

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA.)**

Case No. **A105/2021**

1. REPORTABLE: NO
2. OF INTEREST TO OTHER JUDGES: NO
3. REVISED: 17/12/2023

DATE: 18 January 2024

SIGNATURE JULIAN YENDE

In the matter between:

ADAM SITHOLE

Appellant

And

THE STATE

Respondent

JUDGMENT

YENDE AJ: (C.VAN DER WESTHUIZEN J, Concurring)

Introduction

[1] The appellant is before court by virtue of automatic right to appeal the conviction and sentence, which right he derives from section 309(1)(a) of Act 51 of 1977(as amended) and he is duly represented.

[2] This matter concerns an appeal against both conviction and sentence that was imposed by the Presiding Regional Court Magistrate, Benoni on 18th December 2020 on the following counts:

(a) Count 1: Kidnapping sentenced to 5 years' imprisonment;

(b) Count 3: Rape sentenced to Life imprisonment.

[3] The court *a quo* ordered all sentences to automatically run concurrently with the sentence of life imprisonment.

Grounds of appeal.

[4] I deemed it relevant to restate in the main the most pertinent grounds of appeal averred on behalf of the appellant. As per the grounds of appeal as set out in the Notice of Appeal the appellant contends that the court of first instance misdirected itself by;

“9.1 Finding that the State proved their case beyond reasonable doubt;

9.2 Finding that the evidence in respect to the injuries inflicted on the Complainant was of such a nature that it constituted grievous bodily harm;

9.3 By finding that in terms of the Minimum Sentence Act, Act 32 of 2007 and that the minimum sentence applicable in the present matter in respect to Count 3, is life imprisonment and not 10 years' imprisonment;

9.4 By imposing a sentence in respect to the count 3 which is shockingly harsh and inappropriate having light to the circumstances of the case;

9.5 By finding that there were no substantial and compelling circumstances to deviate from the minimum sentences in terms of the Minimum Sentence Act, Act 105 of 1997;

9.6 By over-emphasizing the seriousness of the offence and the interest of the society;

9.7 By failing to take into account the prospects of rehabilitation;

9.8 The Court erred in not applying the determinative test as laid down in S v MALGAS 2001 (1) SACR 469 (SCA), and therefore erred in not finding substantial and compelling circumstances to deviate from the prescribed minimum sentence of life imprisonment”.

[5] I shall return to these grounds of appeal during the analysis of admitted and/or proven factual evidence and the application of jurisprudence by the court *a quo*.

The relevant factual matrix.

[6] On 23rd July 2018 at approximately 02h00 and at or near Daveyton in the Regional Division of Gauteng the complainant, Ms L[...] M[...], together with her cousin S[...] and P[...] were patrons at the Kayalami tavern. They met the appellant at the tavern whilst sitting amongst a group of friends. She knew the appellant. The appellant offered to buy her a Hunters Dry Cider which she accepted and drank and thereafter she informed S[...] that she wanted to leave as it was getting late.

[7] Whilst she was outside the tavern together with S[...] the appellant requested to talk to her. The complainant told him that she is still busy talking to S[...]. The appellant then pulled the complainant indicating that they must leave. S[...] pulled her from the other side until S[...] let go of her. All three of them then fell down the stairs. She asked the appellant what's the problem was. A friend of the appellant, P[...], intervened and said that the appellant cannot just leave the complainant after buying her liquor.

[8] She told the appellant that she would not accompany him. The appellant then slapped her twice on her face with an open hand. At that time, she was seated on the ground. The appellant then dragged her to the other side of the street by pulling her by her arm. She was on her knees when he dragged her. Whilst at the other side of the

street she was seated on her buttocks when the appellant poured her with beer, kicked her and assaulted her with a beer bottle.

