REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO.
(3) REVISED.

DATE : 20 JUNE 2024

SIGNATURE : [redacted]

CASE NUMBER: A190/2023

In the matter between:

THWALA

Appellant

And

THE STATE

Respondent

This judgment is prepared and authored by the Judge whose name is reflected as such, and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for handing down is deemed to be the 20 ***June 2024***.

JUDGMENT

BALOYI-MERE AJ

Introduction

[1] The appeal on both conviction and sentence is brought with leave of the court *a quo*. The sentence was handed down in the Regional Court, Benoni, on the 22nd July 2022. The court *a quo* found the Appellant guilty of 1 count of rape and sentenced him to 15 years imprisonment.

[2] The State preferred a charge of rape against the accused, that the accused is guilty of contravening the provisions of section 3 read with section 1, 55, 56(1), 57, 58, 59, 60 and 61 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, rape, read with the provisions of section 92(2), 94, 246, 257 and 261 of the Criminal Procedure Act 51 of 1977 and further read with the provisions of section 51 and schedule 2 of the Criminal Law Amendment Act 105 of 1997 as Amended by section 33 of the Judicial Matters Amendment Act 62 of 2000 which carries a prescribed minimum sentence of life imprisonment.

[3] It was alleged that at the time when the alleged rape occurred the Complainant was a minor and under the age of 16 years.

[4] The court *a quo* found the Appellant guilty on the charge of rape and sentenced the Appellant to 15 years' imprisonment. In addition the Appellant was declared unfit to possess a firearm in terms of section 103(1) of the Firearms Control Act 60 of 2000 and further that his name should be entered into the register of sexual offenders in terms of section 50(1)(a)(i) of Act 32 of 2007.

[5] The thrust of the appeal is that the court *a quo* relied on the evidence of the Complainant who was a single witness and also a minor. The Appellant further argues that the Appellant was not properly identified by the Complainant and lastly that the Appellant had a defence of alibi.

[6] The broad definition of sexual penetration with reference to the Sexual Offences and Related Matters Amendment Act is:

" ... include[s] any act which causes penetration to any extent whatsoever by -

(a) the genital organs of one person into or beyond the genital organs, anus, or mouth of another person;

(b) any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or

(c) the genital organs of an animal into or beyond the mouth of another person."

[7] This definition is relevant when analyzing the facts of this case as it was argued, on behalf of the Appellant, that the fact that Appellant penetrated the

Complainant using only his fingers made the rape 'lesser' and the court should view it as such. This type of argument loses sight of the fact that the act of rape, in whatever form or shape, is the worst form of violation that can happen to a human being. Whether penetration is by a penis, fingers, an object or any other, the fact remains that an individual's body was violated. The act of rape is an act of one person's subjugation of another and is a violation of the victim's right to personal freedom, security and safety within his or her community and home.

The State's Case

[8] The Complainant testified that she visited a house where the Appellant came in while she was sitting in the dining room with Nonku, Sipho and two young children. It was Nonku's birthday and the Appellant arrived bringing alcohol. The Appellant was introduced to her as Mandla, a neighbour. While the three, Mandla, Sipho and Nonku were drinking, they ran out of alcohol and decided that they should go together to a nearby tavern to enjoy themselves. Nonku and Sipho prepared themselves and left together with the Appellant leaving the Complainant behind with the two young children.

[9] After a while, the Appellant came back and knocked on the door and informed the Complainant that he was sent by Nonku to check on the children. The Complainant opened the door and the Appellant gave the Complainant a sum of R50.00 for cold drinks. The Appellant then proceeded to touch the Complainant on her breast. She was not happy with the Appellant's behaviour and she threw the R50.00 back at him.

[10] A tussle ensued between the Complainant and the Appellant and she managed to run into Sipho's room where the Appellant followed her and pinned

her to the bed. The Appellant further inserted his two fingers into the Complainant's vagina with his trousers zip lowered down.

