REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

HIGH COURT CASE NO: A146/2021
OPP REF: SA43/2021

1. REPORTABLE: NO
2. OF INTEREST TO OTHER JUDGES: NO
3. REVISED.

DATE: 30/06/2023

In the matter between:

SFISO ALBERT MSIMANGO APPELLANT

And

THE STATE RESPONDENT

JUDGEMENT

A J MOGOTSI AJ (with NV KHUMALO J (Ms) concurring)

INTRODUCTION

[1] On 6 September 2017 the appellant, who was legally represented during the duration of the trial, was convicted by the Benoni Regional Court on two counts of contravention of section 3 read with sections 1, 55, 56 (1) 58, 58, 60, and 61 of the

Criminal Law Amendment Act (Sexual Offences and Related Matters Amendment Act) 32 of 2000 further read with sections 256,257, and 281 of the Criminal Procedure Act 51 of 1977 (CPA), as amended, as well as sections 92 (2) and 94 of the CPA - that is rape and one count of assault. He was on 03 October 2017 sentenced on the rape counts in terms of section 51 (2) (B) of the Criminal Law Amendment Act 105 of 1997 to 15 years and by virtue of section 51 (1) of the Criminal Law Amendment Act 105 of 1997 to life imprisonment respectively, and 2 years' imprisonment for assault.

[2] Aggrieved by the conviction and the subsequent sentence, the appellant filed a notice of appeal on the same date of sentence, exercising an automatic right to appeal the conviction and sentence of life imprisonment that the Regional Court had imposed on him he was entitled to by virtue of sections 10, 11, of the Judicial Matters Amendment Act 43 of 2013 read with sections 309 (1) and 309B of the Criminal Law Amendment Act 105 of1997.

[3] At the commencement of the trial, the trial court appraised him of the provisions of section 51 (1) and 52 (2) of the Criminal Law Amendment Act 51 of 1977.

BACKGROUND

[4] It appears that the appellant's modus operandi was to go to a tavern at night and target women when they leave in the early hours of the morning. He would forcibly take them to his place and have carnal intercourse with them.

EVIDENCE FOR THE STATE

Count 1

[5] P[....] R[....] D[....], ("P[....] ") the complainant in count 1, and her friend G[....] M[....] ("G[....] ") testimony was that on 9 January 2016 they were at Biza's tavern relaxing and drinking liquor. The appellant, G[....] 's ex-boyfriend, was also there but they were not in his company. They left the tavern around 2h00 the next morning and proceeded to G[....] 's place. G[....] exited the house to collect something both could

use to urinate therein. On her return G[....] informed P[....] that there were people outside. G[....] fled into another house in the same premises. P[....] followed G[....] but could not gain entry because G[....] 's father locked the house as soon as G[....] went in. The appellant forcibly left with P[....] . G[....] proceeded to the police station to seek help. The police accompanied her to the appellant's place escorted by the police where they found P[....] . P[....] reported to them that the appellant raped her.

[6] P[....] testified that, after she was locked out, the appellant accosted her outside the premises. He broke a bottle and forced her to leave with him. He dragged her whilst she was resisting until they reached a sports ground where the appellant produced a knife and threatened her with it. The appellant dragged her until they arrived at his place where he continued threatening her with a knife and instructed her to undress. She was screaming and the appellant told her that it will not assist her because his mother will not help her. Whilst she was undressing the appellant slapped her on her shoulder blade. She eventually succumbed and the appellant had canal intercourse with her whilst she was crying, screaming and relentlessly pushing him. G[....] arrived with the police. The appellant attempted to run away and was accosted by the police.

[7] She received medical treatment at Daveyton clinic where she was examined by a registered nurse, Lindiso Valencia Mkamba ("Mkamba"). Mkamba testified that P[....] had visible injuries, however complained of pain on her left shoulder. She, after swabbing P[....] 's vagina noticed that there was blood on it and an abrasion on the fossa navicularis. Mkamba's conclusion was that there was recent penetration. The bleeding was not her menstruation. P[....] was provided with a pair of trousers because hers was blood stained.