[9] Where she was seated there were a lot of bricks in the vicinity. The appellant picked up one of the bricks and hit her on the head causing the brick to break. The appellant picked up another brick and did the same. The brick also broke. She was mostly struck on the top corners of her head. As a result, her head was swollen due to the assault with the bricks. The appellant thereafter tried again to hit her in the face with a brick. She blocked the blow and the appellant hit her next to her mouth causing a cut. He then hit her once on her head with a beer bottle and the bottle broke.

[10] The appellant poured bottle of beer over her head and took her money, cell phone and shoes. He threatened the complainant that she must accompany him otherwise he will injure her. Ms L[...] M[...] accompanied the appellant. Whenever she stopped walking, he hit her with open hands on the exposed parts of her body. Whilst walking in the street a police vehicle passed-by. The appellant threatened the complainant that if she alerted the police, he would hit her with a bottle. She begged the appellant to stop doing what he was doing but he kept on pushing and hitting her with open hands.

[11] They arrived at appellant's shack/room, the appellant pushed her inside and locked the door. He tore her dress and raped her. She cried and the appellant threatened her to stop crying because she would wake up people in the yard. She stopped crying and heard her brother B[...]s voice outside in the yard. He was calling her name from outside the room. Her brother kicked the door of the shack/room whilst calling her name.

[12] The appellant unlocked the door and she managed to leave the room. The appellant then threw her shoes and cell phone at her. Outside she found her mother, her two brothers, S[...] and P[...]. She was taken to the police station whilst crying and in shock. She reported a case against the appellant and a police officer took down her statement. The police officer informed her that she is not fine as she was bleeding and drowsy. She advised her to go home and return the following day.

[13] During the afternoon two female police officers arrived at her house, and they took her to the clinic. During the proceedings a “J88” medical document was handed in as Exhibit “B” by consent. The following injuries are noted on the “J88” medical report:

[13.1] Bruises on the right side of the back.

[13.2] Abrasions on both knees.

[13.3] A 1cm laceration on the upper lip.

[13.4] Two haematomas/swellings on the head.

Legal framework.

[14] It is trite that the State bears the onus of establishing the guilty of the appellant beyond reasonable doubt and the converse is that the appellant is entitled to be acquitted if there is a reasonable possibility that he might be innocent (See *R v Difford* 1937 AD 370 AT 373,383). In *S v Van der Meyden* 1999(2) SA 79 (W), which was adopted and affirmed by the Supreme Court of Appeal in the case of *S v van Aswegen* 2001 (2) SACR 97 (SCA) where the court held “in assessing whether the Appellants are guilty, it goes without saying that the State must prove its case beyond reasonable doubt. If the case reaches a stage where the Appellants has a duty to answer the state testimony, accordingly the Appellants must provide evidence that is reasonably possible to be true the mere fact that their testimony is unlikely is not enough to reject it. It must be so unlikely to be false beyond reasonable doubt”.

[15] In *S v Hadebe and Others* 1998 (1) SACR 422 (SCA) at 426f-h court the said the following “The question for determination is whether, in light of all the evidence adduced at the trial, the guilt of the appellants was established beyond a reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubt about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest

when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgence approach is appropriate when evaluating evidence. Far from it there is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees”.

[16] In *S v Chabalala*¹ the Supreme Court of Appeal reiterated and endorsed this view that “A court must take into account the **‘mosaic of proof’** and the probabilities emerging from the case as a whole in determining whether the accuser’s version was reasonable possible true. It is trite law that a trial court must “weigh up all the elements which points towards the guilty of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accuser’s guilt”.

Findings in respect of appellant’s conviction.

[17] The evidence of state witnesses including that of the appellant cannot be approached and/or evaluated independently of the entire evidence as a whole in this regard see *S v Civa* 1974 SA 884(T) where Margo J stated that “The evidence must be weighed as a whole, taking account of probabilities, the reliability and opportunity for observation of the respective witnesses, the absence of interest or bias, the intrinsic merits or demerits of the testimony itself, any inconsistencies or contradictions, corroboration, and all other relevant factors”.

