**IN THE HIGH COURT OF SOUTH AFRICA**
**GAUTENG DIVISION**

Case Number: A156/2022
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.
18/12/2023

In the matter between:

**TEBOGO PATRICK RANYANI** Appellant

And

**THE STATE** Respondent

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JUDGMENT

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TSHOMBE AJ, (with Van der Westhuizen J concurring)

**INTRODUCTION:**

[1] The appellant appeared before the regional magistrate at the Tsakane Regional division of Gauteng following a charge with 2 counts of rape in contravention of Section 3 of the Criminal Law Amendment Act 32 of 2007[1] read with the provisions of Section 51(1) of the Criminal Law Amendment Act 105 of 1997[2] and one count of assault with intent to do grievous bodily harm.

[2] At the trial the appellant was represented and he pleaded not guilty to all three charges preferred against him. The appellant confirmed that the provisions of

[1] The Sexual Offences and Related Matters Act
[2] The Minimum Sentences legislation

the Minimum Sentences legislation were explained to him and that he understood the explanation. The appellant was convicted of one count of rape, read with the provisions of the Minimum Sentences legislation and found not guilty and acquitted of the second rape count and the assault with intent to do grievous bodily harm. Arising from the application of the Minimum Sentences legislation, he was, upon conviction sentenced to life imprisonment, the court *a quo* having found no mitigation or the existence of substantial and compelling circumstances to support a deviation from the minimum sentence in terms of the Minimum Sentence legislation.

**BACKGROUND:**

[3] At the beginning of the trial the appellant's representative raised an issue of duplication of charges with respect to the two counts of rape. The state denied that there was a duplication and the trial continued on the basis of a charge with three counts as set out in paragraph [1]. I have concluded that there was a duplication because the appellant was charged with a contravention of section 3 of the Sexual Offences and Related Matters Act, read with the provisions of section 51(1) of the Minimum Sentences legislation. The contravention of section 3 of the Sexual Offences and Related Matters Act attracted the provisions of the Minimum Sentences legislation because it was alleged that the complainant was sexually penetrated by the appellant more than once and was assaulted by the appellant with intent to do grievous bodily harm as contemplated in Part 1 of Schedule 2 of the Minimum Sentences Legislation. Accordingly, the second sexual penetration of the complainant by the appellant and the assault to do grievous bodily harm could not be seen as separate standalone counts as these are components of the one rape charge read with the provisions of the Minimum Sentences legislation.

[4] However, because the court *a quo* returned a finding of not guilty for both the second rape count and the count of assault with intent to inflict grievous bodily harm, I am satisfied that the appellant was not subjected to any prejudice during the trial, since the trial was conducted on the same facts; neither is there a basis upon which a duplication in sentencing can be raised.

[5] Prior to sentencing the court required two reports to be prepared, that is, a probation officer's report which was expected to deal with the circumstances of the appellant as well as a victim assessment report, expected to deal with the effect of the incident on the victim. The victim impact assessment report was never obtained and the state led the evidence of the victim from which the court made an assessment of the impact of the rape on the victim and her family.

[6] With regard to the probation officer's report, the court received information from the prosecutor to the effect that the social worker who conducted the necessary interviews and prepared the report had been approached by the complainant, with an admission that the complainant did have a sexual relationship with the appellant and that there was no rape as the sexual intercourse was consensual. Upon hearing this report, the court called for evidence by the social worker. She testified that she had not been contacted by the complainant but by other anonymous people who claimed to have seen a lady that was providing domestic duties to the appellant. Neither the state nor the court could take the matter forward because the social worker testified that the said people wished to remain anonymous, they were not prepared to come forward to court with the evidence and also did not allege that it was the complainant that they had seen coming out of the appellant's shack but a certain lady.

[7] Post sentencing the court advised the appellant of his automatic right to appeal the conviction, sentence and order made by the court *a quo,* that is, that the appellant was free to approach this court to make an application for such appeal without getting leave from the court *a quo.*

**GROUNDS OF APPEAL AGAINST CONVICTION AND SENTENCE:**

*AD CONVICTION:*

[8] The appellant submitted that the court *a quo* erred in finding that:

8.1 the state proved its case beyond a reasonable doubt regarding the non-consensuality of the sexual intercourse; and

8.2 that the appellant had selective memory in his version of the evidence relating to the assault on the victim;

8.3 the appellant's version of the assault on the victim and the reason therefor was not possibly reasonably true.