Count 2

[8] R[....] M[....] ("R[....]"), the complainant in count 2 and Siyabulela Filtane ("Siyabulela") testified they were in a love relationship. On the 10th of July 2016 they were at Rita's tavern and the appellant was also there. R[....] and Siyabulela left around 2 am the following morning. On their way home the appellant tapped R[....]'s

back and when she turned he slapped her across the face and she bled. He further slapped Siyabulela who thereafter fled and left R[....] with the appellant.

[9] R[....] further testified that the appellant insulted her and accused her of spending his money. The appellant grabbed her and when she fell to the ground, he kicked her several times in her face instructing her to stand up so that they should go. She screamed and the appellant placed a knife on her neck. R[....] pleaded with the appellant not to kill her. They proceeded to appellant's shack and along the way he was slapping R[....] with open hands. The appellant opened the shack and threw R[....] on the bed ordering her to undress and she complied. The appellant undressed and then had carnal intercourse with her. He later instructed her to have oral sex with him. He refused to let her go, telling her that she will leave in the morning. In the morning he again had carnal intercourse with her. She proceeded home and reported the matter to her children. R[....] then went to Daveyton Clinic for medical treatment, she was examined by Lindiso Valencia Mkamba ("Lindiso"}.

[10] Lindiso testified that the complainant's left eye was swollen and had a blueish swelling around the eye. Her right eye was extremely swollen and shut along with bruises on the entire eye. She had small bruises on her neck and the upper auxillary of the right arm. Lindiso noticed redness on the left side of R[....]'s face. R[....] complained that her whole body was in pain. She did not observe any genital injuries, however, since she was a sexually active person this does not rule out vaginal penetration.

[11] Karabo Nkonelo, the daughter of R[....] testified that on the 10th of July 2016 her mother came back home around 10:00 am in the morning. Her eye was swollen and both eyes were maroon and green. Her t-shirt and trouser were bloodstained and soiled. R[....] reported to her what transpired and they called the police. The police came, and they all proceeded to the appellant's home and he was not there. He was later apprehended by the police at his girlfriend's place.

EVIDENCE FOR THE DEFENCE

[12] The appellant testified in his defence in respect of both counts. He testified that both complainants are his girlfriends and alleged to have had consensual carnal intercourse with them. Further that R[....] sustained her injuries during a fight they had on the morning in issue.

SUBMISSIONS BY COUNSEL FOR THE APPELLANT

[13] Counsel submitted that the court a quo erred in that it did not properly evaluate the evidence of both complainants relating to the issue of consent. Both are single witnesses and the trial court failed to apply the applicable cautionary rule.

[14] It was further submitted that the court a quo in its evaluation of the evidence did not take into account and therefore have not attached more weight to the discrepancy between the version of P[....] and the testimony of Lindiso, the nurse that examined her.

[15] Counsel pointed out that P[....] testified that she was slapped on the shoulder blades and it turned green or blue. The J88 states that she complained of a painful shoulder but that there was no visible injury. P[....] also testified that her trouser was blood stained but in the J88 it was recorded that the condition of her clothing was intact. These discrepancies rules P[....] out as a credible witness.

[16] The version of R[....] relating to the assault contradicts that of Siyabulela in relation to who was slapped first.

[17] On sentence, it was submitted that the sentence of life imprisonment meted out in respect of count two is not proportional to the offence with which he has been convicted of.

SUBMISSIONS OF COUNSEL FOR THE RESPONDENT.

[18] Respondent's Counsel's first submitted that the evidence should be evaluated holistically. In relation to the act of penetration, there was further evidence corroborating the versions of both complainants even though they were single

witnesses'. Furthermore, it is submitted that the sentences imposed are proportional to the offences for which the appellant has been convicted.

THE LAW

[19] In 5 v V 2000 {1) SACR 453 (SACR) it was held as follows.

> "It is trite that there is no obligation upon an accused person, where the State bears the onus, "to convince the court". If his version is reasonably possibly true he is entitled to his acquittal even though his explanation is improbable. A court is not entitled to convict unless it is satisfied not only that the explanation is improbable but that beyond any reasonable doubt it is false. It is permissible to look at the probabilities of the case to determine whether the accused's version is reasonably possibly true but whether one subjectively believes him is not the test. As pointed out in many judgments of this Court and other courts the test is whether there is a reasonable possibility that the accused's evidence may be true.