[11] The Complainant fought him and eventually broke loose and ran into the kitchen where she opened the door and ran out. The Appellant followed the Complainant outside and the Complainant managed to run back into the house and locked the Appellant outside.

[12] The Complainant called a certain Phineas and requested him to come and help her. Phineas indeed arrived and took the Complainant together with the two minor children with him. He then took the Complainant to the Police Station and further took her to the Far East Hospital where she was examined by a nurse.

[13] Phineas and Sipho were called to testify and they corroborated the testimony of the Complainant vis-à-vis the presence of the Appellant in the house on that particular evening, the trip to the tavern and also Phineas' involvement after the call from the Complainant.

[14] The nurse who examined the Complainant at the Far East Hospital also corroborated the Complainant's allegation that she was sexually violated and penetrated by the Appellant using his fingers as the nurse concluded that the findings upon examining the Complainant are consistent with trauma of a blunt object.

The Defence's Case

[15] The Appellant testified that on the night in question he was indeed at his neighbour's house with Sipho, Nonku and the Complainant in the company of

two minor children and the three of them that is, Sipho, Nonku and the Appellant, were consuming alcohol. He further confirmed that later on he left with Nonku and Sipho to the tavern to buy more drinks.

[16] The Appellant further testified that he met one of his friends, a certain Arends, who bought drinks for him and he later went to his girlfriend Ntombi and spent the night there. The Defendant chose not to call any of these witnesses to testify. The Appellant further denied having committed the offence.

Single Witness

[17] Our courts have had an opportunity on numerous occasions to deal with the applicability of the cautionary rule to single witnesses and in particular in relation to sexual offences. It was held in **Woji v Santam Insurance Co Ltd**[1] that the evidence of young children is subject to the cautionary rule. But the SCA has warned against the blanket application of the cautionary rule instead stating that the child's evidence should be tested for reliability in a holistic manner, taking into account all the evidence[2].

[18] The Appellant, even though he had a right to choose not to testify, remained silent in the face of direct and credible evidence even though it was from a single witness. Thus, the *prima facie* case against the Appellant was left unchallenged. It was held in **State v Tshabalala**[3] that:

"The appellant was faced with direct and apparent credible evidence which made him the prime mover in the offence. He was also called to answer

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[1] 1981 (1) SA 1020(A) at 1028 E.
[2] Vilakazi v S 2016 (2) SACR 365 (SCA) para 18
[3] 2003 (1) SACR 134 (SCA).

evidence of a similar nature relating to the parade. Both attacks were those of a single witness and capable of being neutralized by an honest rebuttal. There can be no acceptable explanation for him not rising to the challenge. ...To have remained silent in the face of the evidence was damning. He thereby left the prima facie case to speak for itself. One is being bound to conclude that the totality of the evidence taken in conjunction with his silence excluded any reasonable doubt about his guilt."

[19] The issue of a single witness was further considered in **S v Hadebe**[4] and cited with approval in the matter of **S v Mbuli**[5] by the SCA as follows:

"the question for determination is whether, in the light of all evidence adduced at the trial, the guilt of the appellant was established beyond 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. Doubts 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 the broad and indulgent 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

[4] 1998(1) SACR 422 (SCA) at 426f 426 h.
[5] [2002[ZASCA 78 (07 June 2002).

back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood from the trees."

[20] The court *a quo* considered both the principles set out above which was the correct approach in evaluating the evidence of a single witness who is also a minor. Although the court a quo did not put it in so many words, the court remarked that the evidence of the Complainant was logical, chronological, clear and consistent throughout.

[21] In this instance, the Complainant's evidence was corroborated by three witnesses, *to wit*, Sipho, Phineas and the nursing sister who examined the Complainant at hospital.

[22] The Complainant's evidence was further corroborated by the fact that the house was in a state of disarray when Sipho came back from the tavern and the chest of drawers was found as she had moved it in order to prevent the Appellant from re-entering Sipho's room.