*AD SENTENCE:*

[9] The appellant submitted that:

9.1 the personal circumstances of the appellant;

9.2 the fact that the appellant was convicted of rape for the first time; and

9.3 the fact that the appellant spent 2 years and 5 months in custody before being sentenced,

all constitute substantial and compelling circumstances and the trial court erred in not finding the existence of such substantial and compelling circumstances and to thus depart from imposing the minimum sentence in terms of the Minimum Sentences legislation.

9.4 The court *a quo* erred in over-emphasizing the seriousness and prevalence of the offence, and that society needs to be protected from people like the appellant.

**THE EVIDENCE:**

The State called 4 witnesses to prove the case against the appellant.

[10] N[...] M[...], the complainant, testified as follows:

10.1 On 9 November 2019 she was sitting with a female friend drinking at George's tavern in Langavile. She and her friend had arrived at the tavern between 2 and 3pm and at about 7pm, the complainant decided to go home. She walked alone and the street was quiet because it was raining. As she walked, she felt somebody grabbing her neck in a vice-grip, dragging her in a particular direction and making it difficult for her to turn and see who it was. Finally, she was able to turn and recognized the person as C[...], the appellant.

10.2 The appellant dragged her to his shack and because she was resisting and the way in which he was dragging her she kept falling, upon which the appellant would slap her with his open hands. The ground was slippery from the rain and she would also slip and fall, upon which the appellant kicked her on her butt, her whole back, slap her on her face, her head, dragging her in the mud until he got her inside his shack and pushed her in while assaulting her the whole time. The complainant's screams for help did not attract any attention from anyone who could assist her. Once inside the shack he continued assaulting her with open hands, fists, kicks on her body, face and head while trying to take off her pants. He finally took off her pants and pushed her on the bed and while still assaulting her, proceeded to rape her until he (the appellant) fell off the bed. At this time the complainant was pleading with him to stop abusing her and in her evidence, she estimated that he spent about two hours off her while she continued begging him to stop.

10.3 The appellant showed no mercy, instead he stood up, smoked a cigarette and when he was done, he came back to her, inserted his penis into her vagina and proceeded to rape her once more while the assault also continued. He went on until he fell off the bed again, and this time he fell asleep and the complainant cautiously sneaked out of the shack. She did this with difficulty because her eyes were swollen and she couldn't see and had to feel her way out by leaning against the

wall of the shack until she reached the door. Once outside she screamed N[...]'s name, someone she knew who lived close to the premises.

10.4 She testified that she was in such a state that she never even saw N[...] coming but only felt her presence when N[...] hugged her. N[...] called for help from complainant's home, and while continuing to help her handed her over to her (complainant's) sister. The complainant was taken to hospital. The hospital sent her to Tsakane Crisis Care Center, a center for the care of sexually abused persons where she was examined, and a J88 medical report prepared. Thereafter she was taken back to the hospital where she was further treated for two weeks before she was discharged.

[11] The next witness for the state was the complainant's sister, O[...] M[...] ("O[...]") and she testified as follows:

11.1 Around 5am on the morning of 10 November 2019, she was awoken by her neighbor, N[...] who was calling out her name. She woke up in response and N[...] drew her attention to the complainant, who was standing at the corner of a house next door to N[...]'s place. O[...] found her sister crying, swollen and covering her face with her hands. The three of them proceeded to O[...]'s home and on the way there the complainant told her sister that she had been beaten up and raped by C[...]. At the time, O[...] did not know who C[...] was but it later transpired that it was the appellant.

11.2 O[...] arranged for her sister to be taken to hospital. Her (O[...]'s) further evidence was that the complainant told her that the appellant applied glue to her eyes because he did not want her to see him.

11.3 The third witness for the state was Nontlantla Tuli ("Tuli"). She lives in the main house on the premises where the appellant rented a shack and she testified that on the night of 9 November 2019 she heard a

screaming voice of a female from the street. This was around 2am and Tuli was inside the house, alone and sleeping. The shack occupied by the appellant was about 4 metres from the house in which Tuli was sleeping and after a while she heard the screaming coming from inside the shack with the screaming person shouting “Help me!”.

11.4 Tuli testified that she did not do anything because she was alone, it was raining, windy and she was in fear for her own safety. At a certain point she could hear that the people in the shack were in a fight because of the noise from the boards, it sounded like people were pushing each other against the boards of the shack, one of which actually fell.

