierdie hof se benadering is om na al die feite van die saak te kyk en dan te besluit of die totaliteit van die getuienis of 'n afleiding van skuld gemaak kan word.*"[14]

[14] Record, Vol 5, p 519

[40] Further, the court *a quo* cannot be faulted for accepting the evidence of the second complainant on charges 2 and 3 when it concluded that the second complainant's evidence was reliable and trustworthy.[15]

[41] The court *a quo*, in our view, justifiably rejected the appellant's suggestion that the first complainant had a motive, that being because he did not book her off on sick leave. It concluded as follows:

"*Hierdie motief kan nie opgaan nie om so 'n ernstige klagte teen die dokter aanhangig te maak net omdat die dokter haar nie af siek boek nie laat 'n verdure groot bevraagteken van geloofwaardigheid van die beskuldigde se weergawe. Dit is duidelik dat die beskuldigde weergaan sy weergawe aanpas selfs vir hierdie aspek van die afboek.*"[16]

[42] In relation to the credibility of the appellant, the court *a quo* concluded as follows:

"*Die hof was nie beindruk met die beskuldigde se verduideliking met betrekking tot hoe hy te werk sou gegaan het en dat die slagoffer vir hom sou toestemming gegee het en die motief wat die slagoffer sou gegee het om hom falslik te beskuldig nie****.***"[17]

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[15] Record, Vol 5, p 550 - 551
[16] Record, Vol 5, p 533 (10 – 20)
[17] Record, Vol 5, p 537

[43] The court *a quo*, in our view, justifiably in view of the totality of the evidence, rejected appellant's version in relation to all charges as false beyond reasonable doubt.[18]

[44] We are accordingly of the view that the court *a quo* correctly found the appellant guilty on all charges.

AD SENTENCE:

ARE THE SENTENCES IMPOSED DISPROPORTIONATE – HAVING CONSIDERED ALL THE RELEVANT CIRCUMSTANCES OF THIS CASE?

[45] In *S v Vilakazi* 2009 (1) SACR 552 (SCA), a leading case dealing with rape and the consequences thereof, Nugent JA expounds on the imposition of the minimum sentencing provisions, as follows:

"*[15] 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 the particular case, whether the prescribed sentence is indeed proportionate to the particular offence.*" (emphasis added)

[46] The appellant's counsel contended that the court *a quo* had imposed a harsh sentence, and had not considered an alternative shorter term of imprisonment, given the personal circumstances of the appellant as

[18] Record, Vol 5, p 551 (1 – 5)

contained in the correctional services report; as well as the content of the victim assessment reports.

[47] The appellant's counsel contended that all three counts should reflect an effective sentence of direct imprisonment of between four to five years.

[48] Counsel for the state contended that in the event of the court considering reducing the sentence imposed, that an effective term of imprisonment of six years be imposed in respect of all the counts. This manifested a concession rightly made in our view that the effective sentence imposed was markedly too heavy and merited interference.

[49] Sentencing is pre-eminently a matter for the discretion of the court *a quo*.[19]

[50] Where the court *a quo* has failed to exercise its discretion properly, judicially, or at all, and thereby committing a material misdirection, an appeal court will be at liberty to interfere with the sentence. Where the sentence imposed by the trial court, differs markedly from that which the appellate court considers appropriate, a misdirected exercise by the trial court is necessarily implied.

[19] *S v Pillay* 1977 (4) SA 531 (A) at 534H-535A; *S v Fazzie* 1964 (4) SA 673 (A)

[51] Whilst it is so that sentences imposed must be commensurate with the offence, the personal circumstances of the offender and the interests of society, it ought to be blended with a measure of mercy.[20]

[52] However, the crimes committed by the appellant are serious and ought to reflect in the sentences imposed by courts. Society must be protected against unethical behaviour on the part of the medical practitioners who repose their trust in medical practitioners when examined. "*Patients must be able to trust that practitioners will work only for their welfare. Sexual involvement with a patient could affect the practitioner's medical judgment and thereby harm the patient. Sexual relationships between patients and practitioners are considered unethical and a form of professional misconduct by most professional councils, including the HPSCA. Because of the unequal power relationship and the dependence of the patient on the practitioner, even a consenting sexual relationship does not relieve the practitioner of its ethical prohibition*."[21]

[53] Having considered the correctional services' report; the appellant's potential to rehabilitate within the community; and the victim impact statements of the two complainants, we are nonetheless of the view that the sentence imposed by the court *a quo* ought to be tempered.

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[20] S v Nkomo (158/2016) [2018] ZAGPJHC 47 (22 March 2018)

[21] Professionalism and the intimate examination – are chaperones the answer? Ames Dhai, Jillian Gardner, Yolande Guidozzi, Graham Howarth, Merryll Vorster *et al* (an article attached to the Respondent's Heads of Argument)

[54] The sentences should nonetheless reflect the interests of society and the heinous nature of the crimes committed by the appellant. The appellant has no doubt suffered the humiliation that he would be barred by the Health Professionals Council practising as a medical doctor in the foreseeable future and this factor ought to be taken into account in considering an appropriate sentence. We accordingly make the following order:

ORDER:

1. The appeal against the appellant's convictions is dismissed;
2. The appeal against the sentences imposed therefor is upheld to the extent set out in paragraph (3) herein below;
3. The sentences imposed by the trial court are set aside, and substituted with the following. The appellant is sentenced to:

    3.1 **Six (6) years** imprisonment on **count one (1)**;

    3.2 **Three (3) years** imprisonment on **count two (2)**;

    3.3 **Three (3) years** imprisonment on **count (3)**.

4. The sentences imposed in respect of **count two (2)** and **three (3)** shall serve concurrently with the sentence imposed on **count one (1)**;

5. The sentences imposed in terms of 3.1; 3.2 and 3.3 herein above, are backdated pursuant to the provisions of s 282 of the CPA, to 28 June 2018.

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M SALIE
ACTING JUDGE OF THE HIGH COURT

I agree, and so ordered.

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A G BINNS-WARD
JUDGE OF THE HIGH COURT

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Heard on:

Friday, 23 April 2021