EVALUATION ON CONVICTION

[20] The court a quo, correctly in my view, found that consent was lacking in both counts. The reasons clearly deducible from the evidence.

[20.1] It was the testimony of both P[....] and G[....] that at the tavern they were not in the company of the appellant and they did not communicate with him. If indeed he had an affair with G[....] it is reasonably expected that they would have spoken or have been in each other's company.

[20.2] They all left the tavern at the same time. If P[....] had the intention to accompany the appellant to his place of abode she would have done so and not go to G[....] 's place, preparing to sleep and getting in bed.

[20.3] Upon seeing the appellant at her place, G[....] rushed into the main house. P[....] tried to follow G[....] , but she was locked out when G[....] 's father quickly

locked G[....] inside the house. The Appellant followed her but could not gain entry to the house. This is not the reaction of someone who was expecting to be picked up or not in distress.

[21] Thirty minutes after the appellant and P[....] left, G[....] proceeded to the police station alone in the early hours of the morning to seek help. She was escorted by the police to the appellant's place where P[....] was rescued and the appellant was arrested.

[22] The nursing sister who examined her noted the abrasion of the fossa navicularis and noticed blood after swabbing her private part. She further complained about pain on her left shoulder. She concluded that there was recent penetration.

[23] Both P[....] and G[....] corroborated each other on the issue of the bloodstained trouser, specifically that R[....] was issued with another pair to wear. The fact that the nurse noted that her clothes were intact does not advance the argument of counsel for the appellant that the trouser was not bloodstained. The word "intact" implies that the clothes were not damaged.

[24] The appellant slapped Siyabulela so as to intimidate him where after he kidnapped R[....]. The extend of R[....]'s injuries coupled with the fact that the appellant was not injured is proof that there was no fight between the two. R[....] reported the matter to her children who in turn called the police and the appellant was apprehended later that day.

[25] In 5 v Sauls and others 1991 (3) SA 172 (A) the court held 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 fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told".

[26] The trial court acknowledged the fact that in respect of the crucial acts of penetration both complainants are single witnesses in their respective cases and mentioned in the judgment that he is approaching their versions with caution.

[27] In 5 v. Francis 1991 (1) SACR 198 A it was held as follows.

> "The powers 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 circumstances that the court of appeal will be entitled to interfere with a trial court's evaluation of oral testimony."

[28] Counsel for the appellant, correctly in my view, did not level any criticism to the appellant's conviction in respect of the assault on Siyabulela because there are no grounds on which to rely on.

[29] In my view, the appellant failed to demonstrate the existence of a clear and material misdirection on the part of the trial court in its evaluation of the evidence and therefore the trial court cannot be faulted in its evaluation of the evidence.

[30] In the premises, I find that the appeal against conviction ought to be dismissed. I shall now turn to deal with the issue of sentencing.

EVALUATION ON SENTENCE

[31] In 5 v Pillay 1977 (4) SA 531 (A) at 535 E-F the court held as follows.

> "The word "misdirection" simply means an error committed by the court in determining or applying the facts for assessing the appropriate sentence. As

the essential enquiry on appeal against sentence is not whether the sentence was right or wrong, but whether the court that imposed it exercised its discretion properly and judicially; a mere misdirection is not by itself sufficient to entitle the appeal court to interfere with the sentence. The misdirection must be of such a nature, degree or seriousness that it shows, directly or inferentially, that the court did not 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 discretion on sentence."

[32] Prior to meting out the sentences, the court a quo dealt with the triad and commenced with the personal circumstances of the appellant which are as follows. He was 32 years of age and single at the time of conviction and sentence. He has a seven-year-old child that lives with the mother. He was self-employed as a carpenter generating an income of about RS00.00 per week. He has been in custody for one year two months prior to the finalization of this matter. When R[....] was testifying in aggravation of sentence the Appellant was laughing which is an indication of lack of remorse.