11.5 After a while, the noise stopped but Tuli could no longer sleep and stayed up watching movies from her computer. At about 5 in the morning, Tuli heard a lady screaming for N[...]. When she opened the house door, she saw the lady, who was bleeding, her eyes closed (as in swollen), her neck showing signs of strangulation and walking against the wall of the house to help her guide herself. M[...] L[...]/N[...] came out of her place of stay and immediately uttered the complainant’s name – Nokubonga! and asking why she was in the state she was in. Upon seeing the complainant’s injuries N[...] asked ‘who did this?’ The complainant answered that it was C[...] and Tuli not knowing who C[...] was, N[...] explained that it was the appellant.

11.6 Tuli further testified that the complainant’s family was called and upon arrival a community whistle was blown. As the whistle was blown Tuli went to the shack and found it in a state, blood on the floor, a stone with bloodstains, everything with stains of blood and the whole place upside down. She had an opportunity to ask the appellant as to what he had done and in answer the appellant denied having done anything. When she confronted him with the information from the complainant that she was raped and assaulted by him to the extent that she even

refused being touched because her whole body was in pain, the appellant just scratched his head, saying “Eish! N[...]”’

11.7 Tuli also testified that she saw bloodstains on the body and head of the appellant. When the appellant realized this, he jumped out of bed, ran to the tap outside and started washing himself after which he jumped the fence to the neighbour to ask for water to drink. As he was drinking the community was standing along the fence asking him to go closer to them to tell them what happened here. Realising this, the appellant finished drinking and ran away. The community members chased and apprehended him. Ms Tuli testified that she refused them entry into the premises with the appellant. According to the witness, the appellant was saved by the arrival of the police as the community was very angrily assaulting him with just about anything.

11.8 In cross- examination, Tuli was challenged as to how she could hear noises outside and inside the shack given the amount of noise that the rain makes on corrugated iron. Tuli responded that she could hear the sounds because the rain was not continuous. She was also challenged with the version of the appellant which was going to be that she was not there on the night that the incident happened, having gone to Tsakane. Tuli agreed that she had told the appellant she’s going to Tsakane and she did go to Tsakane but came back on Saturday and not on Sunday as initially planned.

11.9 Tuli was further confronted with the version that she must have spoken to some community members to have had the detail that she provided in court and her response was that she was there, she saw everything for herself, she was back from Tsakane. Tuli further testified that when she saw the complainant, she (the complainant) was wearing a work suit of the appellant because she could not find her clothes; and such clothes were eventually found at the gate of the premises. The appellant’s work suit was not bloodstained, it was just dirty.

11.10 The fourth witness for the state was Xolisa Beauty Nkosi (“Ms Nkosi”), a registered nurse employed at Tsakane Care Crisis centre and who examined the complainant after the rape. After explaining to the court that she holds a qualification in which she was trained to care for and examine persons that have been subjected to sexual harassment and abuse, she confirmed that she examined the complainant in this matter and completed the J88 Form.

11.11 Ms Nkosi proceeded to walk the court through the J88 Form, and of relevance to the matter before the court she dealt with a section labelled Clinical findings. She listed the following injuries: (i) a 4 centimeter right upper eye lid laceration; (ii) bruises to both upper and lower eyelids, both swollen and painful to complainant when touched; (iii) Swollen chin and painful to complainant when touched; (iv) bruised neck, both sides and front swollen and painful to complainant when touched; (v) Bruised thighs; (vi) multiple bruises on the chest and abdomen; (vii) bruises on the left and right upper arms; (viii) multiple bruises to the back; (ix) abrasions to left and right knees; (x) multiple bruises to right leg and thigh. The nurse proceeded to explain that the complainant was sad but co-operative and well oriented to person, time and place. The nurse explained that there was no clinical evidence of drugs or alcohol influence. The nurse also explained that the injuries were consistent with the injuries of physical assault. There was also a question as to when the complainant last had sexual intercourse with consent and the complainant indicated this to have been 8 November 2019, that is, the day before she was sexually assaulted.

11.12 The nurse testified further that there were no injuries to the complainant’s private parts but also advised that the absence of injuries does not exclude non-consensual penetration. The nurse further reported that there was no anal penetration and that samples of semen were taken. Finally, the nurse explained in testimony that the red marks that were depicted in the human anatomical drawing in the J88 Form were indicative of injuries and the injuries that were marked

in strong red, for instance around the neck, were of a very serious nature.