[23] On the issue of the identification of the Appellant by the Complainant, I agree with the Respondent's submission that:

"in a case where the witness has known the person previously, questions of identification ..., or facial characteristics, and of clothing are in our view of much less importance than in cases where there was no previous acquaintance with the person sought to be identified"[6].

[6] S v Arendse (089/2015)[2015] ZASCA 131

[24] Also in **State v Abdullah**[7] the SCA remarked as follows:

"it has been recognized by our courts that where a witness knows the person sought to be identified, or has seen him frequently, the identification is likely to be accurate".

[25] The Appellant only raised the defence of an alibi two years later during the trial. Most importantly, the issue of the alibi was never put to any of the witnesses that testified on behalf of the State. It is trite that the defence of alibi should be given as early as possible so that the defence is able to investigate the alibi and where it is found that the alibi defence is supported, the State can withdraw the charges against an accused. This did not happen and the Appellant only raised the issue of the alibi in his examination in chief.

[26] It is trite that in a criminal trial the accused does not have to prove his innocence. What is expected of an accused is to give the court the version that is reasonably possibly true. The accused's version cannot be rejected only on the basis that it is improbable, but only once the trial court has found, on credible evidence, that the explanation is false beyond a reasonable doubt[8].

[27] In the absence of an irregularity or misdirection by the trial court, a court of appeal is bound by the credibility findings thereof, unless it is convinced that such findings are clearly incorrect. In order to succeed on appeal an appellant must convince the appeal court, on adequate grounds, that the trial court was wrong in accepting the evidence of the complainant. Bearing in mind the advantage which the court *a quo* had of seeing, hearing and appraising

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[7] 2022 ZASCA 33.
[8] S v V 2000 (1) SACR 453 (SCA) at 455B

witnesses, it is only in exceptional cases that an appeal court will be entitled to interfere with a trial court's evaluation of oral testimony.

[28] I am satisfied that the trial court evaluated the evidence in its totality and considered the inherent probabilities as was dealt with by Heher AJA (as he then was) in S v Tshabalala *supra*. I am thus unable to find that the trial court erred in convicting the Appellant as it did.

The Sentence

[29] The court *a quo* took into consideration, when considering the sentence, the principles held in **S v Zinn**[9] and **S v Khumalo**[10] cases. The court further considered the Appellant's personal circumstances that he was a 45 year old male who had attained grade 12 at school and that he was unmarried with four children, two of which are major and the two minor girls aged 16 and 12 respectively and living with their unemployed mother. The court further considered that the Appellant was employed as a plumber and also worked as a carpenter and was responsible for the upkeep of his children. The court further considered that the Appellant had one previous conviction for an unrelated offence namely that of theft which occurred in 2012 and the court *a quo* decided that it is not going to take that previous offence into account and will treat the Appellant as a first offender.

[9] 1969 (2) SA 537 (A).
[10] 1973 (3) SA 697 (A).

[30] The court found that there were substantial and compelling circumstances and deviated from life imprisonment sentence and sentenced the Appellant to 15 years' imprisonment.

[31] It has long been established that sentencing is preeminently the prerogative of the trial court and a court of appeal should be careful not to erode this discretion. Interference is warranted where there has been an irregularity which results in the failure of justice or when the court *a quo* misdirected itself to such an extent that its decision on sentencing is vitiated or the sentence is so disproportionate or shocking that no other court could have imposed it.

[32] Having carefully studied the record and listened to submissions by both counsel, I find no reason for this court to interfere with the sentence handed down by the court *a quo*.

[33] In light of all the above I am persuaded that there was no misdirection by the court *a quo* in either the conviction or the sentence.

Order

In the circumstances I propose that the following order be made:

1. The appeal on both the conviction and sentence is dismissed.

[redacted]

EM Baloyi-Mere

Acting Judge of the High Court

Gauteng Division, Pretoria

I agree

[redacted]

B Neukircher

Judge of the High Court

Gauteng Division, Pretoria

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