REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Appeal case number: A22/2021

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED.

SIGNATURE

DATE: 8 FEBRUARY 2023

In the matter between:

REWAAN ABDULLAH Appellant

And

THE STATE Respondent

Mabesele J and Mdalana-Mayisela J

J U D G M E N T

MABESELE, J:

[1] The appellant and his co-accused were convicted of two counts of rape, read with section 51(1) of Act 105 of 1997. The appellant was sentenced to imprisonment for life and co-accused to 15 years' imprisonment.

[2] The appellant now appeal against conviction and sentence. He argues that the magistrate did not apply the cautionary rules when he evaluated the evidence of the complainant who was a single witness. With regard to sentence, his argument is that the sentence of life imprisonment imposed on him is inappropriate and does not have sufficient regard to his personal circumstances.

[3] It is common cause that the appellant and co-accused had sexual intercourse with the complainant. The version of the complainant on the one hand is that the appellant and co-accused had sexual intercourse with her, without her consent. The appellant on the other hand contends that the complainant consented to sexual intercourse with him and co-accused.

[4] The complainant was 17 years old. She testified that on 19 March 2017, on Friday, a fundraising function was organised at school. After the function had come to an end, she and her friend, T[...], joined a group of fellow scholars at a park near the school and to entertain themselves with alcohol. T[...] is a daughter of the appellant. The occasion at the park lasted until late that day. Since it was late for T[...] to go home alone, the complainant invited her to spend a night at her home. T[...] agreed and they both went to the complainant's place of residence. T[...] did not go home the following day, on Saturday. Instead, she and the complainant went out and had alcohol with friends until late that day. They again went back to the complainant's home and T[...] spent another night. T[...] was accompanied home by the complainant on Sunday night after she had complained about stomach ache and was given the tablets that made her feel drowsy. On their way to T[...]'s home they met a friend, named P[...], who offered them a lift. After P[...] had parked a vehicle at the passage near T[...]'s home, both T[...] and complainant alighted from the vehicle and entered the house. P[...] waited for the complainant to come back. Inside the house they found the appellant and his friend and were smoking drugs. The appellant asked them why were they coming home late and where they had been. The complainant's response

was that T[...] spent a weekend at her home. The appellant went out of the house and saw P[...] parked next to his yard. P[...] saw him and drove off.

[5] After the appellant had gone back into the house, the complainant informed T[...] that she wanted to go home. It was then agreed that the appellant would accompany her home. She was reluctant to be accompanied by the appellant in the absence of T[...] because he saw the appellant and his friend smoking drugs in the house. However, T[...] assured her that she was in safe hands. After an assurance was given to the complainant she left T[...]'s home with the appellant and co-accused. It was around 23:00. While they were on their way to the complainant's home, they came across a big rock and the appellant sat on it and instructed the complainant not to move any further. The appellant then accused the complainant of bringing T[...] home late and in pain. He then said to the complainant that he wanted her to feel the same pain that T[...] was going through. Subsequently, the appellant took a firearm, pointed same at her and the co-accused told her not to scream. Thereafter the appellant pushed her to the ground. While she was lying on the ground the appellant took off her panty, undress himself, lay on top of her and put his penis into her vagina and made up and down movements. After the appellant had had sexual intercourse with her, she tried to stand up and get dressed but the co-accused handed a firearm to the appellant and instructed her to remain on the ground. After she had acceded to the instruction, the co-accused had sexual intercourse with her. After hat incident she was ordered to get dressed. The appellant then placed a firearm against her waist and ordered her not to scream. Both the appellant and co-accused walked with her for a short distance before they ordered her to close her eyes. After she had closed her eyes, the appellant and co-accused disappeared. When she opened her eyes she saw a Toyota Quantum not far from her and the driver followed her and asked whether he could offer help. It was around midnight. At first she was reluctant to get assistance from the driver of the Quantum. However, she eventually got into the vehicle and told the driver what she had just encountered. The driver of the Quantum then offered to take her to the police station but she declined the offer and asked that she be taken to her boyfriend's place of residence. When she arrived at

the boyfriend's home she knocked at the door and her boyfriend, T[...] M[…], opened the door for her. After she had entered the house she cried and told T[...] M[…] what happened to her. After T[...] M[…] had heard the news he advised her that they should first go and report the matter to her father and proceed to the police station, thereafter. She and T[...] M[…] proceeded going to her home. Upon arrival she knocked at the door and her father opened the door and shouted at her for coming home late. When she tried to inform his father about what happened to her, the father showed no interests. She and T[...] M[…] ultimately left home and went to the police station. Upon arrival at the police station, the police officer refused to take her statement unassisted by her guardian, due to her age.