[18] This approach was amplified and endorsed in *S v Chabalala* 2003 (1) SACR134 (SAC) at 139i-140b where the court held “The correct approach to evaluating evidence is to weigh up all the elements which points towards the guilty of the accused against all those which are indicative of innocence, taking proper account of inherent strengths and weakness, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weigh so heavily in favour of the state as to exclude any

¹ 2003(1) SACR 134 (SCA) at 139 i-140a.

reasonable doubt about the accused' guilty. The result may prove that one scrap of evidence or one defect in the case can only be ex-post facto determination and a trial court should avoid the temptation to latch on to one obvious aspect without assessing it in the context of the full picture presented in evidence".

[19] Generally, a Court of appeal will be hesitant to interfere with the factual findings and evaluation of the evidence by the Court *aqou* and will only interfere where the Court *aqou* materially misdirects itself insofar as its factual and credibility findings are concerned (see R v Dhlumayo and another 1948(2) SA 677(A). The principle applicable on the merits (including credibility findings) of a case and the approach to be followed by the Court of appeal was further clearly formulated in matter of S v Francis 1991(1) SACR198 (A) at par 198j -199a. The same principle was reaffirmed by the Supreme Court of Appeal in the matter of S v Hadebe and others 1997 (2) SACR 641(SCA) at 645e-f where the Court held 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] Now I return to the grounds of appeal, from a perfunctory read of the Appeal Record the following is utmost important. It is evident from the appellant's Notices of Appeal dated 21 December 2020 and 21 August 2021, as well as the Heads of Argument filed on behalf of the appellant dated 1 August 2023, that in respect of conviction in the main the appeal is directed against the court *a qou's* finding that the rape conviction (count 3) involved the infliction of grievous bodily harm.

[21] The finding that the rape involved grievous bodily harm, brought the rape conviction squarely within the ambit of section 51(1) read with Part I of Schedule 2 of the Criminal Law Amendment Act 105 of 1997. Rape as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, involving the infliction of grievous bodily harm, is one of the offences singled out by the legislature - Part I of Schedule 2 of Act 105 of 1997. As a result, the finding that the rape involved the infliction of grievous bodily harm had a direct influence on sentence. Life imprisonment is mandated in terms of section 51(1) read with Part I of Schedule 2 upon conviction, unless in terms of section 51(3) substantial and compelling

circumstances exist which necessitate the imposition of a lesser sentence than the prescribed sentence.

[22] The pertinent question is therefore whether the court of first instance erred in its finding having evaluated the evidence *in toto* that the rape *in casu* involved the infliction of grievous bodily harm. Should it be found, as argued by the appellant, that the rape did not involve the infliction of grievous harm, the rape conviction will be unaffected. The jurisdictional factors singled out by the legislature for certain offences as listed in Parts I – V of Act 105 of 1997, do not create new substantive offences. They are jurisdictional factors that must be found to exist when the listed offences are committed. As such they do not constitute essential elements of the offences.

[23] Now this brings me to consider what constitutes Grievous Bodily Harm. Whilst the term “involving the infliction of grievous bodily harm”, as contemplated in Part I of Schedule 2 of Act 105 of 1997 in terms of the offence of rape, is not defined in the Act, the ordinary meaning of “involving” and “grievous” must be given to the words. It is respectfully submitted that the “infliction of grievous bodily harm” ought not to be equated with the offence of assault with the “intent to do grievous bodily harm”, where mere intention is sufficient, as opposed to actual causation of grievous bodily harm.

