

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

Case no.: A10/23

In the matter between:

OWEN DAVIDS

Appellant

and

THE STATE

Respondent

Coram: V C Saldanha J *et* P S van Zyl AJ

Heard: 10 March 2023

Delivered: 10 March 2023

JUDGMENT

SALDANHA J:

[1] This appeal arises in the context of a domestic relationship. The appellant was convicted in the Paarl Regional Court on a count of rape of Ms S.C., a thirty-one year old woman. He was sentenced to a period of fifteen years' imprisonment. Leave to appeal against both the conviction and sentence was refused by the Regional Court but granted on petition to this division of the High Court.

[2] The charge arises out of an incident on 25 March 2021 when, at No. [...] K[...] Town, Paarl East, the appellant unlawfully and intentionally sexually penetrated the vagina of the complainant with his penis without her consent. The charge sheet recorded that the provisions of section 51 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 (“the minimum sentence legislation”) were applicable.

[3] The appellant was legally represented throughout the trial. He pleaded not guilty to the charge and elected not to disclose the basis of his defence at the outset. The State called the evidence of the complainant and a police officer, Captain Hannelie Yolanda Smith of the Paarl East police station, to whom the complainant had made the first report about the incident. A report on the medico-legal examination conducted on the complainant by Dr Rebecca Cronje, a registered medical practitioner, on 25 March 2021 at approximately 21h55 at the Paarl Hospital, was handed in with the consent of the defence. The appellant testified in his own defence and called no other witnesses.

[4] The appellant and the complainant had previously been in a relationship for a period of nine years, in the course of which two minor children were born. At the time of the trial the children were respectively three and five years old. The complainant had four other children from other relationships.

[5] The complainant claimed that, at the time of the incident, she had no longer been in an intimate sexual relationship with the appellant because of his repeated physical and emotional abuse of her, albeit that they from time to time shared the same residence with the children. The appellant, however, denied that their intimate relationship had been terminated by the complainant. He further denied that he had ever abused her and moreover denied that, on the day of the incident, he had had sexual intercourse with her.

[6] In his grounds of appeal, the appellant contended as regards the conviction that the Regional Court misdirected itself by, amongst others, accepting the version of the complainant, a single witness, against that of the appellant. He contended that the two

versions were mutually destructive and that he was entitled to the benefit of a reasonable doubt. The appellant also submitted that the Regional Court had failed to exercise the necessary caution in considering the evidence of the complainant, as a single witness. He moreover contended that the evidence of the medical doctor as reflected in the J88 form contradicted that of the complainant in material respects. The appellant also argued that the Regional Court had failed in its duty by not calling other witnesses.

[7] In respect of the sentence imposed, the appellant contended that the Regional Court had failed to inform him of the applicable provisions of the minimum sentence legislation when he pleaded. He also contended that the magistrate failed properly to take into account his personal circumstances and that he was a good candidate for rehabilitation. He argued that the Regional Court had over-emphasised the prevalence of the offence. He submitted that the sentence was disproportionate and induced a sense of shock.

[8] In its judgment on conviction, the Regional Court comprehensively set out the evidence of all of the witnesses. For the purposes of this judgment the evidence is no more than briefly stated. The complainant testified that, on the morning of the incident, at her residence and at approximately 09h00, she was still asleep and lying on her side when she felt someone inserting his penis into her vagina from behind. She claimed that she was alerted to the penetration because the person held her very tight from behind and had pressed his hand against a large cyst on her arm. She identified the person as the appellant with whom she had previously been in a relationship. She explained that she had terminated the relationship with him as a result of his physical and emotional abuse of her over a lengthy period. They nonetheless shared her residence. She recalled that he had slept on the couch in the living room the night before. When she was awakened she felt that the appellant had inserted his penis into her vagina. She immediately said to him “*no, Owen you know I do not want to sleep with you, because you are abusing me every day*”. He ignored her and carried on. She cried. When he ejaculated into her, he tightened his hold around her. He then got up and left.

[9] The complainant testified that the cyst on her arm pained and she cried herself to sleep again. She also described that her panties had been drawn down to her knees, presumably by the appellant, as she recalled that when she had gone to sleep the night before she had pulled them up to her waist. She said that she had slept right through the night as she was tired. She explained that, as a result of the abuse that she had suffered at the hands of the appellant, she had developed an extreme hatred towards him and that her life had been reduced to much unhappiness and tears. When she told him that she did not want to continue with their relationship he refused to accept it and, despite the house in which she lived being divided to enable him to live in his own space, he regularly occupied hers.