[12] In defense, the appellant gave the following testimony:

12.1 He was first introduced to the complainant by N[...], who is friends with the complainant. Initially the complainant used to visit him with N[...] but after a while the complainant started to visit him on her own. On 9 November, the complainant showed up at about 10 or 11 am and asked for two beers. The two of them sat drinking and were joined by appellant's colleague, George.

12.2 At about 2pm the appellant and George decided to go to the tavern to watch soccer and the complainant said she is going with them. They all continued drinking at the tavern and at about 6 or 7pm the appellant realized that he had run out of money. The appellant the told the complainant that he is going home but will be back and the complainant said she is going with him.

12.3 At home the appellant took his bank card and the two of them went to withdraw R1000 and went back to the tavern where they proceeded drinking. At around 10 or 11 pm the tavern was closing and the appellant and George decided to change taverns and go to one called Kappising, which was an all-night. The appellant told his friend that he would catch up with him at Kappising because he (appellant) wanted to go home to drop his bank card and some of the money he had on him.

12.4 The appellant testified that once again the complainant went with him and, when they reached his place, he (the appellant) decided to ask the complainant to have sexual intercourse with him as he realized that by the time they come back from Kappising it will already be the following day. The appellant testified that the sexual intercourse thing was a game that he and the complainant played, where he would ask for a sexual favour and thereafter, he would give the complainant

money. According to the testimony there was no agreement as to the amount of money – she would state any amount she wanted after the sexual intercourse; he would give it to her, the only condition she had was that her husband must never know about the arrangement. The appellant's testimony was that before the day in question the complainant had asked for amounts between R250 and R300.

12.5 The appellant testified further that because he was drunk, he fell asleep after they had had sexual intercourse and was woken up in the morning by the complainant who was demanding a sum of R1000. He told her to wait for him to properly wake up and he would give it to her. The appellant testified further that he indeed woke up and after searching himself he realized that he did not have his wallet and money with him. He asked the complainant where his wallet was and upon getting a negative answer, he decided to search her and found a sum of R350 between her breasts. When he asked her where she got the money, she told him she got it from some other guys the day before.

12.6 The appellant became furious and started assaulting the complainant with open hands, on her face, her head and body but according to him using only his open hands, no fists or kicking. When reminded about the J88 Form which reflected a lot of injuries, to wit, to the complainant's eyes, neck, arms, thighs, ears, chest and stomach he speculated that she may have gotten those from falling and hitting some of the furniture in his shack. When asked specifically about the bruises and swelling on complainant's neck, he denied choking her and once again speculated that it could have been his open hands that hit her neck.

12.7 In further speculation the appellant conceded that all the injuries reflected on the J88 Form must have been caused by him because he was looking for his money, on the morning after he had had sexual intercourse with the complainant. The appellant denied that there was

any form of violence with her when they had sexual intercourse the night before and denied forcing her into it. He further testified that he did not take the R350 from the complainant, instead he assaulted her, chased her out and after about 10 minutes she came back with community members.

12.8 The community members knocked on his door and upon him opening, they asked him if he knew the complainant. He answered in the affirmative and even told them that she had just left his place. He was then informed that the complainant said he had raped her. When he told them that this was not the truth and that he had assaulted her because of her stealing his money, the community members did not understand; did not want to listen to him and started assaulting him. When he came to, he was in hospital and badly injured. He testified that he was more injured than the complainant.

12.9 In cross examination, the appellant testified that the complainant was never his girlfriend but someone he knew through a friend. When he and the complainant started the sexual intercourse game, it was in exchange for whatever she needed and on the first day she asked for R300 and he gave it to her.

12.10 In further cross examination the appellant conceded that on the night he came back with the complainant, he never went to the main house and accordingly could not say with precision that the lady who stayed there (Ms Tuli) was back or not. He was just under the impression that she was not there because she had told him she is going to Tsakane on the Friday before and would be back on the Sunday. He therefore had to reluctantly concede that it was possible that Ms Tuli had come back on the Saturday and was in the house on the night he took the complainant to his shack.

12.11 The appellant further insisted in cross examination that the complainant was not selling herself to him – they were merely helping each other;

she would give him the sex and he would give her money, any amount she asked for. There was no agreement as to how much he would give at any given time, no range – he just had to give her whatever amount of money she asked for after every sexual intercourse session they had. He added that he would have given her even the R1000 she demanded on the day and had in fact already indicated that he was going to give it to her.