[24] In the matter of *S v Tuswa* 2013 (2) SACR 269 (KZN) it was held at paragraph [31] as follows regarding the meaning of the words “involving” and “grievous”: “Two further aspects deserve mention. These revolve around the definitions of the words ‘involving’ and ‘grievous’ as they present themselves in the construction of this statutory offence. With respect to the word ‘involving’, in *S v Thole* 2012 (2) SACR 306 (FB) the ordinary dictionary definition is referred to by Molemela J B in para 11 at 309 as — ‘to include something as a necessary part of an activity, event or situation . . .’. That quotation seems to be incomplete, as *The Oxford English Dictionary* repeats it but also includes the word ‘result’. In other words, the quotation reads: ‘. . . include something as a necessary part or result of an activity’ Regarding the meaning of the word ‘grievous’, I refer to *S v Rabako* 2010 (1) SACR 310 (O) para 7 at 315, where Musi J also accords to the word its ordinary natural meaning, describing it as meaning ‘actually serious’. Of this Musi J says: ‘In essence then, if the injury inflicted by the accused on the body of the rape survivor

is serious, then it involves the infliction of grievous bodily harm . . It should not be a trivial or insignificant injury Whether an injury is serious will depend on the facts and circumstances of every case.”

[25] In *S v Rabako* 2010 (1) SACR 310 (O) at para [10] after considering various judgments it was held as follows: “[10] *It seems to me that, in order to determine whether the injuries in a particular case are serious, one has to have regard to the actual injuries sustained, the instrument or object used, the number of the wounds - if any - inflicted, their nature, their position on the body, their seriousness and the results which flowed from their infliction. It must be remembered that an injury can be serious without there, necessarily, being an open wound. In order to determine this, the judicial officer will be guided by medical evidence. It is therefore advisable that in all such cases - where a finding in relation to infliction of grievous bodily harm is considered - medical evidence should be presented. The absence of medical evidence, however, is not fatal.*”

[26] As adumbrated *supra* the raping on the complainant by the appellant involved the infliction of grievous bodily harm. The complainant testified in regard to the nature of the assault by the appellant on her. “*She was dragged over the street. She was slapped in the face and kicked. She was struck with a beer bottle and bricks on her head. The beer bottle and bricks broke as they struck her head. The injuries observed on the complainant during the medical examination and noted on the medical report (J88) corroborate the version of the complainant regarding the assault. The complainant testified that as a result of the assault on her by the appellant, her head was swollen, and she was still bleeding when she reported the incident at the police station. She felt drowsy and she was advised to go home and return later*”.

[27] The complainant's mother confirmed the complainant's evidence that her head was swollen and that she was still bleeding. She confirmed that complainant had a scar which was still visible at the time that she testified.

[28] It is worthy to note that all the injuries sustained by the complaint as depicted on the J88 medical report were never contested since same was handed in as exhibit “B”

by consent. The objects namely, the beer bottles and bricks which the appellant used to assault the complainant on the night in question were there and then intended to inflict serious grievous bodily harm on her. The intention solely being to grievously hurt the complainant so as to force her to succumb to the will of the appellant. I have to pause here to reflect of the submissions made by the counsel for the appellant *inter alia* to the effect that one must look at the intention of the appellant when inflicting such grievous injuries to the complainant. It is my firm belief that such a contention is misplaced in the context of this case and thus devoid of legal precedence.

[29] What is of paramount importance in this case are the established and proven facts, which in my view make out an overwhelming and solid case against the appellant. The circumstances under which the appellant gained control over the complainant through force and violence from the Kayalami tavern leading to the grievous assault on her body was a proof beyond a reasonable doubt the appellant's intentions to rape her.

[30] I find that the manner in which the complainant was attacked and assault by the appellant and thereafter sexually violated makes the conduct of the appellant to fit squarely in terms of the Minimum Sentence Act, Act 32 of 2007 and that the minimum sentence applicable in the present matter in respect to Count 3, is life imprisonment and not 10 years' imprisonment. Thus, the court of first instance was correct in the application of the Minimum Sentence Act, Act 32 of 2007 and in this regard the submission and argument by the appellant's counsel that the injuries sustained by the complaint were not grievous is rejected.

[31] The submission on behalf of the appellant that there was no direct evidence submitted by the State prosecutor to prove that the injuries inflicted on the complainant was of such a nature that it constituted grievous bodily harm is rejected and I further found same to be misplaced as the court in the matter of S v Rabako mentioned *supra* made it clear that "*the absence of medical evidence, however, is not fatal.*" In casu a "J88" medical document was handed in as Exhibit "B" by consent.