[10] Later that afternoon the complainant reported the sexual assault at the Paarl police station to an officer whose details she was not able to recall. She also described an incident that had taken place at the house between her and the appellant that very afternoon, and that led to her threatening him with a knife. This had occurred prior to her going to the police station. When she eventually got out of bed that afternoon she found the appellant and a friend of his, a Mr Mapoli, smoking tik in her house. She remonstrated with him for doing so. In response he stabbed her with a small screwdriver on her upper thigh and threw a brick at her which also struck her on her upper right thigh. She testified that there was no more than a scratch mark on her thigh and the area struck by the brick turned blue. When she confronted the appellant about his use of tik in her house he rebuffed her and told her that she could not tell him what to do.

[11] Later, consumed with anger and hatred for the appellant for what he had done, the complainant took a knife and went in search of him to stab him. She found him at Mr Mapoli's place. She said that she could not get herself to stab the appellant because of the presence of their young son. She left but, before doing so, the appellant threatened that he would stab her in her "*mother's thing*". She went home and wrapped the knife in a jersey. Then she went to the police station and reported the rape incident to the police. She claimed to have handed the knife over to the police officer who attended to

her. She waited for some time at the police station before she was taken to the hospital where she was examined. She was thereafter taken by the police to her house where the appellant was arrested.

[12] She testified that the appellant had on a previous occasion also had sexual intercourse with her without her consent. As a result of the repeated assaults and abuse, together with the sexual assault on her that morning, she had reached her tipping point. Her desperation caused her to resort to taking a knife in anger to use on the appellant, and then reporting the incident of that morning to the police.

[13] In cross-examination it was put to the complainant that she had been in the company of the appellant's sister and the latter's boyfriend when she confronted the appellant and Mr Mapoli about smoking on her premises. The appellant claimed that the complainant had wanted to smoke tik with them but he refused as she had already smoked tik earlier with his sister. The complainant emphatically denied this. She explained that the appellant's sister, who was present together with her boyfriend, wanted to intervene but that the appellant instructed them to leave the scene and not to interfere.

[14] The appellant thereafter stabbed her with the screwdriver and threw the brick at her. The complainant admitted that she was a user of dagga but had stopped using tik some time ago. She claimed that she was in the process of rehabilitating from the use of tik as some of her children had been removed from her by social workers attached to Badisa. Those children had been placed in foster care. She said that while the injuries to her upper thigh would have been visible she had not pointed them out to the doctor during the medical examination. She assumed that the doctor would have seen them. She also claimed to have been infected by the appellant with a sexually transmitted disease for which she required medical treatment. She was adamant under cross-examination that she no longer used tik but continued her use of dagga. She explained that her mind had been preoccupied for some time by the appellant's abuse of her and

her ever-increasing hatred of him, but she did not want to have him imprisoned as he was the father of two of her children.

[15] It was put to the complainant during cross-examination that, while the appellant and Mr Mapoli had been smoking, a memory card went missing from the appellant's cellular phone. When the appellant asked her about it later that day she informed him that it could have been removed by Mr Mapoli while he was still there. The appellant claimed that because the complainant would not accompany him to confront Mr Mapoli he threw a small screwdriver at her, but that it had completely missed her. While she admitted having told him that it could have been Mr Mapoli who took his memory card she denied that the appellant had simply thrown a screwdriver at her.

[16] The evidence of Captain Smith related to the report made by the complainant to her about the appellant's sexual assault on her. Captain Smith also corrected her initial statement to reflect that the appellant was alleged to have sexually penetrated the complainant's vagina and not her anus as initially incorrectly recorded. Captain Smith testified that the complainant had not handed a knife to her.