12.12 The appellant did not remember how much money was left from the R1000 he had earlier withdrawn when he and complainant went back to his shack. He remembered though, that when he came in the night before with the appellant, he had his wallet and phone, both of which he put on his night stand but when he woke up, he could only find his phone. During further cross examination the appellant was at pains to explain why he assaulted the complainant when he discovered that she had R350 between her breasts – he could not decide whether it was because she did not buy her own alcohol the night before or because he was drunk or because he thought she had stolen the money from him. He just continued to insist that he was prepared to give her the R1000 she wanted.

12.13 The appellant also intimated that he allowed the complainant to take the R350 with her in spite of his belief that she had stolen it from him because he wanted to avoid trouble. Yet, he still saw fit to assault the complainant. At best, the appellant told the court that he assaulted the complainant because he wanted to give her the R1000 she had asked for and what made him angry was that he could not find his wallet and money where he had left it. This angered him because he wanted to find these two things so that he could make good on his promise to her to pay her the R1000. What is puzzling is why he couldn't deduct the R350 from the R1000 and make arrangements to give her R650 after he had been to the bank and obtained a new card; in the same way that he would have arranged to give her the balance even if his wallet was there because there would not have been sufficient money for him

to pay R1000 after he had continued buying drinks after the withdrawal of exactly R1000 earlier the previous evening.

12.14 The appellant was challenged in cross examination as to how the complainant could have been injured on her neck if he was assaulting her with open hands and nothing else. While the appellant speculated that the neck injuries must have been caused by his assault, he was further cross examined about how he remembered everything else, to wit the time when they came into the shack, where he put his wallet and phone, how he assaulted the complainant with open hands on her face and body – all except how the complainant sustained the injuries to her neck. He also could not account for the laceration above her right eye.

12.15 He was further challenged with the fact that the complainant was unlikely to call the community on him if their game of sex rewarded with money would reach her husband's ears. He was further challenged with respect to the improbability of the so-called agreement that constituted a blank cheque to the complainant to demand any amount of money she wanted – it was put to him whether he would have given her R10 000 if she had asked for it and when he answered that he would have told her he doesn't have that kind of money it became clear that the so-called agreement was improbable.

[13] In evaluating the appellant's grounds of appeal against the conviction, this court notes that -

13.1 For the submission that the sexual intercourse between him and the complainant was consensual the appellant relies on the fact that the J88 examination did not show any injuries sustained to the private parts of the complainant. It goes without saying that this ground of appeal cannot be entertained because the absence of injuries in the genital area does not exclude penetration without consent. This is clearly stated by Ms Nkosi in Paragraph 11.12 above.

13.2 The appellant's second ground of appeal is that the trial court should have found the appellant's version for his assault on the complainant to be reasonably possibly true. This is in spite of the fact that the appellant's version was taken apart on cross examination, with the trial court also showing the improbabilities, the fact that chunks of the appellant's version just did not make sense for example the agreement/game on sexual intercourse in exchange for indeterminate amounts of money. This is in spite of the fact that the appellant's assault was purportedly because the complainant had stolen money that the appellant did not even know that he had, given that he didn't know how much he came back with from the tavern. This is in spite of the inconsistencies between the complainant's injuries and the alleged manner of assault, the appellant's loss of memory as to the cause of the complainant's neck injuries etc. This court views the appellant's version of the assault as a fabrication that could not reasonably possibly be true at all.

[14] The appellant's grounds of appeal ad sentence rely on:

14.1 Personal circumstances, none of which had any abnormality, that is, no physical, psychological or learning or any inflammatory matter that could be considered substantial and compelling in the consideration of a possible departure from the minimum sentence provided for in the Minimum Sentence legislation. For this view, it was submitted on behalf of the appellant that the phrase substantial and compelling circumstances has not been defined and therefore the appellant's circumstances can also be seen as substantial and compelling circumstances. This court finds no substance to this submission. Clearly, while substantial and compelling circumstances have not been defined, sentencing has purposes which are trite, that is, deterrence, retribution, reformation and taking cognizance of the interests of society.

14.2 The second and third points of the appellant's reliance on the existence of substantial and compelling circumstances were that this was his first conviction of rape and that he had spent two years and five months in custody before being sentenced. This court does not find substance in these points and same cannot be considered to constitute substantial and compelling circumstances within the meaning of section 51(3) of the Minimum Sentences legislation. Fourthly, the appellant submitted that the sentence is disproportional to the crime; and, fifthly that the trial court overemphasized the seriousness of the offence.