[33] The appellant as per case number SH926/2005 was convicted on a charge of robbery and was sentenced to 10 years imprisonment. He was declared unfit to possess a fire-arm. On the 14th of December 2010, he was released on parole. On the 27th of July 2012 he was convicted on the charge of assault, cautioned and discharged. He was incarcerated on the 20 March 2013 for violation of parole conditions. On the 27th May 2014 he was again released on parole and re-admitted on the 12th day of February 2015 after again violating the parole condition.

[34] Rosaline testified in aggravation of sentence that prior the day in issue she was employed at a construction company and was earning R 1800.00 per fortnight. She was disfigured and looked scary as a result of the injuries inflicted on her by the appellant. She lost her employment because her employer thought that she might scare potential buyers of the houses. She now survives on rental income and fortunately her ex-husband takes care of the children. This episode caused a separation between her and her boyfriend. She still has flashback of what transpired

on the night in casu. She no longer eat certain kind of meat as it reminds her of the oral sex ordeal.

[35] In Mudau v S 2013 (2) SACR at para 17 it was held as follows.

> "It is necessary to re-iterate a few self-evident realities. First, rape is undeniably a degrading, humiliating and brutal invasion of a person's most intimate, private space. The very act itself, even absent any accompanying violent assault inflicted by the perpetrator, is a violent and traumatic infringement of a person's fundamental right to be free from all forms of violence and not to be treated in a cruel, inhumane or degrading way."

[36] The court a quo dealt with the seriousness of the offences with which the appellant has been convicted and held as follows, "In terms of the offence rape is an appallingly violent and heinous offence that attacks the vulnerability and integrity of a woman. In the matter at hand this was a brutal, savagery, violation and invasion of two women's dignity and respect" .It further considered that rape of defenceless women and children is escalating at an alarming rate.

[37] The court a quo examined the interest of the community and stated that the latter looks up to the court for protection of their fundamental rights entrenched in the Constitution.

[38] In respect of count one the court a qou, after hearing arguments on the issue imposed a sentence in excess of the prescribed minimum sentence. It continued to state the following as being reasons for its decision: that he threatened R[....] with a bottle, held her captive in her house threatening her with a knife, repeatedly assaulted her to until she succumbed and repeatedly had carnal intercourse with her. The submissions of counsel for the appellant that no reasons were advanced for the increment of the sentence has no merit and is therefore rejected.

[39] In 5 v Ma/gas 20001 (1) 469 (SCA) at para [25] the Court provided guidelines to be followed in determining whether substantial and compelling circumstances exist

to justify the departure from the prescribed sentence. The Court stated, inter alia, that:

> “The specified sentences are not to be departed from lightly and for flimsy reasons."

[40] In my view, the court a quo correctly found that there are no substantial compelling reasons warranting a deviation from the imposition of the prescribed minimum sentence. Nevertheless, the disrespect and arrogance the appellant showed towards the complainants and their friends during the two incidents and when the R[....] was testifying in aggravation of sentence plus his brutality and disdain when he was raping them considered together with his continuous disregard of the law justify the sentences imposed. Also the fact that he committed these crimes two months after completing his sentence on previous crimes was justification for the increased sentences. He is a serious danger to society with no or little if any, respect for the law and fellow human kind. The appeal against sentence ought to be dismissed.

[41] The court a quo ordered that the sentences not to run concurrently. Counsel for the state conceded that the court erred in this regard and the respondent counsel conceded that the appellant was not prejudiced by the order. The error is not of a serious nature and can be corrected without any inconvenience. It however does not imply that the court a quo exercised its discretion improperly or unreasonably in deciding on the appropriate sentences to be meted out. In the premises, there is no reason to interfere with the sentences imposed except for the order that the sentences will run concurrently with the life sentence as in accordance with s 39 (2) (a) (i) of the Correctional Services Act 111 of 1998.

ORDER

1. Appeal against conviction is dismissed.

2. Appeal against sentence is upheld. The order that the sentences imposed are not to run concurrently is set aside and substituted with the following:

"The sentences of 15 years and 2 years imprisonment imposed on count 1 and 3 respectively are to run concurrently with the sentence of life imprisonment" imposed on count 2.

MOGOTSI
Acting Judge of the High
Court Gauteng Division,
Pretoria

I agree and it is.so ordered

N V KHUMALO (MS)
Judge of the High Court
Gauteng Division, Pretoria

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