[17] The medical examination report (the J88) by Dr Cronje recorded that the complainant had claimed that she had been forced to have vaginal intercourse with a male on 25 March 2021. In her clinical observations of the complainant, Dr Cronje recorded no injuries. In particular, none were observed in the complainant's genital area other than noting a "*creamy discharge? 'semen'*". In her conclusion Dr Cronje noted that, although there were no injuries, that in itself did not exclude "*a sexual offence.*"

[18] In his testimony, the appellant denied having had sexual intercourse with the complainant on 25 March 2021. He admitted, though, that she had confronted him that day while he and Mr Mapoli had been smoking tik on her premises. He claimed that she had wanted to smoke with them but he flatly refused as he claimed that she had earlier smoked tik with his sister. After Mr Mapoli left, the appellant noticed that the memory

card of his cellular phone was missing. He confronted the complainant about it. She informed him that Mr Mapoli had taken the card. He claimed that he wanted her to accompany him to confront Mr Mapoli. She refused and he thereupon threw a small screwdriver at her, which missed.

[19] The appellant then went to Mr Mapoli to confront him about the memory card. Mr Mapoli had in fact taken the card and upon being confronted, returned it to the appellant. The appellant claimed that, in a passageway near Mr Mapoli's residence, the complainant approached him with a knife and threatened him as follows: "*Jy ek steek jou nou*". He immediately retreated a few paces. She turned around and left. He claimed that he returned home thereafter to apologise to the complainant for having earlier thrown the screwdriver at her. She was not present and he was informed by his son that she had gone to the police station.

[20] In cross-examination the appellant claimed that there were no problems in his relationship with the complainant and that she had no reason to be angry with him. He claimed that on the day in question she got upset with him because he refused to allow her to join him and Mr Mapoli in the smoking of tik. When she later threatened him with a knife near Mr Mapoli's place it was because he had thrown the screwdriver at her. He sought to explain that her conduct was the result of her use of drugs and that she was prone to losing her temper at him for no good reason. He added that she had previously stabbed him.

[21] The appellant claimed that the reason why the complainant resorted to the laying of a false charge of rape against him was to "*spite*" him. She allegedly said as much to him while he was in the police van after his arrest. Later in his cross-examination he added that she had in fact said to him some time before his arrest that she would lay a false charge of rape against him because, if she simply accused him of an assault, the police would not respond and arrest him. He claimed that he had informed his attorney of these threats despite the complainant not having been confronted her about them during her cross-examination. He also claimed that he was a member of the 27s gang

and that the surrounding community did not want him in the area because of his use of drugs.

[22] In considering the evidence, the Regional Court was particularly mindful that it was dealing with the evidence of a single witness and the application of the cautionary rule in the evaluation of the evidence of the complainant. The Regional Court was nonetheless satisfied that the complainant was both a credible and trustworthy witness, that her first report of the incident to the police officer was consistent with her version in court, and that she had withstood a thorough cross-examination and made concessions when confronted about her lifestyle. In particular, she admitted to having used drugs which led to her children being taken into foster care. She also admitted to her ongoing use of dagga. She explained to the Court the anguish she experienced in her relationship with the appellant and the hatred she had increasingly felt for him. Despite that, she had not previously reported the appellant to the police as she did not want him to go to prison because he was the father of two of her children.

[23] The Regional Court was also mindful of the fact that Dr Cronje had not noted any visible injuries on the right thigh of the complainant in her clinical findings, or any other injuries. The Court noted, however, that the complainant had not specifically drawn such injuries to the doctor's attention, as she said that that was not why she had gone for the medical examination. Dr Cronje did point out that the lack of any visible injuries did not indicate an inconsistency with sexual penetration. I should point out, though, that Courts have repeatedly stated that it is preferable for the medical practitioners who conduct and complete the medical reports to be called to testify in matters involving the alleged sexual assault of women and children. Dr Cronje's oral evidence would no doubt have been of assistance to the Court.

[24] The appellant, on the other hand, made a particularly poor impression on the Regional Court. Although there were important parts of his evidence that supported the complainant's version, such as her threatening him with a knife, the missing memory card and Mr Mapoli's role in it, as well as the appellant's possession of the screwdriver,

the Regional Court – correctly, in my view - rejected the appellant’s denial of having sexually violated the complainant on the day. The Regional Court found that his version was highly improbable. It made no sense that, despite his claim that they had for many years maintained a loving relationship, the complainant on 25 March 2021 for no good reason other than the appellant throwing a screwdriver at her (which missed), would lay a charge of rape against him. He subsequently changed that reason to one of “*spite*”. He claimed that the complainant would, likewise, for no good reason confront him with a knife and threaten to stab him.