The appeal against Sentence

[32] When considering sentence, it is trite that sentencing is the prerogative of the trial court and should not lightly be interfered with. In *Ndou v The State*² Zondi JA said; “In general, sentencing is within the discretion of the sentencing court. An Appellate Court’s power to interfere with sentences imposed by trial court is circumscribed. It can only do so where there has been an irregularity that results in a failure of justice, or that the trial court misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed (*Bogaards v S* 2013(1) SACR 1 (CC) para41)”. The test is not whether the court *a quo* exercised its discretion properly (See *S V Romer* 2011 (2) SACR 153(SCA) at par 22-23).

[33] *Ex facie* the entire appeal record including both counsels’ submissions it is evident that the court *a quo* carefully considered all the relevant personal circumstances of the appellant prior to imposing the prescribed sentence. The appellant was 24 years old at the time he committed the crimes. He was single and had a child. He had progressed to matric and was employed. The appellant was not a first offender he had a previous conviction that relates to assault. The court *a quo* considered these factors before it and precisely found that the aggravating factors far outweigh the mitigatory factors. I found that the court of first instance was correct in its finding that there were no substantial and compelling circumstances which necessitated the imposition of a lesser sentence other than the prescribed minimum sentence. Given the peculiar circumstances of this case it can hardly be said in my view that the prescribed sentence is “*shockingly harsh and in appropriate having light to the circumstances of the case*”. That notion was correctly and firmly dispelled by the trial court.

[34] In *casu* the prescribed sentence was imposed there being no substantial and compelling circumstances found by the trial court justifying a deviation. The court *a quo*’s imposition of the minimum sentence in respect of count 3 was well informed by the presence of aggravation circumstances being the use of force, the grievous attack on the person of the complainant. In an event sentencing is the domain of the sentencing court and trite that the powers of the appeal court to interfere with the sentence is very limited. The quintessential enquiry is not whether the court was wrong,

² (247/18) [2019] ZASCA 85(31 May 2019) at par 21.

it is whether the court exercised its discretion judiciously or not –see Director of Public Prosecutions, Kwazulu-Natal v P 2016 (1) SACR 243 (SCA).

[35] In Director of Public Prosecution, Pretoria v Tsotesti [2017], ZASCA83, 2017 (2) SACR 233 (SCA) (2 June 2017) at par 27 Copper AJA said “As held in *Malgas* confirmed in *S v Dodo*, and explained in *S v Vilakazi*, even though ‘substantial and compelling’ factors need not be exceptional they must be truly convincing reasons, or ‘weighty justification’, for deviation from the prescribed sentence. The minimum sentence is not to be deviated from lightly and should ordinarily be imposed”.

[36] It is trite that the offender’s personal circumstances, whilst relevant, are not the only important considerations in deciding on an appropriate sentence. The court must also consider the nature and seriousness of the offence and the interest of society – (see *S v Zinn* 1969 (2) SA 537 (A)). As adumbrated *supra* the mitigatory factors advanced by the appellant in mitigation of sentence in my view are a common run of a mill factors and do not individually or cumulatively amount to substantial and compelling circumstances. I found same not truly convincing reasons or mighty justification for deviation from the general norm.

[37] In conclusion, I found that there is no misdirection on the part of the court *a quo* in respect of both its findings on conviction and the sentence that it imposed on the appellant and there is no justifiable reason to interfere. As a consequence, the following order is made;

Order

1. The appeal against both the conviction and sentence in respect of count 1 and 3 is dismissed.
2. The sentences imposed by the trial court in respect of count 1 and 3 are confirmed.

J YENDE
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA.

This judgment was prepared by YENDE AJ. It is handed down electronically by circulation to the parties/their legal representatives by e-mail and uploaded on Caselines electronic platform and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 18 January 2024.

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