14.3 The appellant cited that this his first rape conviction while all four of his previous convictions had a clear thread or element of violence. In fact, rather than operate in his favour, his previous convictions reflected someone who was a threat to society as envisaged in the Triad of Zinn[3]

**THE LAW:**

**AD CONVICTION**

***(a) Proof beyond a reasonable doubt:***

[15] In criminal litigation, the State must prove its case against an accused beyond a reasonable doubt. The accused bears no onus and if his version is reasonably possibly true he is entitled to receive the benefit of the doubt and be discharged.[4] It is also trite law that proof beyond a reasonable doubt does not mean proof beyond all doubt. In *Monageng v S*[5] the court described proof beyond a reasonable doubt as:

> *". . . evidence with such high degree of probability that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that the accused has committed the crime charged. An accused's evidence therefore can be rejected on*

[3] S v Zinn 1969(2) SA 537 (A)
[4] S v van Der Meyden 1999(1) SACR 447 W; S v Shackell 2002(2) SACR 185 at para [30]
[5] [2009] 1 All SA 237 (SCA) Para [14]

*the basis of probabilities only if found to be so improbable that it cannot reasonably possibly be true."*

[16] The above establishes a tension between proof beyond a reasonable doubt and the reasonable possibility that the accused's version may reasonably possibly be true. In order to resolve the tension that exists between the two seemingly separate but in essence the same test, the court must look at all the evidence in its totality. In other words, the court must not look at the evidence exculpating the accused in isolation and neither must it look at the evidence implicating the accused in isolation. This therefore means that a court does not base its conclusion, either way, on only part of the evidence. The conclusion of the court must account for all the evidence.

In the van der Meyden matter[6](*supra)* Nugent J stated as follows:

> *"In order to convict, the evidence must establish the guilt of the accused beyond a reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true. The two are inseparable: each being the logical corollary of the other. In whichever* ***form the test is expressed, it must be satisfied upon a consideration of all the evidence. A court does not look at the evidence implicating the accused in isolation in order to determine whether there is proof beyond a reasonable doubt and so too does it not look at the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true****"* (emphasis added).

[17] The classic decision was formulated by Malan JA a couple of decades ago at a time when the popular argument that was to the effect that proof beyond a reasonable doubt requires the prosecution to eliminate every hypothesis which is inconsistent with the accused's guilt or which, as it is also expressed is consistent with his innocence. Malan JA rejected this approach and

[6] *Supra* at 448 F - G

preferred to adhere to an earlier approach which was eventually adopted and is now preferred by the courts.[7]

> ***"In my opinion, there is no obligation upon the Crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the Crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged.*** *He must, in other words, be morally certain of the guilt of the accused. An accused's claim to the benefit of a doubt when it may be said to exist must not be derived from speculation but must rest upon a reasonable and solid foundation created either by positive evidence or gathered from reasonable inferences which are not in conflict with, or outweighed by, the proved facts of the case"* (Emphasis provided)

***(b) The law on the testimony of a single witness:***

[18] While section 208 of the CPA[8] provides that an accused can be convicted of any offence on the single evidence of any competent witness, it is nonetheless established in our law that the evidence of a single witness must be approached with caution, his or her merits as a witness being weighed against factors which militate against his or her credibility. The correct approach to the application of this cautionary rule was set out by Diemont JA in S v Sauls and Others[9] as follows:

> *"There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of a single witness… The trial judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the*

[7] R v Mlambo 1957(4) SA 727 at 738 A-C
[8] Criminal Procedure Act 51 of 1977
[9] 1981 (3) SA 172 (A) at 180E-G

*fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told."*

In the above case, the Judge of Appeal held the view that the cautionary rule may be a guide to the correct decision but it does not mean that any criticism, however slender, of a single witness's evidence, is well founded.

***(c) The appeal court's powers re: credibility findings:***

[19] With reference to the appeal on conviction, there are three legal principles that are applicable to this matter, the first being that a court of appeal should only interfere with the findings of the trial court where there is a material misdirection on the facts and credibility findings of the witnesses.[10] In the case of S v Monyane[11], Ponnan JA referred with approval to the case of S v Hadebe and Others[12] and held that the appeal court's powers to interfere on appeal with the findings of fact of a trial court are limited. The learned Judge of Appeal pronounced further that in the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong.