[6] The complainant went to school the following Thursday. While she was in the classroom with T[...], she related to T[...] what the appellant and co-accused did to her the previous Sunday. Upon hearing the news, T[...] cried. The complainant cried, too, and were both comforted by their class teacher.

[7] T[...] M[…] testified that the complainant came to his place of residence and was crying. He asked the complainant what happened and the complainant told him that her friend's father and his friend raped her. After he had been informed of that incident he accompanied the complainant to the police station. Upon arrival at the police station the police advised him to fetch her father because a guardian was needed, due to her age. He went to the complainant's place of residence to fetch the complainant's father. He returned with the father and left him and the complainant at the police station.

[8] T[...] testified that the complainant accompanied her home after she had spent a weekend at her home. They arrived home late and her father suggested to the complainant to sleep over. The complainant insisted that she wanted to go home. After she had realised that the complainant was refusing to sleep over she asked the appellant to accompany her home. Both the appellant and his friend accompanied the complainant home. She did not know what transpired on the way to the complainant's home.

[9] T[...] testified that the complainant went to school the following Wednesday. While both of them were in the classroom the complainant sent her a note to inform her that the appellant and his friend raped her. After she had read the note she cried and both she and the complainant were taken to the social worker for counselling.

[10] The version of the appellant is that the complainant and T[...] arrived home late and T[...] was complaining about stomach cramps. He asked T[...] where she had been and she informed him that she spent some time at the complainant's home. He looked outside and saw a vehicle parked near his house. The driver of the vehicle saw him and drove off. He suggested to the complainant to sleep over but she insisted to go home. While he was accompanying the complainant home, on foot, he came across his friend, called M[…]. M[…] asked them to go with him to buy drugs. The complainant did not have a problem going with them to buy drugs. On their way back the complainant asked him about the place that they were going to smoke the drugs. He responded that they would smoke along the way. He informed her that he had money and asked her what would she offer him and his friend upon arrival at the place that they were going to smoke. He said that he was referring to sexual intercourse.

[11] The appellant testified that they stopped near a hardware, next to a dustbin. He then asked the complainant if she would have sexual intercourse with his friend and him. The complainant agreed to have sexual intercourse with both of them. The appellant said that before that happened, the complainant smoked drugs. Thereafter she undress herself, lay on the ground on top of paper box and had sexual intercourse with him. After he got off her, she invited his friend to have sexual intercourse with her. Thereafter they accompanied her until Manzini's tarven. As she parted ways with them, she kissed both of them and pleaded with them not to tell anyone about the incident. He offered her R35 00.

[12] The appellant testified further that the complainant offered to have sexual intercourse with them in exchange for the drugs.

[13] Section 208 of the Criminal Procedure Act[1] provides that an accused may be convicted of any offence on the single evidence of any competent witness. Such evidence should be approached with caution and be substantially satisfactory in all material respects[2].

[14] The complainant was reluctant to be accompanied by the appellant in the absence of T[...] because she saw the appellant and his friend smoking drugs in the house. If, indeed, the complainant was smoking drugs as alleged by the appellant, the complainant would have preferred to sleep over for the sake of drugs or would not mind to be accompanied by the appellant in the absence of T[...]. The magistrate correctly accepted the version of the complainant that she does not smoke drugs.

[15] The complainant reported the rape incident to T[...] M[…] on the same day that it occurred. After the report was made the matter was referred to the police the same day. The complainant went further to report the incident to T[...] when she met her at school for the first time after they had parted ways at T[...]'s home the previous Sunday night.