[25] The magistrate found that the appellant readily adapted his version when under pressure in cross-examination. That exposed him as, as the magistrate put it, a “dismal liar”. She rejected his version as not being reasonably possibly true and found that the State had proved its case beyond reasonable doubt.

[26] It was apparent from the evidence of the complainant, that she had been in an abusive relationship with the appellant for many years. The appellant’s denial of that fact was correctly rejected by the Regional Court. That notwithstanding, and without detracting from the strength of the complainant’s evidence on its own, the State should in my view have obtained a psycho-social report on the circumstances of the complainant, which report would have explained what is often referred to as a complex condition known as “battered wife syndrome.” It appeared from the evidence that the complainant found herself trapped in a relationship of abuse with the appellant. As the mother of his two children, her own dependence on dagga and the intervention of the social workers at Badisa in respect of her children, she was particularly vulnerable to continued abuse and manipulation by the appellant.

[27] Nonetheless, the Regional Court correctly found the complainant to be both a credible and reliable witness. She withstood a thorough and at times tendentious cross-examination on matters not related to the charge. Her evidence was particularly clear and persuasive in depicting the history of the abuse in the relationship between herself and the appellant. She clearly reached the end of her tether on the day of the incident.

She was stripped of her dignity by the unlawful penetration of her vagina by the appellant while she was asleep, and the appellant's further audacious assault on her with a screwdriver and a brick. This culminated in her resorting to taking a knife to stab him. To her credit she had changed her mind just before doing so because of the presence of her minor child. She thereafter immediately went to the police station to report the rape.

[28] The fact that the police officer, Captain Smith, did not confirm the complainant's evidence that she had handed in the knife was of no moment as her evidence prior thereto as to the threat with the knife on the appellant was confirmed by him in his own version. The Regional Court likewise and, in my view, correctly, rejected the appellant's version as not reasonably possibly true. He was a typical opportunistic witness who, when confronted with the inconsistencies in his version, was quite happy to colour in his evidence, especially when it came to why the complainant would have laid a charge against him. His version of her having said to him either when he was in the police van or prior thereto that she would lay a false charge of rape against him out of spite was nothing more than a brazen afterthought, as such an important claim should have been put to the complainant during cross-examination when she testified. This did not occur. Likewise, her alleged previous outbursts against him with threats and a stabbing were not put to the complainant. It is evident from the record that the appellant was a dismal witness, and his testimony and demeanour were indicative of his abusive relationship of the complainant. He was quite happy to cast her in a negative light with reference to her previous use of drugs and the fact that she had lost her children as a result thereof.

[29] There is in my view no merit in the criticism by the appellant of the Regional Court in not having called any further witnesses, such as the appellant's sister or her partner. Such evidence would not have been of any assistance to the Court's evaluation of the complainant's version of the sexual violation that had occurred that morning. Neither would it have been of any assistance to the appellant in his version, for the same reason. The appellant was moreover at liberty to call his own sister as a witness if he had really believed that she could have supported his version and if there was any

truth to it. I am satisfied that the Regional Court had not committed any irregularity in the proceedings or in the evaluation of the evidence. The Court correctly found that the State had proved the charge against the appellant beyond reasonable doubt. I propose to confirm the conviction of rape.

[30] The appellant's contention that the magistrate had failed to point out the provisions of the minimum sentence legislation at the time of the plea is likewise without any merit. The charge as read out into the record specifically referred to the relevant provisions of the minimum sentence legislation. Moreover, the appellant was legally represented at the stage at which he had pleaded, and throughout the trial.

[31] It also appears from the record that prior to the appellant's conviction the magistrate had pointed out to counsel for both the State and the appellant that, if she convicted the appellant of the rape and if no substantial and compelling circumstances were proved, they should be prepared to address the Court on why it should not exercise its discretion in imposing a further period of five years on the prescribed minimum of ten years' sentence on the charge. Both counsel for the appellant and State in fact extensively addressed the court on that issue, replete with references to case law.

[32] In sentence, the magistrate was mindful of the triad of factors to be taken into account, such as the personal circumstances of the appellant, the nature and seriousness of the offence, and the interest of society. The magistrate was also alert to the objectives to be achieved by sentencing, such as rehabilitation, retribution, prevention and deterrence, and that the Court should attempt to strike a balance in achieving an appropriate sentence. The Regional Court was further mindful of the element of mercy which it would be required to display in the totality of the circumstances of the matter.