[20] Similarly to the Monyane case, *in casu,* a thorough reading of the record does not indicate any doubt as to the correctness of the findings of the trial court. The trial court traversed the evidence of the state witnesses, which

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[10] R v Dlumayo and Another 1948 (2) SA 677(A) and S v Francis 1991(1) SACR 198(A) at 198j-199a "The power of a Court of appeal to interfere with the findings of fact of a trial Court are limited. In the absence of any misdirection the trial Court's conclusion, including its acceptance of a witness' evidence is presumed to be correct. In order to succeed on appeal, the appellant must therefore convince the court of appeal on adequate grounds that the trial court was wrong in accepting the witness' evidence-a reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage which a trial court has of seeing, hearing and appraising a witness, it is only in exceptional cases that the court of appeal will be entitled to interfere with a trial court's evaluation of oral testimony".

11 S v Monyane and Others 2008 SACR 543 (SCA) Paragraph [15]

[12] S v Hadebe and Others 1997 (2) SACR 641 (SCA) at 645e-f the court held:

"…..in the absence of demonstrable and material misdirection by the trial court . its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong."

corroborated one another in all material respects and they all came across credibly well during cross examination.

[21] The examples are: (i) the complainant's testimony to her screams which were heard by Tuli during the night of 9 November and not on the morning of the 10th, the time when the appellant testified he assaulted the complainant; (ii) fact that Tuli testified she never slept after hearing the screaming and the noise from the shack but sat and watched movies – to the extent that she heard the complainant when same was shouting for N[...] and came out, indicating that if the assault had happened on the morning of the 10th, she would have heard it; (iii) the complainant's injuries which were corroborated by both Tuli and the J88 examination Form completed by a completely independent nurse; (iv) the evidence of the complainant's sister who testified that the complainant told her she was assaulted and raped by the appellant – this showing the consistency of appellant's version; (v) the inconsistency of the complainant's neck injuries with being slapped with open hands but the consistency thereof with a vice-grip as per the complainant's testimony.

[22] The appellant could also not adduce any demonstrable evidence that could have supported a different finding by the court *a quo* with respect to the evidence led by any of the State's witnesses. Therefore, not only was the evidence of the state witnesses credible and constituted proof beyond a reasonable doubt but the version by the appellant could not possibly be reasonably true. Finally, the evidence of the nurse that examined the complainant was that the absence of injury in the complainant's private parts was not inconsistent with forced vaginal penetration as per the complainant's evidence. Accordingly, the two grounds of appeal were discussed largely *in tandem* relating as they both do to proving or disproving whether there was rape or not.

[23] Coming to the sentencing of the appellant it is important to first make reference to the basic elements which come into play in the sentencing regime. The said elements have come to be known as the triad of Zinn, having

been espoused in the Zinn case[13] and remain relevant to the exercise of the court's discretion when sentencing. The first of these, that is, (i) *'the crime'* is considered the most important and influential element on the nature and extent of the sentence. The proportionality requirement, which drew constitutional support for the minimum sentence legislation, reflects the importance of tailoring the sentence to the seriousness of the crime.

[24] The second element is (ii) *'the criminal',* and because of the nature of the analytic factors involved in considering the criminal, this element has been referred to as the *'individualisation'* of the offender. The third element is (iii) '*the interests of society'.* In the face of some difficulty in expressing what is actually meant by this phrase, it has been suggested that this leg be interpreted to mean *'serving the interests of society'.*

[25] The Minimum sentences legislation[14] was passed in order to curb violent crime in South Africa. The legislature identified certain crimes that fit into this category. The legislation requires trial courts to impose various minimum sentences for crimes that fit the legislative description of what it considered violent crimes. In order to meet the requirements of fairness, humanity and constitutionality the legislature put the concept of substantial and compelling circumstances as the main exception to the imposition of minimum sentences in accordance with this legislation.

[26] The concept is to be found in Section 51(3)(a) of the Minimum Sentencing legislation. It reads as follows:

> *"(a) if any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence."*

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[13] *Supra*
[14] *Supra*

[27] While there is no definition of what constitutes substantial and compelling circumstances, the legislature has left it to the courts to decide whether the circumstances of any particular case call for a departure from a prescribed sentence. The above is particularly so because the sentencing regime still requires the sentencing court to consider all the factors or circumstances traditionally considered by sentencing officers. In other words, the elements established in the triad of Zinn, aggravating circumstances, mitigating circumstances, measure of mercy and all other factors relevant for consideration by a sentencing court when it imposes sentence.