[16] Counsel for the appellant has criticised the evidence of the complainant that, she chose not to go home after the rape incident whereas she was nearer home at z[...], P[...] and, instead, preferred to board a taxi and go to a boyfriend in D[...], z[...]. In this regard, the complainant advanced two persuasive reasons. Firstly, she explained that since her grandmother was ill, she did not want to stress her about the rape incident. Secondly, her father was very strict and would possibly chastise her. Regard should be had that the complainant was 17 years old and undoubtedly believed that she could be chastised.

[17] It is common cause that the appellant and his friend did not take a 17 year old complainant home. They parted ways with the complainant on the

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[1] 51 of 1977
[2] 1967(4) SA 203(N) at 206 H; See also S V Sauls and Another 1981(3) SACR 172(A)

way home in the early hours of the morning. The persuasive reason advanced by the complainant in this regard is that the appellant and his friend raped her. On the other hand, the appellant did not give a reasonable explanation for his failure to take the complainant home. The appellant initially testified that the complainant agreed to have sexual intercourse with his friend and him because he promised her money. He later changed his version and testified that the complainant offered to have sexual intercourse with them in exchange for drugs. This material contradiction clearly demonstrate that the complainant never consented to sexual intercourse with the appellant and his friend. Therefore, his version was correctly rejected as not been reasonably possibly true and was correctly convicted on a charge of rape.

[18] I now turn to sentence. The essential inquiry in an appeal against sentence is not whether the sentence was right or wrong, but whether the Court, in imposing it, exercised its discretion properly and judicially. An error committed by the Court in determining or applying the facts for assessing that sentence, is not by itself sufficient to entitle the Appeal Court to interfere with sentence; it must be of such a nature, degree or seriousness that it shows, directly or inferentially, that the Court did no exercise its discretion at all or exercised it improperly or unreasonably. Such a misdirection is usually and conveniently termed one that vitiates the Court's decision on sentence[3]

[19] The magistrate sentenced the appellant to life imprisonment after he had considered his personal circumstances and found that they did not constitute substantial and compelling circumstances that justify a lesser sentence.

[20] The appellant has previous convictions that are unrelated to the offence he has committed. For this reason, he should be regarded as a first offender for the offence that involves bodily harm. The use of drugs contributed to his disgraceful conduct. The complainant did not sustain injuries, according to the medical examination report. (It must be emphasised that this factor alone would not justify a lesser sentence) The magistrate did not take these factors

[3] S V Pillay 1977(4) SA531

into consideration. These factors, taken cumulatively, constitute substantial and compelling circumstances that justify deviation from the sentence of life imprisonment. This implies that the sentence of life imprisonment should be interfered with. This, notwithstanding, rape remains a serious offence and invites harsh punishment. Goldstein J, in S V Ncheche[4] describe this type of offence as an appelling and utterly outrageous crime, gaining nothing of any worth for the perpetrator and inflicting terrible and horrific suffering and outrage on the victim and her family.

[21] The complainant was 17 years old. She was raped on gun point by the two men and left in the street in the early hours of the morning and exposed to further bodily harm. These are aggravating factors that justify a lengthy term of imprisonment.

[22] In view of the above, the following order is made:

22.1 The appeal is upheld, partially.

22.2 The appeal against conviction is dismissed.

22.3 The appeal against sentence is upheld.

22.3.1 The sentence of life imprisonment is set aside and replaced with the sentence of 25 years' imprisonment.

22.3.2 This sentence of 25 years' imprisonment is backdated to 11 January 2021.

M.M MABESELE

Judge of the High Court Gauteng Local Division)

I concur

M.M.P MDALANA-MAYISELA

[4] 2005(2) SACR 386(W); par. 35

(Judge of the High Court Gauteng Local Division)

Date of Hearing	: 28 November 2022
Date of Judgment	: 8 February 2023

Appearances

On behalf of Appellant	: Adv Y. Britz
Instructed by	: Legal Aid Board South Africa
On behalf of the Respondent	: Adv R. Williams
Instructed by	: Director of Public Prosecutions