[33] The appellant, notwithstanding facing a total sentence of 15 years' imprisonment, elected not to lead any evidence in mitigation of sentence. No probation officer's report

was requested by the defence. His legal representative simply addressed the Court, having placed his personal circumstances on record. At the time of sentence the appellant was 26 years old and, although not married, had been in a long-term relationship with the complainant, of which relationship two minor children were born. The appellant had progressed in school to Grade 9. At the time of his arrest he was employed as a carpenter and earned R400 per week that he claimed was used in the maintenance of his family. The appellant, however, was not a first offender. He had two previous convictions: in 2012 and 2018 respectively he had been convicted of offences of which violence was an element. On a count of assault with intent to do grievous bodily harm he was sentenced to a period of six months' imprisonment which was wholly suspended. Likewise, on the second conviction of assault, also with the intent to do grievous bodily harm, he was given the benefit of a sentence in terms of section 276(1)(h) of the Criminal Procedure Act, 1977, to do community service for a period of 36 months.

[34] The state as well as the defence failed to obtain a pre-sentence report on the impact of the sexual assault on the complainant. Our courts have on previous occasions emphasised the importance of such reports in matters of sexual violence. I do so again. Needless to say, the sexual violence suffered by the complainant which was compounded by the abusive relationship she had suffered at the hands of the appellant would have had and will continue to have a long-term and devastating impact on her. The case law is legion on this issue.

[35] In respect of the seriousness of the offence, the Regional Court observed that the complainant was slightly built and remained in a distraught state throughout her testimony in court. The cyst which she claimed was also as a result of the conduct of the appellant was visible right through her clothes and on what appeared to be her thin, tiny arm. She had explained to the Court how her body had been affected by an infection which she claimed to have contracted as a result of the sexual violation of her by the appellant.

[36] The Regional Court appropriately reflected on the prevalence of domestic violence and the rampant abuse of partners at the hands of the other. The Court was appropriately mindful of the interests of society that required of Courts to deal firmly yet fairly with perpetrators of such offences, in particular sexual violence. The Regional Court also commented on the arrogance that the appellant visibly displayed during the sentencing proceedings as indicative of his conduct throughout the trial in his gratuitous attempts at belittling the complainant. He accused her of being a drug addict who had lost her children to foster care, and who was temperamental and prone to assault him without any reason.

[37] In imposing the minimum sentence the Regional Court was guided by the authority of several decisions, in particular the oft-quoted decision of *S v Malgas* 2001 (1) SACR 469 (SCA) where Courts were cautioned against departing from the prescribed sentences for no more than flimsy and fanciful reasons. On the record in the present matter it is apparent that there were simply no substantial and compelling circumstances to have enabled the Regional Court to have deviated from the prescribed minimum sentence.

[38] It is so that the appellant had served eight months awaiting trial. Nonetheless, in my view, the exercise by the Regional Court of its discretion to impose a further period of 5 years in addition to that of the prescribed minimum of 10 years was wholly appropriate. There is no real basis for the appellant to complain that he will not be able to rehabilitate himself while in prison. In my view, given the circumstances of the offence and the brazen conduct of the appellant, he should count himself lucky to have a sentence of only 15 years' imprisonment imposed on him.

[39] This Court notes with concern that no evidence was led about whether the complainant had received any trauma counselling for the ordeal she had suffered at the hands of appellant. The Office of the Director of Public Prosecutions is directed to assist in ensuring that the complainant receives the necessary assessment and counselling as

needed. Counsel for the state, Ms Uys, at the hearing of the appeal, kindly undertook to do so. The Court is indebted to her.

[40] In conclusion, there having been no misdirection by the Regional Court in having imposed the sentence of 15 years' imprisonment on the appellant, I propose to confirm it.

[41] It is ordered that:

i. The appeal on conviction is dismissed.

ii. The appeal on sentence is likewise dismissed and the sentence of 15 years' imprisonment is confirmed.

V C SALDANHA
JUDGE OF THE HIGH COURT

I agree.

P S VAN ZYL
ACTING JUDGE OF THE HIGH COURT