[28] In *S v Homareda*[15] Cloete J and Robinson AJ proposed what they referred to as the correct approach in exercising the discretion conferred on the court in section 51 of the Amendment Act and it is that:

- The starting point is that a prescribed minimum sentence must be imposed;
- Only if the court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence may it do so;
- In deciding whether substantial and compelling circumstances exist each case must be decided on its own facts and the court is required to look at all factors and consider them cumulatively;
- If the court concludes in a particular case that a minimum prescribed sentence is so disproportionate to the sentence which would have been appropriate it is entitled to impose a lesser sentence.

Substantial and compelling circumstances may be described as those circumstances the existence of which would make a prescribed minimum sentence disproportionate to the crime.

[29] Turning attention to proportionality, in S v Dodo[16], the constitutional court endorsed proportionality as a requirement in the sentencing regime. The constitutional court explained that, *"proportionality goes to the heart of the*

[15] 1999(2) SACR 319 (W)
[16] 2001 (1) SACR 594 (CC)

*inquiry as to whether punishment is cruel, inhumane or degrading, particularly where, as here, it is almost exclusively the length of time for which an offender is sentenced that is in issue."*[17] The court referred to section 12(1)(a) of the Constitution, which provides that a person *"not be deprived of freedom arbitrarily or without just cause"* and found that when a person commits a crime the crime provides the just cause to deprive the offender of freedom.

[30] The above jurisprudential approach is the essence of the reasoning of the Supreme Court of Appeal (SCA) in S v Malgas[18], which is recognized as the seminal judgment on how courts should deal with substantial and compelling circumstances. The approach adopted by the court in Homareda blends with the view expressed by the SCA that, in the prescribed minimum sentences regime it is longer *"business as usual"*[19]*,* meaning that the sentencing court does not start the sentencing process from a clean slate, but must start by imposing the prescribed minimum sentence. In so far as is relevant to the matter *in casu,* the SCA further held as follows:

a. Section 51 has limited, but not eliminated the court's discretion in imposing sentence. The section has left it to the courts to decide whether the circumstances of any particular call for a departure from a prescribed minimum sentence.

b. In deciding whether substantial and compelling circumstances exist, the court is to consider all factors relevant to sentence, both aggravating and mitigating circumstances **cumulatively** and the circumstances do not have to be exceptional in order for the court to depart from the prescribed minimum sentence. In aggravating circumstances, some relevant ones for purposes *in casu* are the seriousness of the crime, after-effects of the crime, previous convictions, lack of remorse, vulnerable victims, prevalence of crime, the need for deterrence and retribution, the protection of society, punishment to fit the crime. **Mitigating circumstances** could be having no criminal record, the presence of real remorse (not regret)

[17] At paragraph 37
[18] 2001 (1) SACR 469 (SCA)
[19] At Paragraph 7

coupled with a plea of guilty, various mental and emotional factors, financial need and social status, character of the offender, the reason why the crime was committed, the offender's background etc. This court does not find any mitigating circumstances given the appellant's lack of remorse, denial of any wrong doing and admitting to assaulting the complainant on an improbable basis intended to steer away from the rape rather than admit wrongful behaviour.

[31] There was no overstating of the seriousness of the offence, the offence is objectively serious with very serious **aggravating circumstances** where the complainant became a nervous wreck after the incident. A further factor to be considered in this regard is the interests of the community. The administration of justice and the confidence of the public in the courts must not be undermined by light sentences for serious crimes. This court is of the view that the trial court balanced all the factors in this particular case and upon a **holistic and cumulative consideration,** the trial court exercised its sentencing discretion appropriately.

[32] The effects of this incident as set out by the complainant in her testimony are indicative of the need for the administration of justice to seriously consider the effects of criminal conduct on communities when exercising the sentencing discretion.

**CONCLUSIONS:**

[33] Having regard to the above the appeal against both conviction and sentence cannot succeed and both the conviction and the sentence of the court *a quo* of life imprisonment is confirmed.

**THE ORDER:**

The appeal against conviction and sentence is dismissed.

**NL TSHOMBE**
**ACTING JUDGE OF THE HIGH COURT**
**GAUTENG DIVISION, PRETORIA**

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| Instructed by: | Legal-Aid Board of South Africa |
| | |
| On behalf of the respondent: | Adv. EV Sihlangu |
| Instructed by: | Director of Public Prosecutions |
| | |
| Date of Hearing: | 17 October 2023 |
| Judgment handed down: | 18 December 2023 |